LEGAL NOTES VOL 5/2020

Compiled by: Matthew Klein

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SA LAW REPORTS MAY 2020

AMCU AND OTHERS v ROYAL BAFOKENG PLATINUM LTD AND OTHERS 2020 (3) SA 1 (CC)

Labour law — Dismissal — Dismissal for operational requirements — Collective agreement between employer and majority union giving union exclusive right to be consulted on dismissals due to operational requirements — Whether minority union or its individual members had right to be consulted — Labour Relations Act 66 of 1995, s 189(1).

Second and third respondent trade unions were party to a collective agreement with first respondent company. First applicant was a union not party to the agreement and second applicant and the further applicants were its members. (See [1], [4] and [9].)
First respondent entered into a retrenchment process and to this end consulted second and third respondents.
The Labour Relations Act 66 of 1995 requires, in this respect, that where there is a collective agreement and an employer contemplates dismissing employees due to operational requirements, the employer need consult only those persons the agreement requires them to consult (see [29]). Here the agreement did not require first respondent to consult with first or second or the other applicants, and it did not do so (see [9]).
First respondent later, pursuant to the collective agreement, entered an agreement with second and third respondents on who would be dismissed, and thereafter dismissed those persons (see [4] and [10]). They included members of first applicant, and it came later to challenge their dismissals (see [11]).
The matter began in the Commission for Conciliation Mediation and Arbitration, which ruled that it had no jurisdiction. From there it proceeded to the Labour Court, where applicants challenged the constitutionality of ss 189(1)*(a) – (c)* and 23(1)*(d)* of

[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 Act. (The latter provides that a collective agreement binds employees who are not members of the trade unions party to the agreement.) (See [12] – [13] and [29].)
First applicant's case was, apparently, that by not giving minority unions a right to be consulted, s 189(1) infringed their members' right to fair labour practices (see [5], [7], [13], [15], [28] and [58]); and further that s 23(1)*(d)* was procedurally unfair and thus irrational and unconstitutional, in allowing for the extending of retrenchment agreements to minority unions' members in circumstances where those unions had not been consulted thereon (see [6], [13] and [19]).
When the Labour Court dismissed the claim, applicants made appeal to the Labour Appeal Court, which ultimately dismissed the appeal (see [14] and [16]).
Applicants then applied to the Constitutional Court for leave to appeal (see [20]).
The court, per Froneman J for the majority, gave leave but dismissed the appeal (see [132]). Froneman J considered that:

- Section 189(1) had been consistently interpreted to not require individual consultation (see [108]);
- Textually, s 23(1) of the Constitution, the right to fair labour practices, did not give an individual a right to be consulted in a retrenchment process (see [118] and [123]); and
- Nor did s 189(1) of the Act in the situation of dismissals based on operational requirements (see [118] and [130]).
- Non-inclusion of an individual's right in s 189 was rational (see [119] – [120] and [126]);
- The s 189 process was procedurally fair (see [126]);
- It accorded with international practice and standards (see [126]); and
- Even were s 189 taken to limit a constitutional right, such a limit would be justifiable (see [130]).
- Moreover, any collective agreement on dismissal extended under s 23(1)*(d)* of the Act to non-contracting parties could, if need be, be subjected to legality review (see [128]).

Theron J, concurring, considered why it was appropriate to test s 189(1) against a standard of rationality rather than reasonableness (see [205] – [207] and [211]); and explained further why the court ought not adjudicate s 189(1)'s alleged limitation of the constitutional rights to equality and freedom of association (see [205] and [210], and ss 9(1) and 18 of the Constitution).
Ledwaba AJ, writing for the minority, would have granted leave to appeal and upheld the appeal in part (see [99]). In his view:

- There was authority for fairness requiring consultation with all employees liable to retrenchment (see [46]);
- Section 189(1) limited the right to fair labour practices of employees excluded from consultation (see [65]);
- The limit was unreasonable and unjustifiable (see [65] and [85]). (An obligation of inclusive consultation would not affect an employer's right to dismiss by reason of operational requirements and would not prevent conclusion of collective agreements on retrenchment (see [69] and [74]); while non-consultation would negate the Act's aims of workplace democratisation and labour peace (see [80] and [83]).)
- The s 23(1)*(d)* challenge should fail (it was contingent on extension of an agreement concluded without inclusive consultation (see [88]); another remedy was available (see [91]); and any extension could be reviewed (see [92])).

Ledwaba AJ would inter alia have held s 189(1) unconstitutional and invalid; have suspended the declaration; and ordered the section to be read during the suspension as set out at [99]. (See [99].)
Jafta J, supporting the minority's order, took issue with certain conclusions of the majority judgment. These were that neither the Constitution nor the Labour Relations Act were source of an 'individual right' to consultation; that there was no other source of such a right; and that the only remaining basis for a constitutional challenge, irrationality, was not pleaded. (See [135] – [136] and [203].)
He asserted that:

- Applicants sought only for first applicant union to be consulted on behalf of its members (see [136]);
- There were other sources for such entitlement (see [138]);
- These had been pleaded (see [138]);
- As had irrationality (see [139]).

Moreover, in the absence of consultation with first applicant union, the right to fair labour practices, to freedom of association, to form and join a trade union, and to equality, were violated.

CONTANGO TRADING SA AND OTHERS v CENTRAL ENERGY FUND SOC LTD AND OTHERS 2020 (3) SA 58 (SCA)

Discovery and inspection — Production of documents — Notice to produce documents — Ambit — Need for reference to be made in affidavit to specific document — Document not having to be produced merely because its existence may be deduced by inferential reasoning — Uniform Rules of court, rule 35(12).

Evidence — Privilege — Legal professional privilege — Legal advice privilege — Waiver — Implied waiver — Summary of principles.

Evidence — Privilege — Legal professional privilege — Legal advice privilege — Waiver — Implied waiver — Whether any distinction between 'implied waiver' and 'imputed waiver'.

The state entities, the Central Energy Fund SOC Ltd (CEF) and its subsidiary, the Strategic Fuel Fund Association NPC (SFF), were applicants in a review application (the main review) in which they sought to set aside several of their own decisions and contracts concluded relating to the sale of a large amount of the country's oil reserves. The oil companies Contango Trading SA, Natixis SA and Glencore Energy UK Ltd were respondents, amongst others, in that main review. The present appeal heard before the Supreme Court of Appeal, brought by the oil companies, was against a decision of the Western Cape High Court dismissing their two interlocutory applications in terms of rule 30A of the Uniform Rules of Court seeking to compel the CEF and the SFF to discover certain documents following their refusal when requested to do so in terms of rule 35(12). In an appeal to the Supreme Court of Appeal, the oil companies (the appellants) insisted that the CEF and the SFF (collectively, the respondents) were obliged to produce the following 'documents' mentioned in their founding affidavit (see [8] for relevant portion of affidavit):

- A 'legal review', that the then Minister of Energy had directed the CEF to conduct in respect of all contracts entered into by the SFF relating to the sale of oil reserves. The affidavit set out the broad outline of the outcome of the review, ie that

the sale was unlawful for failure to comply with certain conditions set by the Minister, and certain legislation.

- 'Two legal opinions', which had been provided by senior counsel to the CEF, at the latter's instance, considering the outcomes of the legal review. The affidavit did not attach the opinions, and the only comment in their regard was that, '(a)lthough the advice received from senior counsel is legally privileged and is not . . . capable of discovery, given where we are now, suffice it to say that the senior advocates agreed with the outcome of the CEF legal review'.
- Reports by KPMG and PwC, provided to the CEF at the latter's instance, on the financial consequences for the CEF, SFF and by implication the fiscus, given the unlawfulness of the sale.

The decision of the SCA consisted of two unanimous judgments. The first, written by Cachalia JA, concerned whether the respondents were obliged in terms of rule 35(12) to produce *the 'legal review'* and *the auditing reports by KPMG and PWC*. The principal issues called to be addressed here were whether the respondents were justified in resisting disclosure on the basis of their claims that (1) 'the legal review' *was not a 'document'* for the purposes of rule 35(12); and (2) the reports by KPMG and PwC were subject to litigation privilege. In the course of answering this question, Cachalia JA addressed the general requirements for production under the subrule referred to (see [9]), as well as the circumstances in which litigation privilege justified the withholding of a document (see [29]).

The second judgment, by Wallis JA, addressed whether the respondents were required to disclose the 'legal opinions'. The focus here was whether the respondents were entitled, as they argued they were, to resist production on the basis of their claim that the legal opinions were subject to legal advice privilege, or whether, as the appellants argued, the comments made in the affidavit referred to above amounted to a waiver of such privilege (which they agreed did prima facie attach to such opinions). The court in answering these questions considered when a party would be found to have waived legal advice privilege where there was, as here, *no express waiver* (see [42]). Waiver of such kind was customarily referred to as implied waiver. However, it was also sometimes referred to as 'imputed waiver'. (See [42].) The SCA sought to clarify whether it was appropriate to distinguish, as some courts had done, between implied and imputed waiver, on the supposed basis that the former operated where there was a subjective intention to waive, while the latter operated in the absence of any subjective intention and based solely on the requirements of fairness. (See [49].)

Legal review and reports

Held, in respect of *the 'legal review'*, that there was no reference in the respondents' affidavit to a specific document triggering the right to ask for its production. It did no more than refer to the legal review, which was *a process* by which a legal investigation into the contracts concluded by the SFF regarding the sale of oil reserves was conducted. Only by a process of inferential reasoning could it be found that the legal review referred to a specific document; this was impermissible.(See [23].)

Held, further, that for a request to fall within the ambit of the subrule there had to be a reference to a specific document, not to a general category of documents, as, in effect, was the case at present. An order of that kind would include every bit of paper generated during the review process. That is not what the subrule envisaged. It would amount to early discovery and rule 35(12) was not directed at that purpose. (See [27].)

Held, accordingly, that the reference to the legal review in the affidavit was not a reference to a document as contemplated in rule 35(12). The court a quo therefore correctly refused to order its production. (See [27] and [35].)
Held, as to *the KPMG and PwC reports*, that they were procured, not for the purpose of obtaining legal advice or for any anticipated litigation, but for an entirely different purpose, ie to assess the financial implications of the possible termination of the unlawful contracts. The respondents' claim of litigation privilege therefore had to fail, and both the documents had to be produced. (See [31], [34] and [35].)
The two legal opinions
Held, that implied waiver arose where the conduct of the person concerned, in disclosing part of the content, or the gist of the material, was objectively inconsistent with the intention to maintain confidentiality, and where the disclosure introduced into the claim or defence contentions that could only fairly be responded to if there was full disclosure. It arose notwithstanding any express reservation of the right to invoke privilege. It was furthermore clear that there was no automatic waiver as a result of partial disclosure. (See [48], [51], [63] and [67].)
Held, further, that there was no difference between implied waiver and waiver imputed by law; they were different expressions referring to the same thing. (See [48].) Implied waiver had never been concerned with whether an inference of intentional waiver could be drawn from a person's objective conduct. If as a matter of fact such an inference could be drawn, the case was one of actual waiver. (See [51].) Furthermore, there was no over-arching principle that privilege could be overridden on grounds of fairness alone. (See [48] and [63].)
Held, on the facts, that there was no implied waiver of the legal advice privilege that attached to the legal opinions (see [67]), and the appellants were not entitled to an order for their production: While there was a partial disclosure and limited disclosure in the affidavit of the conclusions reached in the opinions — and as such it could be said there was conduct on the part of the respondents that could objectively speaking be viewed as inconsistent with preserving in full the confidentiality of the opinions — such conduct had to be viewed in light of the respondents' express claim in the affidavit asserting privilege. (See [66].) Further, the content of the opinions was not made an issue in the proceedings and there was no need for the appellants to respond to them. The relevance of their contents to the litigation was not apparent. Finally, the appellants did not attempt to show why it would be unfair for them to proceed with their opposition to the review without having seen the full opinions. (See [67].) Accordingly, appeal partly upheld, in manner as set out in [37].

MZALISI NO AND OTHERS v OCHOGWU AND ANOTHER 2020 (3) SA 83 (SCA)

Immigration — Refugee — Asylum seeker — Rights — Marriage — Department refusing to register customary marriage of asylum seeker and South African citizen on basis of departmental circular — Validity of circular.

First respondent was an asylum seeker whose application for asylum had been refused. His appeal of that refusal was pending.
Latterly, first respondent had married a South African citizen under customary law, and he and his wife (second respondent) had approached the Department of Home Affairs to register that marriage, as well as to solemnise a civil marriage (see [2] – [3]).

This the Department had refused to do on the basis of a circular which provided that refugees 'whose asylum seeker application status is pending cannot contemplate marriage' and 'should there be an inquiry [into] a refugee or asylum seeker status the marriage cannot be concluded' (see [4] and [22]).
First and second respondents had then obtained a High Court declaration that the paragraph containing these provisions was inconsistent with the Constitution and invalid to the extent that it barred them registering their customary marriage and solemnising a civil marriage. The High Court had set the paragraph aside (see 5 and 6 at n8).
Here, the Department appealed to the Supreme Court of Appeal.
It confirmed that the provisions were invalid, on the ground that they limited the rights to freedom and security of the person, and dignity (see [23] and [25]).
The court also considered the assertion of the Department, that the High Court's order was incompetent in declaring a right to conclude a civil marriage and directing registration of the customary union (see 6 at n8 and [30]).
The Department's contention was that it was impermissible to be married both civilly and customarily at the same time. It asserted that the header 'Change of marriage system', read with ss 10(1) and 10(4) of the Recognition of Customary Marriages Act 120 of 1998, supported this position (see [29] – [30]).
The Supreme Court of Appeal rejected the contention, relying on authority that where the words of a provision were clear, a header may not be permitted, in the interpretive exercise, to override them. In the court's view the words were clear and allowed a man and a woman to be married both civilly and customarily (see [32]).
Appeal dismissed (see [38]).

WISHART AND OTHERS v BLIEDEN NO AND OTHERS 2020 (3) SA 99 (SCA)

Attorney — Rights and duties — Duties — Conflict of interest — Former clients — Common-law rule that legal practitioner with confidential information about former client, precluded from acting against such former client — Whether to develop rule to include 'quasi-clients' or 'informal clients' — Circumstances of present case not warranting development of such rule.

The appellants were directors of a number of companies in which the Wishart family owned the shareholding through trusts. Mr Badenhorst, an attorney, acting for BHP Billiton Energy Coal South Africa (Pty) Ltd (Billiton), had instructed two counsel, Mr Suttner SC and Mr Eyles, in arbitration proceedings against one such company, Eurocoal (Pty) Ltd (Eurocoal). Mr Badenhorst later acted for other Wishart companies in matters unrelated to Eurocoal. In one (the Avstar matter) counsel was not briefed; in the others (the Colt and Rietfontein matters), Messrs Suttner SC and Eyles were briefed.
Messrs Badenhorst, Suttner and Eyles, however, withdrew from the Colt and Rietfontein matters when it became clear that Mr Wishart would have to give evidence at pending arbitration hearings. This raised a potential conflict of interest because Billiton had proceeded with a liquidation application against Eurocoal, which meant that they would have had to interrogate Mr Wishart at the anticipated enquiry.
The Eurocoal inquiry proceeded in 2009, with Messrs Badenhorst, Suttner and Eyles representing Billiton at the interrogation. When Mr Wishart was summoned to give evidence at the interrogation, his legal representative objected to him being interrogated by them on the basis that they had previously acted in the Avstar, Colt

and Rietfontein matters. This objection formed the basis of a yet to be decided High Court application for an interdict restraining Messrs Badenhorst, Suttner and Eyles from participating at the enquiry.
In 2011 a similar application was launched in the Avstar matter after its winding-up was ordered and Billiton had obtained the court's sanction for an enquiry into Avstar's affairs in terms of ss 417 and 418 of the Companies Act 61of 1973. The High Court, dismissing the application, found that none of appellants had ever been clients of the lawyers and that such information as they had was not confidential. The present case concerned an appeal against this decision to the Supreme Court of Appeal.
At common law a legal practitioner who has confidential information about a former client is precluded from acting against such a former client. The appellants did not contest the court a quo's finding regarding confidentiality; they argued that they had been 'quasi-clients' or 'informal clients' of the lawyers. To this end they contended for developing the common law so as to protect former quasi-clients from adversarial litigation conducted against them by their former legal representatives.
Held
Even if our courts, as in England, enjoyed an inherent jurisdiction to restrain lawyers from acting when it would be in the interest of the administration of justice, in the present case the appellants were not themselves clients of the lawyers. The lawyers' client was Billiton, not the appellants. At the heart of a client's right to be protected against a former legal representative taking the other side was the possible misuse of confidential information. What the law sought to do in these situations was to protect a former client of a lawyer from being prejudiced by having that representative, in whom trust had been reposed, and who was armed with information about that client, act against them. That was hardly in issue in this matter. The facts simply did not warrant the application of the principles contended for.
In this matter the appellants were not clients of the lawyers and they had not disclosed any confidential information to the lawyers. There was no possibility, let alone probability, that the lawyers could use their secrets against them. It was accordingly not necessary, in this case, to find that the common law should be extended in the manner suggested by the appellants. The High Court had correctly found that the application for the interdict against the lawyers had to fail, and accordingly the appeal would be dismissed.

ANTONSSON AND OTHERS v JACKSON AND OTHERS 2020 (3) SA 113 (WCC)

Evidence — Subpoena duces tecum — Application to set aside by non-recipient — Locus standi to challenge subpoena on ground of irrelevance — Superior Courts Act 10 of 2013, s 35(1), s 36(5).

Practice — Trial — Witnesses — Subpoena duces tecum — Application to set aside by non-recipient — Locus standi to challenge subpoena on ground of irrelevance — Superior Courts Act 10 of 2013, s 35(1), s 36(5).

Practice — Applications and motions — Dispute of fact — Referral for oral evidence — Cross-examination of witnesses — Permissible scope — Use of documents.

The principal parties in this interlocutory application, Messrs Jackson and Antonsson, were involved in motion proceedings against each other. There were

applications and counter-applications, including opposing delinquency applications under s 162(5)*(c)* of the Companies Act 71 of 2008. There were allegations of dishonesty and mala fides from both sides, among them that Antonsson fabricated the evidence in his delinquency application with the ulterior motive to conceal his own misconduct. The presiding judge referred the application for oral evidence on several issues.
Jackson issued subpoenas duces tecum directed at various non-litigant witnesses. In the present application Antonsson requested the court to set aside the subpoenas because the requested documents were irrelevant and the subpoenas an abuse of process. Jackson in turn contested Antonsson's locus standi, arguing that the application to set the subpoenas aside should come from the witnesses, not a party to the proceedings. Jackson argued that Antonsson could himself challenge the subpoenas only on the ground of abuse of process, not the irrelevance of the documents.
Section 35(1) of the Superior Courts Act 10 of 2013 (the Act) empowers a party to secure the attendance of witnesses and the production of documents at proceedings. Section 36(5)*(c)* of the Act allows a judge to cancel a subpoena if it constitutes an abuse of process.
Held
Documents were relevant if they contained information which *could,* either directly or indirectly, enable the party who sought them to advance his or her case or damage the opponent's case (see [47] – [48]). A party to litigation (like Antonsson) did have locus standi to challenge a subpoena on the ground that the documents called for were irrelevant (see [60]). Abuse of process was not required, but if it were shown that the documents were clearly irrelevant, then the subpoena would usually also amount to an abuse (see [60] – [61]). Therefore Antonsson had locus standi to challenge the relevance of the documents in order to show that their irrelevance constituted an abuse as intended in s 36(5)*(c)* of the Act (see [62] – [63]).
At the heart of the delinquency application was the question whether Antonsson had fabricated evidence to conceal his own misconduct (see [67]). Documents that showed fabrication, or the ulterior motive behind it, were relevant and could be put to Antonsson during cross-examination (see [69] – [72]). And even if the motive were a collateral issue, then the documents could still be used to cross-examine Antonsson to his credit (see [87] – [89], [92]).
Courts should be slow to allow one party to prevent another from gaining access to information, which was what Antonsson was attempting by this application (see [119]). Since he failed to prove that the listed documents were irrelevant or could be obtained through normal discovery, or that the subpoenas were an abuse of the process, the interlocutory application would be dismissed (see [127] – [128].)

CENTRE FOR CHILD LAW AND OTHERS v MINISTER OF BASIC EDUCATION AND OTHERS 2020 (3) SA 141 (ECG)

Constitutional law — Human rights — Right to basic education — Extending to all within boundaries of South Africa — Nationality and immigration status irrelevant — Constitution, s 29(1).

Constitutional practice — Review — Condonation — For late filing of review application — Court's discretion — Alleged infringement of constitutional rights, especially those of children, by itself warranting condonation — Promotion of Administrative Justice Act 3 of 2000, s 9.

Education — School — Admission policy — Exclusion of learners without valid South African identity or passport numbers — Inconsistent with constitutionally enshrined best interest of children, and their right to education, dignity and equality — Declaration of invalidity issued — Constitution, ss 9(3), 10, 28(2) and 29(1).

Immigration — Illegal foreigner — Immigration Act's prohibition on training or instruction of illegal foreigners by learning institutions — Prohibition not applicable to illegal foreign children — Constitution, ss 28(2) and 29(1)*(b)*; Immigration Act 13 of 2002, ss 39(1) and 42.

Prior to 2016 the Department of Education of the Eastern Cape Provincial Government (the Department) provided teaching staff and funding to all learners at schools in the Eastern Cape, based on the actual learner numbers — regardless of whether the learners possessed identification documents. Then, in a circular dated 17 March 2016 (Circular 06 of 2016), issued by the Acting Superintendent-General of the Department, and in a further circular dated 6 June 2016, requirements were introduced that withheld funding for learners without valid identity or passport numbers.

This effectively resulted in the exclusion of such 'undocumented children' from school and from being funded if they remained at school. (See [6] – [8].) In particular, clause 15 of Circular 06 of 2016 (quoted at [73]) made the admission to public schools of children who were South African nationals conditional upon the production of a birth certificate within three months, failing which the child of the defaulting parent would be excluded from enrolment; and clause 21 required that learners classified as 'illegal aliens' must prove that they have applied to legalise their stay before they could be admitted to public schools.

On 26 May 2017 the first and second applicants, respectively the Centre for Child Law and the Phakamisa High School's governing body, applied inter alia for a declaratory order that Circular 06 of 2016 was 'inconsistent with the Constitution and/or the South African Schools Act and unlawful', and for certain consequential relief (see [10]). They were unsuccessful in obtaining an urgent interim order that pending this application, 37 affected learners at the Phakamisa High School be admitted into a public school. The Constitutional Court on 15 February 2019 however set aside the dismissal of their urgent application, affording them interim relief (see [13]).

In the main application the 37 affected learners were granted leave to intervene as applicants; and the Minister of Home Affairs and the Superintendent-General of the Department of Home Affairs, respectively, joined as the fourth and fifth respondents. Two amici curiae were also admitted. Before the main application was heard, Circular 01 of 2019 was issued. The latter circular ostensibly recalled Circular 06 of 2016, by accommodating undocumented children at schools while their parents or caregivers were afforded a limited time within which to obtain the requisite documents.

The bases of the parties' respective cases are set out at [21] – [31]). The issues raised and the court's findings were as follows:

- Whether the delay in launching the application of more than a year was unreasonable and, if so, whether it should be condoned in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Held, that the delay was more than 180 days and was therefore per se unreasonable; it would however be condoned because it was sufficiently explained,

and because the alleged infringement of constitutional rights — especially of children — on its own warranted granting condonation. (See [51] – [52].)

- Whether the issue on the constitutionality of the admission policy embodied in Circular 06 of 2016 was rendered moot by Circular 01 of 2019.

Held, that, upon a proper interpretation, Circular 01 of 2019 gave guidance to schools when implementing the policy embodied in Circular 06 of 2016, pending a revision process that was still under way. The issue of the constitutionality of the latter circular was therefore not academic or hypothetical but very much alive.

- The constitutionality of clauses 15 and 21 of the admission policy.

Held, that (apart from the right to education in s 29 of the Constitution) clause 15 constituted a severe limitation on other rights enshrined in the Constitution for the protection of children, namely the right of children to have their best interests considered paramount (s 28(2)); their right to dignity (s 10); and the right to equality (s 9(3)). As for clause 21, the right to education extended to everyone within the boundaries of South Africa (ss 12 and 35(2)); nationality or immigration status was irrelevant. Clause 21 undoubtedly also constituted a severe limitation on other rights that protect children. And because both were policy and not 'a law of general application', s 36 of the Constitution did not apply. Both clauses were therefore unconstitutional. (See [75] – [87], [90] – [93], [97] and [101.)

- Whether ss 39(1) and 42 of the Immigration Act 13 of 2002 * should be interpreted as prohibiting the provision of basic education to children whose presence in the country was illegal.

Held, that on a proper interpretation, the sections fell to be interpreted in a way that did not prohibit children from receiving basic education from schools. Such interpretation would be consistent with the right to basic education enshrined in s 29; every child's rights under s 28(2) to have their best interests taken into account in matters concerning them; international conventions' emphasis on providing education to all children irrespective of their status and the existing obligation in the Schools Act 84 of 1996 placed on parents and schools to ensure that all learners receive basic education. (See [127].)

Held, further, that clauses 15 and 21 were also liable to be set aside on the basis that they are ultra vires the Schools Act 84 of 1996, and the National Education Policy Act 27 of 1996 (NEPA). (See paras [102] – [106].)

CHETTY v ERF 311, SOUTHCREST CC 2020 (3) SA 181 (GJ)

Land — Sale — Contract — Prescribed terms — Non-compliance — Effect — Contract voidable ab initio at instance of purchaser, provided appropriate proceedings instituted within two years after sale and non-compliance substantial — Alienation of Land Act 68 of 1981, s 6, s 24(1).

Alienation of Land Act 68 of 1981, s 27(1)— Contract — Instalment sale agreement — Statutory right of purchaser to demand transfer upon payment of 50% of purchase price against registration of bond in seller's favour to secure balance and interest — Demand may be made for first time in notice of motion — No requirement that demand incorporate tender to register mortgage bond for outstanding balance — Cost of registration of bond to be borne by purchaser — Alienation of Land Act 68 of 1981, s 27(1).

If a contract for the sale of land in instalments does not comply with s 6(1) of the Alienation of Land Act 68 of 1981, the purchaser — and not the seller — can apply to have it declared void ab initio, provided (i) it initiates proceedings within two years of the date of the sale and (ii) the non-compliance was substantial (see [38]).
Here, the applicant (the purchaser), who had, it was agreed, paid the better part of the purchase price in instalments, sought specific performance by the respondent (the seller). While the Act, and in particular s 27 (see below), was applicable to the transaction, neither party realised it at the time. The respondent in turn sought the cancellation of the agreement.

Section 20 of the Act obliges the seller to record the agreement with the registrar of deeds and to notify the purchaser of this, which the respondent never did. Section 27 allows the purchaser to demand transfer of the property once it had paid 50% or more of the purchase price on condition that it secured the balance by passing a mortgage bond over the property in favour of the seller. Section 6(1) sets out the prescribed terms of a sale of land in instalments, some of which the present agreement lacked. If s 6(1) is not complied with, then the purchaser can within two years apply under s 24(1) for an order declaring the sale void ab initio.
The respondent argued that the applicant was not entitled to invoke s 27 because he did not demand transfer before launching the application. The respondent also argued that, since the agreement did comply with s 6, it was void ab initio, thus depriving the applicant of the right to claim specific performance. The respondent argued, finally, that the applicant should have tendered (i) registration of a first bond to secure the balance of the purchase price; and (ii) payment of the arrear rates and taxes on the property.
Held
The respondent's failure to comply with s 20 meant that it was precluded from placing the applicant in mora and cancelling the agreement. It was also precluded from cancelling by s 19, which required it to first make proper demand (see [11], [13]). That being so, the applicant was entitled to claim transfer under s 27(1). The agreement revealed no basis for the respondent's allegation that the applicant was liable for pre-transfer rates and taxes (see [12]).

The respondent's claim that the applicant should have made extrajudicial demand for registration of transfer did not hold water: s 27(1) did not require it, and it was in any event established law that a notice of motion itself constituted sufficient demand (see [16], [18] – [19]). There was no requirement for the demand for transfer to incorporate a tender to register a first mortgage bond to secure the outstanding balance (see [19]). Hence the applicant had, without realising it, brought himself within the four corners of s 27(1) (see [20]).

If s 24(1) was interpreted through the prism of the primary purpose of the Act, namely the protection of purchasers, then it was clear that the legislature intended to make contracts that did not comply with s 6 voidable ab initio at the instance of the purchaser only, and then only if it instituted proceedings within two years of the conclusion of the contract (see [34]). Because the issue could be determined on the basis of s 24(1), it was not necessary for the court to decide whether the legislature intended the requirements of s 6(1) to be peremptory or whether they were material terms of the agreement (see [31]).

The applicant did not within two years of the conclusion of the sale agreement institute proceedings to have it declared void ab initio for want of compliance with s 6(1), and therefore the agreement stood and was enforceable (see [39]). The applicant was entitled to registration of the property into his name (see [40]).
Given that the costs of registration of the first mortgage bond were incidental costs to the transfer, these had to be borne by the applicant (see [40]).
Application accordingly granted and the respondent ordered to transfer the property into the name of the applicant and to pay all outstanding rates and taxes up to the date of transfer.

FAIRVEST PROPERTY HOLDINGS v VALDIMAX CC t/a FISH & CHIPS CO AND OTHERS 2020 (3) SA 202 (GJ)

Magistrates' court — Civil proceedings — Practice — Special plea to jurisdiction — Must in general be raised before litis contestatio — However, where sum claimed exceeding monetary jurisdiction of magistrates' court, and written consent to jurisdiction absent, then defendant retaining right to raise lack of jurisdiction even after litis constestatio — Magistrates' Courts Act 32 of 1944, s 29, s 45, s 46.

In magistrates' court proceedings, a special plea of lack of jurisdiction must, in general, be raised before litis contestatio. But where the sum claimed exceeds the court's money jurisdiction, and there was no written consent to jurisdiction, then the defendant may raise lack of jurisdiction even after litis contestatio. (See [21] – [26].)

FRAJENRON (PTY) LTD v METCASH TRADING LTD AND OTHERS 2020 (3) SA 210 (GJ)

Contract — Discharge — Impossibility of performance — Principles discussed — Similarity to English doctrine of frustration considered.

Contract — Discharge — Impossibility of performance — Specific instances — Inability of lessee to return premises on termination of lease — Sub-lessee refusing, unlawfully, to vacate premises — Not amounting to impossibility — Self-created impossibility (in subletting property) — Conclusion stood despite lessee instituting legal proceedings against sublessee prior to termination of lease.

The plaintiff company, Frajenron, let certain premises to the first defendant company, Metcash. On termination, on 1 December 2013, of the lease entered into between them, Metcash did not return possession of the property. It was prevented from doing so, as it had granted possession to the third defendant company, IH, in terms of an agreement of sublease, yet the latter — despite the intervening cancellation of the sublease owing to its breach thereof, as well as the institution of eviction proceedings against it by Metcash — had refused to vacate the premises. Frajenron brought an action against Metcash, as well as the second defendant company, Metro Cash & Carry (which had stood surety for Metcash), for damages arising from the breach of the lease in the failure to return the premises on time. Frajenron sought, inter alia, rental due to it from the date of termination of the lease until 1 April 2016, the date upon which it managed to secure possession of the premises, plus interest thereon (see [6]). Metcash and Metro, in a separate action, sued IH, as well as the

fourth defendant, Mr Motsoeneng (who had stood surety for IH), for, inter alia, payment of arrear rental, as well as for reimbursement of any damages the court might award to Frajenron. Both actions were consolidated and heard together. Metcash, in defence to Frajenron's claims, raised impossibility of performance. It argued that it had done all that was legally possible to ensure that it complied with the lease with Frajenron and returned possession upon termination; however, it was stymied in its efforts by the unlawful conduct of IH, over which it had no control. It was, it claimed, therefore impossible for it to perform. Whether this defence should succeed formed the focus of the court's attention. In assessing the question, the court provided an overview (see [9] – [17]) of the development in South Africa of the principle that impossibility of performance was a legally permissible basis for discharging a party from performing its contractual obligation (see [9]). It also considered the English 'doctrine of frustration' (see [9], [11], [12] and [15] – [17]), in terms of which 'frustration' might discharge a party's obligations under a contract, and the extent to which it aligned with the South African approach (see [15] – [17]).

Held, that the law was as follows: If a person was prevented from performing under their contract by certain events *vis major* or *casus fortuitus*, they were discharged from liability (see [10] and [13]). Such events were not confined to acts of nature only: they encapsulated any event that may be caused by human agency, as long as it was 'unforeseeable with reasonable foresight and unavoidable with reasonable care' (see [14] and [17]). Further, no party was allowed to rely on an impossibility caused by their own act or omission — there should be no fault or neglect on their part in the creation of the impossibility. The impossibility had to be absolute and not relative, and it had to be applicable to everyone and not personal to the defendant, ie it had be objective. (See [13].)

Held, that, on the facts, the impossibility of performance rule did not rescue Metcash from the consequences of its breach (see [22]): Its own initial conduct (in subletting the property to IH) was the cause of the event which prevented it from returning possession of the property to Frajenron (see [20]). Further, it was of no moment that Metcash had taken legal steps to evict IH, and had been stymied by the legal process to secure the eviction before the date of termination. The fact that the operation of the legal process sometimes failed to move with the speed that met the interest of a party did not constitute impossibility of performance. The unlawful actions of IH and the nature of the legal process involved in securing appropriate relief to terminate the unlawfulness were, or ought to have been, within the contemplation of Metcash when it contracted with IH. In other words, it was foreseeable by Metcash, as it would have been to any reasonable person in its position, and it could have been avoided. (See [21].)

Held, that Frajenron was entitled to various damages, including rental from 1 December 2013 to 15 April 2016, plus interest thereon calculated from the date of summons (see [24] – [25]).

Held, further, that IH and Mr Motsoeneng were liable for all the claims brought against them by Metcash (see [34]).

MAGURU v ROAD ACCIDENT FUND 2020 (3) SA 225 (LT)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Costs — Where, at pre-trial conference, draft order handed up confirming settlement of merits and that *RAF* would pay plaintiff's taxed or agreed costs on High Court scale — Whether plaintiff entitled to costs on High Court scale when, at such stage of proceedings, not known if final award would render magistrates' or regional court scale applicable.

In an action for damages against it, the Road Accident Fund initially defended both merits and quantum of the plaintiff's claim. The merits were later settled; and at the pre-trial conference a draft order was handed to the court to be made an order. The draft order included that '(t)he defendant pays the plaintiff's taxed or agreed party and party costs, pertaining to the question of liability (merits) on applicable High Court scale'.
The court however in requested the parties to address it on the appropriateness of awarding costs on a High Court scale at this stage of the proceedings, when at the end the amount awarded may fall into the jurisdiction of the magistrates' or regional court.
Held
The danger of awarding costs on a High Court scale after only merits have been settled, was that it may happen that at the quantum stage the award might be on magistrates' or regional court scale, and it may be found that it was unreasonable or unnecessary of the plaintiff to have instituted proceeding in the High Court. In that situation the taxing master will have no discretion up to when the merits were settled but to tax the plaintiff's bill on a High Court scale, as that will be by virtue of the court order, despite it being found that the action should have been instituted in the lower court. (See [16].)
Once the merits have been settled, there will be no need to revisit them. An order in relation to that must therefore be formulated in such a way that it would not lead to different interpretations. When an order on the merits was made and there was a separation of issues, with quantum to be heard at a later date, it must be clear on the order which scale of costs was awarded. It was undesirable to leave it to be determined at a later date, unless the circumstances so warranted. (See [17].)
The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate merits of the issues between the parties. In the present case there were no good grounds why the plaintiff should not be awarded costs, and it would therefore be appropriate to order the defendant to pay plaintiff's taxed or agreed party and party costs. The issue whether the costs should be on High Court or regional court or magistrates' court scale was best suited to be argued during quantum proceedings. The proposed draft order would therefore be amended by deleting the words 'on applicable High Court scale'.

MERRYWEATHER v SCHOLTZ AND ANOTHER 2020 (3) SA 230 (WCC)

Delict — Action for damages — Trial — Onus and duty to begin — Assault — Plea of confession and avoidance shifting onus and duty to begin to defendant — Sufficient that there is admission of assault — Need not mirror details of assault described by plaintiff — Uniform Rules of Court, rule 39(11).

Practice — Trial — Duty to begin — Action for damages for assault — Defendant admitting assault but raising justification of self-defence — Amounting to plea of confession and avoidance and attracting onus of proving defence and duty to begin — Uniform Rules of Court, rule 39(11).

Merryweather and Scholtz were involved in a fight that left Merryweather paralysed. Merryweather sued Scholtz for damages, claiming that Scholtz had assaulted him by 'grabbing and pushing, kicking and punching him and throwing and/or spear-tackling him against a stationary motor vehicle'. In his plea Scholtz denied the allegations but added, 'without derogating from the [above] denial', that Merryweather had 'hit' and 'grabbed' him, and that he had then 'pushed [Merryweather] to get [Merryweather] off him'. Scholtz also specifically denied that he 'threw or tackled [Merryweather] against a motor vehicle' or 'pushed [him] off his feet' or 'intended [him] to lose his footing'.
In the present matter the judge was called upon to make a preliminary ruling, under rule 39(11) of the Uniform Rules of Court, on the duty to begin and the onus of proof. *Mabaso v Felix* 1981 (3) SA 865 (A) established the principle that in delicts affecting plaintiff's personality and bodily integrity, the onus was on the defendant to prove excuse or justification like self-defence.
Counsel for Merryweather argued that Scholtz's plea was one of confession and avoidance and that he therefore attracted the onus, in accordance with *Mabaso*, of proving self-defence. Counsel argued that the statement in Scholtz's plea that he had 'pushed [Merryweather] away' was an admission of assault, and that the fact that he did not admit to the exact type of assault alleged in the particulars was irrelevant.
Counsel for Scholtz argued that since Scholtz did not admit material aspects of the assault alleged by Merryweather, his plea was not one of confession and avoidance that triggered *Mabaso*. Counsel pointed out that Scholtz specifically denied kicking or punching Merryweather, that he threw or spear-tackled Merryweather against a car, or intended Merryweather to lose his footing. Counsel also pointed out that Scholtz had stated in amplification of his plea that any contact between himself and Merryweather was not initiated by him and that he had acted to ward off acts directed against himself.

Held

Scholtz's admission in his plea that he had pushed Merryweather in self-defence was an admission to an assault on Merryweather, albeit not the precise assault described in the particulars. (See [12].) The admission and invocation of self-defence put Scholtz within the ambit of the *Mabaso* principle, notwithstanding the factual disputes as to the type of assault perpetrated by Scholtz. Since principles like the one in *Mabaso* were of general application, the admission of assault was sufficient for the *Mabaso* principle to apply, even though the admitted assault did not mirror the details described by Merryweather. It did not matter that the assault described in the particulars was a spear tackle and the assault admitted to in the plea was a push in self-defence to avert an attack. (See [13].)
Since Scholtz's plea was one of confession and avoidance, he attracted an onus as set out in *Mabaso* and bore the duty to begin. (See [14].)

MALATJI v ROAD ACCIDENT FUND 2020 (3) SA 236 (GP)

Damages — Quantification — General damages — Nature — Aim of — Court's discretion — Role of case law — Balancing of interests.

Plaintiff was a married woman with a son. She was employed as a facility maintenance co-ordinator and was actively involved in her church (see [8] and [10]).
At age 40, plaintiff's spine was injured in a motor vehicle accident, and she was rendered quadriplegic (see [8]).
Plaintiff later sued the Road Accident Fund for damages, and the issue here was the amount of her general damages (see [7]).
The court considered the nature of general damages (see [11]); the aim of such awards (see [11] – [12]); the court's discretion and the bearing thereon of prior cases (see [13]); and the need to balance the claimant's interests and the award's aims against the public's interest (the Fund's liquidity) (see [15]).
The court awarded R2,65 million in general damages (see [16]).

NW CIVIL CONTRACTORS CC v ANTON RAMAANO INC AND ANOTHER 2020 (3) SA 241 (SCA)

Attorney — Fidelity fund — Fidelity fund certificate — Work done by attorney not in possession of certificate — Whether section renders work null — Attorneys Act 53 of 1979, s 41(1).

Appellant's attorney prosecuted an application for appellant, and obtained favourable orders in the matter against first respondent.
However, at the time of so acting, appellant's attorney was not in possession of a valid fidelity fund certificate (see [5]).
Section 41(1) of the Attorneys Act 53 of 1979 provides in this regard that 'A practitioner shall not practise . . . unless he is in possession of a fidelity fund certificate' (see [12]).
First respondent then approached the High Court, and it set aside the orders appellant had obtained (see [7]). In its view, absent certificate, all work done in the matter, including drafting of the notice of motion, was rendered null by the contravention of the section. This translated into the notice of motion, and the orders based thereon, requiring setting-aside (see [11]).
Appellant appealed to the Supreme Court of Appeal. It set aside the decision on the ground that the High Court's orders were impermissibly vague, and so contravened the principle of the rule of law; and also on the basis that where s 41(1) was contravened, then the attorney concerned was disentitled to his fee and guilty of an offence, but the work done by him was not rendered null (see [15] and [19] – [20]).
The appeal upheld; the order of the High Court set aside; and the order replaced with an order dismissing first respondent's application (see [23]).

RANDGOLD & EXPLORATION CO LTD AND ANOTHER v GOLD FIELDS OPERATIONS LTD AND OTHERS 2020 (3) SA 251 (GJ)

Evidence — Witness — Giving of evidence via video link — High Court asked to request foreign judicial authority to subpoena witness to testify by video link from foreign jurisdiction before South African court.

Applicants instituted an action against first respondent and was pending (see [9] and [23]). Applicants applied to the High Court for it to issue letters to certain foreign judicial authorities requesting them to subpoena witnesses in their jurisdictions to give evidence from those jurisdictions, in real time by audiovisual link, to the South African trial court (see [4] – [5] and [23]).
Held, that the application should be dismissed for the following reasons (see [150]).

- Applicants had not produced precedent in which the foreign judicial authorities had made the orders the letters sought (see [37]).
- There was no local precedent of a court making the request the High Court was asked to make (see [38] – [40]).
- No legislation empowered the High Court to make the request (see [47]).
- The Hague Evidence Convention gave no such power (see [43]).
- Profiles of the foreign jurisdictions recorded that none would compel a witness to give testimony in the manner sought (see [59] and [65] (United Kingdom), [66] (Jersey), [75] (New South Wales, Australia) and [79] (United States of America)).
- Representations in the letters would be inaccurate (see [80] and, for example, [85], [87], [91] and [95]).
- Resort to the inherent power to make the requests would be inappropriate, in that an alternative remedy was available (a commission de bene esse), and such resort would breach the principle of subsidiarity (see [132] – [133] and [137]).

SHARMA v HIRSCHOWITZ AND ANOTHER 2020 (3) SA 285 (GJ)

Lease — Termination — Lease for undetermined period — Whether parties may orally agree to increased rent on expiry of lease — Section 5(5) of Rental Housing Act providing that if landlord allowing tenant to remain on property on expiry of lease, parties 'deemed', in absence of further written agreement, to have entered into periodic lease on same terms and conditions as expired lease — Word 'deemed' construed to mean prima facie or rebuttable — Oral agreement recognised — Section aimed at facilitating proof of matters in which no written lease — Section providing evidentiary tool only — Rental Housing Act 50 of 1999, s 5(5).

The present case concerned in chief the question whether, when a tenant remained, with their landlord's consent, on the leased premises after the expiry of their lease, they may agree, *orally*, to *increase* the further rental payable.
The appellant, as lessee, rented a certain property from the respondents, as lessors. On expiry on 27 February 2014 of a written renewal lease agreement entered into between them, the parties *orally* agreed that the appellant would be allowed to remain on the property at *an increased monthly rental of R34 500 (from R32 400)*. The appellant paid this rent for the months March to October 2014. The respondents gave notice to the appellant to vacate the property, effective October 2014. The appellant, however, stayed on until 26 February 2015, having only paid further rent (at R34 500) for the months November and December 2014. Consequently, in the magistrates' court (Randburg) the respondents sued the appellant for cancellation of the lease agreement and payment of damages for holding over, as well as payment of water and electricity consumption charges. The appellant defended the action, and also counterclaimed for payment of his rental deposit plus interest. The magistrates' court granted cancellation and found that the respondents were entitled to holding-over damages in the sum of R40 000 per month for the period 1 November 2014 to 26 February 2015, therefore awarding them the sum of R91 000

(having taken into account the payments that had been made by the appellant in November and December 2014). It further dismissed the respondents' claim for utilities, and also the appellant's counterclaim.
The appellant appealed to the High Court (Johannesburg). While accepting that he had held over for the period claimed, he disputed the amount of damages to which the respondents were entitled. He argued, in this regard, that the magistrate had erred in calculating damages by reference to the respondents' evidence of the rental amount that had been received during A*pril 2018*: this, he argued, was contrary to the law that, in the absence of evidence before the court as to the market rental value of the premises — as was the case here — the rental value of the premises was assumed to be rental paid under the lease at the time of the breach, in this case R34 500 per month (see [12] and [19] – [26]). The court agreed (see [27]). The appellant also argued that, in terms of applicable law, the deposit it had paid to the respondents (in the amount of R40 000), plus interest thereon, ought to have been set off against the amount found to be owing to the respondents (see [12]). The court once again agreed (see [37]).
The main argument of the appellant was that the magistrate should have found that the *oral lease renewal agreement* was invalid. He referred to s 5(5) of the Rental Housing Act 50 of 1999, which provided that, '(if) on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, *the parties are deemed, in the absence of a further written lease,* to have entered into a periodic lease, on *the same terms and conditions as the expired lease* . . .'. He argued that the oral agreement contravened these provisions, because the *increased* rental agreed to (an increase in the amount of R2100 per month from the amount of R32 400 paid under the renewed lease agreement) was not provided for in a *further written agreement*, and such amount, being R16 800 (R2100 x 8), fell to be set off against any amount found to be owing by the appellant to the respondents. In the court's view, whether the oral agreement did indeed breach the provisions of s 5(5), turned on how the use of the deeming provision was to be construed (see [50]).
Held, that s 5(5) of the Act only served as an evidentiary tool (see [55]), aimed at facilitating the proof of matters *in which there was no written agreement*, matters which might otherwise be difficult to prove in a court of law (see [51] and [54]). In terms thereof, absent writing, the renewed lease was 'deemed' to be the same as the previous one (see [51]). 'Deemed' in such context had to be regarded or accepted as being merely prima facie or rebuttable (see [53] – [54]). Countervailing evidence suggesting otherwise was permissible (see [55]).
Held, accordingly, it being common cause that the oral agreement was concluded, and indeed implemented, that it followed that the deeming provision had been rebutted, albeit by the common-cause oral instead of any written agreement, and therefore the rental due under the oral agreement was an enforceable obligation. Thus, the amount of R16 800 did not stand to be set off or deducted as against any amounts owed to the respondents. (See [56].)
Held, in conclusion, that the appeal should be partly upheld with costs, and that the magistrates' court ought to have granted judgment in favour of the respondents in the amount of R20 836, being damages for holding over in the amount of R69 000 (ie R34 500 x 2), less the deposit, plus interest in the amount of R48 164 (see [73] – [74]).

STANDARD BANK OF SOUTH AFRICA LTD v BLOEMFONTEIN CELTIC FOOTBALL CLUB (PTY) LTD 2020 (3) SA 298 (FB)

Contract — Legality — Contracts contrary to public policy — Clause in settlement agreement between bank and company providing that if company failed and defaulted, bank would reinstate application for company's liquidation on unopposed motion roll — Clause contrary to public policy and illegal.

Financial institution — Financial services providers — Accountable institution — Duties of when engaging with prospective client — Failure by institution to obtain necessary information about prospective client as intended in s 21A of FICA — Factor in refusing application by institution for winding-up of client — Companies Act 61 of 1973, s 347(1); Financial Intelligence Centre Act 38 of 2001, s 21A.

Company — Winding-up — Application — Discretion of court — Mortgagee bank seeking winding-up of mortgagor instead of selling property under power of attorney — Factor in refusing application for winding-up — Companies Act 61 of 1973, s 347(1).

In 2015 the applicant bank entered into six home-loan agreements with the respondent company. Mortgage bonds in favour of the applicant were registered over all six properties. At this point the respondent had no assets, no bank account, no income tax registration number and no financial statements. The respondent defaulted and on 2 August 2018 the applicant instituted liquidation proceedings. The respondent filed a notice of intention to oppose. Shortly thereafter the parties entered into a settlement agreement under which they agreed that if the respondent failed to make certain payments, the applicant could re-enrol the liquidation application on an unopposed basis (clause 2.2). The respondent also signed a power of attorney which granted the applicant the right to sell the properties. Under the settlement agreement the applicant was entitled, in the event of default by the respondent, to either sell the properties or proceed with liquidation under clause 2.2.
The respondent defaulted and here the applicant proceeded with a liquidation application under clause 2.2, ie in terms of its original notice of motion. The respondent contended that the applicant was barred from doing so because clause 2.2 was contrary to public policy and void. The applicant contended that the respondent had an opportunity to oppose the application, and indeed did so, with the result that it suffered no prejudice as a result of the operation of clause 2.2.

Held

Clause 2.2 fell squarely into the category of offensive and unconscionable agreements, while also having the tendency to deprive the respondent of its constitutional right of access to the courts (see [25]). It made no difference that the respondent was a company, not a person: both sequestration and liquidation involved a change of status (see [26]). It also made no difference that the respondent had filed an answering affidavit: the offending agreement or clause remained illegal and could not be transformed by expedience or pragmatism (see [28]). Since clause 2.2 was contrary to public policy and void, the applicant could not fall back on the original notice of motion to seek the respondent's liquidation (see [29]).
But even had clause 2.2 been legal, the court would nevertheless exercise its discretion under s 347(1) of the Companies Act 61 of 1973 by refusing to wind up the respondent on the ground that the applicant could recover its money by selling the mortgaged properties under its power of attorney and not at a forced sale in liquidation (see [39] – [41]).

The applicant's conduct in lending money to the respondent, an entity of which it knew nothing, was, moreover, in violation of s 21A of the Financial Intelligence Centre Act (FICA) (see [37]). As an accountable institution under sch 1 to FICA, it should have obtained all necessary information about the respondent, which manifestly it failed to do (see [38]).
For these reasons the application fell to be dismissed with costs.

UNIVERSITY OF STELLENBOSCH LAW CLINIC AND OTHERS v NATIONAL CREDIT REGULATOR AND OTHERS 2020 (3) SA 307 (WCC)

Credit agreement — Consumer credit agreement — Cost of credit — 'Collection costs' — Including all legal fees incurred by credit provider in order to enforce monetary obligations of consumer under credit agreement charged before, during and after litigation — National Credit Act 34 of 2005, s 1 sv 'collection costs' and ss 101(1)*(g)* and 103(5).

Credit agreement — Consumer credit agreement — Cost of credit — 'Collection costs' — Legal fees — Legal fees, including fees of attorneys and advocates, inasmuch as comprising part of collection costs as contemplated in s 101(1)*(g)* of National Credit Act, may not be claimed from consumer or recovered by credit provider pursuant to judgment to enforce consumer's monetary obligations under credit agreement, unless agreed to by consumer or been taxed — National Credit Act 34 of 2005, s 101(1)*(g)*.

Credit agreement — Consumer credit agreement — Cost of credit — Limit — Section 103(5) of National Credit Act applying for as long as consumer remaining in default of credit obligations, from date of default to date of collection of final payment owing in order to purge default, irrespective of whether judgment in respect of default been granted or not during this period — National Credit Act 34 of 2005, s 103(5).

The background to this matter was the widespread problem affecting consumers — particularly those, who were often the poorest members of society, who had entered into small or microloans * — of their debts under a credit agreement spiralling *far beyond the initial debts incurred*, owing to the credit provider's escalating legal fees being passed on to them. In terms of s 103(5) of the National Credit Act 34 of 2005, the various costs of credit which are allowed to be charged under a credit agreement in terms of s 101(1)*(b)* – *(g)* cannot in aggregate exceed the unpaid balance of the principal debt as at the time the default occurs. Such allowable costs of credit include 'collection charges', ie as defined in s 1, amounts 'that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge'. Collection costs are subject to a further limitation as provided in s 101(1)*(g)*, in that they cannot exceed 'the prescribed maximum for the category of credit agreement concerned'.
The question addressed in the present case was whether legal fees formed part of collection costs. Of course, if they did, legal fees would be subject to the abovementioned caps, and the problem of spiralling debts would potentially be alleviated.
In the present application proceedings, instituted in the Cape Town High Court, the legal services providers the University of Stellenbosch Law Clinic and Summit Financial Partners (Pty) Ltd, as well as a number of consumers as defined in terms of the Act, sought an order declaring that 'collection costs', given the broad language used in the section, had to be read to include all *legal fees incurred to enforce the*

monetary obligation under the credit agreement, whether charged before, during, or after litigation. Such an interpretation, they argued, was demanded, given the purpose of the provisions in question, namely to protect the consumer, especially the poor (see [38]); it would also promote responsible lending practices, another of the purposes of the Act, by encouraging credit providers to properly vet clients (see [39]). The applicants also sought a declarator to the effect that the limitation in terms of s 103(5) had to apply at all times, regardless of whether a judgment has been granted. Further, they asked for an order that legal fees may not be claimed until they were agreed upon or taxed, this arising from their claim that, in utilising emolument attachment orders, credit providers added costs as and when incurred, without any determination of how they were quantified, whether they were reasonable and whether they were in fact due and payable.

The appearing respondents included, inter alia, the National Credit Regulator (which did not oppose the relief sought), the Legal Practice Council, and the Banking Association of South Africa. The respondents who opposed argued that legal fees did not form part of collection costs, for a variety of reasons (see [18] – [24]), but, principally, because when a judgment was granted after a summons or application was issued and served, it constituted *a new cause of action* (see [24]).

The court firstly rejected the above argument raised by the respondents. It held that, when a summons or application was issued and served, and thereafter a judgment granted, it did not constitute a new cause of action against the defendant or respondent; it was a continuation of one cause of action and simply a further procedural step to enforce the claim, which retained exactly the same character it had always had, in this case the enforcement of the terms of a credit agreement. (See [25].)

The starting point, the court went on to hold, in deciding whether the applicants were entitled to the relief sought, was the National Credit Act and the rules of interpretation (see [26]). It noted that one of the appropriate considerations to aid the interpretation of the legislation was the intention of the legislature, or — which was the same thing — what ill was being sought to be cured (see [29] and [35]). The court referred to various purposes of the Act, to protect the consumer (see [31]), to 'promote responsible credit granting' (see [30]), to create a competitive and sustainable credit market (see [32]), to balance the competing rights of consumers and credit providers (see [31]), and to curb exploitation of the poor and ever widening disparities of wealth in the country (see [39]). The court stressed that there was a responsibility on credit providers to be socially conscious and behave fairly (see [31]), and more particularly, when consumers defaulted, to attempt to resolve the dispute by adhering to the hallmarks of equity, good faith, reasonableness and equality (see [33]). (The court suggested that credit providers had failed to meet such responsibilities, by allowing costs to run up with apparent abandon (see [33]).)

The court held that the interpretation favoured by the applicants fell in line with above purposes, by protecting consumers, particularly the poor, from incurring spiralling debts, by, inter alia, ensuring a proper vetting process (see [38]–[39]). The court concluded, and granted declarators in such regard, as follows:

- Collection costs as referred to in s 101(1)*(g)*, as defined in s 1, and as contemplated in s 103(5) of the Act, included all legal fees incurred by the credit provider in order to enforce the monetary obligations of the consumer under a credit agreement charged before, during and after litigation.
- Section 103(5) of the Act applied for as long as the consumer remained in default of their credit obligations, from the date of default to the date of collection of

the final payment owing in order to purge their default, irrespective of whether judgment in respect of the default has been granted or not during this period.

- Legal fees, including fees of attorneys and advocates, inasmuch as they comprised part of collection costs as contemplated in s 101(1)*(g)* of the Act, may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they were agreed to by the consumer or they had been taxed.

SA CRIMINAL LAW REPORTS MAY 2020

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v SCHOEMAN AND ANOTHER 2020 (1) SACR 449 (SCA)

Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Requirements for — Factual basis to be set out in record — In instant case such not done — State contending that trial court erred in assessing circumstantial evidence — Incorrect drawing of inferences from evidence amounting to factual error not legal error, and no proper reservation of question of law before court.

The appellant applied for leave to appeal against the refusal by the trial court to reserve four questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 in the acquittal of the respondents on charges of contraventions of the Prevention of Organised Crime Act 121 of 1998, fraud, contraventions of the Value Added Tax Act 89 of 1991, contraventions of the Income Tax Act 58 of 1962 and the Companies Act 61 of 1973. The first question of law, on which the fate of the other questions depended, was whether the court had correctly conceived and applied the legal principles pertaining to circumstantial evidence, including that all such evidence had to be properly considered and evaluated without improperly omitting to consider some of the evidence; whether the court failed at all to evaluate and give any weight to probative evidence that, had it been considered, would inevitably have led a reasonable court to convict the respondents; and whether, by omitting to evaluate probative evidence in contravention of the legal principles regarding circumstantial evidence, it gave undue weight to the evidence that it did evaluate in favour of an acquittal, and insufficient weight to that in favour of conviction.

Held, that the factual bases for the reservation of the questions of law were not set out in the record and they did not appear fully from the judgment of the High Court. Furthermore, the state did not request the trial court to return a special finding on the facts upon which the points of law hinged. (See [44].)

Held, further, it was evident, from the reasons dismissing the application for the reservation of the point of law, that the trial judge was aware of the rules regarding the drawing of inferences from circumstantial evidence, and had applied them in the case. If the trial judge drew incorrect inferences from this evidence, he committed factual, not legal, errors. It was apparent that the state's real complaint was that, having regard to all the evidence, including the circumstantial evidence, no reasonable court would have acquitted the respondents. This was quintessentially an attempt to reserve a question of law from a value judgment of the trial court regarding the facts. (See [57].)

Held, further, that, as the questions of law were not properly reserved for want of a proper factual foundation, and the first question of law that was reserved, and which was the key to the other three being considered, was a question of fact, and not of law, there were no reasonable prospects of the appeal succeeding. (See [79].) The application for leave was dismissed.

CENTRE FOR CHILD LAW AND OTHERS v MEDIA 24 LTD AND OTHERS 2020 (1) SACR 469 (CC)

Child — As victim of crime — Protection of anonymity — Section 154(3) of Criminal Procedure Act 51 of 1977 constitutionally invalid to extent that did not protect identity of children as victims of crime — Section also invalid to extent that protection that children received in terms thereof not extending beyond age of 18.

The applicants applied for the confirmation of an order by the Supreme Court of Appeal declaring that s 154(3) of the Criminal Procedure Act 51 of 1977 was constitutionally invalid to the extent that it did not protect the identity of children as victims of crime in criminal proceedings. They also sought leave to appeal against that part of the order of the court that dismissed an appeal challenging the constitutionality of s 154(3) on the basis that it did not extend protection to children once they reached the age of 18. The section expressly provided anonymity directions for child accused or witnesses which prevented the publication of any information that disclosed the identity of children in such cases, and those protections could only be lifted with the permission of a court on a case-by-case basis if it was just and equitable to do so. The protection, however, did not extend to child victims.

Held, per Mhlantla J (Mogoeng CJ, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring), that, on the basis of the text of the section, the provision did not explicitly contemplate or extend to child victims who were not called as witnesses, and there was indeed a lacuna in the law as it pertained to protecting the identity of child victims in criminal proceedings. (See [27] – [28].)

Held, further, that any protection against identification afforded to child accused or witnesses in criminal proceedings was also relevant to child victims, including those not called as witnesses. The exclusion of child victims did not appear to serve any legitimate government purpose, and the fact that the section did not offer equal protection and benefit of the law, and the arbitrary differentiation between classes of children, gave rise to a breach of the right to equality. (See [35].)

Held, further, that child victims were vulnerable to harm if they were publicly identified. Those who had fallen victim to crime were no less deserving than those who had witnessed crime or those who were in conflict with the law. It was further neither reasonable nor practical for child victims to bear the onus of approaching courts for an interdict against publi- cation. The lacuna in the section ran contrary to the best interests of children and it followed that it infringed s 28(2) of the Constitution. (See [41] – [43].)

Held, further, that, by excluding child victims in criminal proceedings from its protection, s 154(3) also limited their rights to privacy and dignity. (See [51].)

Held, further, that the limitation was not saved by s 36 of the Constitution and in the result s 154(3) was declared constitutionally invalid to the extent that it did not protect the identity of child victims in criminal proceedings. (See [59].)
Held, further, default ongoing protection for a child past the age of 18 years was a valuable means to create a more meaningful engagement with agency, enabling personal choice and giving effect to restorative justice. It accounted for adequate protection, as well as evolving capacities, and fostered conditions that allowed children to maximise their opportunities and lead happy and productive lives. A child who had experienced trauma, whether as a victim, a witness or an accused, should not, as a result of turning 18, have their story and identity exposed without their consent or necessary judicial oversight. By limiting a person's agency and autonomy, a lack of ongoing protection infringed the rights of dignity, privacy and the best interests of the child. (See [87.)

Held, further, that, if ongoing protection was not the default, an unfair burden would be placed on child participants who had recently reached 18. Ongoing protection resulted in a curtailment of the principle of open justice and freedom of expression, but it was of minimal harm, and had to be juxtaposed with the serious harm and impact on all classes of child participants. (See [103] – [104].)

Held, further, that the limitation arising from a failure to provide ongoing protection was not justified and, although the purpose of freedom of expression and open justice was compelling, when it came to the balancing of those competing rights, the best interests of children, and the right to dignity and privacy outweighed the subtle impediment to the principle of open justice. The granting of the default ongoing protection would not present a severe incursion into media freedom, and the appeal on this issue accordingly had to be upheld. (See [112].)

Held, per Cameron J and Froneman J, that s 154(3) was constitutionally invalid in protecting only child accused and child witnesses from publicity arising from criminal proceedings, but that the court should use state power to limit knowledge with caution. Justifying the indefinite anonymisation in the case of adults who were, when children, witnesses to or victims of or accused of crimes, pointed our hard-won process protections in an untoward direction. The court should rather take the risk of erring in the case of openness and knowledge, and against stigma and shame, and the appeal accordingly should be dismissed. (See [140] – [141].)

Held, per Jafta J, that s 154(3) did not violate the privacy and dignity rights of children and the right guaranteed by s 28(2) of the Constitution, but was invalid for being inconsistent with s 9(1) of the Constitution to the extent that it differentiated child victims from child accused and witnesses in affording protection against publicity. It was, however, for Parliament to extend the scope of protection afforded by s 154(3). (See [142] – [143] and [185].)

S v TSHEFU 2020 (1) SACR 525 (ECB)
Sentence — Compensatory order — Application in terms of s 300 of Criminal Procedure Act 51 of 1977 — Requirements — Application must emanate from injured person and not prosecutor — Criminal Procedure Act 51 of 1977, s 300.

The accused was convicted in a magistrates' court of two counts of common assault and was sentenced to pay a fine with the alternative of a period of direct imprisonment, the whole sentence being suspended for five years. He was also ordered to compensate one of the complainants an amount of R800 for a damaged door in terms of s 300 of the Criminal Procedure Act 51 of 1977. The damaged door was the subject of a count of malicious injury to property, but this was not pursued by the prosecution. Despite this, the prosecutor urged the court to make the award. The court acquiesced and granted it.

Held, that one of the prerequisites before an order of compensation could be made was that there had to be an application after the conviction which emanated from the injured person. Where the prosecutor brought the application, it had to be clear that he was acting on the instructions of the injured person. In the present case there was no semblance of any application for compensation by either of the complainants or the woman to whom the broken door ostensibly belonged. On the contrary, the assault victims had seemingly rejected the notion that some form of restorative justice as a viable alternative sentencing option was a suitable pursuit of justice for the unwarranted attack upon them, insisting instead on the full might of a criminal prosecution and the penal consequences that would flow therefrom. As a result the compensation order was issued arbitrarily and had to be set aside. (See [17] – [19].)

IMPANGELE LOGISTICS (PTY) LTD AND ANOTHER v ALL TRUCK DRIVERS' FOUNDATION AND OTHERS 2020 (1) SACR 536 (ML)

Police — Duties of — Duty to protect public — Police refusing to intervene and prevent criminal activity during protest action without prior court order — Failing to comply with obligations under s 205 of Constitution — Matter to be brought to attention of relevant provincial commissioner of South African Police Service.

The applicants in two separate applications, that were similar in nature, sought orders restraining the main respondents from unlawfully damaging, obstructing, and interfering in the business conducted by Mbali Coal Mine; restraining and interdicting the respondents from impounding, detaining or obstructing in any manner whatsoever the vehicles belonging to Impangele Logistics; and restraining the respondents from intimidating, harassing, threatening or attacking any of the applicants' employees. Six police stations were also cited as respondents and the applicants sought orders compelling the police to assist in the enforcement of the orders. The particular police stations were cited because when the applicants sought assistance from those police stations to prevent unlawful conduct by various groups of protesters, they refused to intervene in clear criminal activity until the court had directed them to do so. The applicants provided clear evidence of the commission of criminal activities, including assault, robbery, hijacking, malicious damage to property, unlawful detention of vehicles, blockage of public roads and inciting violence, which the police failed to intervene in.
The court commented that this was not the first time that the court was hearing about this kind of response by the South African Police Service. When matters deserving maintenance of public order by the police were reported, immediate response was required. To have to seek an order of court before action was taken on criminal activity could only serve to bring the criminal-justice system into disrepute. It was not the responsibility of the court to prevent, combat and/or investigate crimes and

neither was it its function to maintain public order, and secure the inhabitants and their property. That was a power and authority constitutionally bestowed on the police in terms of s 205 of the Constitution. (See [16 – [17].)
The court ordered that the registrar bring the judgment to the attention of the Mpumalanga Provincial Commissioner who was to consider whether to institute an inquiry, to consult with the applicants' attorneys for the purpose of fully addressing the complaints raised and to take measures to avoid a recurrence of similar complaints in the future. (See [32].)
Two applications for interdicts restraining the respondents from unlawfully damaging, obstructing and interfering in the applicants' businesses and compelling the police to take action to prevent unlawful conduct.
Order: 1. The registrar of this court is hereby directed to bring this judgment to the attention of the Mpumalanga Provincial Commissioner. 2. The Provincial Commissioner is to consider whether to institute an inquiry and to consult with the applicants' attorneys for the purpose of fully addressing the complaints raised herein, and to take measures to avoid a recurrence of similar complaints in the future, if necessary.

S v MATHEBULA 2020 (1) SACR 543 (ML)

Sentence — Factors to be taken into account — Magistrate remarking that she had also been victim of crime in question on more than one occasion — Remarks indicating that she was associating and identifying herself with challenges faced by society — Sentence imposed took into account all necessary factors and no misdirection committed.
Court — Judicial officer — Conduct of — Presiding officer making disparaging remarks about work of court orderly and referring to Chief Justice as 'Chief Justice what what' — Presiding officers to show respect to support staff of court and remarks relating to Chief Justice showing disrespect.
Trial — Language — Language of record — English language of record since March 2017 — Evidence of witnesses to be interpreted into English, not merely to accommodate presiding officers but for smooth running of administration of justice.

The appellant appealed against his conviction on a charge of robbery with aggravating circumstances and the sentence imposed upon him by a regional magistrates' court, of 15 years' imprisonment. The court dismissed his appeal against the conviction, finding that there had been no misdirection by the court on its factual findings. It then considered the submissions of the appellant on sentence and in particular that the court committed a misdirection in allowing itself to be prejudiced by its own personal experience in encountering crime. The magistrate mentioned in her judgment that she had been the victim of crime more often than she would have liked to be, and that it caused her so much trauma that she could not sleep at night.
Held, that, as opposed to bringing her personal prejudices to the bench, the magistrate was associating and identifying herself with the challenges faced by society, and she made a point, after identifying herself as such, of imposing a sentence not only permissible in terms of the law, but also taking into consideration the well-known triad applicable to sentencing. The sentence was not affected by any misdirection and the appeal against sentence also had to be dismissed. (See [11].)

The court felt constrained to remark on the conduct of the magistrate, in that it appeared from the record that she made disparaging remarks about the work performed by the court orderly, and then, voicing her frustration at the length of time the matter was taking to be finalised, said that she would now have to report to the 'Chief Justice, what what . . . .'
The court remarked that the conversation between the magistrate and the court orderly suggested that the only work he did in court was to hand over exhibits to attorneys present in court, but she should have known better because that was far from the truth since court orderlies were court officers who saw to it that there were order, security and decorum in a courtroom. The remarks were unfortunate and if presiding officers were not able to respect court officers and the support staff whose role was to bring efficiency to the court, it could not expect respect from members of the public, since court decorum flowed from the bench. (See [13].)
Equally, the reference to the Chief Justice reflected disrespect flowing from the courtroom to the highest judicial officer in the land. The court could only presume that this must have been in reference to the current Chief Justice and, without suggesting that she had a duty to know the name of the Chief Justice, the least she could have done was to merely refer to the office he held simply as 'the Chief Justice'. (See [14].)
The court also remarked that, although the trial had taken place before the adoption of English as the court language of record in March 2017, the potential prejudice to the state's presentation of its case, where there had been no interpreting of witnesses's evidence into Afrikaans, beckoned the court to intervene. Witnesses were free to give evidence in any language, provided same was interpreted into English as the court language of record. This was not aimed at accommodating particular judicial officers presiding over cases at a particular time, but it was for the smooth running of the court and administration of justice. (See [17] – [18].)

S v JONGA 2020 (1) SACR 550 (ECG)

Drug offences — Mandrax — Dealing in in contravention of s 5(*b*) of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Correctional report indicating that appellant, 60-year-old woman supporting unemployed adult son and sister, suitable candidate for correctional supervision — Sentence of 15 years' imprisonment, of which five years suspended, set aside on appeal and replaced with effective sentence of five years' imprisonment, wholly suspended for three years.

The appellant, a 60-year-old woman, was convicted in a magistrates' court of two counts of dealing in methaqualone in contravention of s 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992, and sentenced to 15 years' imprisonment of which five years were suspended for five years. She pleaded guilty and admitted that on two occasions she had sold 10 Mandrax tablets to unknown persons. It appeared that her unemployed adult son and her sister were dependent on her and that prior to her arrest she had sold drugs to make ends meet, but after her arrest she stopped selling drugs and started selling milk from which she earned an income of R200 per month. She had a previous conviction in 2016 for the unlawful possession of dangerous or undesirable dependence-producing drugs for which she was given a suspended sentence of 12 months' imprisonment. The magistrate took into account that the sale of Mandrax within and around East London was prevalent and also that the appellant had previously been arrested for selling drugs, but not convicted,

because the search of her premises had been conducted without a search warrant. A correctional-supervision report was handed in to court without objection, which suggested that the appellant was a suitable candidate for correctional supervision. On appeal it was contended for the appellant that the sentence was shockingly severe in the circumstances.
Held, that it was improper for the court to have taken into account the evidence of the previous arrest for which the appellant had not been convicted. In view of the appellant's impecunious situation, which was unlikely to improve, her age, the quantity of the Mandrax, that she had cooperated with the police immediately after her arrest, and that she had pleaded guilty, the interests of society did not demand that she be incarcerated. An appropriate sentence would accordingly be one of five years' imprisonment on each of the two counts and that the sentences be suspended for three years. (See [8] and [13].)

S v RAMONTJA 2020 (1) SACR 556 (NWM)

Evidence — Witness — Intermediary — Appointment of — Criminal Procedure Act 51 of 1977, s 170A — Record of proceedings not indicating name and qualifications of intermediary or that undertook to convey to witness general purport of questions put to her — Also no indication that intermediary duly appointed — Convictions and sentences set aside.

The appellant was convicted in a regional magistrates' court of two counts of rape and was sentenced to life imprisonment on each count. He appealed against the convictions. The complainants in the two matters were both aged 9 at the time of the commission of the offences, and an intermediary was appointed at the trial, purportedly in terms of s 170A of the Criminal Procedure Act 51 of 1977. The record of proceedings, however, did not indicate the name and qualifications of the intermediary or that she undertook to convey to the witness the general purport of any questions put to her. The record referred to a person purportedly appointed by the court, but there was no record of such an appointment.
Held, that the failure by the regional magistrate to appoint and swear in the intermediary was an irregularity which rendered the proceedings a nullity. The evidence of the two complainants was accordingly not properly before the court and could not be relied upon. In addition, the doctor was not called to testify, and the state only handed in the completed medical certificate without reading the contents thereof into the record. No reliance could accordingly be placed on the medical evidence either. The convictions and sentences accordingly had to be set aside. (See [10] – [12].)

ALL SA LAW REPORTS MAY 2020

Aquarius Platinum (South Africa) (Pty) Ltd v Bonene and others [2020] 2 All SA 323 (SCA)

Property – Eviction order – Prerequisites for eviction– Section 8 of the Extension of Security of Tenure Act 62 of 1997 requires termination of right of residence – Failure to terminate right of residence constituting a fatal defect in eviction application.

The appellant contracted a company ("MRC") to perform mining operations at two mines. The occupiers were employed by MRC and resided in hostels situated on the farm on which one of the mines was located and at the other mine. During 2009 the occupiers and thousands of their co-workers participated in an unprotected strike. At the conclusion of internal disciplinary proceedings, the occupiers were all dismissed. They, however, challenged their dismissals through the processes provided under the Labour Relations Act 66 of 1995. However, on 2 September 2009, the appellant successfully approached the High Court for an order evicting the occupiers from the various hostels. The granting of the eviction order led to the demolition of the hostels, but the Land Claims Court ("LCC") overturned the High Court order, resulting in the occupiers resuming residence in reconstructed hostel facilities on the property

When the appellant became the employer of the occupiers, they continued to exercise their rights of residence in terms of the Extension of Security of Tenure Act 62 of 1997. The appellant subsequently dismissed the occupiers and sought their eviction from the property. The LCC found that the appellant failed to satisfy the first statutory requirement (in section 8 of the Extension of Security of Tenure Act) for the granting of an order of eviction. The dismissal of the application led to the present appeal.

Held – Section 8 deals with termination of the right of residence and section 9 with limitations on eviction. A two-stage procedure is envisaged. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable, taking into account, *inter alia*, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, *inter alia*, the occupier's right of residence has been terminated in terms of section 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order.

The appellant's eviction application suffered from a fatal defect as it had failed to terminate the right of residence of any of the occupiers.

The appeal was dismissed with costs.

Bo-Kaap Civic and Ratepayers Association and others v City of Cape Town and others [2020] 2 All SA 330 (SCA)

Property – Property development – Impact on heritage area – Approval by municipality of application for land use – Reasonableness of decision challenged – Evidence establishing that municipality had engaged with experts and taken into account all relevant factors including heritage concerns in approving applications.

Applications for land use approval were made by the fourth respondent (the "developer") in respect of the construction of an eighteen-storey building, 60m tall, in the immediate vicinity of a heritage area (the "Bo-Kaap"). The first respondent, the City of Cape Town (the "City") granted approval, leading to the present litigation.

The High Court, adjudicating an application by the three appellants, for the review and setting aside of the approvals, held that they were all lawful and dismissed the application with costs. A prayer for an order declaring that the intended development could not proceed without a permit issued in terms of section 27(18) of the National Heritage Resources Act 25 of 1999 was also dismissed. It was against those findings that the present appeal was directed.

The appellants were aggrieved, first, at the City's attitude in relation to how an overlay zoning that attached to one of the erven had to be construed and applied. Overlay zonings are provided for in the City's Development Management Scheme, which was incorporated into the City's By-laws. Among the matters that have to be taken into account in relation to an overlay zone are environmental, heritage and conservations concerns.

According to the appellants, the proposed development would disturb the link between the City and the Bo-Kaap because of its sheer height and mass. Various other grounds of objection were added to their complaint.

Held – The question was whether the City and the third respondent (the "Mayor") had due regard to heritage concerns, as provided for in applicable legislation and policies, and whether they complied with administrative law principles.

The essential question was whether the criteria under section 99 of the City of Cape Town: Municipal Planning By-Law were adhered to by the City and the Mayor. In short, the nub of the appellants' case, whether by reference specifically to the By-law or to the policies, strategies and statutory provisions, was that heritage considerations were ignored or downplayed and that the decisions by the City and the Mayor were therefore unreasonable, irrational or tainted by the City's mistaken position in relation to base zoning rights.

The Court found that the City had in fact considered heritage concerns and had engaged with experts in that regard. The Mayor, in dealing with the appeal process, had also considered all relevant factors.

The appeal was dismissed with costs.

KwaDukuza Municipality v Lahaf (Pty) Ltd [2020] 2 All SA 356 (SCA)

Property – Zoning of property – Town planning scheme – Interpretation of – Language used in zoning provision had to be interpreted against contextual background, taking into account nature and purpose of property.

Application by the respondent ("Lahaf") to the appellant municipality, for the approval of building plans was not considered by the municipality on the ground that what Lahaf proposed building contravened the limitations imposed on the property in terms of zoning controls. The parties could not agree on the meaning to be ascribed to the

words “the total Gross Lettable Area (“GLA”) of the Property”, in the town planning scheme which applied exclusively to the property (the “Centre”).

Lahaf contended that “GLA” had to be interpreted to mean only the area of “shops” as defined in the scheme clauses, that is to say, the areas let out by the respondent to be used as shops and all areas used exclusively by a shop tenant. On the other hand, the appellant contended that “GLA” comprised all areas notionally capable of being let including storage areas and receiving yards.

The High Court found for Lahaf and directed the appellant to consider the relevant building plans.

Held – On appeal, that land management or town planning lay in the hands of the municipality through the scheme. The municipality exercised control of the town planning process through the scheme, hence applications for rezoning and special consents were to be made to the municipality. The appellant, being a regulatory authority, had a duty to amend the scheme for the benefit of the inhabitants of the area covered by the scheme. In that regard it had a duty to balance the interests of the public as well as those of Lahaf as the developer.

In considering how the term GLA should be defined, a material consideration had to be the nature of the Centre, as the term GLA was not defined in the scheme. It was common cause that the nature of the Centre was not a conventional shopping complex. It was a complex consisting of shops, restaurants and entertainment facilities, with the focus on outdoor living areas, including a nursery, having recreational facilities like an animal farm, gymnasium, wellness centre, open air gardens and extensive landscaping. If GLA was intended to apply to shops only to the exclusion of other lettable areas, that would go against the nature and purpose of the Centre. The dominance of the shops over the lifestyle activities was never envisaged in the town planning scheme. The majority of the court held that GLA applied to all lettable areas.

The appeal was accordingly upheld.

Meyers v MEC, Department of Health, Eastern Cape [2020] 2 All SA 377 (SCA)

Personal Injury/Delict – Medical negligence – Claim for damages – Test for negligence – Negligence arises if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence but the defendant failed to take those steps – Where specialised skill is involved, the general standard of the reasonable person is adjusted upwards, to that of the reasonable person in the field of endeavour involved.

In March 2010, the appellant underwent surgery at a provincial hospital. During the procedure two small injuries, each about 2mm in diameter, were caused to the common bile duct, with the result that bile leaked into her stomach after the operation, causing infection. That required surgery, performed by the same doctor, in order to remedy the situation.

Suing the defendant for damages, the appellant alleged that the injuries to her bile duct that occurred during the first operation were caused by the negligence of the

doctor or members of his team in one of four ways. The Court found that the appellant had not discharged the onus on her to establish that the injuries were the result of negligence, and dismissed the claim. An appeal to the Full Court also failed, but special leave to appeal to the present Court was obtained.

Held – For Aquilian liability to arise, the harm caused by the defendant must have been both unjustified, or, in other words, wrongful, and culpable, in the sense of having been either negligently or intentionally caused. The element of wrongfulness was not in issue in this matter and it was common cause that the injuries were caused during the operation. The only issue that required consideration was whether negligence on the part of the doctor had been established by the appellant.

The test for negligence is that negligence arises if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence but the defendant failed to take those steps. Where specialised skill is involved, the general standard of the reasonable person is adjusted upwards, to that of the reasonable person in the field of endeavour involved.

The appellant bore the onus of establishing the negligence that she pleaded.

In the majority judgment, it was found that there was sufficient evidence which gave rise to an inference of negligence on the part of the doctor. The appeal was upheld with costs.

South African Football Association v Fli-Afrika Travel (Pty) Limited [2020] 2 All SA 403 (SCA)

Corporate and Commercial – Contract – Interpretation of – Proper approach to the interpretation of written documents involves considering the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to the drafters – A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document.

The appellant ("SAFA") administered football in South Africa. It had a business relationship with the respondent ("Fli-Afrika"), a travel agent, stretching back to the 1990s.

In January 2009, shortly before South Africa was to host the 2010 Federation Internationale de Football Association World Cup (the "World Cup"), the parties entered into a joint venture agreement with a view to exploiting possibilities that the World Cup would offer. It was agreed that Fli-Afrika would put together travel packages for the World Cup event, including event tickets which would be supplied by SAFA. Fli-Afrika set about making bookings of hotel rooms but SAFA failed to deliver a single ticket, with the result that no packages could be sold and Fli-Afrika was left holding a vast number of hotel bookings.

Alleging breach of the joint venture agreement on the part of SAFA, Fli-Afrika sued SAFA for damages. The dismissal of the claim by the trial court was overturned by the Full Court, which ordered SAFA to pay Fli-Afrika R13 989 452,78, interest on that amount and costs. Special leave to appeal was granted to SAFA by the present Court.

Held – Fli-Afrika's case was that it was obliged, in terms of two clauses in the agreement, either expressly or tacitly, to pay for accommodation and travel in advance, and SAFA, in turn, was required to reimburse it for what it had expended. The correctness of that assertion depended upon an interpretation of the relevant clauses within their context. It was concluded that the interpretation contended for by Fli-Afrika could not be supported. The parties did not provide expressly that prior to SAFA supplying tickets, Fli-Afrika was obliged to expend money, recoverable from SAFA, for accommodation and other travel arrangements. Furthermore, the tacit term contended for by Fli-Afrika could not be inferred.

Although that was dispositive of the appeal, the court also considered a settlement agreement entered into the parties in April 2010. Even if the obligations contended for by Fli-Afrika were created by the joint venture agreement, they were all extinguished by the settlement agreement which was concluded by SAFA and Fli-Afrika.

The appeal was upheld.

Britz v Sequeira [2020] 2 All SA 415 (FB)

Civil Procedure – Motion proceedings – Application for termination of joint ownership of property – Whether parties must use action procedure – While parties seeking termination of joint ownership often make use of action procedure, there is no reason why the application procedure may not be utilised if material factual disputes are not foreseen.

Property – Joint ownership – Termination of joint ownership – Requirements for termination – There must be facts upon which the court can exercise its discretion as to the method of termination, which method must be fair and equitable to all parties – Where granting of application to terminate joint ownership would place one party at an unfair disadvantage, court declining to grant relief sought at present stage.

The question at the heart of the present application was whether joint ownership of certain immovable property should be terminated with appropriate further relief.

The applicant was married to the respondent's sister. Apart from the familial relationship, the parties were also business associates. In March 2002, they purchased the property for use as a holiday home. The respondent had been residing on the property for the previous four years.

In the present application, the applicant sought the termination of the joint ownership of the property. He stated that the respondent could either purchase the applicant's undivided half-share in the property as set out in the notice of motion, or the property was to be sold by public auction to the highest bidder subject to a reserve price of R3 million.

Another aspect of the relationship between the parties involved their shares in three close corporations ("CCs"). The respondents held shares of respectively 33%, 25%, and 20% in each of the CCs. The remainder of the shares were held by the applicant, his wife and children. Although the CCs continued with business activities under the control of the applicant, his wife and children, the respondent did not receive any financial benefits for his member's interests. That led to his instituting action against the three CCs as well as all the other members thereof in which action he claimed

specified amounts in respect of his member's interests in each of the CCs. The court referred to that as "the Pretoria action".

The termination of joint ownership is brought about by the institution of the *actio communi dividendo*. The respondent's legal representative took the point that the application could not succeed based on the technicality that action procedure should have been followed. He relied in that regard on the unreported judgment of *Lesenya v Ngwenya* 2018 JDR 1039 (GP).

Held – The conclusion arrived at in the *Lesenya* judgment could not be followed. While parties seeking termination of joint ownership often make use of action procedure, there is no reason why the application procedure may not be utilised if material factual disputes are not foreseen.

Regarding termination of joint ownership, the Court pointed out that in principle every co-owner is entitled to have the joint ownership terminated. the requirements to be alleged and proven by a party claiming termination of co-ownership are the existence of joint ownership; a ground for termination of joint ownership; and facts upon which the court can exercise its discretion as to the method of termination. Such method must be fair and equitable to all parties.

The undisputed facts and those relied upon by the respondent which the court was prepared to accept insofar as they were neither far-fetched, nor untenable, were such that the main application should be stayed pending finalisation of the Pretoria action. To grant the relief sought by the applicant would place the respondent at a disadvantage as he did not have the necessary financial resources to purchase applicant's share, or to put in an offer to purchase the property on a public auction. The applicant was to blame for the respondent's lack of funds as he had ensured that the respondent received no financial benefits from the three CCs for the past four years.

Concluding that it would not be just and equitable to order the termination of the joint ownership, the Court stayed the application pending finalisation of the proceedings in the Pretoria action.

Commissioner of the South Africa Revenue Service v Public Protector and others [2020] 2 All SA 427 (GP)

Constitutional and Administrative Law – Public Protector – Power to subpoena – Subpoena against Commissioner of Revenue Services – Entitlement of South African Commissioner of Revenue Services to withhold taxpayer information – Tax Administration Act 28 of 2011, section 69(1) prohibits SARS officials from releasing taxpayer information – SARS officials are entitled under the provision of "just cause" set out in section 11(3) of the Public Protector Act 23 of 1994, read with section 61(1) of the Tax Administration Act, to withhold taxpayer information, and Public Protector not empowered to circumvent such provisions by issuing subpoena for information.

The applicant (the "Commissioner") sought a declaration that the South African Revenue Service ("SARS") is entitled to withhold taxpayer information and that the Public Protector's powers do not extend to such information.

The Commissioner stated that the Public Protector's subpoena, in the course of an investigation into the tax affairs of former President Jacob Zuma, sought to coerce the production of information which the Tax Administration Act 28 of 2011 prohibited SARS officials from producing.

Held – Correspondence produced by SARS showed that the Public Protector had been apprised of the fact that section 69(1) of the Tax Administration Act prohibited SARS officials from releasing taxpayer information. The Public Protector was also advised that she could obtain a court order to access the information sought. Legal advice obtained further confirmed that the Public Protector's power to subpoena could not be used to compel disclosure by SARS of confidential taxpayer information. Nevertheless, she opted to issue a subpoena against the Commissioner. That showed either a misunderstanding of the law by the Public Protector, or a decision to ignore it. The Court found that she had acted unreasonably, arbitrarily and in bad faith in issuing the subpoena.

It was confirmed that SARS officials are entitled under the provision of "just cause" set out in section 11(3) of the Public Protector Act 23 of 1994, read with section 61(1) of the Tax Administration Act, to withhold taxpayer information.

Fleki Proprietary Limited v FNB Securities (Pty) Limited [2020] 2 All SA 452 (GJ)

Civil Procedure – Declaratory relief – Courts will not give a party legal advice or answer abstract, hypothetical or academic issues – Where declaratory order sought by the applicant was held to be sweepingly broad and raised abstract, hypothetical or academic issues, such relief was refused.

Corporate and Commercial Law – Company law – Request by client to stockbroker – Rematerialising of dematerialised shares – Whether stockbroker's compliance with request may be made subject to a condition – Section 54 of the Companies Act 71 of 2008 requires the stockbroker to comply with the rematerialisation of shares, and the stockbroker's suspicion of bad motives on client's part in casu shown to be unsound.

The applicant sought an order directing the respondent ("FNBS") to take all steps necessary to cause the re-materialising under the Companies Act 71 of 2008 of the applicant's holding of 3000 shares (the "BTI shares") in a company. Secondly, a declaratory order was sought "that objectively no fact or circumstances existed in 2017 and 2018 that gave ground for fearing or regarding anything in respect of the applicant or its behaviour as being irregular, unlawful, suspicious, or in breach of any compliance with anything or could justify a reasonable discretion to refuse doing stockbroking type business with applicant and any related person.

The applicant and its associated companies, controlled by a retired High Court judge ("HC"), had stockbroking accounts with FNBS. Certain instruction received by FNBS from HC in August 2017 raised a red flag, because they were consistent with a composite transaction in terms of which, essentially, shares were moved between associated accounts and their base cost increased without any record of a capital gain by the account holder, or any certificate issued in that regard by FNBS to the South African Revenue Service ("SARS"). FNBS averred that, in light of its statutory and/or regulatory obligations under the Financial Intelligence Centre Act 38 of 2001 ("FICA"), to monitor and report suspicious and/or unusual transactions, it was duty-bound to first make enquiries before complying with HC's instruction to dematerialise certain shares

(the “AFE and PIK shares”) to the applicant’s credit. FNBS therefore requested proof of the payment/submission/declaration to SARS for its records. That led to a dispute between the parties, as HC did not comply with the request.

It was applicant’s case that in terms of the Companies Act, it has a choice as to the form of its shares, ie. in either certificated, or in un-certificated, form and that if it makes a request to the broker in terms of section 54 that its uncertificated shares be withdrawn from the uncertificated securities register and that certificates be issued in respect of those withdrawn securities, the broker is obliged to comply with the request by notifying the relevant company to provide the requested certificate and to remove the details of the uncertificated shares from the uncertificated securities register.

Held – The main issue arising from the first prayer was whether FNBS’ compliance with a request of the applicant in terms of section 54 of the Companies Act to materialise its dematerialised BTI shares, could be made subject to a condition. The second issue arising related to the present Court’s jurisdiction and its discretion to make declaratory orders.

The Court held that the actions contemplated in section 54 of the Companies Act are not “transactions” as contemplated in FICA. FNBS’s reliance on FICA, including section 29 of that Act, was misplaced and based on a misreading of those provisions. FNBS’s assumption of bad motives on the part of the applicant for requesting a materialisation of its BTI shares was found to be unsound and could not serve to lawfully justify FNBS’s refusal to comply with section 54 of the Companies Act. The applicant’s first prayer was granted.

The declaratory order sought by the applicant was held to be sweepingly broad and raised abstract, hypothetical or academic issues. The said relief was declined.

FNBS was ordered to pay the costs of the application.

Institute for Accountability in Southern Africa v Public Protector and others [2020] 2 All SA 469 (GP)

Constitutional and Administrative Law – Public Protector – Application to declare Public Protector unfit for office and for removal from office – Court’s powers – Doctrine of separation of powers – Court required to respect doctrine of separation of powers, and not assume powers assigned by the Constitution to the National Assembly and the President – In absence of suggestion that the National Assembly, the Speaker, or the President, was unwilling or unable to exercise the functions assigned to them, Court declining to grant relief sought.

The applicant (the “Institute”) sought to have the Public Protector declared unfit for office, together with ancillary orders.

Held – Before the Court, the Institute conceded that the relief sought regarding the fitness of the Public Protector would include an investigation into the incumbent’s capacity, competence and conduct. There was therefore an overlap between the relief being sought and what the National Assembly is empowered to do in terms of section 194 of the Constitution. It was common cause that the process envisaged in section 194 concerning whether the current Public Protector ought to be removed from office had already commenced in the National Assembly.

The Court was required to respect the doctrine of separation of powers, and not assume powers assigned by the Constitution to the National Assembly and the President. There was no suggestion that the National Assembly, the Speaker, or the President, was unwilling or unable to exercise the functions assigned to them.

The application was dismissed, as was a counter-application brought by the Public Protector. Each party was to pay its own costs.

Khanyisa Community Development Organisation and others v Director Development Management Region 2, Western Cape, Department of Local Government, Environmental Affairs and Development and others
[2020] 2 All SA 485 (WCC)

Constitutional and Administrative Law – Establishment of regional landfill site – Application for review of decision – Whether a specialist traffic impact assessment was a requirement imposed on decision-makers in establishing landfill site – Court finding that the absence of a specialist traffic impact assessment before the decision-makers was not considered to be legally relevant as there was no significant impact on traffic – Decision held not to be reviewable.

The third respondent was a district municipality, exercising jurisdiction over a number of local municipalities in its region. In terms of section 84(1)(e)(iii) of the Municipal Structures Act 117 of 1998, a district municipality is given responsibility for establishment of waste disposal sites in the various local municipalities falling under its jurisdiction. In 2010, the district municipality began a process aimed at the rationalisation of its waste management functions in the Eastern region, the intention being the establishment of a regional landfill site to accommodate the ever increasing demand for solid waste management in the local municipalities falling within the region.

In September 2015, it obtained environmental authorisation by the first respondent (the "Director") to construct a new regional landfill at a site adjacent to an existing landfill site. That decision was referred to by the court as the Director's ROD.

A number of bodies and individuals exercised their appeal rights against the Director's ROD. Such appeals were determined in favour of the district municipality by the second respondent (the "MEC"). It was common cause that both the MEC's decision (the "appeal decision") and the Director's ROD constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000 and in these proceedings the three applicants sought to review both decisions. The main ground of review was that both decision-makers allegedly failed to have regard to the potential impact of the traffic conditions which would be occasioned by the use of road transport to convey waste from the various local municipalities to the new landfill site. It was said that the anticipated increase in traffic was an important factor which warranted a specialist study, that the district municipality failed to conduct such a study and that the absence of such information rendered the decision-making process of the Director (and later the MEC) fundamentally flawed.

Held – There could be no suggestion that either the Director's ROD or the appeal decision were capable of review on the basis that the responsible functionaries did not discharge their duties properly under the Constitution, National Environmental Management Act 107 of 1998, National Environmental Management: Waste Act, 59

of 2008 or the applicable environmental regulations, or that their findings and recommendations were otherwise assailable. The question then was whether a specialist traffic impact assessment ("TIA") was a requirement.

The Court found that the absence of a specialist TIA before the decision-makers was not considered to be legally relevant (and therefore reviewable) as it was not considered to be of significant impact. In addition, due consideration was given to the environmental justice provisions contemplated in the Constitution and National Environmental Management Act.

The application for review was dismissed.

Meechan and another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants [2020] 2 All SA 510 (GJ)

Civil Procedure – Evidence – Integration rule or parol evidence rule – If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning – Plaintiffs relying on report to sustain cause of action not entitled to explain their interpretation of such report.

Civil Procedure – Exceptions to particulars of claim – Rule 23(1) providing for exceptions when a claim lacks averments necessary to sustain a cause of action, or where it is vague and embarrassing – Excipient relying on lack of averments to sustain cause of action must satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every reasonable interpretation that can be put to the facts – Where report relied on by plaintiffs did not contain representations alleged, no cause of action was established.

Personal Injury/Delict – Delictual liability – Claim for damages based on issue of report by auditing firm, allegedly without conducting proper investigation – Wrongfulness – Whether allegations made in particulars of claim were sufficient to establish element of wrongfulness or unlawfulness – Plaintiffs precluded from relying on wrongfulness where reliance on impugned report was unreasonable.

In a delictual action, the plaintiffs made claims for pure economic losses they allegedly suffered as a result of a report issued by the defendant to the members of a Dutch foundation on 19 October 2016.

The first and second plaintiffs took up employment as COO and CEO of a company ("FMLR"). FMLR was owned by a Dutch company ("FMLAM"). The defendant was a partnership carrying on business as accountants and auditors.

On 19 October 2016, the defendant alternatively, one of its directors (Mr Schalekamp) acting in the course and scope of his employment with the defendant, issued a financial report representing that FMLAM (not FMLR) had access to current assets of USD1 trillion. In fact, neither entity had access to current assets in the sum of USD1 trillion.

The plaintiffs averred that the defendant, alternatively Mr Schalekamp, breached a duty of care to the plaintiffs in issuing the report about FMLAM without conducting a proper investigation and due diligence into the correctness of the financial report and failing to verify the truth and veracity of the information contained in the report. The issue of the report by the defendant caused the plaintiffs to remain in the employment of FMLR by virtue of which they suffered loss of earnings.

The defendant filed an exception to the plaintiffs' particulars of claim. After the plaintiffs amended the particulars of claim, only three grounds of the exception remained relevant.

Held – The first ground of exception was that the document upon which the plaintiffs based their claim (ie the report) did not make the representations the plaintiffs contended for and that the particulars of claim did not disclose a cause of action. The court found that the report made no mention of the plaintiffs nor of FMLR, nor the representations it was alleged to convey. The plaintiffs were not free to explain how they interpreted the report. The integration (or *parol* evidence) rule remains part of our law and if a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. As the representations pleaded were not in the report, the pleading did not disclose a cause of action and the exception was upheld.

The second ground of exception was that the allegations made in the plaintiffs' amended particulars were insufficient to establish the element of wrongfulness or unlawfulness. Considerations of public policy and the legal convictions of the community inform the issue of wrongfulness, and the question of whether a defendant should be held legally liable for loss resulting from a misstatement or be afforded legal immunity. In this case, the plaintiffs could not rely on wrongfulness or unlawfulness for a variety of reasons set out in the court's judgment. The exception on this point was also upheld.

The Court did not decide the third exception, which related to causation, as that issue was to be decided after the hearing of evidence.

National Union of Metalworkers of SA and others v VR Laser Services (Pty) Ltd and others [2020] 2 All SA 536 (GJ)

Corporate and Commercial – Company law – Business rescue – Ranking of claims – Section 134 of the Companies Act 71 of 2008 deals with a creditor's security which was obtained prior to the commencement of the business rescue proceedings, providing for the protection of the security and specifying the manner in which the encumbered asset is to be disposed of by business rescue practitioners – Remuneration due to employees post commencement of business rescue proceedings does not place them in preference to pre-business rescue proceedings secured creditors.

The first respondent ("VR Laser") was unable to continue operating after its banking services were all withdrawn. Its directors consequently resolved to place the company in business rescue. The second and third respondents were jointly appointed as the business rescue practitioners ("BRP's"). They took control of the assets, liabilities and business operations of VR Laser.

From the date of the loss of the last of the company's banking services, its employees were deprived of their wages and salaries. After two months, on 28 May 2018, the BRPs decided that the most prudent course of action would be to temporarily place all employees of VR Laser on discretionary leave "with full recognition of their entitlement to earn remuneration during the period of discretionary leave being granted".

At a meeting of creditors, the first applicant ("NUMSA"), which was a trade union representing many of the employees, including all of the third to further applicants, proposed that the employees be retrenched in terms of the Labour Relations Act 66 of 1995 so that the employees could at the very least apply for unemployment benefits to the Unemployment Insurance Fund ("UIF").

The BRPs encouraged the stakeholders to vote in favour of the "commencement of a controlled 'liquidation/winding down' procedure" under their control, acting in their capacity as the BRPs. Crucially, the proposal was not a solution to salvage the company. It was a proposal to liquidate the company – albeit in a "controlled" manner under their command. It was clear on any interpretation that as at 12 June 2018, the BRPs had come to the conclusion that it was no longer possible to rescue VR Laser. The focus then was on whether VR Laser should be liquidated in a "controlled" manner under their command or through a court order. The employees were aggrieved at the conduct of the BRPs as they were required to endure a situation of having worked for several months without receiving a cent in remuneration since March 2018 - purely a result of the BRPs' conduct and decisions.

In the present application, the employees sought a declarator to the effect that certain claims (the "PCF claims") of the former employees of the company ranked ahead of the secured claim of the fourth respondent (the "Bank"); and the sum of approximately R32m held by the BRPs representing the proceeds of the sale of the encumbered assets should be used to settle the former employees' claims. A further order was sought directing the BRPs to pay the employees' PCF claims from the proceeds of the sale of the encumbered assets before settling the claim of the Bank.

Held – Business rescue places a financially distressed company temporarily in intensive care with the sole objective of trying to rescue it, or put it on a footing where there is a reasonable prospect that it would be rescued. Sec tion 134 of the Companies Act 71 of 2008 deals with a creditor's security which was obtained prior to the commencement of the business rescue proceedings. It provides for the protection of the security and specifies the manner in which the encumbered asset is to be disposed of by the BRPs. In terms of section 135(1) read with section 135(3)(a) the remuneration due to employees post the commencement of the business rescue proceedings receive preference over some PCF creditors and over the pre-rescue unsecured creditors, but it does not place them in preference to those pre-business rescue proceedings secured creditors. Thus, the applicants' contention that their PCF claims reigned superior to that of the Bank was incorrect.

The application was dismissed.

Ndlovu v S [2020] 2 All SA 556 (GJ)

Criminal law and procedure – Rape and robbery with aggravating circumstances– Gang rape – Arrest and conviction of one perpetrator – Court rejecting submission that in order for the minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 to be triggered, there must be an actual conviction of rape of the co-perpetrator/s – Once evidence of complainant and other witnesses was accepted, the requisite proof needed to convict the appellant of multiple rapes was established, triggering the minimum sentence legislation.

The appellant was found to have been part of a group of three men who kidnapped the complainant at gunpoint, and one of two men who raped her. He was convicted of rape and sentenced to life imprisonment on the basis that the minimum sentencing provisions in section 51(1) of the Criminal Law Amendment Act 105 of 1997 applied as the rape took place in circumstances where the complainant was raped more than once. He was also convicted of robbery with aggravating circumstances, as it was found that the complainant was robbed at gunpoint, and was sentenced to 15 years' imprisonment on that count.

The present appeal was against conviction and sentence. Regarding conviction, the appellant argued that he was wrongly identified. As to sentence, he argued that the application of the "*Mahlase dictum*" meant that the magistrate had incorrectly applied the minimum sentencing provisions.

Held – The witnesses' identification of the appellant was clear and emphatic. The magistrate's conclusion that that the identification was established beyond a reasonable doubt could not be faulted. The alibi called by the appellant was found to be unsatisfactory and unreliable. The appellant was found approximately two hours after the attack, driving the taxi which was used in the commission of the offences. In it were some of the items stolen from the women in question. The conviction was thus confirmed.

As in the *Mahlase* case referred to above, it often happens that only one person accused of having been involved in a gang rape is apprehended and convicted in due course. The premise in *Mahlase* was that, in order for the minimum sentencing provisions to be triggered, there must be an actual conviction of rape of the co-perpetrator/s. That approach was held to be illogical.

In the present case the conviction was based on the evidence of the complainant and other witnesses. Once that evidence was accepted, it constituted the requisite proof needed to convict the appellant of multiple rapes, triggering the minimum sentence legislation.

The appeal was dismissed.

Oppenheimer Park Golf Club v Matjhabeng Local Municipality and another [2020] 2 All SA 574 (FB)

Civil Procedure – Relief – Structural interdict – Nature of – A structural interdict is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order.

Constitutional and Administrative Law – Local government – Water and sanitation services – Duties of municipality – Part B of Schedule 4 to the Constitution places the obligation in respect of water and sanitation services, potable water supply systems and domestic waste water and sewerage disposal systems on a local municipality – Failure by municipality to fulfil duties leading court to issue a structural interdict.

The applicant, a voluntary association of persons, was the occupier of property in the municipal district of the first respondent municipality. It operated a golf course on the property.

According to the applicant, the municipality was in breach of its constitutional obligations to promote a safe and healthy environment, to strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner, and to ensure that the management of waste, sewerage, waste disposal, water and sewerage management was done in a safe and environmentally safe manner. As a result of the municipality's persistent failure to comply with its obligations to maintain a pump station, including the pumps and appurtenances and the infrastructure, the applicant obtained a structural interdict in 2015.

However, the municipality continued to fail to fulfil its obligations, and in the present proceedings, the applicant sought a further structural interdict.

Held – Section 24 of the Constitution guarantees the right to an environment that is not harmful to people's health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation. Part B of Schedule 4 to the Constitution places the obligation in respect of water and sanitation services, potable water supply systems and domestic waste water and sewerage disposal systems on a local municipality.

The municipality's explanation for the situation and its allegation that it was striving to fulfil its obligations could not be accepted. The Court found that the applicant had established its entitlement to the relief sought.

P v P [2020] 2 All SA 587 (WCC)

Family Law and Persons – Parent and child – Application by parent for primary care of children – Factors to be considered include best interests of children; relationship between parent and children, and between any other relevant person and children; degree of commitment parent has shown towards the children; extent to which parent contributed towards expenses in connection with the birth and maintenance of children.

Family Law and Persons – Parent and child – Relocation of children – Where a custodian parent wishes to emigrate with a child, the court will be slow to prohibit it if the wish to relocate is genuine and reasonable – Such considerations not applicable where the parent wishing to relocate with children is not the custodian parent.

The appellant and respondent were married in October 2006 and divorced in August 2013. In terms of a consent paper incorporated into the divorce decree, the parties remained co-guardians of their three children and co-holders of parental responsibilities. As the respondent was working abroad and would not then be able to exercise his rights of contact in accordance with the specified schedule, he was entitled to exercise fair and reasonable contact during his leave periods by prior arrangement with the appellant.

In 2016, the respondent was in South Africa on leave, when he developed concerns about the children's welfare. He engaged a clinical psychologist who was critical of the

appellant's performance as a mother and found that the children were suffering neglect. By then, the respondent intended relocating to Alaska and the psychologist's recommendation was that the children should be allowed to relocate with him. The parties engaged in several bouts of litigation regarding contact with the children, and in August 2018, the respondent brought an urgent application for an order that another psychologist ("Ms Boon") be appointed to investigate the children's care, contact and residence arrangements and that in the meanwhile he should enjoy specified rights of contact. In a second part of the application, he anticipated orders to reflect the implementation of Ms Boon's recommendations. The court hearing the matter accepted Ms Boon's recommendations and authorised the respondent to relocate with the children to Alaska. Provision was made for the appellant's contact with the children, for them to receive counselling and therapeutic assistance, and for the appointment of a parenting coordinator.

On petition to the Supreme Court of Appeal, the appellant obtained leave to appeal against the relocation order. In the meantime however, the respondent left the country with the children. The appellant thus obtained a repatriation order requiring the respondent to return the children to South Africa, which he eventually did.

Held – On appeal, that need to relocate the children to Alaska was based on the respondent's desire to live there in his own interests. He regarded it as a preferable location for obtaining work in his chosen field, and had remarried there. Where a custodian parent wishes to emigrate with a child, the court will be slow to prohibit it if the wish to relocate is genuine and reasonable, because generally the best interests of the child will not be served by thwarting the custodian parent's wish. In this case, the respondent was not the custodian parent. He was also not open to the notion of remaining in South Africa to be with the children if the Court refused the relocation order.

In an application for primary care as envisaged in section 23(1) of the Children's Act 38 of 2005, the matters the court must take into account are: (a) the best interests of the children; (b) the relationship between the respondent and the children, and between any other relevant person and the children; (c) the degree of commitment the respondent has shown towards the children; (d) the extent to which he has contributed towards expenses in connection with the birth and maintenance of the children; (e) any other factor that should in the court's opinion be taken into account. The respondent's conduct was not satisfactory to the court in many respects in this case.

The Court dismissed the allegations of neglect. It overturned the lower court's order placing all three children in the respondent's care.

In what it acknowledged was a contentious order, the Court ordered that the male child be place in the respondent's primary care and the female children in the appellant's primary care.

END-for now