LEGAL NOTES VOL 4/2020

Compiled by: Matthew Klein

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INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD v KWAZULU-NATAL LAW SOCIETY AND OTHERS 2020 (2) SA 325 (CC)

Attorney — Admission and enrolment — Admission — Requirements — LLB degree obtained at 'university' — Whether private higher education institution accredited to offer and confer four-year LLB was university — Legal Practice Act 28 of 2014, s 26(1)*(a)*.

Applicant was a registered private higher education institution accredited to offer and confer four-year LLB degrees (see [4]). However, the KwaZulu-Natal Law Society decided it would not register the articles of applicant's graduates (see [6]). In its view the meaning of 'university' in the Higher Education Act 101 of 1997, which excluded applicant, was the meaning of that word in s 26(1)*(a)* of the Legal Practice Act 28 of 2014, which states that '(a) person qualifies to be admitted and enrolled as a legal practitioner, if that person . . . has satisfied all the requirements for the LLB degree obtained at any university registered in the Republic' (see [8] – [9]). Applicant's graduates would not meet this requirement since their LLB would not be from a 'university'.

The decision caused applicant to approach the High Court which, like the Law Society, reasoned that the meaning of 'university' in s 26(1)*(a)* should be the same as the meaning of that word in the Higher Education Act and, on this interpretation, it declared s 26(1)*(a)* constitutionally invalid (see [10] – [11]).

Here applicant applied to the Constitutional Court for it to confirm this declaration. It declined to do so (see [34]). This was on the basis that the ordinary meaning should be given to 'university' rather than that of the Higher Education Act. On this meaning applicant was a 'university' (see [13], [19] and [25]). So interpreted, s 26(1)*(a)* was saved from inconsistency with the Constitution (see [22]).

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[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the 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!**

The order of the High Court not confirmed, and applicant's graduates declared to be eligible for enrolment and admission under the Legal Practice Act (see [34]).
The concurring judgment considers the relationship between the rule that a statute should be interpreted to be consistent with other statutes, and the contextual approach to interpretation (see [37] and [38]). It describes how other legislation forms part of the external context of the statute being interpreted, such, in this case, that the Higher Education Act would be part of s 26(1)*(a)*'s context (see [42] – [43]). However, it records that using the Higher Education Act's definition of university in s 26(1)*(a)* would limit the constitutional rights of applicant's students, and that this necessitates that consistency of s 26(1)*(a)* with the Higher Education Act be trumped by the need for consistency with the Constitution (see [46] – [47] and [50]). The limitation would be that the constitutionally compliant interpretation should not 'unduly strain' the words in issue (see [51]). Here the meaning the first judgment gave 'university' would not unduly strain that word (see [53]).

GOOSEN AND ANOTHER v WIEHAHN AND OTHERS 2020 (2) SA 341 (SCA)

Will — Interpretation — Right bequeathed — Nature of — Right to buy property.

In this case a testator bequeathed two farms to his wife in his will (see [1]). The will stipulated:

If my spouse does not sell . . . both farms during her lifetime, the spouse [first appellant] of my daughter [second appellant] . . . shall have the option . . . described in clause 2.1 . . . upon the death of my spouse . . . to buy the property . . . on . . . the . . . terms . . . described in clause 2.1 . . . .' (See [1].)

When the testator died the farms were transferred to his wife, and during her lifetime she sold one (see [2]).
On her death the daughter's spouse, by letter to the executrix, took up the 'option', and the executrix sold the farm to him (see [3]). Another of the testator's daughters (first respondent) then obtained a High Court ruling that the sale was null and void (see [4] and [8]). This for non-compliance with the Alienation of Land Act 68 of 1981, which requires options for the sale of land to be in writing and signed (the daughter's spouse's letter was unsigned) (see [7]).
On appeal to the Supreme Court of Appeal this decision was reversed on the basis that the daughter's spouse's right was not, properly characterised, an option, sourced as it was in a will; and accordingly the Act's formalities were of no application to the letter.

KOMAPE AND OTHERS v MINISTER OF BASIC EDUCATION AND OTHERS 2020 (2) SA 347 (SCA)

Delict — Specific forms — Emotional shock — Claimant parents seeing body of son in toilet in which he drowned — Claimant siblings hearing of manner of death.

When 5-year-old Michael Komape went to the pit toilet at his state school, the seat collapsed, causing him to fall into the pit below, where he drowned (see [9] and [11]). Michael's mother and father and eldest sister (first – third appellants) later saw his body in the pit, while his eldest brother (fourth appellant) and three other siblings heard of the manner of his death (see [12] – [14]).
Everyone, it was agreed, thereafter incurred post-traumatic stress disorder; and in addition Michael's parents developed a depressive disorder (see [52]).
They later instituted claims in the High Court for damages for emotional shock and grief, as well as for constitutional damages (see [1], [15], [17], [32] – [33] and [45]).

These claims were denied, and the appellants appealed to the Supreme Court of Appeal (see [20] and [22]).
There a firm of attorneys that was representing a class of plaintiffs in a separate action against a company applied for admission as a friend of the court. The class comprised families claiming damages stemming from the death of their children by bacterial poisoning.
Held

- The application for admission as an amicus should be dismissed (see [2]). This on the bases that the firm had a financial interest in the matter (should the firm have established the claim it advanced, it would bind the court in the class action, likely result in that court awarding greater damages, and the firm receiving a higher contingency fee) (see [4] – [6]); certain of the firm's submissions would not be useful (the claim the firm asserted was not made in the High Court, and the Supreme Court of Appeal was bound to determine only the claims made there) (see [7]); and certain other submissions did not differ from submissions made by the appellants and the admitted amicus curiae (see [8]).
- The High Court had erred in dismissing the claims for emotional shock on the basis that a requirement of such claims — psychiatric injury — had not been proved (see [25] – [27] and [47] – [48]).
- It was unnecessary to develop the common law to recognise a claim of damages for grief not arising from a psychiatric injury (the family's grief was associated with the recognised psychiatric injuries underlying their emotional shock claims, and could be compensated for in the damages awards for those claims) (see [33] – [35], [40], [45] and [49] – [50]).
- The claim for constitutional damages for breach of appellants' rights to a peaceful family life should be dismissed (see [57] and [63]). There was no authority for such an award in these circumstances (no financial loss; award of damages for psychiatric injury) (see [58]); it could not be justified as a means to bring to the state's attention the need to improve sanitation facilities (this had been done) (see [59]); nor, given the circumstances of the country and the case, and despite foreign authority, was such an award appropriate as a mark of displeasure at the state impairing constitutional rights (see [60] – [61] and [63]).
- The High Court's refusal to grant a declarator that the court had breached its constitutional obligations, had been an appropriate exercise of the court's discretion (see [64] and [67]): the request for the declarator was based on the court's obligation to declare invalid any unconstitutional policy — but it had not been policy to provide poor sanitation (see [64] – [65]); the High Court had rebuked the state for its failure of provision, and this would hopefully move it to action (see [65]); the declaration would serve no useful purpose (the state was aware of the problem and its obligations) (see [66]); and nor, owing to its lack of specificity, would it be appropriate (see [66]).

Ordered, inter alia, that the High Court's order be altered to uphold the claim for emotional shock (see [73]).

MABASO v NATIONAL COMMISSIONER OF POLICE AND ANOTHER 2020 (2) SA 375 (SCA)

State — Actions by and against — Actions against — Notice — Whether duty on organ of state receiving notice to make decision to accept, reject or settle claim prior to commencement of litigation — Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, s 3.

On 10 June 2015 Mr Mabaso duly gave notice of his intention to institute action against an organ of state, as required by s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act). When no reply was forthcoming, Mr Mabaso sent a letter dated 13 July 2015 to the National Commissioner of Police in which he demanded of the Commissioner to take a decision within 14 days as to whether liability was admitted, failing which he indicated that an application would be brought to 'enforce our right to a decision from you'.

Not having received any response, Mr Mabaso launched an application (during December 2015) for the following relief: a declarator that the respondents, the National Commissioner of Police and the Minister of Police, were obliged to take a decision to accept, reject or settle the claim (based on the constitutional right of access to courts); a concomitant order in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review and setting-aside of the respondents' failure to take the decision; and an ancillary order directing the respondents to take a decision and inform the applicant thereof, within 14 days of service of the order, with 'full and suitable written reasons therefor'.

The High Court dismissed the application, reasoning that, given the context and purpose of the provisions of the Act, it could not have been intended by the legislature to create a duty on the respondents to take a decision to accept, reject or endeavour to settle claims pursuant to a s 3 notice, prior to commencement of litigation. In Mr Mabaso's appeal to the Supreme Court of Appeal —

Held

The underlying purpose for the giving of notice in terms of s 3 of the Act was one of convenience: to assist the particular organ of state to conduct proper investigations into the claim and then to decide whether to make payment or defend the intended action (see [15]). There was no express provision in s 3 placing an obligation on an organ of state to make a decision concerning the contemplated legal proceedings prior to it being instituted; such an obligation could only be found by reading the provision into the section by implication (see [21]).

A dispute envisaged in s 34 was one in respect of which legal proceedings had been instituted, and was therefore capable of resolution by the application of law in a 'public hearing before a court'. At the stage when a s 3 notice was given, and until legal proceedings were instituted, there was no adjudicable 'dispute'. It followed that s 3 did not implicate the right of access to courts.

The department's failure to make a decision pursuant to a s 3 notice did not affect any right of the appellant, let alone adversely. The appellant's right to institute legal proceedings was fully reserved, subject only to the limitation period in s 5(2). Reliance on the provisions of PAJA was thus misplaced; it was not applicable. (See [28] – [30].)

Also of no assistance to appellant was his reliance on the allegedly comparable Road Accident Fund Act 56 of 1996. There was a marked distinction between that Act and its regulations and s 3; they had discernible philosophical orientations and there were other important differences between them. (See [31] – [40].)

As for the appellant's reliance on the Independent Police Investigative Directorate Act 1 of 2011 (IPID Act) and the constitutional norms of accountability and responsiveness, the IPID Act had no connection with the Act; they served disparate purposes and therefore the IPID Act was not relevant to the interpretation of s 3. And the laudable constitutional norms of accountability and responsiveness also could

not found an obligation where the Act did not expressly provide for it, and where such an obligation could not be reasonably implied. (See [41] – [42].)
Two further factors militated against implying the suggested provision in s 3: firstly, the difficulty of formulating the provision and determining its scope; and second, the prospect of parallel litigation. Had the legislature intended for the organs of state to have an obligation to make a decision pursuant to receipt of s 3, it would have said so in express terms. (See [43] – [48].)
The consequences of the declarator sought would be to deduce a time within which, in general terms, a decision had to be made. To accede to what was sought by the appellant would be to place an intolerable time burden on the state, and would also ignore reality. For all these reasons the appeal would fail (see [50]).

NATIONAL CREDIT REGULATOR v LEWIS STORES (PTY) LTD AND ANOTHER 2020 (2) SA 390 (SCA)

Appeal — Leave to appeal — Against High Court order made pursuant to statutory appeal against National Consumer Tribunal ruling — Leave to appeal must be sought from High Court sitting as court of first instance, not by way of special leave from Supreme Court of Appeal — Superior Courts Act 10 of 2013, s 16(1)*(a);* National Credit Act 4 of 2005, s 148(2)*(b)*.

Credit agreement — Consumer credit agreement — Cost of credit — Extended warranties in respect of goods sold not void by virtue of incomplete or inaccurate testimonial of agreement — Charging subscriptions for credit provider's club membership, not cost of — National Credit Act 34 of 2005, ss 100, 101(1)*(a)* and 102(1).

Credit agreement — Consumer credit agreement — Statutory appeal to High Court against rulings of National Consumer Tribunal — Nature of appeal — High Court, either as full court or single judge, sitting as court of first instance in hearing such appeal — Leave to appeal against High Court's decision must be sought from High Court sitting as court of first instance, not by way of special leave from Supreme Court of Appeal — Superior Courts Act 10 of 2013, s 16(1)*(a)*; National Credit Act 4 of 2005, s 148(2)*(b)*.

The National Credit Regulator (the Regulator), pursuant to its investigation of the first respondent, Lewis Stores (Pty) Ltd (Lewis), had sought declarators and directives from the National Consumer Tribunal (the Tribunal) regarding the charges for extended warranties and club membership Lewis offered its clients. Some of the extended warranties did not reflect the correct dates and duration thereof. This, said the Regulator, meant that the terms of the incomplete extended warranties had not been agreed, so that they were void; and requiring payment from consumers in respect thereof constituted a contravention of ss 100, 101(1)*(a)* and 102(1) of the National Credit Act 34 of 2005 (the NCA). In addition, the Regulator complained that where the period of the extended warranties coincided with the period of the supplier's warranty, the extended warranties unlawfully increased the cost of credit as contemplated in ss 90 and 91 of the NCA. The club fees, the Regulator said, were part of the cost of credit not permitted by the NCA.
The Tribunal dismissed the Regulator's application, and a full bench of the High Court dismissed the Regulator's appeal. The present case concerned the Regulator's further appeal to the Supreme Court of Appeal (the SCA), with its special leave in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013. This raised the

further issue — apart from the Regulator's contentions with regard to the extended warranties and club fees — whether special leave was the correct procedure in bringing the matter to the SCA. In this regard s 148(2)*(b)* of the NCA provided for a direct right of appeal to the High Court against Tribunal decisions; and s 16(1)*(b)* of the Superior Courts Act 10 of 2013 provided that 'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'. The issue was the scope of s 16(1)*(b)*: whether it applied only to decisions of a court on appeal to it — ie from a magistrates' court or an appeal from a High Court sitting at first instance — or whether it applied equally to statutory appeals from administrative bodies falling outside the judicial system, like the Tribunal.

Held

As to the correct procedure to follow in appeals against Tribunal findings, for reasons set out in [38] – [55] an appeal from the decision of a High Court under s 148(2)*(b)* of the NCA — whether constituted of a single judge, or two judges, or as a full court — lies with leave of that court sitting as a court of first instance. Such leave should be sought in terms of s 16(1)*(a)* of the Superior Courts Act and not by way of an application for special leave to appeal from this court. (See [36].) However, special circumstances existed for the court to exercise its inherent jurisdiction to regulate its own procedure and condone the irregular manner in which this appeal was brought.

As to extended warranties, like any other agreement, were a dispute to arise inter partes relating to the terms of the written document, either party would be entitled to raise rectification of the document. The court a quo correctly concluded that the evidence presented on behalf of Lewis established that, notwithstanding the incorrect dates in some of the extended warranty agreements, the terms of the actual agreements were honoured. Had a dispute arisen between a customer and Lewis, both parties would have been entitled to claim rectification of the extended warranty document. Where, as here, the errors in completing the extended warranty were resolved by evidence of the actual warranty agreements concluded, the Regulator's objections fell away. And, even if that were not the case, in terms s 90(4) of the NCA a court was entitled to alter an offending provision so as to render it lawful, provided that it was reasonable to do so. In the circumstances of this case, it would be appropriate to alter the terms in regard to the duration of the extended warranties (See [19] – [22].)

As to club fees, on the undisputed facts set out on behalf of Lewis, the membership agreement between consumers and the club was an agreement unrelated to the credit facility. The club fees were payable in advance and did not constitute credit; no interest was raised on the arrears and in the event of them not being paid they were not recovered. In these circumstances it could not be said that a consumer was 'required' to pay the club fee; nor that it increased the cost of credit; nor can it be said that the club fee, if it was paid, was paid under the credit agreement. The mere fact that some consumers were introduced to the notion of club membership during the credit application process can have no bearing on the interpretation of the provisions of the NCA. In the result, the appeal would be dismissed with costs.

MN v FN 2020 (2) SA 410 (SCA)

Marriage — Divorce — Order — Interpretation — Whether reference in divorce order to 'Pension Fund' is to pension fund section of Fund alone, or also to its provident fund section — Pension Funds Act 24 of 1956; Divorce Act 70 of 1979.

Appellant and respondent concluded a settlement agreement, and a divorce court incorporated it in its order (see [2]). One of its terms was 'that the joint estate shall be divided and 50% of the plaintiff's right and interest in the University . . . Pension Fund when it becomes due and payable to plaintiff be made out to defendant, calculated to date of this order.' (See [1].) Appellant then lodged a claim with the Fund's administrator for the amount owed in terms of the order (see [5]).
The Fund had a pension and provident fund section, and the administrator's interpretation was that the appellant was entitled only to 50% of the amount in the pension section (see [8]).
Appellant then applied to the regional court to vary the divorce court's order to direct that the 50% interest was in both the pension and provident sections (see [9]). The regional court dismissed the application, and the appellant appealed to the High Court (see [12] – [13]). The High Court dismissed the appeal, and appellant requested, and obtained, special leave to appeal from the Supreme Court of Appeal (see [15]).
The Supreme Court of Appeal considered the definitions of 'pension fund' in the Divorce Act 70 of 1979 and 'pension fund organisation' in the Pension Funds Act 24 of 1956, and concluded that 'pension fund' in the Divorce Act was a 'pension fund organisation' in the Pension Funds Act. Such a 'pension fund organisation' included both pension and provident funds. (See [21] – [22] and [25].)
Accordingly the divorce order's reference to 'Pension Fund' was to both the Fund's pension and provident sections, and appellant was entitled to 50% of respondent's right and interest in both sections (see [25] – [26]).
The Supreme Court of Appeal upheld the appeal and set aside the High Court's order. It replaced it with an order that the regional court's order should in turn be set aside and replaced. The replacement order declared that the reference in the divorce order, to 50% of the right and interest in the Fund, included respondent's right and interest in both the pension and provident fund sections of the Fund. (See [30].)

SHEPHERD REAL ESTATE INVESTMENTS (PTY) LTD v ROUX LE ROUX MOTORS CC 2020 (2) SA 419 (SCA)

Contract — Terms — Validity — Invalidity by reason of vagueness — Preliminary agreement to negotiate further agreement — Whether void for vagueness — Restatement of principles.

Lease — Validity — Invalidity by reason of vagueness — Option to renew — Agreement that rental and costs shall be mutually agreed upon in writing between landlord and tenant when right of renewal in lease exercised — Unenforceable agreement to agree — Void for vagueness — Arbitration clause in lease not deadlock-breaking mechanism curing invalidity.

It was a principle of South African law that, generally speaking, an agreement to negotiate to conclude another agreement was unenforceable for vagueness and uncertainty. An exception would be in those circumstances where such an agreement was accompanied by a deadlock-breaking mechanism, by which a third party could make a binding determination in the absence of consensus. (See [16] – [18].) The present case concerned the application of such principles in the context of a lease entered into between the appellant, as lessor, and the respondent, as lessee —

- granting in clause 6 the lessee the option to renew the lease for a further period subject to the condition that '*the rental and costs shall be mutually agreed upon in*

writing between the Landlord and the Tenant when the right of renewal [was] exercised'; and

- providing that '(i)n the event of any dispute arising between the parties as to the true intent and meaning of this agreement or the implementation thereof, such dispute shall be determined by an advocate . . .'.

Subsequent to the respondent's seeking to exercise the above option, the parties proceeded to enter into the negotiations as envisioned above. However, they failed to arrive at a rental that was acceptable to both of them. The appel- lant rejected the respondent's suggestion that the matter be referred to arbitration. The appellant then applied to the High Court (Cape Town) for the ejectment of the respondent, contending that that there had been no renewal — there having been no agreement on rental — and that the lease agreement had expired by effluxion of time. The appellant argued that the above-quoted portion of clause 6 in no way obliged the parties to negotiate in good faith or reach an agreement on rental that was reasonable. It amounted to an unenforceable 'agreement to agree'. The High Court, however, held that the arbitration clause in the lease amounted to a deadlock-breaking mechanism that cured the invalidity of the clause in question. Holding that arbitration should have been resorted to to resolve the impasse, the High Court dismissed the appellant's application.

The SCA considered in detail the legal position in South Africa, England and Australia in respect of the validity of agreements to agree or to negotiate (see [10] – [19]). After doing so, it held that the above-quoted portion of clause 6 of the lease was an unenforceable agreement to agree, void on the ground of vagueness (see [17] – [19]). It further held that the invalidity of the clause was not cured by the arbitration provision (see [17]). In this regard it held that this was not a case where an external arbitrator was nominated to resolve certain outstanding differences. In its view an arbitrator would have been ill-equipped to fill in the blanks or resolve the questions that the parties could not; and an arbitrator certainly could not give effect to arrangements that the parties themselves had not concluded, and then require the party who was resisting to continue with the ongoing relationship. Nor, it added, could the arbitrator simply invoke certain vague, ill-defined, objective standards. The court went on to hold that there was a further insurmountable difficulty for the respondent: the arbitration clause did not survive the agreement; thus, once the agreement was terminated by effluxion of time, the respondent could no longer invoke the arbitration clause. (See [17].)

The SCA, in conclusion, upheld the appeal, and reversed the finding of the court a quo, such that the appellant be granted its order for ejectment of the respondent. (See [25].) (Besides denying that the clause in its present state was a legally unenforceable agreement to agree, the respondent also raised defences to the effect that (1) the renewal clause in question did not accurately reflect the common intention of the parties, that it was mistakenly or intentionally inserted, where the parties had in fact agreed to another specific rental price and escalation, and that rectification was appropriate to reflect such consensus; and (2) alternatively, that it was a tacit term that rental for the extended period would be a reasonable rental and should be determined . . . *arbitro bono viri*'. (See [7].) The SCA rejected both defences: As to (1), it held that there was no common mistake (see [21]), and that what the respondent sought would not result in rectification, but the creation of a new contract for the parties (see [23]). As to (2), the SCA held that, given the express terms of the agreement, there was no room for importing the alleged tacit term asserted by the respondent (see [24]).)

TELLYTRACK v MARSHALLS WORLD OF SPORT (PTY) LTD AND OTHERS 2020 (2) SA 435 (SCA)

Intellectual property — Copyright — Subsistence of — Sports event fed to television channel for broadcasting — Shown to public at respondents' premises — Appellant's copyright in broadcast images, and whether violated — Appellant recording images before broadcasting them, thus reducing them to 'material form' — Hence public allowed to see protected 'cinematograph film' at respondents' premises — Appellant entitled to interdict — Copyright Act 98 of 1978, s 1 sv 'cinematograph film', s 2(2) and s 8(1)*(b)*.

Tellytrack claimed that Marshalls and the six other respondents, bookmakers (collectively, Marshalls et al), infringed its copyright in 'cinematograph films' by allowing the public to view live national and international horseracing events at their premises on channel 239 on South Africa's digital satellite television service — Multichoice DSTV. According to the evidence Tellytrack received raw television footage from various international and South African racetracks. In the case of South African races, Tellytrack had production teams that operated from outdoor broadcast (OB) vans at the tracks. Tellytrack would edit, compile and add graphics to the footage, and convert it to a suitable format for sending to Multichoice via fibre-optic cable. Tellytrack recorded the material at the OB vans and at its control room. After the product was received by Multichoice it was encrypted for transmission to its subscribers, a process that took six seconds.
Marshalls et al denied infringement of copyright, claiming that what was shown at their premises was not a cinematograph film but a broadcast, there being no 'fixation or storage' of images as required by the definition of 'cinematograph film' in s 1 of the Copyright Act 98 of 1978.
Section 1 defined 'cinematograph film' as 'any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images'. Section 2(2) provided that a work was not eligible for protection unless it was 'written down, recorded, represented in digital data or signals or otherwise reduced to a material form', and s 8(1)*(b)* vested in the holder the exclusive right to cause the film to be seen in public.
In dismissing Tellytrack's action for an interdict, the Durban High Court found in favour of Marshalls et al that, since the recording and broadcast happened simultaneously and there was copying, Tellytrack lacked copyright. Instead, copyright vested in Multichoice as broadcaster. The High Court relied on *Golden China TV Game Centre and Others v Nintendo Co Ltd* 1997 (1) SA 405 (A), where the court held that a work had to be reduced to some or other material form before it was eligible for copyright under s 2(2). In an appeal to the Supreme Court of Appeal —

Held

What the public was allowed to see at the premises of Marshalls et al was a sequence of images seen as a moving picture constituting the horseracing events. These images and the enhancements were indisputably reduced to material form by way of recordings made by Tellytrack. (See [34].)
There was something to be said for Tellytrack's argument that it was not possible to broadcast 'nothing' and that, consequently, what the public was being allowed to view at the respondents' business locations was a cinematograph film. There was no

dispute about it being produced at source and later being added to by Tellytrack. In the circumstances, Tellytrack discharged the onus of establishing copyright in cinematograph film, and it was therefore entitled to the interdict sought. To hold otherwise would frustrate the purpose of the Act. (See [35].)
An enquiry to be held for the purposes of determining the amount of damages, alternatively, a reasonable royalty to be paid, would provide Tellytrack with effective relief. (See [36].)
Appeal upheld and the order of the High Court set aside and replaced with an order interdicting Marshalls et al from infringing Tellytrack's copyright. (See [38].)

UMGENI WATER v SEMBCORP SIZA WATER (PTY) LTD AND OTHERS AND ANOTHER APPEAL 2020 (2) SA 450 (SCA)

Water — Supply — Tariff — Bulk supplier — Imposing substantially greater tariff increase on private purchaser than on municipal purchasers providing same service — Private purchaser unfairly targeted — Decision to differentiate tariffs unreasonable and unsustainable — Water Services Act 108 of 1997, s 19(1)*(b)*(i) and s 19(2).

The first respondent in each of these consolidated appeals, Semcorp Siza Water (Pty) Ltd (Siza), was a private water services provider that purchased bulk water from Umgeni Water (Umgeni) — a water board established under s 28 of the Water Services Act 108 of 1997 (the Act) — and distributed it, by agreement (the concession agreement) with the Ilembe District Municipality (Ilembe), to consumers in part of the Ilembe municipal area (the concession area). Outside the concession area, Ilembe itself performed the function of a water services provider.
In 2015 Umgeni, which supplied bulk water to several other municipalities besides Ilembe, and had until then charged a uniform tariff, obtained ministerial approval to increase Siza's tariff by 39,7% and that of the municipalities by 7,8%. Umgeni, which accepted that Siza acted like a municipality when distributing water, offered two reasons for the differentiation: the elimination of 'cross-subsidisation' for Siza and the fact that Siza was not a municipality but a private entity that made a profit. Siza termed the differentiation unlawful. ‡ Nowhere did Umgeni's pricing policy provide that any of the bulk water customers would be singled out for separate treatment.
Siza applied to the Pietermaritzburg High Court for the rescission of Umgeni's decision. The court granted the application, ruling that Siza had stepped into the shoes of Ilembe and that there was therefore no basis for differentiating Siza from Umgeni's municipal customers. On appeal to the Supreme Court of Appeal —
Held
The lawfulness of the differential tariff imposed on Siza had to be considered against the background that Siza was discharging a constitutional and statutory obligation resting on Ilembe in the same manner and under the same constitutional and statutory obligations that rested on Ilembe (see [10], [39]).
Nothing in Umgeni's pricing policy suggested an intention to eliminate 'cross-subsidisation' (see [34] – [36]). Nor did the numbers show that charging a differential tariff would materially benefit its finances or contribute to the elimination of cross-subsidisation (see [36] – [37]).
The rationale behind entering into a contract with a private water services provider such as Siza was that it would undertake the function of supplying water services more efficiently than the water services authority. There was no question of

excessive profits because the Minister was entitled to impose conditions concerning the overall profitability of the private water services provider. (See [38].)
The proposed tariff change was unfair, particularly to Siza and the consumers. Umgeni's reasoning that the differential was necessary to eliminate cross-subsidisation was neither reasonable nor rational, and based on an incorrect factual premise. There was, moreover, nothing in the evidence to suggest that Umgeni was indeed endeavouring to eliminate cross-subsidisation, which threw doubt on the veracity of this reason. (See [38] – [40].)
When it distinguished between Siza and the municipalities on the basis that Siza was a private entity that made profits whereas the municipalities ploughed surpluses back into service delivery, Umgeni ignored the fact that Siza was carrying out Ilembe's constitutional and statutory functions in respect of water supply to the concession area. It was irrelevant that it was a private entity, and Umgeni was unable to explain why it should be treated differently. (See [46] – [49].)
So, neither of Umgeni's justifications stood up to scrutiny: when it sought to rely on an explanation based on eliminating cross-subsidisation, it was unable to furnish a coherent explanation for treating Siza differently from Ilembe or the other municipalities, and when forced to concede that the reason was simply that Siza was a private entity and not a municipality, it had no answer to Siza's suggestion that this was an artificial and contrived conclusion. On either approach the reasons given by Umgeni lacked rational basis. They were founded on clear errors of fact and had unreasonable results, and therefore fell to be set aside under s 6(2)*(e)*(iii) of PAJA.

BODY CORPORATE, PADDOCK SECTIONAL TITLE SCHEME v NICHOLL 2020 (2) SA 472 (GJ)

Sectional title — Body corporate — Conduct rules — Restriction of short-term rentals — Validity — Conduct rules amended to prohibit rentals shorter than six months — Not unfair, unreasonable or unconstitutional — Complying with applicable legislation — Interdict prohibiting short-term rental of unit granted — Constitution, s 25; Sectional Titles Schemes Management Act 8 of 2011, s 10(2)*(b),* s 13*(e)*, reg 30.

During November 2016 the applicant, a body corporate representing a ten-unit sectional title scheme, received complaints from unit owners objecting to the respondent's short-term leasing of her unit on the Airbnb platform. The complainants alleged that it compromised the security of the scheme. In response to the complaints, the applicant in January 2017 adopted a special resolution amending its rules of conduct by —

- prohibiting the use of units for commercial purposes without the consent of the applicants' trustees;
- prohibiting the use of units as bed-and-breakfast (B&B) establishments; and
- prohibiting leases shorter than six months.

The applicant proceeded to seek an interdict against the respondent to prohibit her from conducting short-term rentals in violation of the amended rules. The respondent, who denied using her unit for commercial purposes, counter-applied for the rescission of the amended rules on the grounds that they were unfair and unreasonable, and contrary to her constitutional right to freely deal with her property as intended in s 25 of the Constitution.
The relationship between the applicant and the respondent was governed by the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) and its regulations. Under the STSMA, a body corporate was allowed to make or amend

rules provided it was approved by the Community Schemes Ombud Service. The rules, which had to be reasonable, were equally binding on all owners and occupiers (STSMA s 10(3), s 13*(d)*, s 13*(e)*).

Held

The respondent's denial that she was running a commercial business was contradicted by her admission that she was renting out her unit through Airbnb to generate an income (see [22] – [23]). It was clear that she had purchased her unit for investment purposes and was renting it out with the objective of paying it off, and the only conclusion was that the very nature of the Airbnb rentals was commercial and in contravention of the amended rules (see [24]).

A sectional title scheme was entitled to limit or prohibit Airbnb listings by putting them to the vote at a meeting of owners (see [33]). In the context of short-term letting such as Airbnb operations, which could go hand in hand with increased activity, noise and use of shared amenities, the question was whether the complaint was objectively reasonable, ie whether it would be fair to require the complainant to tolerate the intrusion. What was reasonable would vary from scheme to scheme: what might be acceptable in a sectional title scheme inhabited mainly by students might not be acceptable in a quiet residential estate such as that of the applicant (see [34]). It could not in the present case be expected of the complainants to tolerate the intrusions caused by an Airbnb operation (see [35]). The amendment to the conduct rules to prohibit short-term rentals accordingly complied with the STSMA (see [36]).

The respondent was aware that she had bought a unit that would be subject to conduct rules and future amendments thereto (see [49]). Those rules were for the benefit of all the scheme's occupants and residents, and applied to everyone, including the respondent (see [50]).

The applicant was entitled to an interdict: it had a clear right to ensure that the conduct rules were complied with; it was reasonable for it to have enacted measures to protect the lives and property of its members; and it had no other satisfactory remedy (see [51] – [60]).

As to the respondent's constitutional challenge to the rules: substantial interference with her property rights was required, and here the limitation was purely to determine the length of lease she was permitted to enter into, and did not dictate other terms of the lease or intrude into the relationship between the respondent and her tenants, as long as the conduct rules were adhered to. Properly construed, nothing in the conduct rules deprived the respondent of her right to property, and there was no substantial interference with it. (See [75] – [77].)

The court accordingly granted the application and dismissed the counter-application.

DE GEE v TRANSNET SOC LTD 2020 (2) SA 488 (GJ)

Delict — Exclusion of liability — Statutory barring of claim by employee against employer for occupational injury — Occupational injury — What constitutes — Injuries sustained during travel to and from work — Employee injured on his way to work in building owned by his employer, when elevator he boarded fell seven floors — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35(1).

The plaintiff was injured when the lift in which he was travelling fell about seven floors. At the time of the accident he was on his way to his office in a high-rise building where he was employed by defendant, who was the owner of the building. Defendant raised a special plea that plaintiff's action against it for damages was barred by s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), which provides that an employee who suffers an 'occupational

injury' has no action for the recovery of damages against their employer. In terms of the definitions in COIDA, an 'occupational injury' is one that is sustained as a result of an accident *arising out of and in the course of an employee's employment* and resulting in a personal injury, illness or the death of the employee.
By agreement, the matter proceeded by way of a stated case in which certain facts were agreed upon, and the question of law stated as whether s 35 of COIDA barred plaintiff's claim against the defendant. It was the plaintiff's contention that his was not an injury on duty arising out of or in the course of his employment — when the incident occurred he was not executing his contract of employment but was on his way to his place of work.
At issue was whether, on a proper construction of COIDA and the facts in the stated case, it could be found that the accident arose out of and in the course of plaintiff's employment.
Held
The defendant's observation that the incident occurred whilst plaintiff was at 'premises owned by the Defendant' was not decisive for purposes of the enquiry under s 35(1) — the relevant and important question was whether the injury was sustained as a result of an accident 'arising out of and in the course of an employee's employment'. There was no bright-line test; each case must be decided on its own facts. (See paras [22] – [23].)
The course of employment normally began when the employee reached his place of work. To extend it to the journey to and from work it must be shown that, in travelling by the particular method and route at the particular time, the employee was fulfilling an express or implied term of his contract of service. Therefore, in all cases where a workman on going to or on leaving his work suffered an accident on the way, the first question to be determined was whether the workman was at the place where the accident occurred by virtue of his status as a workman or by virtue of his status as a member of the public (see [15.9] and [15.10]).
Accordingly the court must consider essential questions such as whether, in travelling on elevator 017 to reach his office, the plaintiff was doing something he was employed to do or was part of his service to his employer at the time when the accident occurred; was the elevator the nearest available route to plaintiff's office or was it the prescribed route or means of conveyance for plaintiff to reach his office; was there a duty imposed on the plaintiff to travel on the elevator; was the elevator a private means of access to plaintiff's office which he was entitled to use by reason only of his status as an employee or was that lift accessible to the general public; in travelling on the elevator, was plaintiff fulfilling an express or implied term of his contract of service? (See [18].)
Here the facts provided in the stated case were woefully inadequate to support a finding, on the balance of probabilities, that at the time of the incident plaintiff was acting within the course and scope of his employment. None of the essential questions could be answered on the stated case. The special plea must accordingly fail on the basis of the facts of the stated case, in that the defendant has failed to prove on a balance of probabilities that the accident which resulted in plaintiff's injury arose within the course and scope of plaintiff's employment with defendant. On the basis of the stated case, s 35 of COIDA did not prohibit plaintiff's claim against defendant. (See [24] – [27].)

JEANY INDUSTRIAL HOLDINGS (PTY) LTD AND OTHERS v ZUNGU-ELGIN ENGINEERING (PTY) LTD 2020 (2) SA 504 (KZD)

Company — Business rescue — Suretyship — Effect of company's business rescue on its sureties' liability — Sureties not acquiring, before recourse, status to participate in business rescue plans — Not 'contingent creditors' — Companies Act 71 of 2008, s 154.

A surety's right of recourse against a principal debtor arises when it pays the creditor, and before this it is not an 'affected person' (as intended in s 128 of the Companies Act 71 of 2008 (the Act)) with the right to participate in business rescue plans in respect of the principal debtor (see [21]).
In the present case the principal debtor, Z-E (the defendant), a company that had gone into and emerged from business rescue, wanted to ward off an application for summary judgment by sureties (the plaintiffs) who, having paid off Z-E's creditor, were exercising their right of recourse. The plaintiffs began paying the creditor on 17 March 2015, after the commencement of Z-E's business rescue on 11 March 2015. Z-E argued that business rescue discharged it from its obligations to both the creditor and the plaintiffs as sureties, and that the plaintiffs should in any event have lodged their claims with the practitioner when business rescue proceedings began. Z-E also argued that the plaintiffs were 'contingent creditors' and precluded, under s 154(2) of the Act, from enforcing any pre-business rescue debt against it.
The principal issue was whether the institution of plaintiffs' action in May 2018 was precluded by the fact that Z-E was placed under business rescue on 11 March 2015. See [4].
Held
The plaintiffs did not at the relevant time (March 2015) have any claims to lodge, or ones that were capable of enforcement: their claims, which were based strictly on the surety's right of recourse, could have arisen only when they made payment to the creditor (see [18]).
Z-E's argument that the plaintiffs would have been 'contingent creditors' in the business rescue plan also lacked traction. Even if they were 'affected persons' as intended in s 128 of the Act (and there was nothing to indicate that they were), contingent claims had to be liquidated, and the plaintiffs would not on 11 March 2015 have had any idea of the liquidated amount of their claims (see [19] – [20]).
Moreover, it was generally accepted that a surety did not acquire status to participate in business rescue plans (see [21]).
The court accordingly found that Z-E did not succeed in setting up a bona fide defence to plaintiffs' claim and granted summary judgment.

KT v AT AND OTHERS 2020 (2) SA 516 (WCC)
Marriage — Divorce — Rule 43 proceedings — Permissible length of rule 43(2) and (3) affidavits — Test for — Costs — Liability of attorneys — Uniform Rules of Court, rules 43(2) and (3).

Applicant had applied, under rule 43, for maintenance and a contribution to her costs (see [1]). Her affidavit was 68 pages long; its supporting annexures 290 pages; and confirmatory affidavits and notice of motion another 10 pages (see [8]).
First respondent had later applied under rule 30 for the rule 43 application to be declared an irregular step and abuse of process, and for it to be struck from the roll (see [1]).

The High Court reiterated the requirements of a rule 43 application (see [9] – [11]); the test for whether the parties' papers fell within the length requirements of the rule (relevance of the matter therein to the relief sought) (see [18] – [20] and [25] – [29] for a description of irrelevant matter); and it *held* that the application was an abuse of process and should be struck from the roll (see [30] – [31]).
The High Court declared that the rule 43 application was an irregular step and abuse of process, and should be struck from the roll; and ordered that applicant's attorneys be liable *de bonis propriis* for both respondents' rule 30 application and the rule 43 application, on the attorney and own client scale. Moreover, applicant's attorneys were disentitled to recover any costs in respect of the rule 30 application, the rule 43 application, or the order, from applicant (see [35]).

LAWRENCE v MAGISTRATES COMMISSION AND OTHERS 2020 (2) SA 526 (FB)

Magistrate — Appointment — Procedure — Shortlisting — Best-qualified applicant, white male, not shortlisted — Contrary to policy, unconstitutional and unlawful — Set aside — Constitution, s 174(2); Magistrates Act 90 of 1993, s 5(2), s 5(4) and s 6(7).

Magistrate — Appointment — Procedure — Quorum — Majority of members of appointments committee constituting quorum — Despite ambiguity, applicable provisions of Magistrates Act not to be interpreted to allow for minority decision on shortlisting — Magistrates Act 90 of 1993, s 5(2), s 5(4) and s 6(7).

The applicant, an experienced white male senior magistrate with an outstanding track record, was not even considered in shortlisting proceedings for the appointment of magistrates for three Free State magisterial districts, including Bloemfontein. The appointments committee of the Magistrates Commission (the first respondent) had simply disregarded white candidates. The applicant was informed that he could not be included in the shortlists because he 'did not meet the section 174(2) of the Constitution criteria in any of those offices'. Section 174(2) states that the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'. The respondents' case was that the committee had acted fairly in approaching the shortlisting process as it did. The shortlisting proceedings were subsequently finalised and recommended persons, including ones who had never acted as magistrates before, appointed.
The applicant filed an application for the setting-aside of the shortlisting proceedings. He argued that, by elevating race to the overarching and sole consideration for shortlisting, the appointments committee (the committee) had misapplied s 174(2) and ignored reg 5 of the regulations under the Magistrates Act 90 of 1993 (the Act). Regulation 5 provided that '(i)n the appointment . . . of a Magistrate, only the qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify . . . shall be taken into account'. The committee's own rules required it, inter alia, to '(c)onsider the candidature of all applicants' and to have regard to relevant experience, qualifications, and appropriate managerial experience or skills.
The committee, which was chaired by the second respondent, consisted of 10 persons. It appeared that the second respondent and four members had attended the committee meeting for the Bloemfontein shortlisting, which raised the issue whether it was quorate. Citing s 5(4) of the Act, which authorised the chairperson 'to regulate proceedings and procedure . . . including the quorum for a decision', the

respondents contended that the chairperson could decide during the meeting that a valid decision could be taken by a minority of members.

Held

Section 5(4) read with s 6(7) of the Act indicated unambiguously that the majority of the members of the committee constituted a quorum (see [36]). While s 5(2) and s 5(4) were irreconcilable, they could not be married in the way suggested by the second respondent, for allowing a minority to decide on an important issue like the shortlisting of candidates for important judicial posts would be illogical (see [37]). Since the meeting in respect of the Bloemfontein shortlisting was not quorate, the decisions taken were unconstitutional, unlawful and invalid (see [40]).

It was apparent from the transcripts of the shortlisting meetings that the committee had totally disregarded the applicable legislation, reg 5, their own shortlisting process and the right of whites to at least be considered during the shortlisting process (see [47]). By not considering all applicants whose applications were compliant, the committee failed to adhere to its own policy (see [51]). Since magistrates were no longer appointed on probation, it was a sound principle to recommend candidates for appointment only once they had shown an ability to cope as judicial officers (see [52]). It was unnecessary to dwell on the expertise and experience of the applicant: the committee had, by preventing any whites from being interviewed, lost the opportunity to duly consider whether the applicant was not such an excellent candidate that he ought to be recommended for appointment, notwithstanding its obligation to ensure that s 174(2) was diligently applied (see [53]). Consequently the shortlisting proceedings and the resulting appointments would be set aside as being unlawful and unconstitutional.

LF AND ANOTHER v TV 2020 (2) SA 546 (GJ)

Children — Access — Grandparents — Always in best interests of minor child to enjoy contact with grandparents — Especially so when one parent of child deceased — Children's Act 38 of 2005, s 7.

In the High Court (Johannesburg) the applicants sought an order granting them extensive contact with their minor grandson, BF, who was in the custody of the mother of the child, the respondent. They alleged that their relationship with the respondent had soured after the death of their son — the partner of the respondent and the father to BF — as a result of which the respondent had begun hindering and/or preventing their contact. They claimed that the present application became necessary when attempts to resolve the dispute amicably failed.

The court firstly noted that, in terms of the Children's Act 38 of 2005, in all matters concerning a child, parties, as well as their legal representatives, were duty-bound to adopt an approach that was conducive to conciliation and problem-solving, in order to avoid litigation and unnecessary confrontation. (See [14].) It expressed disapproval of the fact that many legal practitioners did not make sufficient effort to timeously settle disputes such as the present nor did they actively seek to encourage their clients to act reasonably, with the results that the best interests of the child were adversely affected, legal costs were unnecessarily incurred, and the courts had to intervene and make practical decisions for the parties, where common sense ought to have prevailed. Often it further subjected minor children to countless assessments and continued conflict, to their long-term emotional and psychological detriment. (See [15].) The court reminded legal practitioners of their duty to properly advise

their clients of those provisions of the Act exhorting parties to always act in the best interests of children. (See [17].)
The primary issue in the present case was the appropriate extent and manner of the applicants' contact with the minor child. In this regard the court noted that the respondent did not dispute that BF had a right to have contact with the applicants (see [4]), and that historically the applicants had played an active role in the care of the child with the full consent of the respondent (see [40]). In assessing the issue, the court stressed that it was *always* in the best interests of a minor child to enjoy contact with their extended family (and more specifically grandparents), *unless* there was a compelling or material reason to prevent, refuse or restrict such contact. This was especially so, it added, when, as here, a minor child had lost one of his or her parents. Ongoing relationships with the extended family of a deceased parent (or divorced parents) had to be encouraged, in order to secure the emotional and psychological wellbeing of the minor child — obviously subject to practicalities and other needs of the minor child taking preference. The court pointed out that the provisions of the Act — see s 7 — must not simply be paid lip service in this regard nor should such provisions be considered with duplicity. (See [41].) (The court, however, stressed that the extended family or grandparents were not as of right entitled to step into the shoes of such deceased or divorced parent; the respondent in the present matter remained the parent of the minor child, and retained the right to make decisions pertaining to the minor child.
The court concluded that it would be in the best interests of BF for the applicants to be allowed once again to exercise contact with him (see [47]) (although not in the extensive and impractical terms sought (see [18])). The court accordingly granted the order set out in [50].

MEYER v TRUSTEES, AURUM MYKEL TRUST 2020 (2) SA 557 (WCC)
Way — Right of way — By implied consent — Requirements.

In a magistrates' court, appellant claimed a final interdict on respondent interfering with his alleged right of way over respondent's property. Such right was alleged to be based on implied consent or alternatively on acquisitive prescription. (See [1] and [11].)
The magistrate dismissed the claim and appellant appealed to the High Court (see [2] and [4]). There the issue was whether the requirements of a right of way (1) by implied consent; or (2) acquisitive prescription, were met (see [16]).
As to (1), a right of way by implied consent may be created where the owner of land A subdivides it into B and C; B has no access to a public road but C does; and C continues to be owned by the person who owned A (see [17]). Here these requirements were not met, in that appellant and respondent's properties were not part of a single piece of land which was subdivided (see [17.5]).
As to (2), acquisitive prescription, its requirements (use of the servient property peacefully; openly; in the absence of a request for use and its grant; adverse to the owner; for 30 years) were similarly not met (see [18.2] and [23]).
Appeal accordingly dismissed.

MSM OBO KBM v MEC FOR HEALTH, GAUTENG 2020 (2) SA 567 (GJ)

Damages — Bodily injuries — Medical expenses — Future medical expenses — Common-law rule requiring delictual damages to be paid in money — Wider interests of justice requiring development of law — Rule developed to permit court to order

compensation in kind in appropriate case where plaintiff suffering from cerebral palsy as result of negligence committed in public hospital.

The plaintiff was the mother of 7-year-old K, who had cerebral palsy. It was the plaintiff's claim that such condition was caused by the negligent conduct of the medical staff of the Leratong public hospital, in attending to the birth of K there. The plaintiff, acting on behalf of K, consequently sought damages from the MEC for Health, Gauteng. The MEC later conceded liability for K's agreed or proven damages flowing from the neurological injury sustained during her birth. The matter therefore proceeded to trial, in the Johannesburg High Court, on quantum only. The plaintiff's claim for damages included an order for a lump sum payment of K's future medical expenses as calculated by various experts, such sum based on the cost of acquiring the necessary treatment for K *in the private healthcare sector*. The MEC opposed this relief as being unreasonable (see [173]). He argued that most of K's future medical requirements ('identified services') could be provided by the *public* hospital, the Charlotte Maxeke Johannesburg Academic Hospital (CMJAH), at the same or a better level of service than could be provided in the private sector, and at a lower cost, given the hospital's use of economies of scale and its ability to negotiate better prices with suppliers (see [56]). He proposed that the court, instead of granting a lump sum payment as envisaged by the plaintiff, should order the CMJAH to provide the 'identified services' to K, during the course of her life; in other words, he sought an order granting *compensation in kind*. Further, in respect of any 'non-identified' services, he proposed that the court grant a monetary award payable *by way of periodic payments*.

The court noted that, in terms of the common law, a plaintiff's claim for the cost of future medical expenses in the form of a lump sum payment based on the cost of private healthcare could be rejected as unreasonable, in circumstances in which a defendant could adduce evidence that the medical services needed by the plaintiff were available at the same or higher standard from the public sector at no, or less, cost to the plaintiff. (See [27] and [32].) The court held that, based on the evidence presented by the MEC, the medical services needed by the plaintiff — insofar as the 'identified services' were concerned — were indeed available at the CMJAH at such a standard and cost. There was therefore merit to the MEC's claim that the relief sought by the plaintiff was unreasonable.

However, the court noted, the MEC did not simply want the claim for future medical expenses to be dismissed or reduced. He also pleaded for an order granting compensation in kind, and one allowing for periodic payments. (See [33] and [173].) To allow for such relief, the court said, the common law had to be developed (see [30] – [31]): in terms of existing principles, insofar as the Aquilian action was concerned, damages had to be awarded in money (see [22]); further, in terms of the so-called 'once and for all' rule, a plaintiff had to claim, in one action, all past and prospective damages arising from one cause of action. (See [22].) The question facing the court, then, was whether this was an appropriate case to develop the common law (see [40]). The court dealt briefly with the question of the 'once and for all rule', finding that the pleaded development was not supported by sufficient evidence (see [204]). The question that formed the focus of the court's attention was whether the common-law rule requiring that delictual damages be compensated in money had to be developed.

The court first considered whether the development of the common law in the manner sought would in any way undermine the underlying rationale of the existing

common-law rule, ie redressing damage and compensating the victim. The court concluded that it would not. (See [37], [174] and [195].)

The court went on to consider whether there was a legal basis for the development of the common law. The court held that there was, namely on the strength of s 173 of the Constitution: it held that it was necessary in the wider interests of justice to develop the common law to permit courts, in cases like this, to make orders for compensation in kind as opposed to being restricted to making orders for monetary compensation for future medical expenses. (See [175] and [194].) In this regard, the court drew attention to the constitutional duty imposed upon the state under s 27(2) of the Constitution to 'take reasonable legislative measures and other measures, within its available resources, to achieve the progressive realisation of [healthcare services]'. (See [177].) The court held that, if the door remained closed to the state to seek the alternative form of compensation, based on our current common law, the inevitable result would be a continued drain on its financial resources which were so critical in its meeting this constitutional obligation. (See [194].) (The court noted that there was less cost to the state in using its budgeted, existing resources to render services to a litigant like K than to pay for the cost [to K] of sourcing those goods in the private sector (see [187]).) Where the resources to render the medical services required already existed in the public healthcare system, and where there would be no detriment to the plaintiff in receiving those services in that system, it would be contrary to the broader interests of justice for courts to continue to be bound to ignore this as a factor, and to continue to be limited in having no choice other than to order the state to pay for the cost of those services in the private sector. (See [194].)

The court also considered the wider consequences of the proposed change. They would be limited, it held: the development applied only in the context of cases like the present one, in appropriate cases where the MEC was sued for the cost of future medical expenses by a plaintiff who suffered from cerebral palsy due to the negligent conduct of staff in a public hospital. (See [182] – [183] and [196].)

The court concluded that the common-law rule requiring that delictual damages had to be compensated in money was to be developed so as to permit a court to order compensation in kind in appropriate cases in circumstances where *(a)* the MEC was held liable for the negligent conduct of public healthcare staff causing injury during or at birth to a child in the form of cerebral palsy; and *(b)* the MEC established that medical services of the same or higher standard would be available to the child in future in the public healthcare system at no or lesser cost to the child than the cost of the private medical care claimed. (See [207].)

The court further held that the present matter was an appropriate case to make an order for compensation in kind, in respect of the identified services. This was based on the evidence presented, which established that there would be no detriment for K: she would receive the treatment she needed, in some respects at a better standard than what she would receive in the private sector. (See [197] and [201].)

The court, then, in respect of the 'identified services', directed the MEC to ensure that they were provided to K at the CMJAH. It also held that the plaintiff, in her representative capacity on behalf of K, would be entitled to a lump sum payment from the MEC for her claimed damages for loss of earnings; general damages for pain and suffering and the costs of the Trust to be established; and the cost of her future medical and related services in respect of the 'non-identified services'.

NSOVO HOLDINGS (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD 2020 (2) SA 619 (GJ)

Banking — Liability of bank — To client — Client lost credit card and PIN to person who concluded number of transactions in client's name — Client claiming losses from bank — Client failed to comply with contractual duties to keep card under its control and keep PIN separate from card and secret — Bank's efforts to minimise client's losses by attempting to contact it regarding transactions sufficient — Bank not liable.

The applicant company lost control of its credit card and PIN to a person who then conducted a number of transactions with the card. A computer algorithm used by the bank deemed the transactions unusual, and the bank on the same day tried but failed to contact M, the authorised cardholder and signatory to whom the applicant company specified the PIN should be disclosed. The PIN had been kept in a notebook in a safe together with the card. The applicant, having characterised its claim against the bank as delictual, argued that the bank should have made a greater effort to protect it.

Held

The bank was entitled to assume that the applicant used the card and the PIN lawfully and in accordance with the contract between them (see [16]). The loss was the result of the applicant's breach of its contractual obligations to keep the card under its control and the PIN secret and separate from the card (see [5], [15]). There was no negligence on the part of the bank; instead, it had kept the rights of the applicant in full view when it took steps to diminish any possible loss to it by attempting to make contact with it (see [14]). And even assuming that the bank had breached an obligation by failing to contact the applicant, the loss had by that time already been incurred (see [17]). Application dismissed with costs (see [20] – [21]).

W & A LE ROUX SLAGHUIS (PTY) LTD AND ANOTHER v VAN NIEKERK 2020 (2) SA 624 (GP)

Auction and auctioneer — Auctioneer — Personal liability of — Whether auctioneer, acting as agent, could be held personally liable for obligations of principal.

Contract — Consensus — Offer and acceptance — Irrevocable offer — Withdrawal — Whether party who made irrevocable offer may withdraw it while it still open for acceptance.

Contract — Breach — Repudiation — Whether agreement could be repudiated before coming into existence.

On 14 May 2015 the second appellant (the auctioneer), acting on instructions from the first appellant (the seller), conducted an auction at which the respondent (the purchaser) made a successful bid for Lot 1, consisting of a building which included a butchery with cold and freezer rooms. The purchaser signed an agreement on the same day, and paid an amount of R612 150 as a deposit on the purchase price and as commission.

The agreement inter alia recorded that it constituted an offer to purchase to which the purchaser was 'irrevocably bound' for a period of 14 days, during which time it was open for acceptance by the seller (see [26]); and that 'the person signing this contract will nevertheless be held personally liable for the fulfilment of all the terms hereof, even though he acts on behalf of the principal' (see [8] and [24.4]).

Then, on 18 May 2015, it came to the purchaser's attention that the auctioneer had mistakenly auctioned off the cold and freezer rooms a second time and that they had been almost fully dismantled by the successful bidder. The next day the purchaser's attorney addressed a letter to the auctioneer, advising that they were no longer prepared to continue with the transaction, given that what remained of Lot 1 was not what they bid for, and requested that the deposit and commission be paid back.
The auctioneer's attorneys (also the seller's attorneys) reverted on 28 May 2015, claiming that the fixed property had been restored to what it was at the time of the bid, and refused to pay back the deposit and commission, but undertook to hold it in trust to cover any damages claim. The purchaser responded by advising the seller and the auctioneer, via their attorneys, that the removal and destruction of the cold rooms and freezer constituted a repudiation of their agreement, and they had already indicated that they would not continue with the transaction. The purchaser again demanded that the R612 150 be paid back. On 29 May 2015 the purchaser transmitted a signed termination of agreement document to the seller and auctioneer's attorneys. Before this, on 27 May 2015, the seller had accepted the purchaser's bid.
During July 2015 the purchaser, together with experts and legal representatives, inspected the property to determine the extent of the damage. They found it to be substantial. However, the seller and the auctioneer's attorneys, in a letter dated 4 August 2015, insisted that the cold and freezer rooms had been restored to the condition they were in when the purchaser made his bid. And then, on 7 August 2015, they advised the purchaser's attorneys that the seller had accepted the purchaser's repudiation and that the seller had cancelled the contract.
The purchaser subsequently approached the High Court for relief, which ruled that the purchaser had cancelled the agreement properly and lawfully, and ordered the seller and auctioneer to pay back the amount claimed, the one paying and the other to be absolved — ie the seller and the auctioneer were held liable jointly and severally.

Issues

In this case, the seller and auctioneer's appeal to the full bench, the parties were agreed that the only issues that the court had to adjudicate were —
(a) whether an auctioneer, who acts as an agent, can be held personally liable for obligations of his principal;
(b) whether a party who makes an irrevocable offer may withdraw the offer whilst it is still open for acceptance; and
(c) whether an agreement can be repudiated before it comes into existence.

Held

(a) A sale by public auction involved three agreements: one between the seller and the auctioneer (as principal and agent, respectively), one between the purchaser and the seller, and one between the purchaser and the auctioneer. In terms of the agreement the auctioneer signed, he had waived any right not to be held personally liable for any conduct performed on behalf of his principal. Accordingly, an auctioneer may be held jointly liable with the seller. (See [23.3], [23.4] and [24].)
(b) Irrevocability could only mean that the offer remained open for as long as the seller acted in accordance with the agreement. The implications were that the offer, which had evolved into an option — by virtue of the purchaser keeping the offer open for 14 days — would hold steadfast, provided that the seller did nothing to change the character of the merx or commodity. There was therefore an implied duty imposed on the seller to preserve the merx, violation of which may constitute

repudiation of the option by the seller. Such repudiation, where the merx is materially damaged, would entitle a purchaser to withdraw their offer while it was still open for acceptance by the seller, whether or not the offer was said to be irrevocable. (See [27] and [35.3] and [37].)

An offer was not irrevocable simply because it was said to be irrevocable. Whether or not an offer was irrevocable depended on the conduct of the parties. An innocent party was entitled to withdraw an offer on any of the recognised grounds on which an agreement may be repudiated, even if it is said to be irrevocable. The purchaser could not be forced to keep the offer open even after the auctioneer had caused massive damage to the commodity simply because the offer was said to be irrevocable. An offer that was said to be irrevocable may be withdrawn if circumstances, such as in this case, favour such a withdrawal. (See [28] and [30].)

(c) It was clear that an option was created. This was an agreement on its own that could be repudiated. When the purchaser complained that the agreement had been repudiated, he meant the option agreement. An option placed the offeror under an obligation to preserve the commodity intact, in the same condition it was when the offeror inspected it and decided to make an offer to purchase it, until the offer was accepted. Before the offeree accepted the offer, he was tacitly bound by the terms of the option not to do or suffer to be done anything to the merx or harm or destroy or damage it. If he should destroy it or damage it in any manner whatsoever, it changed the character of the commodity. The offeror may regard that as a repudiation of the option and he may, on that basis only, be entitled to revoke the offer, even if it was agreed that the offer was irrevocable. (See [39].)

Accordingly, the appeal would be dismissed

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MINISTER OF POLICE AND ANOTHER v STANFIELD AND OTHERS 2020 (1) SACR 339 (SCA)

Search and seizure — Return, in terms of s 31(1)*(a)* of Criminal Procedure Act 51 of 1977, of article seized to owner — Charges of unlawful possession of firearms withdrawn against accused — Accused required to show that no reasonable likelihood of criminal proceedings being instituted in connection with firearms in future.

The appellants appealed against a decision of the High Court which dismissed an application for an order that firearms seized from the respondents be returned to them, but granted an alternative order that the matter be referred to an inquiry in terms of s 102 of the Firearms Control Act 60 of 2000.

The respondents had been charged with the unlawful possession of the firearms, but the matter had been provisionally withdrawn pending a decision by the Director of Public Prosecutions as to where the prosecution was to be held, given that there were other accused involved in other provinces who were to be charged with similar offences relating to the respondents' acquisition of the firearms. The appellants relied on the provisions of s 31(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) which provided that if a seized article was not required at the trial for purposes of evidence or for purposes of an order of court, it had to be returned to the person from whom it was seized if such person could lawfully possess the article.

Held, that for the respondents to succeed in an application for the return of the firearms it was necessary for them to establish that there was no reasonable likelihood of criminal proceedings being instituted in connection with the firearms in the foreseeable future. (See [12].)
Held, further, that, even though the charges had been withdrawn, given the evidence before the court, there was a reasonable likelihood that they would be reinstated. (See [13] and [16].)
Held, further, that the court had to decide, on a balance of probabilities, whether the appellants' retention of the firearms was justified, and they had clearly shown this to be the case. Accordingly, the respondents were not entitled on any of the grounds in s 31(1)*(a)* of the CPA to the return of the firearms. (See [22].)

S v NC 2020 (1) SACR 346 (WCC)

Contempt of court — Failure to comply with order of children's court — Sentence — Accused failing to enrol child in specific school in terms of parental plan — Imposition of periodic imprisonment — Impact on child's ability to visit parent over weekend whilst serving imprisonment — Sentence suspended on appeal.

The appellant was granted leave by the Supreme Court of Appeal to appeal against his conviction on one of two counts of contempt of court in respect of an order by the children's court that he enrol his minor daughter in a particular school (decided upon after facilitation by a clinical psychologist appointed in terms of a parental plan that was made an order of court). He was sentenced to one year of periodic imprisonment but on special review to the High Court this was altered to a period of 2000 hours. The count in respect of which he was granted leave to appeal was for a period in which the children's court order was effectively suspended by the appellant's lodging of an appeal, and in the present proceedings the court held that, by virtue of the order being in abeyance after the filing of the notice of appeal, the appellant should not have been found guilty of contempt of court for that period. The appeal therefore had to be upheld and the sentence imposed for the conviction on both counts had to be reconsidered. (See [40] – [41].) In respect of a revised sentence,
Held, that taking into account the personal circumstances of the appellant, as well as the possible impact that the sentence might have on the minor child not being able to visit her father at weekends whilst he was serving periodic imprisonment, the magistrate had misdirected himself in imposing the maximum sentence and the hours of periodic imprisonment should be reduced to 1000 hours. It was also appropriate that the sentence be suspended to serve as a deterrent to force the appellant to respect the law and conduct himself in a manner that would not, in the future, jeopardise the wellbeing of his minor child. (See [52] – [53].) Appeal upheld.

S v OSMOND 2020 (1) SACR 357 (ML)
Sentence — Imposition of — Factors to be taken into account — Where convicted person primary caregiver of minor children — Court failing to enquire properly into circumstances of children.
Trial — Record — Duty of presiding officer to keep record of proceedings — Discrepancies between magistrate's notes and transcribed record — Magistrate required to see to it that record accurate.

Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(1) of Firearms Control Act 60 of 2000 — Presiding officer required to hold proper inquiry.
Review — Delay in submission of record of proceedings — Expeditious dispatch of records on review required to prevent injustice.
The accused was convicted in a magistrates' court of the theft of a shower gel and a body wash valued at R160,50 and was sentenced to three years' imprisonment. The matter was sent on review and from the record it appeared that the accused was 43 years old and a father of two children aged 16 and 11 years, respectively. He also had three previous convictions for crimes of dishonesty. It was not clear whether the accused was a primary caregiver to his two children, but he did state that he had been widowed. The record of the proceedings, however, also showed discrepancies between the handwritten notes of the magistrate and the transcribed record, and the magistrate's response to a query from the reviewing judge (concerning the absence from the transcribed record of the prosecutor's address regarding the accused's fitness to possess a firearm) suggested that the transcribers had simply omitted it. Further, the accused was sentenced on 22 June 2018, but the complete record of the proceedings was only placed before the court on 6 September 2019, over 14 months after sentencing, by which stage the accused had already served his sentence.
Held, that the court had displayed no interest whatsoever in the fate of the accused's children, and sentenced him without a proper inquiry as to whom the primary caregiver was. In this regard the court had clearly failed in its duty. (See [10].)
Held, further, that the suggestion that the transcribers had omitted to type a further part of the prosecutor's address was improbable. If it were so, the court would have expected the magistrate to have confronted the transcribers, armed with the audio recording and demanding an explanation and the correction of the record, but she had chosen rather to certify the record as reflecting the correct version of what happened before her. A magistrate was not only expected to keep the record of proceedings, but also to see to it that such record was an accurate record that reflected what happened in court. (See [21] – [22].)
Held, further, that it was patently clear that, given the offence the accused was convicted of and the sentence imposed, he became automatically unfit to possess a firearm. The court was, however, empowered to order that he was still fit to possess one, but this could only be done after the holding of an inquiry envisaged in s 103(1) of the Firearms Control Act 60 of 2000. In the present matter the magistrate had literally no information before her on which she could exercise the discretion conferred on to her. (See [28].)
Held, further, that, presenting a case for review after an accused had already served the sentence, defeated the whole purpose of review. For an accused to have their case reviewed by a High Court was a right and not a privilege and all owed it to the Constitution and the public to respect this right. If everyone did their part without negligent delays, injustice could be averted. (See [33].) The court confirmed the conviction but reduced the sentence to 18 months' imprisonment and ordered the magistrate to conduct an inquiry in terms of s 103 of the Firearms Control Act.

S v TONI 2020 (1) SACR 369 (ECG)
Traffic offences — Alcohol-related driving offences — Sentence — First offender sentenced to five years' imprisonment for driving under influence of liquor — Courts

reluctant to send first offenders to prison for such offences — Sentence reduced and suspended on appeal — National Road Traffic Act 93 of 1996, s 65(1)*(a)*.

The appellant, a first offender, was convicted in a magistrates' court of driving under the influence of liquor in contravention of s 65(1)*(a)* of the National Road Traffic Act 93 of 1996 and was sentenced to five years' imprisonment. He appealed against the sentence only. In sentencing the appellant, the magistrate had taken into consideration that the appellant had not only driven a motor vehicle while under the influence of liquor, but also without a driver's licence. He further considered that the appellant had collided with a pedestrian who had sustained serious injuries, some of which were still being treated. It appeared that the appellant's blood-alcohol level was 0,36 grams per 100 millilitres.
Held, that it was not clear given all the circumstances of the matter, both in mitigation and aggravation, that the appellant was beyond rehabilitation. He was 36 years of age and had two children, one of whom lived with him and his girlfriend. He was a productive member of society and earned a salary of R13 000 per month. Although the level of alcohol in his blood was very high, he was a first offender who had pleaded guilty and cooperated with the police and the court, and he was employed. Courts were loath to impose custodial sentences on first offenders and there were no special circumstances in the present matter that justified such a sentence. (See [11].)
Held, further, that a sentence of three years' imprisonment, wholly suspended for a period of five years, would be an appropriate sentence in the circumstances. The appeal was accordingly upheld, and sentence reduced accordingly.

MOYO AND ANOTHER v MINISTER OF POLICE AND OTHERS 2020 (1) SACR 373 (CC)

Intimidation — Contravention of s 1(1)*(b)* read with s 1(2) of Intimidation Act 72 of 1982 — Constitutionality of — Definition of intimidation in s 1(1)*(b)* — Such not including incitement to imminent violence but only covering intentional conduct creating objectively reasonable fear of harm to person, property or security of livelihood — Amounting to criminalisation of protected free speech and peaceful forms of protest — Section 1(1)*(b)* unconstitutional and invalid.
Intimidation — Contravention of s 1(1)*(b)* read with s 1(2) of Intimidation Act 72 of 1982 — Constitutionality of — Section 1(2) absolving state from proving all elements of crimes created in s 1 of Act — Obvious and impermissible infringement of right to be presumed innocent, to remain silent, and right not to be compelled to give self-incriminating evidence as enshrined in ss 35(3)*(h)* and *(j)* of Constitution — Section 1(2) unconstitutional and invalid.

In two separate cases that came before magistrates' courts involving prosecutions under s 1(1)*(b)* and s 1(1)*(a)*(ii) of the Intimidation Act 72 of 1982 (the Act), respectively, the accused (now the applicants in two matters argued before the court together) attacked the constitutionality of the provisions. The matters had proceeded to the Supreme Court of Appeal (the SCA) in which the majority had held in the first matter (the *Moyo* case) that s 1(1)*(b)* passed constitutional muster: it could be construed in a manner that was compatible with the Constitution and would serve the valuable purpose of providing a protection in criminal law against intimidatory conduct that was antithetical to an open democratic society. In the present

proceedings the applicant challenged the findings of the SCA. In the second matter (the *Sonti* matter) the SCA held that s 1(2) of the Act was unconstitutional, and in the present proceedings the applicant sought the confirmation of that decision.
In respect of the confirmation in the *Sonti* matter,
Held, that it was clear that s 1(2) absolved the state from proving all the elements of the crimes created in s 1 of the Act. This was an obvious and impermissible infringement of the right to be presumed innocent, to remain silent, and the right not to be compelled to give self-incriminating evidence, as enshrined in ss 35(3)*(h)* and *(j)* of the Constitution. (See [36].)
Held, further, that s 1(2) did not create a mere evidentiary burden and no justification had been given by the state for the reverse onus created by the section. The confirmation therefore had to succeed and s 1(2) fell to be declared unconstitutional and invalid. The order of invalidity was to operate immediately and retrospectively to the extent that it operated on pending trials and pending appeals. (See [37] – [39].)
In respect of the appeal in the *Moyo* matter,
Held, that the decision of the majority in the SCA, that the definition of intimidation equated with the 'incitement of imminent violence', unduly strained the text of s 1(1)*(b)*; and if it only covered intentional conduct that created an objectively reasonable fear of harm to person, property or security of livelihood, then it would criminalise protected free speech and probably also peaceful forms of protest. (See [69].)
Held, further, that s 1(1)*(b)* of the Act fell to be declared constitutionally invalid and the order of invalidity was to operate immediately and apply retrospectively to any pending matter that had not been finalised on appeal.

MAHLEZA v MINISTER OF POLICE AND ANOTHER 2020 (1) SACR 392 (ECG)

Arrest — Arrest without warrant — Lawfulness of — Duty of arresting officer — Reasonable suspicion — Nothing in police docket indicating that plaintiff caused death of deceased — Detention for one month and two days in shocking conditions — Police liable for further detention after remand until first bail application could be held.
The plaintiff claimed damages of R990 000 against the first defendant and the second defendant, the Director of Public Prosecutions (the DPP), for wrongful arrest and detention for a period of one month and two days. The plaintiff was a security guard at a tavern, who got into an altercation with the deceased who stabbed him in the shoulder with a long-bladed knife. The plaintiff's colleague came to his assistance and shot the deceased in both legs. The plaintiff then grabbed a kierie and hit the deceased once on the body. The deceased died as a result of his injuries. The plaintiff was arrested, without a warrant, at his home four months later by a large group of police at 04h00. He was detained and subsequently charged with murder but was acquitted and found guilty instead of assault. The arresting officer at the time had only taken over the police docket three days prior to the arrest. There was an indication in the police docket that the DPP had instructed the police to arrest the plaintiff. He was taken to the court on the morning after his arrest and was remanded to prison, without being given a chance to speak or told of his right to bail. He was kept in shocking conditions with 32 others in a cell which was dirty and had only one toilet and a bed. He spent Christmas in prison, away from his family. The only witness for the defence was the arresting officer who claimed, untruthfully, that he

had relied on a statement by the deceased's wife, but it subsequently transpired that this statement was in fact made well after the arrest of the plaintiff.
Held, that nothing in the statements in the police docket established any more than one blow on the abdomen with the kierie, which had no consequence for the death of the deceased, and there was certainly no basis set out for a suspicion on reasonable grounds that the plaintiff had any part in the murder of the deceased in any culpable way at all. It appeared that the arrest was premised on the instruction of a police captain and the prior instruction of the DPP and was unwarranted, unjustified and unlawful. (See 27] – [29].)
Held, further, that, notwithstanding the investigating officer's assertion that he did not realise that the plaintiff's first appearance would exclude the possibility of bail, and had no knowledge of the impact of s 60(1)*(b)* of the Criminal Procedure Act 51 of 1977, the court could not accept that this was a credible response for a policeman of 30 years' experience. The investigating officer in fact subjectively foresaw that, as a consequence of the arrest, there would be an inevitable mechanical remand of the plaintiff at his first court appearance, without bail being granted until a formal bail application could be heard, thereby delaying things inevitably for at least two weeks before his final release. Public-policy considerations based on constitutional norms and values pointed to the first defendant being liable for the period of detention until a bail application would be entertained, namely up until two weeks before his actual release. (See [46] – [47].)
Held, further, that, in respect of the last period of detention, the second defendant could not be held liable, given the unavailability of the plaintiff's legal representative, and the second defendant had to be absolved of liability in respect thereof. (See [49] – [53].) The court awarded an amount of R600 000 to the plaintiff to be paid by the first defendant for the period of 19 days' detention.

S v JANSEN 2020 (1) SACR 413 (ECG)

Arms and ammunition — Unlawful possession of arms and ammunition in contravention of ss 3 and 4 of Firearms Control Act 60 of 2000 — Sentence — Imposition of minimum sentence of 15 years' imprisonment in terms of s 51(2), read with part III of sch 2 to Criminal Law Amendment Act 101 of 1997 — Not reserved for exceptional circumstances only — Such sentence appropriate where violent crime involving use of firearms prevalent in area.
The appellant was convicted in a regional magistrates' court of the unlawful possession of an unlicensed 9 millimetre pistol and seven rounds of ammunition in contravention of the provisions of the Firearms Control Act 60 of 2000. He was sentenced to 15 years' imprisonment in respect of the firearm, and 18 months' imprisonment in respect of the possession of ammunition, the terms of imprisonment being ordered to run concurrently.
A witness testified that he had seen what he thought was a firearm concealed under the shirt of the appellant at the taxi rank in Port Elizabeth. He called the police because a month earlier he had been in the same area when the appellant and his friends had approached him. On that occasion, the appellant, whom he knew as a member of a gang, had produced a firearm. The witness had ran away and heard shots being fired as he did so. When the police arrived (on the second occasion) they observed the appellant boarding a taxi and throwing a firearm onto the floor of the taxi. A 9 millimetre semiautomatic pistol loaded with the ammunition was

subsequently recovered. It was established that cartridge cases and a bullet jacket recovered from the earlier shooting scene had been fired from this firearm.
The appellant appealed against both his convictions and the sentences. On appeal, and after examining the record, the court dismissed the appeal against the convictions. In the charge-sheet, the state had given notice of its intention to rely on the provisions of s 51(2) of the Criminal Law Amendment Act 101 of 1997 (the Act), which, read with part III of sch 2, obliged a court to impose a sentence of 15 years' imprisonment in the case of a first conviction for any offence relating to the possession of an automatic or semiautomatic firearm, unless substantial and compelling circumstances were present. In argument, the appellant submitted that the prescribed sentence of 15 years' imprisonment had to be reserved for exceptional cases.
Held, that the appellant's argument was incorrect and inconsistent with the clear and unambiguous intention of the legislature, that the sentencing court was obliged to comply with the minimum-sentence regime, unless it was satisfied that there were substantial and compelling circumstances that justified the imposition of a lesser sentence. (See [27].)
Held, further, although the appellant had a previous conviction for the unlawful possession of a firearm, in the absence of evidence that the previous conviction involved the possession of a semiautomatic firearm, the trial court had correctly treated the appellant as a first offender for purposes of s 51(2) of the Act. (See [35].)
Held, further, that the circumstances of the offences in the present case pointed to the seriousness thereof, in that there was nothing which indicated that the appellant's possession of the firearm and ammunition was for any purpose other than for a criminal purpose. He had carried the firearm on his person in a concealed manner and had attempted to get rid of it when he realised that he was about to be searched by the police after they had stopped the taxi in which he was a passenger. The firearm was loaded at the time and there was evidence that it had already been used in an unlawful shooting. (See [38].)
Held, further, that the appellant had been in custody for two years before he was sentenced, had justifiably not persuaded the court a quo that this was, by itself, a sufficient reason in the circumstances to depart from the prescribed minimum sentence. (See [39].)
Held, further, that the trial court had correctly taken into account the prevalence of the commission of the offences in question and the use of unlicensed firearms in the commission of violent crime, and, more particularly, in the unlawful activities of gangs in the Port Elizabeth area. The city was plagued by gangsterism and violent crime in certain of its areas and this was a relevant factor that the court a quo was entitled to take cognisance of. In the circumstances of the case it could not be concluded that a sentence of 15 years' imprisonment was disproportionate to the crime, the criminal, and the interests of society, such that would create an injustice. The appeal against sentence was accordingly also dismissed. (See [40] – [42].)

MINISTER OF POLICE AND ANOTHER v MULLER 2020 (1) SACR 432 (SCA)

Arrest — Detention of accused by police — Detention following upon unlawful arrest — Liability of police for further detention on remand by magistrate — Magistrate establishing that accused had previous conviction for rape and ordering formal bail application as required by s 60(11)*(b)* of Criminal Procedure Act 51 of 1977 — Neither prosecutor nor police aware of accused's previous conviction at time and

were amenable to accused being released on warning — No liability on police after remand by magistrate.

The respondent instituted action for damages against the first appellant (the Minister) arising from his alleged unlawful arrest and the ensuing detention, and against the Minister and the second appellant, the National Director of Public Prosecutions (the NDPP), jointly and severally for damages arising from his further detention after his first appearance in court. The magistrate awarded him R50 000 for the arrest and initial detention and R150 000 for the further detention.
An appeal against these awards was dismissed by the High Court. On appeal to the present court the respondent abandoned his judgment against the NDPP.
The claim arose from an incident in which the respondent was arrested for an alleged contravention of s 36 of the General Law Amendment Act 62 of 1955 (the Act) for the possession of a police bulletproof vest. Acting on information, the police had gone to the respondent's flat where they found the vest on the veranda. Two occupants, the respondent's son and a young woman, identified it as being the property of an itinerant visitor to the flat and occasional occupant. Upon his arrival, the respondent confirmed that information. Nonetheless, the respondent was arrested and taken to the local police station where he was detained, and a warning statement was taken from him. The investigating officer recommended that he be released on bail of R500, but this was changed by the prosecutor to an instruction that the respondent could be released on warning. The prosecutor who appeared in court proceeded on that basis, but the magistrate enquired about the respondent's previous convictions and he replied that he had a previous conviction for rape. She then ruled that the matter be referred to the bail court which was unfortunately congested and unable to hear the application on the same day. She then remanded the matter to 2 December 2013 on which day the respondent was released on bail.
Held, that the respondent had given a satisfactory explanation for his possession of the bulletproof vest and therefore met the standard required by s 36 of the Act, and the trial court and the court a quo had correctly held that the arrest and initial detention were unlawful. (See [21].)
Held, further, that the magistrate had given judicial consideration to the respondent's release and remanded him in custody, which she was obliged to do in terms of s 60(11)*(b)* of the Criminal Procedure Act 51 of 1977, because of his admitted previous conviction. Neither the prosecutor nor the police had knowledge of the respondent's previous conviction and accordingly could not have foreseen that he would be remanded in custody. In the circumstances the liability of the police for the wrongful and unlawful arrest
and detention was truncated upon the remand order made at the first appearance. The appeal accordingly had to succeed in respect of the further detention. (See [38] – [39].)

S v LM 2020 (1) SACR 445 (GP)
Sentence — Prescribed minimum sentence — Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Accused's HIV-positive status — This, together with lengthy period of imprisonment before sentencing, justifying slight deviation from prescribed minimum sentence.

The appellant was convicted in a regional magistrates' court of robbery with aggravating circumstances, attempted murder and two offences relating to the

unlawful possession of a firearm. During sentencing proceedings he disclosed that he was HIV-positive and had contracted tuberculosis. In light of this the court sentenced him to an effective 13 years' imprisonment. On appeal he submitted that the trial court had failed to conduct an inquiry to establish the extent of his ill health before sentencing him.
Held, that it was clear that the appellant's condition had not developed into full-blown Aids and it seemed that his HIV status was in its early stages. The court a quo had taken into account the fact of his ill health and had correctly concluded that it could not be ignored. This factor, together with the fact that he had been in custody for two years before sentence, constituted substantial and compelling circumstances justifying a deviation from the minimum sentence of 15 years' imprisonment for a first offender. The court had not misdirected itself when sentencing the appellant and the appeal had to be dismissed. (See [6] – [7].)

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Airports Company South Africa SOC Ltd v Imperial Group Ltd and others [2020] 2 All SA 1 (SCA)

Constitutional and Administrative Law – Procurement – Tender bids – Request for bids – Constitutionality – Section 217 of the Constitution provides that when an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost-effective – Preferential procurement policy as reflected in a Request for Bids bearing no relation to the requirements of section 217 of the Constitution or the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000, rightly held by High Court to be unlawful and unconstitutional.

On 5 September 2017, the appellant ("ACSA") published a Request for Bids ("RFB") calling for bids for the hiring of 71 car rental kiosks and parking bays at nine airports operated by it. The RFB indicated that each successful applicant would be granted car rental concessions for ten years. The first respondent ("Imperial"), a car rental company, submitted a bid in response to the RFB.

After ACSA published a document addressing bidders' queries, Imperial contended that the pre-qualification criteria and several provisions of the RFB contravened section 217 of the Constitution and legislative prescripts relating to procurement. Imperial launched a two-pronged urgent application in the High Court. In Part A, it successfully sought the joinder of all entities having an interest in the matter as co-respondents in the application. In Part B, Imperial sought an order reviewing and setting aside ACSA's decision to issue and publish the RFB on the basis that it was unlawful, unreasonable, inconsistent with the constitution and invalid.

The High Court held that the RFB and the decision to publish it were unlawful, inconsistent with the Constitution and invalid. It reviewed and set aside the RFB and the decision to publish the RFB based on the principle of legality, alternatively in terms of section 6(2)(a)(i), and/or 6(2)(b), and/or 6(2)(e)(i), and/ or 6(2)(f)(i), and/or section 6(2)(i) of the Promotion of Access to Justice Act 3 of 2000.

On appeal, the main issues were the interpretation and applicability of section 217 of the Constitution together with the relevant statutes falling under its legislative scheme; and, the rationality of several provisions of the RFB (impugned provisions) as well as the process leading to the decision to publish the RFB culminating in its publication. Two ancillary issues were whether the terms of the RFB were vague and whether ACSA committed an error of law that impacted negatively on the RFB.

Held – The disqualification of Imperial at the first hurdle of the evaluation process would have an external effect and adversely affected Imperial's rights. It was not reasonable to expect Imperial to wait for the outcome of the entire process before launching a challenge. The RFB constituted an administrative action that was ripe for a judicial challenge.

Section 217 of the Constitution provides that when an Organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost-effective. The RFB was subject to section 217.

The principle of legality dictates that there must be a rational connection between the decision taken and the purpose for which the decision was taken. ACSA's preferential procurement policy as reflected in its RFB bore no relation to the requirements of section 217 of the Constitution or the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000.

The appeal was dismissed.

National Credit Regulator v Lewis Stores (Pty) Ltd and another [2020] 2 All SA 31 (SCA)

Consumer – Credit agreements – Alleged prohibited charges – Whether charges levied by retailer as club fees and for certain extended warranties in respect of goods purchased from it constituted prohibited conduct as envisaged in sections 90, 91, 100, 101(1)(a) and 102(1) of the National Credit Act 34 of 2005 – Retailer's actions not in breach of Act as section 102(1) of the Act expressly authorises a credit provider to include in the deferred debt, the cost of an extended warranty agreement and the club fees charged did not constitute an additional cost of credit.

The appellant (the "Regulator") applied to the second respondent (the "tribunal"), pursuant to an investigation it had carried out, for a declarator that the first respondent, a national retailer of furniture and electrical appliances ("Lewis"), had repeatedly contravened sections 90, 91, 100, 101(1)(a) and 102(1) of the National Credit Act 34 of 2005. The tribunal dismissed the application and a subsequent appeal to the High Court failed. The present appeal was with special leave of the present Court.

The Regulator contended that the charge levied by Lewis for certain extended warranties in respect of goods purchased from it constituted prohibited conduct as envisaged in sections 100, 101(1) and 102(1) of the Act and that the extended warranties also contravened sections 90 and 91. It also found that the charging of subscriptions for membership of the "Lewis Family Club" ("club fees") to customers who had entered into credit agreements with Lewis was prohibited conduct as

envisaged in sections 100, 101 and 102(1) as those fees constituted a prohibited "cost of credit".

Held – Terms and conditions of the extended warranty were explained to consumers prior to the conclusion of the agreement and it was entirely optional as to whether the consumer accepted the warranty. The Court found that neither the charge levied by Lewis for extended warranties nor the club fees contravened the provisions of the Act.

Consequently, the appeal was dismissed with costs.

Allner v Werner [2020] 2 All SA 49 (ECG)

Family law and Persons – Cohabitation – Universal partnership – Party seeking to invoke remedy must prove that each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills; the business had been carried on for the joint benefit of both parties; the object was to make a profit; and the partnership contract was legitimate – Where such agreement was tacit, party alleging its existence must establish that the other party was fully aware of the circumstances connected to the transaction; the act relied upon was unequivocal; and the tacit contract does not extend beyond what the parties contemplated.

Arising from the parties cohabitation as a couple, the plaintiff sought an order declaring that she and the defendant concluded an agreement of partnership, namely *societas omnium bonorum*, upon equal shares. She also sued for the dissolution of the partnership and for its liquidation. She alleged that the universal partnership emanated from the parties' cohabitation and conduct, thus relying on the existence of a tacit agreement, while the defendant asserted that their relationship was merely one of cohabitation as lovers.

According to the plaintiff, the parties had commenced their cohabitation during 1996 when they, either tacitly or by implication, entered into a universal partnership in equal shares. They conducted a farming business in respect of which they took joint decisions and contributed equally through their labour and business skills. The plaintiff alleged further that she had effectively acted as the defendant's wife and companion and had sacrificed her own career prospects in order to support the defendant.

Held – In our law, cohabitation does not have special legal consequences. Generally the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation. However, if a cohabitee can establish that the parties were not only living together as husband and wife but that they were partners, he or she can invoke that remedy. The party seeking to invoke this private law remedy must prove that each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills; the business had been carried on for the joint benefit of both parties; the object was to make a profit; and the partnership contract was legitimate. A universal partnership does not require express agreement but, like any other contract, can come into existence by way of tacit agreement. The contributions by the parties do not necessarily have to be confined to the profit making entity.

Our law recognises two types of universal partnerships namely *societas universorum bonorum*, where parties agree that all their possessions (present and

future) will be considered assets of the partnership and *societas universorum quae ex quaestu veniunt*, where parties agree that all they may acquire during the continuation of the partnership from every kind of commercial undertaking shall be taken to the partnership property.

In order to established the existence of a tacit contract the plaintiff must establish that the defendant was fully aware of the circumstances connected to the transaction; the act relied upon was unequivocal; and the tacit contract does not extend beyond what the parties contemplated. A court will find the existence of a tacit contract where by a process of inference it concludes that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence.

Based on the evidence, the court found that a universal partnership existed between the plaintiff and the defendant of all assets acquired by them up to June 2018. The plaintiff was shown to have a 30% share in such partnership. It was declared that the partnership was dissolved with effect from June 2018.

AS and another v GS and another [2020] 2 All SA 65 (KZD)

Constitutional and Administrative Law – Right to equality guaranteed in section 9 of the Constitution – Any differentiation caused by a statutory provision must have a rational basis, and if not, should be justified in an open and democratic society based on human dignity, equality and freedom.

Family Law and Persons – Marriage – Matrimonial Property Act 88 of 1984, section 21(2)(a) – Constitutionality – Whether effect of section 21(2)(a) was that couples who were married subject to section 22(6) of the Black Administration Act 38 of 1927 would remain married out of community of property, unless they opted to change their property regime to in community of property – As section 21(2)(a) maintained a marriage out of community of property as the default position of black persons who married before 1988, it constituted indirect unfair discrimination, had unequal application and was arbitrary in application.

The first applicant was a 72-year old housewife, and one of approximately 400 000 black women whose marriages were out of community due to section 22(6) of the Black Administration Act 38 of 1927. The first applicant and the first respondent were married to each other on 16 December 1972, out of community of property under section 22(6). They had been married for a period of 47 years and such marriage still subsisted. The first applicant contended that notwithstanding the repeal of section 22(6), being married out of community of property was still the default position of their marriage due to the fact that the provisions of section 21(1) and 21(2)(a) of the Matrimonial Property Act 88 of 1984 perpetuated such position. The applicants submitted that the discrimination was in terms of section 9(5) of the Constitution, unfair and that accordingly, the provisions of section 21(1) and 21(2)(a) of the Matrimonial Property Act were unconstitutional and invalid to that extent.

Held – Section 9 of the Constitution provides for the principle of equality before the law. The stages of an enquiry into a violation of the equality clause requires that there is a preliminary enquiry as to whether the impugned provision or conduct differentiates between people or categories of people. That is a threshold test. If there is no differentiation, then there can be no question of a violation of any part of section 9. If a provision or conduct does differentiate, then a two–stage analysis must be applied.

The first stage concerns the right to equal treatment and equality before the law. It tests whether the law or conduct has a rational basis ie is there a rational connection between the differentiation in question and a legitimate government purpose that is designed to further or achieve? If the answer is in the negative, then the impugned law or conduct violates section 9(1) and it fails at the first stage. If, however, the differentiation is shown to be rational, then the second stage of the enquiry is activated. A differentiation that is rational may nevertheless constitute an unfair discrimination under section 9(3) or (4). In principle, both unfair discrimination and differentiation without a rational basis can then be justified as limitations on the right to equality in terms of section 36. Such unfairness and irrationality should be justified in an open and democratic society based on human dignity, equality and freedom.

The Court found section 21(2)(a) to be unconstitutional, and granted ancillary relief.

Jacobs NO and others v Hylton Grange (Pty) Ltd and others [2020] 2 All SA 89 (WCC)

Personal Injury/Delict – Nuisance in the form of offensive odours– Imposition of liability – Question is whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable – Where, by taking reasonable steps, the offender could abate the nuisance, liability was imposed.

The appellants were the trustees of a trust which owned a farm ("MD93"). The first and third respondents were companies which owned or leased grape farms bordering on MD93. The second and fourth respondents were individuals associated with the first and third respondents respectively, and resided on the grape farms. They were ordered by the court a quo, to cease all composting activities on MD93. The composting activities mentioned in the order were carried out by the trust as part of commercial mushroom farming. The compost (or substrate) was the material in which the mushrooms grew. It was not in dispute that the making of mushroom substrate can emit gases with offensive odours, particularly ammonia and hydrogen sulphide.

Held – The case was about alleged unlawful nuisance in the form of offensive odours.

Although the term "nuisance" continues to be used in this country under the influence of English law, the question is whether the conduct of the person causing the alleged nuisance is, in the delictual sense, wrongful in relation to the party complaining of the nuisance. Since the applicants sought an interdict, and not damages, the question of fault was not relevant.

In a case of nuisance, the neighbour complains that his right to enjoy the undisturbed use of his property with reasonable comfort and convenience is impaired. Because the offending conduct does not cause physical damage to body or property, wrongfulness is not presumed. Wrongfulness must be determined with regard to the particular circumstances of the case. The question is whether the harm-causing conduct, assessed in accordance with public policy and the legal convictions of the community, constitutionally understood, is or is not acceptable; in short, whether it is objectively reasonable to impose liability.

Balancing the right to an environment that is not harmful to health or well-being against the right to choose a trade, occupation or profession freely, the court found

that on the evidence it ought to be possible, by taking reasonable steps, for the trust to abate the nuisance.

The appeal was therefore dismissed.

King Phahlo Royal Family and another v Molosi and others [2020] 2 All SA 111 (ECM)

Local Government – Traditional leadership – Incumbency of kingship of traditional community – Challenge by respondents to identification of King of AmaMpondomise based on alleged non-compliance with customary law prescripts – Court rejecting challenge on basis that invalid administrative action may not simply be ignored, but may be valid and effectual and may continue to have legal consequences, until set aside by proper process.

The present matter concerned the incumbency of the kingship of AmaMpondomise. An earlier court decision, in the case of *Matiwane v President of the Republic of South Africa and others* [2019] 3 All SA 209 (ECM), saw the kingship of AmaMpondomise having been restored, but the question of incumbency remained unresolved.

In the present application, the applicants sought a declaration that the resolution dated 31 May 2019, issued by the third respondent in terms of which it identified the second respondent as the King or Queen of AmaMpondomise was unlawful and void *ab initio*, and accordingly fell to be set aside. A further declaration was sought that the third respondent was not a royal family entitled and responsible for the identification of any person and making recommendations to the fourth respondent in terms of section 9 of the Traditional Leadership and Governance Framework Act 41 of 2003 to assume kingship or queenship of AmaMpondomise. In addition, an interdict was sought preventing the first to third respondents from identifying a person to assume kingship or queenship and making recommendations to the fourth respondent in terms of section 9 of the Act. Finally, an order was sought directing the fourth respondent to recognise the second applicant as King of AmaMpondomise.

The respondents' basis for opposing the application was that the second respondent was the descendant of Dosini who was the heir of King Ngcwina.

Held – The second applicant was properly identified by the first applicant to the extent that he came from the Cira lineage and was a direct descendant of Mhlontlo. What the respondents disputed was the entitlement to the throne of AmaMpondomise of not only the second applicant but also King Mhlontlo and all those who reigned before him up to King Cira, the first king in the Cira lineage. That challenge or allegation of non-compliance with the customary law prescripts was premised in the disinheritance of Dosini by his father King Ngcwina. It was the compliance of King Ngcwina with customary law and custom in disinheriting Dosini and handing over the kingship to the minor house of Cira in or around 1300 that was in dispute. Invalid administrative action may not simply be ignored, but may be valid and effectual and may continue to have legal consequences, until set aside by proper process. That is known as the *Oudekraal* principle. The recognition of the second applicant could not affect the respondents in taking whatever steps necessary to prosecute their claim for the throne of AmaMpondomise in future.

Kruger and another v Rayner and others [2020] 2 All SA 138 (KZP)

Property – Agricultural property – Operation of school on farm – Rights of neighbours – Application by neighbour for interdict preventing operation of school on property based on failure to adhere to the by-laws and to obtain a certificate of occupation in terms of the National Building Regulations and Building Standards Act 103 of 1977 – As any interference with neighbours' use and enjoyment of their property was minor, that could not trump the right of learners to attend the school, with result that the balance of convenience favoured refusing interdictory relief.

The first applicant lived on a farm, and was the sole member of the second applicant, which owned the farm. The first and second respondents ("the Rayners") owned an adjoining farm (the "third respondent"). The fourth respondent was the municipality within which the farm was located. The Rayners operated a school on their farm. It was common cause that they were not authorised to do so under the South African Schools Act 84 of 1996.

The applicants sought to interdict the Rayners from operating the school on their farm until the municipality granted the required permission in terms of the Spatial Planning and Land Use Management Act 16 of 2013 and the KwaZulu-Natal Planning and Development Act 6 of 2008 – and a certificate of occupation in terms of the National Building Regulations and Building Standards Act 103 of 1977.

Among the reasons for the application was the fact that the land was zoned for primarily agricultural use, and that the location of a school in the area was out of place. The applicants also contended that the increased traffic caused by the school impeded access to their property. They contended that their clear right to apply for an interdict was based on the unlawful operation of the school.

Held – The building and structures constituting the school had not been approved for such use by the municipality. However, neither the applicants' nor the Rayners' property fell within any town planning scheme. The applicants had to prove that a violation by the Rayners had caused or would cause damage. They relied on the Rayners' failure to adhere to the by-laws and to obtain a certificate of occupation. The applicants had to show that the alleged contravention of the by-laws would impact their interests. The high water mark of their case was that the school disturbed the sense of peace in their agricultural environment. The Court found that any interference with the applicants' use and enjoyment of their property was minor, and could not trump the right of learners to attend the school. The balance of convenience favoured refusing the interdictory relief.

The first to third respondents were ordered to apply for approval of the use of the relevant buildings as a school, and for permission by the provincial Department of Education, to operate an independent school.

Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another [2020] 2 ALL SA 157 (GJ)

Civil Procedure – Interim interdict – Nature of – An interim interdict restraining the exercise of statutory powers is not an ordinary interdict, and courts grant it only in exceptional cases and when a strong case for that relief has been made out.

Civil Procedure – Interim interdict – Requirements – Applicant must establish the existence of a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted (and the ultimate relief is granted); the balance of convenience favours the granting of the interdict; the absence of a suitable alternative remedy.

Civil Procedure – Urgency – Requirements – Rule 6(12) of the Uniform Rules of Court provides for abridgment of times for service and filing of process and documents prescribed by the Uniform Rules of Court, and the departure from established sitting times of the court – Test for urgency is whether the applicant brought the application with the requisite degree of urgency; and whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course – Delay in bringing application justified where caused by other party's conduct.

The applicants ("Marcè") had brought an urgent application for an interim interdict, preventing the first and second respondents from implementing the contract entered into between them for the supply of fire engines and water trucks pursuant to the award of a tender by the first respondent (the "City").

The respondents took issue with the urgency of the application, and also opposed the application on the merits.

Marcè alleged that the awarding of a tender was unlawful, unreasonable, procedurally unfair and inconsistent with the Constitution because the City failed to follow proper procurement procedures and to adhere to relevant specifications.

Held – The central issue was whether Marcè, as an unsuccessful tenderer, had the right to interdict the further implementation of the tender and whether such an interdict, if granted, would encroach on the City's executive functions to the prejudice of the second respondent ("TFM").

The court confirmed the *locus standi* of Marcè, as a bidder, to challenge the award of the tender to TFM.

Next the issue of urgency was addressed. Rule 6(12) of the Uniform Rules of Court provides for the abridgment of the times for the service and filing of process and documents prescribed by the Uniform Rules of Court, and the departure from the established sitting times of the court. The test for urgency is whether the applicant brought the application with the requisite degree of urgency; and whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course. On the common cause facts, Marcè did not bring the application promptly after it learnt that the City had awarded the tender to TFM. The Court found that the City had dragged its feet in providing information sought by Marcè, and Marcè's delay in bringing the application was justified.

For an interim interdict to be successful, it must establish the existence of a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted (and the ultimate relief is granted); the balance of convenience favours the granting of the interdict; the absence of a suitable alternative remedy. An interim interdict restraining the exercise of statutory powers is not an ordinary interdict. Courts grant it only in exceptional cases and when a strong case for that relief has been made out. In this case, the requirements were met. The order granted was therefore confirmed.

MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government [2020] 2 All SA 177 (GJ)

Civil Procedure – Notice regarding raising of constitutional issue in action – Rule 16A of the Uniform Rules of Court – Person raising a constitutional issue in an action must give notice thereof to the Registrar at the time of filing the relevant pleading – Rule 16A(9) permits a court to condone non-compliance with the Rule where in the interests of justice.

Personal Injury/Delict – Claim for damages – Once and for all rule – A plaintiff must claim, in one action, all past and prospective damages arising from one cause of action, and courts are obliged to award such damages in one lump sum.

Personal Injury/Delict – Medical negligence – Quantum of damages to be awarded – Court developing common law to make order of damages not sounding wholly in money and to include an order of compensation in kind; and to permit monetary award to be payable by way of periodic payments, rather than in one lump sum.

In an action based on negligent conduct by medical staff in a public hospital resulting in the birth of a child ("K") who was now severely disabled by cerebral palsy, the plaintiff (as mother of the child) sued the defendant (the "MEC") for damages. In settling the merits, the MEC conceded liability for K's agreed or proven damages flowing from the neurological injury she sustained during her birth, and the resultant cerebral palsy she suffered.

In his defence to the *quantum* aspect of the claim, the MEC raised what was referred to as "the DZ defences" flowing from the judgment of the Constitutional Court in *MEC for Health and Social Development*, *Gauteng v DZ obo WZ* 2017 (12) BCLR 1528 (CC). Based on that judgment, the court was asked to develop the common law to permit the court to make an order of damages that did not sound wholly in money and to include an order of compensation in kind; and to permit the court to order, insofar as any monetary award was made, that it be payable by way of periodic payments, rather than in one lump sum.

As the development of the common law is a constitutional issue, the plaintiff submitted that the defendant had not complied with the provisions of rule 16A of the Uniform Rules of Court. In terms of the Rule, a person raising a constitutional issue in an action must give notice thereof to the Registrar at the time of filing the relevant pleading.

Held – Rule 16A(9) permits a court to condone non-compliance with the Rule where this is in the interests of justice. While a court should not lightly condone the failure to comply with it, in this case, such condonation was justified.

In *DZ* the court confirmed the rule that insofar as the Aquilian action is concerned, damages are to be awarded in money. Second, the "once and for all" rule is part of our law of delict. This means that a plaintiff must claim, in one action, all past and prospective damages arising from one cause of action, and courts are obliged to award such damages in one lump sum. The generally accepted method of calculating the damages payable in respect of future medical expenses is to base these on the costs of the relevant services in the private healthcare sector. However, the Court accepted that a plaintiff bears the onus of proving that damages claimed are reasonable. Thus, a defendant could counter the method and measure of a damages

claimed on the basis that the amount (based on the costs of private healthcare) was not reasonable because the plaintiff was more likely to use public healthcare, which was as good as, and cheaper than, private healthcare. That does not involve any need to develop the common law. However, if the defendant wants to go further and to plead either for an order that it render services in kind (the public healthcare defence) or for payment of the damages to be made in instalments, some development of the common law will be necessary.Based on the evidence adduced, the Court accepted that the identified services were available to K at a public hospital at a level comparable with those in the private sector.

The development of the common law as set out above was ordered.

Ndumo v Minister of Arts and Culture NO and others [2020] 2 All SA 225 (ECG)

Civil Procedure – Judicial review – As distinct from an appeal, a review is generally about illegality, procedural irregularity or irrationality which is such as to justify intervention by the court – In matter involving geographic name change, sole enquiry was whether irrelevant considerations were taken into account or relevant considerations not considered in the impugned decision – and not the appropriateness or merits of the name change issue.

Constitutional and Administrative Law – Geographical names – Change of town name – Required process – Approval of name change by Minister – Application for review – Whether South African Geographical Names Council correctly informed the Minister that a proper consultation process had been followed – Court finding that a consultative process regarding name changes did occur.

In terms of section 10 of the South African Geographical Names Council Act 118 of 1998, the first respondent made a decision to approve the change of name of the town of Grahamstown to “Makhanda”. The present application was for the review of that decision.

Held – The Court, in considering the review application, was not required to comment on the appropriateness or merits of the name change issue. The sole enquiry was whether irrelevant considerations were taken into account or relevant considerations not considered in the impugned decision. In the alternative, the court had to address a rationality challenge.

As distinct from an appeal, a review is generally about illegality, procedural irregularity or irrationality which is such as to justify intervention by the court. Where the Promotion of Administrative Justice Act 30 of 2000 is applicable, it forms the foundation of such administrative review.

At the heart of the application for review was whether, in the statutorily prescribed process, adequate consultation with communities and stakeholders took place. The crucial enquiry was thus whether the second respondent (the “Names Council”) had correctly informed the Minister that a proper consultation process had been followed.

The South African Geographical Names Council Act 118 of 1998 (the “Act”) sets out the process to be followed in the change of geographical names. The Act requires the Minister to issue Regulations as to the criteria to be followed when deciding whether or not a geographical name should be regarded as a national, provincial or local competence. In terms of those Regulations, the change of geographical names of

towns are geographical names of “national concern” (national competence) and not of local concern. Section 9(1) of the Act refers to the Guidelines, which require that the Names Council ensures that proper consultation has taken place.

In considering the legislative provisions referred to above, the court set out the principles of statutory interpretation. The general rule that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity, is subject to three important interrelated riders: statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and all statutes must be construed consistently with the Constitution. On a purposive interpretation of the Act, standardisation and transformation are key factors in effecting name changes.

Accepting that the Act clearly envisages and provides for a consultative process as to name changes, the Court found that such process did in fact occur. There was therefore no material misstatement of fact in the recommendation to the Minister in that regard.

Further grounds of review raised by the applicant were all found to lack merit, and were also dismissed.

The review application was dismissed, and each party was ordered to pay its own costs.

Old Mutual Limited and others v Moyo and another [2020] 2 All SA 261 (GJ)

Civil Procedure – Interim interdict – Appealability – An interim interdict is appealable in limited circumstances as dictated by the interests of justice.

Labour and Employment – Contract of employment – Termination on notice – Challenge to fairness of termination while expressly disavowing reliance on Labour Relations Act 66 of 1995 – As there is no self-standing common-law right to fairness in employment contracts, the termination of an employment contract by providing notice as stipulated in contract does not amount to repudiation.

The first appellant (“Old Mutual”) terminated the contract of employment of its CEO, the first respondent (“Moyo”). The court *a quo* granted an interim interdicting reinstating Moyo. It found him to have established the existence of a *prima facie* right to reinstatement, which, if not protected by the interim interdict, would cause him to suffer irreparable prejudice. It found that Old Mutual had repudiated the contract of employment by terminating it in terms of clause 24.1.1, and in not following the disciplinary enquiry or pre-dismissal arbitration procedure contemplated in clause 25.1.1 in circumstances where it had accused Mr Moyo of having had a conflict of interest and of having committed gross misconduct.

Held – The position and scope of Moyo’s duties required him to faithfully and diligently perform such duties and exercise such powers consistent with his position. At the time of Moyo’s appointment as the chief executive of Old Mutual, he was a shareholder and director of an investment holding company (“NMT”), in which Old Mutual was a 20% shareholder. Because of Moyo’s interest in NMT and that of Old Mutual, they concluded protocols which set out the way in which any potential conflict of interest that might arise would be dealt with. The appellants’ view that Moyo had not conducted himself in line with the terms of the protocols and that he had not acted in Old Mutual’s

best interests in his involvement as non-executive director of NMT, was the cause of the termination of the employment relationship.

Despite Moyo's express disavowal of any reliance on his rights under the Labour Relations Act 66 of 1995, the Court below viewed the interdict application through a labour law prism. There is no self-standing common-law right to fairness in employment contracts. The contract simply provided for termination by either party on 6 months' notice. Old Mutual's written notification of termination on six months' notice did not require any justification. The court *a quo*'s conclusion that Moyo had established that Old Mutual repudiated the contract when terminating it by providing him with six months' written notice to that effect was wrong.

Since Moyo had failed to establish the first requisite for an interim interdict, *viz* a *prima facie* right to reinstatement that requires protection pending the finalisation of the action in which he claimed reinstatement as a contractual remedy, the court *a quo* should not have granted the interim interdict reinstating him in the position of chief executive of Old Mutual.

Although it is generally considered not in the interests of justice to permit an appeal against an interim interdict since it will defeat the interim nature of the order, it is now settled that there are limited circumstances where the interests of justice dictate that an interim interdict be appealable. The present matter was one of those exceptional cases where the interests of justice demanded that the interim interdict be appealable.

The appeal was upheld with costs.

Sakhisizwe Local Municipality v Tshefu and others [2020] 2 All SA 299 (ECG)

Civil Procedure – Motion proceedings – Disputes of fact – Applications are not designed to resolve factual disputes between the parties and are decided on common cause facts – Court has to accept those facts averred by applicant that were not disputed by respondent, and respondents' version insofar as plausible, tenable and credible.

Constitutional and Administrative Law – Municipal appointment – Application for review based on legality – Delay in bringing application – Legality reviews must be brought within a reasonable time – Court is required to determine whether there was unreasonable delay; if so, whether in all the circumstances the unreasonable delay ought to be condoned; and whether in appropriate circumstances relief should in any event be granted, in constitutional matters – No grounds found to condone delay in present matter.

A post advertised by the applicant municipality was filled by the appointment of the first respondent. The advertisement had specified the minimum requirements for the position. Alleging that the first respondent failed to meet the minimum experience requirement, the applicant sought to review and set aside its own decision to appoint her to the post. The appointment was said to be null and void and in contravention of section 56 of the Municipal Systems Act 32 of 2000.

Held – The parties were in dispute about the extent of the first respondent's experience at middle management level. Generally applications are not designed to resolve factual disputes between the parties and are decided on common cause facts.

Probabilities and onus issues are not amenable to being determined in motion proceedings. The Court has to accept those facts averred by applicant that were not disputed by respondent, and respondents' version insofar as plausible, tenable and credible. It is generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute. In such a case it is preferable that oral evidence be led to enable the Court to see and hear the witnesses before coming to a conclusion. On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. In every case the Court should examine the alleged disputes of fact and determine whether in truth there is a real dispute of fact that cannot be satisfactorily resolved without the aid of oral evidence. Whether a factual dispute exists is not a discretionary matter, but a question of fact and a jurisdictional prerequisite for the exercise of the Court's discretion. The Court found no genuine dispute of fact in this case.

It was common cause that this was a legality review and not one subject to the Promotion of Administrative Justice Act 3 of 2000.

A critical issue was that of delay in bringing the review application. Legality reviews must be brought within a reasonable time. The Court is required to determine whether there was unreasonable delay; if so, whether in all the circumstances the unreasonable delay ought to be condoned; and whether in appropriate circumstances relief should in any event be granted, in constitutional matters. The delay enquiry is a factual one calling for a value judgment. A condonation enquiry requires the exercise of a judicial discretion taking into account all relevant circumstances.

The applicant correctly conceded that the delay in this matter, viewed factually, was unreasonable. The Court found no basis on which to condone the delay.

The application was dismissed.

END-FOR NOW