LEGAL NOTES VOL 2/2020

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ASCENDIS ANIMAL HEALTH (PTY) LTD v MERCK SHARP DOHME CORPORATION AND OTHERS 2020 (1) SA 327 (CC)

Intellectual property — Patent — Dispute — Revocation and infringement — Whether findings in revocation application having binding effect in later action based on infringement — Res judicata (issue estoppel) and piecemeal litigation (multiple-stage defences) in patent disputes — Court deadlocked on whether failed bid for revocation barring applicant from raising invalidity defences in subsequent infringement (damages) action against it — Whether applicant should be allowed to launch fresh validity challenge on new ground — Ease with which validity challenges should be allowed — Patents Act 57 of 1978, s 25 and s 61(1).

Estoppel — Res judicata — Ambit of doctrine — Court deadlocked on issue of whether failed bid for revocation of patent would bar applicant from raising fresh invalidity defences in subsequent infringement claim.

The Patents Act 57 of 1978 (the Act) creates two-track proceedings in patents disputes: first, *revocation* under ch X, where a challenger seeks to remove a patent from the register; and, second, *infringement* under ch VI, where the patent-holder vindicates its rights against an infringer. In defending the latter the infringer may rely on any of the grounds on which the patent may be revoked. The issue in the present case was whether findings in the revocation proceedings had final, binding effect on the infringement proceedings (see [105]).

The challenger (Ascendis) applied in the court of the Commissioner of Patents for the revocation of a patent held by the respondents (collectively, Merck). As grounds for revocation Ascendis raised (i) lack of novelty and (ii) lack of inventiveness (obviousness), but indicated that the hearing would be confined to novelty, which, unlike obviousness, would not require oral

[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!**

evidence. Merck stipulated that it deemed this piecemeal procedure incompetent, and that it would regard the failure to advance argument on obviousness as an abandonment of the defence. It would oppose any attempt to resurrect it on the basis of res judicata. The commissioner, Teffo J, upheld the novelty point and revoked Merck's patent. In an appeal the Supreme Court of Appeal (SCA) overturned Teffo J's judgment, holding — without mentioning the obviousness point — that the novelty point was bad and the patent valid.
Merck had in the meantime launched its infringement action for damages before Van der Westhuizen J, as commissioner. The SCA's findings in the revocation proceedings prompted Ascendis to seek an amendment to its plea in the infringement action by deleting its novelty point (while retaining its obviousness point), and adding a new inutility † point. In response, Merck applied to amend its own pleadings to argue that, since the SCA had upheld the validity of the patent, the entire matter was res judicata.
Van der Westhuizen J denied Ascendis' application for the amendment of its plea. He ruled that there was only one cause of action, invalidity, and that while a defendant could rely on any one or more of the listed grounds of invalidity, it could not do so in piecemeal fashion. He allowed Merck to raise res judicata, which he upheld on the basis that the matter was disposed of by the SCA's finding that the patent was valid. All that remained, ruled Van der Westhuizen J, was the quantification of Merck's damages.
Ascendis, seeking the reversal of Van der Westhuizen J's denial of its application to amend, and having been rebuffed by the High Court and the Supreme Court of Appeal, applied for leave to appeal to the Constitutional Court. The issues before the court were (i) whether each ground for revocation in s 61 was a separate cause of action, or the cause of action was just one, the invalidity of the patent; and (ii) res judicata.

The Constitutional Court handed down an evenly split decision: while all ten would have granted leave to appeal, five would have upheld it and five dismissed it.
Held per Khampepe J (Froneman J, Ledwaba AJ, Nicholls AJ and Theron J concurring)
Ascendis should have been allowed to amend its plea. The various grounds for revocation did not provide for a common cause of action (ie the general invalidity of the patent) but, by virtue of having different facta probanda, constituted separate and distinct causes of action. Since Teffo J had made no decision on the merits of the ground of inutility, the matter was not res judicata, and Van der Westhuizen J erred in finding that it was. (See [54], [61], [63], [65] – [66], [74].)
The crux of res judicata was that where a cause of action had been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party would not be allowed. There was no reason to extend it to include the same conclusion, even when an alleged procedural error by the applicant was the underlying reason why the cause of action was not heard on the merits or formally separated in the first proceedings.

The second judgment's widening of the scope of res judicata by making it applicable to new defences in infringement proceedings, could result in hardship and injustice by depriving future adjudicators of room to invoke equity to decide whether this really was the 'same issue'. Merck did not make out a case as to why equity and fairness

should preclude Acendis from raising the validity of the patent as a defence in the infringement proceedings.
The above did not create carte blanche for parties to institute revocation proceedings on a repetitive basis. Should this occur, considerations of abuse of process would be applicable.
Testing the validity of patents was in the public interest because patents created artificial monopolies. Currently, South Africa completely relied on private parties to regulate this artificial monopoly system because the government does not examine a patent's validity upon registration. Instead of being deterred, litigants — who were working both in a private capacity and for the public interest — had to be encouraged to bring more revocation challenges. (See [97], [100].)
Held per Cameron J (Mogoeng CJ, Jafta J, Madlanga J and Mhlantla J concurring)
Leave to appeal should be granted, but the application to amend dismissed.
Ascendis sought to introduce new defences against Merck's infringement claim because it previously (before Teffo J) tried and failed to invalidate Merck's patent on the ground of novelty. Ascendis had in those proceedings abandoned its obviousness defence when it argued, unsuccessfully, for revocation. Courts should not countenance multiple-stage defences in patent disputes: first bite at revocation, second bite when sued for infringement. This was not how enforcement of patents would most fairly and efficiently work. (See [107].)
If an alleged infringer, who had failed to make a successful case for revocation, was permitted to raise further invalidity defences when later sued for infringement, there could be no principled reason to preclude it from launching a fresh revocation claim on any new ground. When that failed, the patent-holder would have to initiate yet another damages claim, to which the alleged infringer could then respond with further new defences, and so on. The resulting dissonance in the two sets of patent litigation would not only produce incoherence, but also affront long-held judicial caution against piecemeal litigation. (See [108].)
The default position should be that a previously unsuccessful revocation applicant was precluded from raising the validity of the patent in a subsequent damages claim. The conclusion that the Act did not sanction endless validity challenges was prudent and squared with the position in the majority of foreign jurisdictions. (See [123], [125].)
Justice required that the SCA's refusal of Ascendis' revocation argument should be treated as conclusive of the patent's validity. There was no reason why res judicata, appropriately expanded, should not apply. While this prejudiced Ascendis, the destabilisation of our patent litigation system, through the creation of a perilous and novel default, was of greater importance, for it would be to the prejudice of all. The courts in both the amendment proceedings and the interdict application were alive to this fact, and the issue of validity between the parties was long-worn and settled. (See [139].)
Held per the court
Since there was no majority decision, the judgment of the commissioner would stand.

GELYKE KANSE AND OTHERS v CHAIRPERSON, SENATE OF THE UNIVERSITY OF STELLENBOSCH AND OTHERS 2020 (1) SA 368 (CC)

Education — University — Language policy — Historically Afrikaans university's decision to adopt new language policy giving preference to English over (formerly predominant) Afrikaans — Reasonable practicability and appropriate justification — University reasonably citing cost barrier to alternative of full parallel-medium teaching — University's decision enhancing equitable access to education and constitutionally justified — Constitution, s 29(2).

In June 2016 the University of Stellenbosch (the University) — an historically Afrikaans institution * — decided to replace its existing (2014) Language Policy — in which Afrikaans and English enjoyed equal status — with a new one that would offer all classes one hundred percent in English while still accommodating Afrikaans, particularly at the undergraduate level. The University's stated position was that the 2016 Policy did not reduce, but merely 'reconfigured', Afrikaans tuition (see [6]).
Gelyke Kanse (GK), a voluntary association, challenged the 2016 Policy in the Western Cape High Court. GK argued that the policy violated the right to publicly funded mother-tongue education in s 29(2) of the Constitution. Since the application was brought before the 2016 Policy was implemented, the High Court rejected GK's evidence of the negative effects its implementation was having on Afrikaans.
Section 29(2), in conferring the right to receive publicly funded mother-tongue education, makes it subject to the internal modifier that it must be 'reasonably practicable' (see n8 for the wording of s 29(2)).
The University argued that the 2016 Policy was necessary because the 2014 Policy — separate classes in English and Afrikaans, or single classes conducted in Afrikaans, with interpreting from Afrikaans to English — marginalised and stigmatised black students who did not understand Afrikaans (see [28]). The University further argued that GK's suggestion that the University offer full parallel Afrikaans/English tuition was, while feasible, too expensive to be 'reasonably practicable' (see [30]).
The High Court held that the University had advanced 'appropriate justification' for the reduction in Afrikaans tuition and that the 2016 Policy conformed to s 29(2). The High Court was guided by the decision of the Supreme Court of Appeal in *University of Free State v AfriForum* (see 'Cases cited'), which dealt with an Afrikaans university's decision to adopt an English-only policy on the ground that parallel-medium instruction had resulted in overt racial segregation. The SCA's judgment was subsequently confirmed by the Constitutional Court in *AfriForum v University of the Free State (AfriFroum CC* — see 'Cases cited'), which held that reasonable practicability in the context of s 29(2) had to be assessed by taking into account the factors mentioned in the second part of s 29(2), namely equity, practicabilty and redress.
The Constitutional Court, having granted leave to appeal directly from the High Court
Held per Cameron JA, for the court
The University's view that the 2016 Policy did not reduce Afrikaans education was incorrect: while it did preserve Afrikaans, this was subject to demand and available resources. The 2016 Policy effectively gave preference to English in order to advance the University's goals of equal access, multiculturalism and integration. Afrikaans had lost its position of primacy. (See [6] – [7].)

The High Court correctly rejected GK's evidence that the 2016 Policy was being implemented in a way that vindicated its fears about the sidelining of Afrikaans. The present proceedings were a challenge to the policy itself, not an 'as applied' challenge, and GK was not entitled to adduce evidence to create doubt about its legitimacy in the light of how it was being applied (see [18]).
The constitutional test of 'reasonable practicability', to determine whether the s 29(2) right could be conferred, was in essence synonymous with the test of 'appropriate justification' for cutting it back, once afforded. They were two sides of the same coin, the former dealing with the positive duty to fulfil the right, and the latter with the negative duty not to take it away, once enjoyed (see [23]).
While GK was correct in asserting that the criterion of reasonable practicability had to be judged objectively, and that it required an approach founded in evidence, the evidence showed that the primacy of Afrikaans under the 2014 Policy created an exclusionary hurdle for black students (see [28], [40] – [41]). The University was, moreover, entitled to defend the 2016 Policy by showing that the alternative of offering full parallel-medium tuition would be enormously, even if not prohibitively, expensive (see [34]). Since it was not, given the facts and figures advanced by the University, possible to override its conclusion on cost, its decision to reduce the role of Afrikaans passed the 'reasonably practicable' test (see [36], [45]).
While the facts were differrent there, the doctrine articulated in *AfriForum CC* supported the conclusion that it was permissible under s 29(2) for a public educational institution to reduce tuition in an official language in order to enhance equitable access for those who did not understand it, when the institution judged the costs of non-reduction too high (see [38] – [39]). Weighing what was lost in language terms against the social justice objective sought to be achieved — together with cost considerations, where appropriate — was constitutionally justified (see [41]).
Cameron J concluded his judgment by acknowledging that the court's endorsement of the 2016 Policy came at a cost to Afrikaans, but pointed out that neither the threat that the flood-tide of English posed to South Africa's indigenous languages, nor the virtual disappearance of Afrikaans as a language of instruction at tertiary institutions, was the University's burden, or an issue before court (see [47] – [49]).

In a concurring judgment Mogoeng CJ agreed with Cameron J that it was neither reasonably practicable nor ethical to adhere to the position that obtained before the 2016 Policy came into being (see [60]).
In a further concurring judgment Froneman J, after noting that the court was bound by *AfriForum CC*, warned that the cost of the entrenchment of English as the dominant language of education and the concomitant erosion of mother-tongue education would fall disproportionally on the poor and marginalised.

MOODLEY v KENMONT SCHOOL AND OTHERS 2020 (1) SA 410 (CC)

Education — School — Public school — Assets — Bar on attachment — South African Schools Act 84 of 1996, s 58A(4).

In proceedings in the High Court, and later on appeal to the Supreme Court of Appeal, Mr Moodley obtained costs awards against a public school (see [5] – [6]). But neither the school, nor its governing body, would satisfy them, and so Mr Moodley obtained a warrant of execution, and attachment of the school's bus and moneys in its bank account (see [7]).

The school respondents later instituted proceedings to set aside the attachment and warrant, on the basis that it conflicted with s 58A(4) of the South African Schools Act 84 of 1996 ('The assets of a public school may not be attached as a result of any legal action taken against the school') (see [8]).
Mr Moodley counter-applied for an order directing the school and the governing body to pay him the costs, and a declaration that s 58A(4) was unconstitutional (see [10]).
The High Court granted this relief (see [11]).
Here, Mr Moodley applied to the Constitutional Court to confirm the declaration of invalidity (see [12]).
It declined to do so.
The court considered, following authority, that, although Mr Moodley's rights to equality and dignity were limited by the section, the limitation was nonetheless justifiable: while the rights limited were plainly important, and the limit absolute, this had to be weighed against the limit's tailoring, and that there was no less restrictive means to achieve its purpose (see [23] – [24] and [31] – [32]). That was to avert the impact of attachment on school- children's right to basic education, and best interests (see [26]).
As to remedy, that was to put the school on terms to pay the costs order; and to order the governing body to take all steps to ensure this was done. (Should the members of the governing body fail to, they would be liable to contempt proceedings.) (See [53].)
The declaration of invalidity not confirmed; the school ordered to pay the costs concerned within three months; the governing body's members mandated to ensure all steps were taken toward this end; the school and governing body's appeal upheld; and the court a quo's costs order set aside (see [57]).

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v DEMOCRATIC ALLIANCE AND OTHERS 2020 (1) SA 428 (CC)

Appeal — To Constitutional Court — Discretion of court to decide moot issue arising from interlocutory order — Interests of justice — Main application withdrawn and its merits essential for proper determination of issues — Court declining to entertain appeal.

President — Powers — To appoint and dismiss cabinet ministers — Review — Applicability of rule 53 of Uniform Rules — Issue moot and interlocutory — Constitutional Court refusing to exercise discretion to entertain it on appeal — Semble: While executive decisions generally reviewable under principle of legality and rule 53, applicability of rule 53 to cabinet appointments requiring detailed consideration — Constitution, ss 91(2) and 93(1); Uniform Rules of Court, rule 53.

The March 2017 decision of former President Zuma to use his powers under ss 91(2) and 93(1) of the Constitution to reshuffle his cabinet led to a High Court application by the respondent political party (the DA) to have the decision declared unconstitutional and invalid. During the course of proceedings the DA applied for an interlocutory order requiring the President to furnish the record and reasons for his decision under rule 53(1)*(b)* of the Uniform Rules of Court. The High Court granted the interlocutory application on the basis that executive functions like the appointment and removal of ministers fell within the scope of rule 53. The President was granted leave to appeal the High Court's interlocutory ruling to the Supreme Court of Appeal, but while the appeal was pending the President resigned and was

replaced with the current President. The DA then withdrew its main application. The presidency however persisted with the appeal against the interlocutory ruling on the ground that the High Court's alleged extension of the scope of rule 53 breached the doctrine of separation of powers. The SCA dismissed the appeal on the ground that the withdrawal of the main application meant that there was no reason for it to determine the ambit of rule 53: the matter was moot.† The presidency, arguing that the applicability of rule 53 would nevertheless have a bearing on future decisions to appoint or dismiss cabinet members, applied for leave to appeal to the Constitutional Court.

Held per Mogoeng CJ for the majority
The court had an established discretion to entertain moot issues if it was in the interests of justice, but it was not in the interests of justice this time because (i) the court was dealing with an appeal against an interlocutory order; and (ii) the merits of the withdrawn application were essential for the proper determination of the issue of the applicability of rule 53 (see [17] – [19], [27] – [28], [36] – [37]). While it could be assumed that executive decisions were, in general, reviewable either under the principle of legality or rule 53, in the present case the lack of prospects of the court exercising its discretion in the President's favour meant that the rule 53 issue — which required detailed consideration — was best left for another day. (See [26], [28], [34] – [39].) Appeal dismissed.

Held per Jafta J for the minority
The appeal should be upheld (see [88]). While the matter between President and the DA was indeed moot, it was nevertheless in the interests of justice to interpret rule 53 for guidance in future cases (see [42]). The proposition that the President should wait for a similar review in the future and then raise the issue of the applicability of rule 53 was unacceptable since it would put the President at odds with his duty to uphold the Constitution and all law (see [64]).
Properly construed, rule 53 applied to bodies like inferior courts, boards and tribunals, not to the review of decisions to appoint or dismiss cabinet members. The question whether those decisions were subject to review did not arise at present and had to be left for determination in appropriate proceedings (see [83], [86]).

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND ANOTHER v PG GROUP (PTY) LTD AND OTHERS 2020 (1) SA 450 (CC)

Administrative law — Administrative action — Review — Rationality — Assessment of process leading to decision — Part of rationality enquiry under Act — Promotion of Administrative Justice Act 3 of 2000, s 6.

This matter concerns second applicant's (Sasol's) application to first applicant (the National Energy Regulator) for determinations of the maximum price it could charge for gas and its transmission (see [10]).
In respect of the price application the Regulator determined a calculation method, then whether there was inadequate competition in the market, and then the application itself (see [13] – [15] and [17] – [18]).
This it approved, as it did the tariff application (see [12] and [18]).

Thereafter the respondents applied to the High Court to set aside both determinations on the ground that they were irrational and unreasonable (see [19]). The High Court refused to hear the review on the basis that the respondents ought to have challenged the methodology decision, and that they were out of time, in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in which to do so (see [20]).
On appeal the Supreme Court of Appeal found that the methodology and price decisions were part of a composite process, and that they were binding only after the decision on price. Given this, the review had been brought in time. (See [22] – [23].) The court further found, on a comparison of the price of gas before and after the pricing decision, that the decision defeated the end sought: a mimicking of a price in a competitive market. The decision was thus irrational and unreasonable. (See [24] – [25], [52] and [59].) The court accordingly set it aside (see [2]). The court also set aside the transmission-tariff decision, owing to its 'inextricable link' to the price decision (see [25]).
Here the applicants applied to the Constitutional Court for leave to appeal (see [2]). It considered, firstly, whether the price decision could be reviewed without reviewing the pricing method. It *held* that it could be, as it was a separate decision to the decision on method. (See [28], [32] and [36].)
The court turned, secondly, to whether the pricing decision was irrational and unreasonable. It *held* that it was, in that the means used to make it, specifically the pricing method, was deficient. Deficient, because it failed to include a consideration of Sasol's marginal costs. (See [28], [38], [65] and [78].)
In this regard it further held that means included everything done in the process toward taking a decision, and a process assessment was part of a rationality enquiry under PAJA (see [50] and [64]).
Lastly, the court examined whether the lawfulness of the tariff decision was dependent on the lawfulness of the pricing decision. It *held* that it was not, in that the price determination had no influence on the tariff determination (see [28] and [83] – [84]).
The court ordered that the application for leave to appeal was granted; that the appeal against the Supreme Court of Appeal's setting-aside of the tariff decision was upheld; and that the remainder of the appeal was dismissed (see [93]).
Jafta J concurred in the court's order (see [94] and [128]).
But to him the pricing decision ought to be invalidated on the basis that the decision itself was irrational, rather than on the basis that the process leading to the decision was irrational (see [96] and [122]).
This because the pleaded case aimed at the decision, not the process (see [103] – [105]); the parties did not address the process' rationality at the hearing (see [100] and [101]); the Supreme Court of Appeal made its decision based on the irrationality of the decision, rather than its process (see [122] and [124]); and PAJA did not contain, as a ground of review, procedural rationality (see [98] and [113]).

BMW SOUTH AFRICA (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (1) SA 484 (SCA)

Revenue — Income tax — Gross income — Payment by employer to tax consultants to render assistance iro its expatriate employees' tax obligations — Whether taxable 'benefit or advantage' — Income Tax Act 58 of 1962, s 1*(i)* sv 'gross income', read with sch 7 paras s 2*(e)* and *(h)*.

BMW South Africa (Pty) Ltd (the taxpayer) paid R6 795 450 for tax consulting services it had procured to achieve 'tax equalisation' in respect of its expatriate employees' tax obligations (see [2] – [3]). Sars took the view that the payments were a taxable benefit in the hands of the employees in terms of the definition of 'gross income' in s 1*(i)* of the Act read with paras 2*(e)* and *(h)* of the seventh schedule, * assessed the taxpayer accordingly and dismissed the taxpayer's subsequent objection (see [5]). The taxpayer's appeal to the Tax Court was dismissed, as was its appeal to a full bench of the High Court (see [7] – [19]).
In this case, a further appeal to the Supreme Court of Appeal, the taxpayer's case was that *(a)* no causal link had been shown between the employment as contemplated in para 2 of the seventh schedule and 'the benefit, advantage or reward' allegedly received by expatriate employees by reason of the services of the tax consultancy firms; and *(b)* relying on academic opinion, that para 2*(e)* only applied where the services were for wholly private or domestic use, while here the services were procured by the taxpayer in pursuit of *its* tax equalisation policy, ie at least partially for the benefit of the taxpayer.
Held
The payments were made in terms of the contract of employment; these were services that the expatriate employees would otherwise have had to pay for personally. The ineluctable conclusion was that the services provided are a benefit or advantage as contemplated by s 1 of the Act, read with para 2*(e)* of the seventh schedule. That there might have been some peripheral advantage to BMWSA, was irrelevant. The primary question was whether an advantage or benefit was granted by an employer to an employee and whether it was for the latter's private or domestic purposes. The compelling conclusion was that the services were correctly valued and utilised for the employees' private or domestic purposes as contemplated by s 1 of the Act read with para 2*(e)* of the seventh schedule. The appeal would accordingly be dismissed. (See [24], [25] and [27].)

NPGS PROTECTION & SECURITY SERVICES CC AND ANOTHER v FIRSTRAND BANK LTD 2020 (1) SA 494 (SCA)

Mortgage — Foreclosure — Judicial execution — Judicial oversight — When triggered — Legally represented debtor obtained mortgage loan to finance his business — Failed to provide court with any information regarding infringement of housing rights, save last-minute statement from bar by legal representative — Summary judgment correctly granted — Court's oversight role not triggered — Constitution, s 26(3); Uniform Rules of Court, rule 46A.

The respondent, FNB, gave the first appellant (NPGS) a R250 000 credit facility. The second appellant, Mr Rwaxa, the sole member of NPGS, stood surety. The loan was also secured by a mortgage bond over Mr Rwaxa's immovable property. NPGS defaulted and FNB issued summons against appellants jointly and severally. FNB also sought an order declaring Mr Rwaxa's immovable property specially executable. In its summons FNB drew Mr Rwaxa's attention to s 26 of the Constitution, informing him that he could not be evicted from his home, or his home be declared executable and sold in execution, without a court order, which could only be granted after the court had considered all the relevant circumstances. The summons drew further

attention to rule 46(1)*(a)*(ii) of the Uniform Rules, which sets out in greater detail the protection afforded to a debtor under s 26. Rules 46(1) and 46A allowed judgment debtors to oppose orders of special execution against their homes.
After both NPGS and Mr Rwaxa gave notice of their intention to defend the action, FirstRand sought and obtained summary judgment in the Johannesburg High Court, which also declared the property specially executable. In resisting summary judgment Mr Rwaxa came up with various defences but failed to list any reasons why his s 26 right would be affected. Instead, the High Court was informed via a statement from the bar that the immovable property was Mr Rwaxa's home. The appellants appealed to the Supreme Court of Appeal.

Held per Davis AJA for the majority

In an application for summary judgment there was — provided the creditor has complied with the requirements of rule 46A — an onus on the debtor, at the very least, to provide the court with information concerning whether the property was his or her personal residence; whether it was a primary residence; whether there were other means available to discharge the debt; and whether there was a disproportionality between the execution and other possible means to exact payment of the judgment debt (see [55]).
While the High Court erred in its finding that a company rather than an individual was affected, it was equally clear that it saw the submission from the bar regarding the loss of primary residence as a mere ruse to escape the consequences of default (see [63]). While the courts had the duty to investigate a debtor's position if it involved an unrepresented litigant, or the loan was not exclusively of a commercial nature, or where at least some evidence suggested that the execution was in respect of a debtor's primary residence, Mr Rwaxa's complete failure to avail himself of rights that were expressly drawn to his attention in the summons dictated the contrary (see [66] – [67]). Imposing an obligation on a court in a case like this one would also cause significant uncertainty, and arguably serious damage, to the efficient provision of credit in the economy (see [67]). Appeal dismissed.

Held per Makgoka JA, dissenting

Judicial oversight was required in all applications for an order of execution against the primary home of a judgment debtor, irrespective of the purpose for which the debt was incurred, and courts should not shirk their oversight role where there was no opposition to the order of execution, even if the debtor was legally represented (see [37]). There was nothing to prevent a court, in a case such as the present, from playing an active role to ensure that its execution order was constitutionally compliant (see [43]). The prayer for execution against Mr Rwaxa's immovable property should therefore be remitted to the High Court for it to conduct the enquiry envisaged in s 26(3) of the Constitution (see [44]).

TELKOM SA SOC LTD v CAPE TOWN (CITY) AND ANOTHER 2020 (1) SA 514 (SCA)

Telecommunication — Network — Facility — Licensee applying for rezoning of private land to allow erection of telecommunications station — Before rezoning approved licensee erecting station — Municipality obtaining declarator that erection unlawful — Challenge on appeal to provisions of municipal bylaw requiring municipality's consent to rezoning of property to allow erection of such station.

Telkom asked the City of Cape Town for a change of zoning of a property, to a zoning that allowed it to put up a telecommunications station. However, before the City approved the application, Telkom erected the station. The City then informed Telkom that it had infringed its bylaw governing zoning, and that Telkom was required to satisfy an administrative penalty before it continued with its application. Telkom approached the High Court for a declarator that the bylaw was invalid. The High Court refused to grant it, instead granting the City's counter-application for a declarator that the erection of the station was unlawful.
Telkom then, with the High Court's leave, appealed to the Supreme Court of Appeal. There Telkom contended that the City's power to consent to or withhold consent to rezoning or to the erection of telecommunications infrastructure was unconstitutional (see [15]).
Telkom argued firstly that, by controlling placement of infrastructure, the bylaw regulated telecommunications, where the City had no competence to do so (see [19]).
Held, though, that, if national or provincial law entirely subordinated a municipality's lawmaking power, then a municipality's was a very limited power indeed (see [21]). And that was not the aim of the Constitution, which was to devolve power on local authorities (see [23]).
Telkom's second argument was that municipalities should not be allowed regulatory control in matters of cross-municipal networking, as then their narrower interests could subordinate the broader (see [24]).
Held, however, that authority was to the effect that municipalities' narrower interests should prevail (see [25]).
Telkom's third argument was that, if municipalities had zoning competence in national or provincial networking matters, providers of such networks would be frustrated in planning and providing such networks (see [26]).
Held, though, that authority provided that national and provincial governments could use their legislative powers to alleviate this possibility, and this had indeed been done (see [26] – [27]).
Held, moreover, that if municipalities had no control over the locating of telecommunications infrastructure, then there would be the anomaly that there would be no control over its placement (see [28]).
Held, therefore, that Telkom's primary argument, namely that the City had no lawmaking power over the siting of telecommunications infrastructure, had to be rejected (see [29]).
Telkom's alternative argument was that the City's requirement of consent to the erection of infrastructure conflicted with s 22(1) of the Electronic Communications Act 26 of 2005 (see [15] and [30]).
Held, in rejecting this argument, that it was indistinct from Telkom's primary one, and incorrect for the same reasons applying to it (see [31] and [39]). Furthermore, in a similar matter, the finding had been that national legislation did not subordinate local planning law (see [32] and [37] – [38]).
Then, in passing, the Supreme Court of Appeal considered the meaning of a well-known passage in *Link Africa*:
'[189] These provisions indicate that licensees, though empowered by national legislation, must abide by municipal bylaws. The only limit is that bylaws may not thwart the purpose of the statute by requiring the municipality's consent. If bylaws exist that regulate the manner (what counsel called the "modality") in which a licensee should exercise its powers, the licensee must comply.'

In the court's view it referenced the principle that where a regulatory power was given, it could not be used to prohibit, wholly or substantially, the activity in question (see [49]).
Telkom's last challenge was to the City's telecommunications infrastructure policy. Telkom asserted it attempted to regulate telecommunications and so went beyond the City's competence (see [52]).
Held, that, to the extent that the policy affected telecoms, it fell within the City's lawmaking power (see [54]).
Telkom's appeal accordingly dismissed (see [55]).

ACHUKO v ABSA BANK LTD AND OTHERS 2020 (1) SA 533 (GJ)

International law — Jurisdiction of courts — Whether South African courts enjoying jurisdiction to consider violation of Bill of Rights in respect of conduct taking place outside territory of South Africa, but having effects within its borders.

This matter concerned a challenge to the conduct of the banks Absa and FirstRand in prearranging non-competitive corn and soybean futures trades on the Chicago Board of Trade. A statutory regulator in the United States, the Commodity Futures Trading Commission (the Commission), had found such trades to constitute non-competitive transactions in breach of American law. In the present proceedings heard before the High Court (Johannesburg), the applicant sought, inter alia, an order declaring the infringing conduct to amount to an infringement of s 27(1)*(b)* of the Constitution — which secured everyone the right to have access to sufficient food and water. In this regard the applicant argued that the banks' conduct would or could compromise the price of food, especially maize meal, in South Africa, creating a risk for food security. The applicant also sought a declarator that participation in non-competitive prearranged trades was unlawful in terms of s 80 of the Financial Markets Act 19 of 2012 (the FMA), and, if not, that s 80 was inconsistent with the Constitution. The banks (first respondent and second respondent) opposed the application; so too the relevant South African regulatory body, the Financial Sector Conduct Authority (the third respondent), as well as the Minister of Finance (the seventh respondent).
The principal argument raised in opposition was that South African courts had no jurisdiction to enquire into or make findings concerning conduct carried out in the US in breach of that country's laws. The court, in addressing such argument, acknowledged that territoriality was the traditional basis upon which jurisdiction was established, and that the extra-territorial assumption of jurisdiction may interfere with the sovereignty of other states. It added, however, that the territorial principle of jurisdiction had a subjective *and an objective aspect*: the subjective aspect recognised the power of the state to enact laws that governed conduct taking place within the territorial borders of the state, while the objective aspect of territorial jurisdiction recognised the power of the state to enact laws that concerned conduct taking place outside of the borders of the state, *the effects of which took place within the borders of the state*. (See [15].)
Held, that it was correct that South African courts should not assume jurisdiction to pronounce upon regulatory violations under United States law. The violation was one against the municipal laws of the United States. But it did not follow that conduct in the United States that had effects in South Africa may not fall within the jurisdiction of

the South African courts. The issue for the South African courts was not whether the conduct was unlawful under the law of the United States, but rather whether the conduct and its consequences infringed rights conferred by the South African Constitution. Such a finding by a South African court did not rest upon the Commission's findings of a violation under the law of the United States, much less any consideration by a South African court as to whether there was such a violation. The South African court was simply concerned with the question as to whether the conduct and its effects infringed, in this case, the Bill of Rights, in particular s 27(1)*(b)*. Such a question fell within the jurisdiction of this court. (See [21] and [25] – [26].) (The court reasoned that if the effects of conduct undertaken abroad occurred in South Africa and those effects gave rise to an infringement of the rights guaranteed in the Bill of Rights, the infringement was no less significant because the effects had their origin abroad (see [22]).)
Held, nevertheless, that the applicant had failed to prove any infringement or threatened infringement of the right to have access to sufficient food, and, accordingly, there was no warrant to declare the conduct of the banks to be unlawful and unconstitutional (see [38]).
Held, further, that there was no live dispute that warranted entertaining the further declaratory relief sought, ie that the prearranged trades were in breach of the FMA, alternatively that the FMA was unconstitutional for failing to censure this conduct (see [43]) – [48]). This was because the FMA had not come into effect at the time the trades took place, and could not be interpreted as having retroactive or retrospective effect (see [42]). Application accordingly dismissed (see [56]).

DRUMMOND CABLE CONCEPTS v ADVANCENET (PTY) LTD 2020 (1) SA 546 (GJ)
Contract — Breach — Remedies — Damages — Calculation — Proper approach.

Advancenet (Pty) Ltd contracted Drummond Cable Concepts and paid it to install wiring to a particular standard. Drummond failed to install to that standard, so breaching the agreement, and, ultimately, Advancenet was obliged to hire a third party to remedy Drummond's deficient work (see [2]).
Advancenet later came to sue Drummond for damages for breach of contract, and the issue, raised on exception, was whether Advancenet's particulars disclosed the *facta probanda* of such a claim (see [1], [4] – [5] and [7] – [8]).
Advancenet asserted that it had calculated its damages as those flowing from its having entered the agreement, and it further asserted that this was legally competent (see [6]).
The court, in upholding the exception, considered positive and negative interesse, and concluded it was bound to the approach that damages are calculated as those flowing from the breach of the agreement, rather than entry into the contract itself.

FOURIE v VAN DER SPUY & DE JONGH INC AND OTHERS 2020 (1) SA 560 (GP)

Legal practitioners — Attorney — Rights and duties — Duties — Duty to execute mandate with required standard of diligence, skill and care — Cybercrime — Payments by law firm, using money held in trust on behalf of client, purportedly on latter's instructions — Emails in fact from unknown third parties who had hacked

client's account — Failure of attorney to employ measures to ensure attorney and client safe from online fraud — Failure to exercise requisite skill, knowledge and diligence of average practising attorney, and thus failure to discharge fiduciary duty to client.

Legal practitioners — Attorney — Rights and duties — Duties — Cybercrime — Duty to employ measures to ensure attorney and client safe from online fraud.

This matter highlighted the risk posed by cybercrime to the attorneys' profession and the duty to employ safeguards when transacting online. The applicant had entered into a contract of mandate with his attorney, the second respondent, of the first-respondent law firm (the firm), instructing her to keep certain moneys belonging to him in her trust account, until further instruction. The second respondent later received emails, purportedly from the applicant, requesting the firm to make certain payments into identified bank accounts. It did so. However, it came to light that such emails had in fact not been sent by the applicant; his email account had been hacked; client as well as attorney had apparently been the victims of cybercrime. In the present application proceedings heard before the Pretoria High Court, the applicant sued his attorney, the firm, as well as the other attorney in the firm — the third respondent — for payment of the aforementioned amounts. The question to be answered, the court held, was: Who must take the knock for the loss described? The attorney? Or the client?
Held, that the second respondent, by transacting via email without employing any measures to ensure that both she and her client would not fall victim to fraud * — knowing full well that it was prevalent in her profession — acted negligently and failed to exercise the requisite skill, knowledge and diligence of an average practising attorney, and thus failed to discharge her fiduciary duty to her client. (See [30].)
Held, that the second respondent had failed to meet her obligation, as principal, to account to her client for the funds held in the firm's trust account on such client's behalf (see [15], [21] and [31]). In this regard, it was no defence to claim that payments were erroneously made to the wrong person (see [15], [21] and [31]).
Held, accordingly, that the second respondent as attorney was liable for the loss suffered by the applicant and that the respondents be ordered to pay him the amount claimed (see [31]).

EX PARTE GOOSEN AND OTHERS 2020 (1) SA 569 (GJ)

Recusal — On grounds of appearance of bias — What constitutes — Sitting judge a member of amicus curiae invited by court to address it on certain legal issues.

Recusal — Application — Locus standi — Of amicus curiae, invited to assist court, to bring application for recusal of judge.

At the direction of the Judge President, in terms of s 14(1)*(b)* of the Superior Courts Act 10 of 2013, a number of advocates' admission applications instituted in the Johannesburg High Court were referred to its full bench, for the purpose of addressing, inter alia, the question whether a person who had qualified for admission as an advocate or attorney, prior to the coming into effect of the Legal Practice Act, was, without more, entitled to admission as a legal practitioner under such Act. The Judge President invited several entities concerned with the legal profession to assist

the full court as amici curiae. One such amicus was the Legal Practice Council (LPC). A judge on the bench hearing the referral, Millar AJ, was a member of that body. Such a fact prompted one of the other amici, the General Council of the Bar (the GBC), to apply for his recusal, the argument being that such was necessary to avoid any perception of bias. This was the judgment in such application.
The critical question to be answered in this matter, the court held — after having provided a summary of the relevant principles pertaining to applications for recusal (see [10] – [14]) — was the following: Could there be an apprehension, reasonably held, that Millar AJ was likely to be biased about the views expressed on behalf of the LPC, in circumstances in which he, an attorney in private practice, served, in a part-time and unremunerated capacity, representing the Attorneys Fidelity Fund, as a non-executive member of such very body? (See [22].)
The court, in addressing such a question, examined — its being a relevant fact (see [14]) — the specific role played by an amicus invited by a court to assist by providing its perspective in respect of issues at stake (see [17]). The court noted that an amicus was not a party to the litigation. No order was sought against it, and it may not pray for an order in its own favour. It had in this sense no 'interest' in the outcome as would a party. In a matter such as the present one, in which no additional facts were laid before the court, an amicus's role was limited to a contribution of an opinion about the law from the perspective of an informed person, as opposed to a self-interest; in the case of the LPC, it was the correct interpretation of the law which it as a regulatory body had to apply. (See [17] – [18].)
The court held that in this case, where the LPC had expressed no 'official position' (see [18]) on an issue at stake, it could not be said that a member of the LPC acting in a judicial role could be compromised. Millar AJ was, in any event, not bound by the views of the LPC in his personal capacity or his professional capacity as an attorney, still less in his capacity as an acting judge. (See [26].) What existed here, the court held, was 'mere association'. More was needed: the association had to be of a nature to contaminate the expectation of a fair and unbiased decision. (See [27].) The court held, quoting from an Australian case, that there had to be 'an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a judge [had] an interest in litigation, or an interest in a party to it, [would] be of no assistance until the *nature of the interest, and the asserted connection with the possibility of departure from impartial decision making [was] articulated*.' [Emphasis supplied.] (See [29].)
The court concluded that the recusal application was without merit, and refused it (see [30]).
(The court also held that the application could be refused on the basis of lack of standing, suggesting that there were sound policy considerations that confined standing in regard to recusal of a judge to a party, and *not extending standing to an amicus* of the kind who appeared in this matter (see [20]).)

HABIB AND ANOTHER v ETHEKWINI MUNICIPALITY 2020 (1) SA 580 (KZD)

Practice — Pleadings — Exception — Prescription raised in exception rather than in special plea — Whether exception is an irregular proceeding.

Plaintiff had bought a property from a third party in defendant municipality's area. The municipality demanded that plaintiff pay the third party's rates, and plaintiff did.

The Constitutional Court later declared that a municipality could not compel someone in plaintiff's position to pay the prior owner's rates, and plaintiff instituted an action for return of what it paid.
The municipality excepted to plaintiff's particulars of claim, as disclosing no cause of action, in that they were lacking averments to show the claim was still extant, that it had not prescribed.
Plaintiff then delivered a notice to the municipality, asserting that the municipality's exception was an irregular proceeding, in that prescription could not be raised on exception. Prescription, it asserted, must be raised in a special plea. The municipality did not respond.
Plaintiff now applied to set aside the exception.
The question before the court was, if prescription was raised by exception, whether the exception was an irregular step (see [6]).
The court *held* that it was not, and that the approach a court should adopt, if presented with an exception raising prescription, was to examine if the particulars of claim were indeed excipiable — whether they contained insufficient averments to sustain a cause of action (see [16] and [19]).
Here, the particulars of claim did contain sufficient averments to sustain one (see [24]).
The court dismissed the application to set aside the exception as an irregular step, and it also dismissed the exception (see [25]).

GORDHAN v MALEMA 2020 (1) SA 587 (GJ)

Equality legislation — Hate speech — What constitutes — Requirements — 'Words based on one or more of the prohibited grounds' — Prohibited grounds — Unlisted grounds — Character of such grounds must be eiusdem generis with those of listed grounds — Not encompassing statements vilifying person other than on ground of one or more personal attributes, as defined — Not encompassing purely personal attacks — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 1 sv 'prohibited grounds' and s 10.

On 20 November 2018 Mr Julius Malema, the leader of the Economic Freedom Fighters, in a speech to a crowd of his supporters, accused Mr Pravin Gordhan, the present Minister of Public Enterprises, of being 'a dog of White Monopoly Capital' * that had to be 'hit until the owner comes out', and 'a cabal that belongs to the UDF and destroyed all good African comrades'. Mr Malema went on to declare that '(w)e've now taken a decision to fight Pravin', and that there would be 'casualties', and 'even loss of life'. In the present matter heard before the Equality Court, Mr Gordhan submitted that such statements constituted hate speech in contravention of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), in that they were based on one of the listed prohibited grounds (as set out in the definition of 'prohibited grounds' in s 1), namely his race or ethnicity as an Indian South African, and they were intended to be hurtful; be harmful or to incite harm; and to propagate hatred. Mr Gordhan acknowledged that his Indian identity was not overtly expressed in the utterances, but that an anti-Indian bias was implied by the talk of his being a member of 'a cabal that belongs to the UDF'; those to whom the speech was directed would have understood this to be a reference to an exclusively Indian group within the UDF (the

United Democratic Front, a political party active during the 1980s, committed at the time to opposing apartheid) who had been accused, in various fora, of trying to suppress African leadership within the party (see [10]).
The court found that the content and tenor of the utterances were clearly disparaging of Mr Gordhan, and intended to be hurtful and promote hatred of him. The key issue, in its view, however, was whether they went any further: were they discriminatory within the meaning and purpose of the Equality Act? (See [8].)
The court held that the comments made by Mr Malema against Mr Gordhan did not fall within the listed prohibited ground of race or ethnicity (see [12] and [14]). The implied accusation behind the statement that Mr Gordhan was part of a cabal of the UDF was to the effect that a group composed of Indians had been racist towards Africans; there was no allegation that Indians were, by reason of their ethnic identity, racist. Nor was there any call to vilify Indians as a class. (See [11] – [12].) Further, in calling Mr Gordhan 'a dog' of 'white monopoly capital', Mr Malema was condemning his alleged personal connivance with such alleged evil social force; his own race or ethnic identity was not implicated (see [14]).
The court further held that the comments in question did fall within any unlisted ground envisioned in part *(b)* of the definition of 'prohibited grounds' in s 1 of the Equality Act. The character of these 'other grounds' had to be understood to be eiusdem generis with those grounds listed in *(a*) (see [18]). Accordingly, the effect of an utterance on a particular person which vilified that person, but did not vilify that person on the ground of one or another personal attribute, as defined, was not the subject-matter of s 10 (see [19]). The attacks on the applicant were personal in nature only (see [20]). The application accordingly had to fail.

MABUDUGA v NEDBANK LTD 2020 (1) SA 599 (GP)

Credit agreement — Consumer credit agreement — Debt review — Whether consumer entitled to exit, withdraw from, or terminate debt review process after application for debt review — National Credit Act 34 of 2005, s 86(1).

Nedbank Ltd, enforcing a consumer credit agreement, instituted action and obtained default judgment against Mr Mabuduga. This, after it was served with a notice of Mr Mabuduga's application for debt review (under s 86(4)*(b)*(i) of the National Credit Act 34 of 2005) and a subsequent notice by the debt counsellor that the application had been 'voluntarily withdrawn by the consumer'.
In this case, Mr Mabuduga's application for rescission, the parties requested the court to make a draft order, reached by consent, an order of court. The court, however, raised the issue of whether it was competent for a consumer to exit, withdraw from, or terminate the debt review process after their application in terms of s 86(1). The parties thereafter presented the court with a second draft order addressing this issue.
Held
No provision in the NCA empowered the consumer to do so (see [16]). After Mr Mabuduga had filed his application in terms of s 86(1), it was out of his hands to withdraw his application, or from the debt review process. The withdrawal was therefore ultra vires and of no force and effect. Accordingly, from date of receiving notice in terms of s 86(4)*(b)*(i), Nedbank was barred from instituting action, which made its summons premature. The debt review process must resume from where it

derailed: in the application process, and while the matter was in the statutory hands of the debt counsellor. (See [19] – [20].)
The second draft order — rescinding the judgment, withdrawing the main action, and resuming the debt review process by placing the matter back in the hands of the debt counsellor — was good in law and would be made an order of court.

RAKGASE AND ANOTHER v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND ANOTHER 2020 (1) SA 605 (GP)

Administrative law — Administrative action — Review — Of decision not to sell land to 78-year old African farmer who qualified for grant but instead to enter into 30-year lease — Failure to hear affected person, to furnish reasons, to act rationally and reasonably — Failure to comply with constitutional imperative to realise land reform — Constitution, 1996, ss 25 and 237; Promotion of Administrative Justice Act 3 of 2000, ss 3(1) and 6(2)*(h)*.

Constitutional law — Duties of state — Duty to perform constitutional obligations diligently and without delay — Land reform — Decision not to sell land to 78-year old African farmer who qualified for grant but instead to enter into 30-year lease — Failure to convert tenuous land rights when able to do so, amounting to breach of constitutional obligation — Constitution, 1996, ss 25 and 237.

Land — Land reform — Restitution — Duty of state — Breach — Failure to comply with constitutional imperatives — Decision not to sell land to an African farmer who qualified for grant but instead to enter into 30-year lease — Failure to convert tenuous land rights when able to do so, amounting to breach of constitutional obligation — Constitution, 1996, ss 25 and 237.

Mr Rakgase leased a farm from the (then) Bophuthatswana Homeland Government and subsequently from the National Government, the current owner of the farm. Then, in 2003, the provincial grant committee of the National Department of Agriculture approved Mr Rakgase's application to purchase the farm through the then operative Land Redistribution for Agricultural Development Programme (LRAD). However, seven years later the delegate of the relevant Minister, the Deputy Director-General: Land and Tenure Reform (the DDG), decided not to approve the sale of the farm to Mr Rakgase, but instead to lease it to him for a period of 30 years, ostensibly to see if he qualified to purchase the farm.
This case concerned an application by Mr Rakgase and his son (who also lived on the farm in question) to have the DDG's decision not to sell, but to lease, the farm reviewed and set aside, and that the Minister be ordered to take the necessary steps to have the farm transferred to the applicant.
Held
The decision was procedurally unfair under PAJA, s 3(1)
This section applied where the person concerned had a legitimate expectation that before an adverse decision were to be taken by a public authority, they would at least be given an opportunity to be heard. Mr Rakgase's expectation that the decision for approval of the disposal of the land to him would follow, was reasonable, competent and lawful; and the DDG, in considering the adverse decision, did not give him any opportunity to be heard or to make representations. The DDG's decision should therefore be set aside on the grounds of procedural unfairness alone. (See [5.1].)

The decision was unreasonable under PAJA, s 6(2)(h)
Apart from the requirement in s 5 to furnish reasons, s 6(2)*(h)* of PAJA as a separate substantive ground, required that administrative action must itself be reasonable. In the absence of any legitimate justification for why the decision was not 'absurd', the DDG's decision was clearly so unreasonable that no reasonable decision-maker could have taken the decision in the fashion that he did. This ground of review would therefore also succeed. (See [5.2].)
The decision was irrational
The DDG's decision appears to have been taken completely arbitrarily. The Constitution required every administrative action to be underpinned by plausible reasons, justifying the action taken. However, the DDG gave no reasons at all; the absence of reasons by itself rendered the decision arbitrary. While arbitrariness was but one of the forms of irrationality, the decision itself appeared to be irrational: where an organ of state was presented with an opportunity to implement the constitutional imperatives prescribed in s 25 of the Constitution and had the means to do so through a structured grant procedure for which an African farmer with a proven track record had qualified, then a decision not to sell to that farmer state land which the state did not otherwise require, and which was not utilised for any other function of service delivery, was irrational. This ground of review would therefore also succeed. (See [5.3])
The decision was unconstitutional
The decision was a breach of the state's constitutional duty to realise land reform. Section 237 of the Constitution required that all constitutional obligations must be performed diligently and without delay This was a perfect opportunity to realise one of its imperatives — the transfer of ownership of land. The failure to grasp such an opportunity with both hands amounted to a breach of a constitutional duty. This was even more so where an opportunity presented itself to remedy tenuous occupational rights acquired in a former homeland as a result of apartheid policy, but ignored without reasons or justification. This ground of review would therefore also succeed. (See [5.4].)
Appropriate relief
The court would substitute its decision for that of the DDG. Exceptional circumstances had been established, and a substituting decision would be just and equitable (see [6]).

RAUMIX AGGREGATES (PTY) LTD v RICHTER SAND CC AND ANOTHER, AND SIMILAR MATTERS 2020 (1) SA 623 (GJ)

Practice — Judgments and orders — Summary judgment — Applications — Effect of amended rule 32 on applications initiated before its coming into effect — Amended rule not applying retrospectively — Uniform Rule 32.

Before its amendment (effective 1 July 2019) rule 32 of the Uniform Rules provided that a plaintiff could apply for summary judgment upon delivery of a notice of intention to defend; after its amendment a plaintiff may only apply for summary judgment after delivery of the plea. Following a number of conflicting decisions as to whether the amendment had retrospective effect (see [2] – [4]), the Judge President issued a directive referring the matter to the full court for decision.

The full court — after restating the principles regarding retrospectivity at [7] – [17]), and for the reasons set out at [18] – [27] — *held* that the amended rule did not apply retrospectively to pending applications for summary judgments initiated before 1 July 2019 (see [27] – [28]).

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC v MOODLIAR AND OTHERS 2020 (1) SA 632 (WCC)

Company — Winding-up — Liquidator — Remuneration — Where provisional liquidation order discharged — Whether liquidator entitled to retain estimate of remuneration in attorneys' trust account as security for payment thereof pending taxation by Master.

In two related matters, final liquidation orders in respect of the applicant companies were set aside on appeal on the basis that the provisional liquidation orders were incorrectly granted, the court of appeal replacing the final liquidation orders with orders discharging the provisional liquidation orders. Shortly before the hearing of the appeal, the liquidators (the first respondents) paid over the amount of their estimated fees to a firm of attorneys (the fourth respondents) to be held as security for the payment of their fees upon taxation thereof by the Master. (See [9] – [11].) Here the companies applied for declaratory relief that the retained moneys, approximately R16,8 million, be returned to them. The liquidators contended that the fact that the remuneration had not been taxed or agreed did not detract from their entitlement to retain sufficient funds to cover that which they considered to be their reasonable remuneration (see [29]).

Held

It was firmly established in our law that (i) liquidators must immediately on the discharge of a company from liquidation deliver to the company or its directors all its assets; (ii) liquidators' appointment end simultaneously with the discharge and they retain no powers in respect of the company or its assets; and (iii) liquidators have no lien or other form of security over company assets as security for their fees. (See [24].)

The liquidators' contention was not supported by the Companies Act of 1973, the Winding-up Regulations, the relevant case law or by legal commentators on insolvency (see [30]). It was clear that, under the Companies Act of 1973 and the Winding-up Regulations, liquidators may not simply retain funds for themselves, out of the assets of the company, for what they proposed as their fees. The case law cited by the liquidators offered no authority for the proposition that they were entitled to retain sufficient funds to cover their remuneration (see [35] – [42]). Liquidators' proposed fees must first be taxed by the Master and the quantum accordingly determined. (See [43].)

Where a provisional liquidation order was discharged, the fact that liquidators may in law be entitled to reasonable remuneration as taxed by the Master did not infer a right to retain their estimated fees from funds held by them, and to pay them over to a firm of attorneys to hold as security for payment of their fees as taxed by the Master. (See [49].) Accordingly, the companies were entitled to the declaratory relief sought (see [81]).

STENERSEN & TULLEKEN ADMINISTRATION CC v LINTON PARK BODY CORPORATE AND ANOTHER 2020 (1) SA 651 (GJ)

Housing — Consumer protection — Community Schemes Ombud — Appeal against adjudicator's order — Nature of appeal — Correct procedure — Community Schemes Ombud Service Act 9 of 2011, s 57.

This case concerned a statutory appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act) against an adjudicator's order. Because of divergent approaches in different divisions of the High Court regarding the correct procedure for bringing such an appeal (see [6]), the Judge President of the Gauteng Division issued a directive constituting a full court to determine the manner and procedure to be followed.
The lis between the parties became settled during the hearing, and the remaining issues were (i) which category of appeals an appeal brought in terms of s 57 of the Act fell into; and (ii) what process must be followed by an appellant in launching such an appeal.
Held as to (i)
An appeal to the High Court against a decision of the adjudicator contemplated in s 57 was an appeal in the ordinary strict sense, with the proviso that the right of appeal was limited to questions of law only. It was a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, ie the record and the adjudicator's order and reasons. The question for decision was whether the order of the statutory body performing a quasi-judicial function was right or wrong — in respect of a question of law — on the material which it had before it. (See [42] – [43].)
Held as to (ii)
For purposes of forming an appeal record, the following would be sufficient: the application filed with Community Schemes Ombud Service; any subsequent exchange of written submissions between the parties to the adjudication; and the adjudicator's written reasons for their determination (see [37]). The prescribed procedure for all appeals on the question of law contemplated in s 57 of the CSOS Act, would be as set out in the order in [44].

SA CRIMINAL LAW REPORTS FEBRUARY 2020

FREEDOM OF RELIGION SOUTH AFRICA v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2020 (1) SACR 113 (CC)
Assault — Common assault — Defences — Parent's right to moderate and reasonable chastisement of child — Constitutionally invalid.

In this case a child was assaulted by his father, the state brought a charge of common assault against the man, and a magistrate convicted him (see [5]). The man appealed, and the High Court, in the course of dismissing the appeal, mero motu found the defence of moderate and reasonable chastisement to be inconsistent with the Constitution and invalid (see [6]).

Here the Constitutional Court granted Freedom of Religion South Africa (FoR), an amicus below, leave to intervene as a party, and direct access; and FoR sought leave to appeal the High Court's declaration (see [13], [20] and [28]).
The court found that chastisement, even if moderate and reasonable, was violence within the meaning of s 12(1)*(c)* of the Constitution — 'the right to be free from all forms of violence' — and so limited that right (see [36], [39] and [44]). It also limited s 10, the right to dignity (see [45] and [48]).
And it further found that the defence of moderacy and reasonableness was, on a charge flowing from chastisement, an unjustified limitation of those rights (see [50] and [71]).
In coming to this conclusion it considered: the difference between chastisement administered by a parent, and that by an institution (see [51]); that invalidating the defence might remove a culturally or religiously directed form of child discipline (see [52]); the vulnerability of children (see [55]); the constitutional obligation to protect a child's rights (see [56]); that neither the Constitution nor international law recognised a parent's right to chastise (see [63]); that little had been advanced to suggest chastisement was in a child's best interests (see [65]); and that there were less restrictive means to instil discipline (see [68]).
It declared the common-law defence of moderate and reasonable chastisement inconsistent with ss 10 and 12(1)*(c)* of the Constitution; and it refused leave to appeal (see [76]).

S v DAVIDS AND ANOTHER 2020 (1) SACR 134 (WCC)

Court — Jurisdiction — District courts — Magistrate submitting matter to regional court despite having called for reports for sentencing purposes — Reasons for committal not set out and committal not explained to appellants — Procedure adopted irregular — Criminal Procedure Act 51 of 1977, s 116(1)*(b)*.

The appellants appealed against the sentences of nine years' imprisonment of which two years were suspended, imposed on them in a regional court for housebreaking with intent to steal and theft. They had broken into business premises and stolen a laptop computer.
The matter commenced in a magistrates' court, but when the appellants' previous convictions were disclosed after conviction the magistrate noted that the court would be considering a reviewable sentence and ordered the acquisition of reports from a probation officer and a correctional officer. The matter was thereafter postponed several times for the purposes of sentencing. The reports were never obtained, and the matter was forwarded to the regional court where the magistrate confirmed the convictions and imposed the sentences referred to. On appeal,
Held, that the order for the acquisition of the two reports for purposes of sentencing stood. They had never been set aside by a competent court and could not simply be disregarded. The correct procedure for committal to the regional court as envisaged by s 116(1)*(b)* of the Criminal Procedure Act 51 of 1977 had not been followed. The reasons for such committal also had to be clearly expressed and the committal should unequivocally appear on the record of proceedings. It did not appear that the committal in the present case had been explained to the appellants and the matter was accordingly not properly placed before the regional court. (See [15] – [16].)

The court, nevertheless, decided that it was a matter in which it should interfere with the sentences which were replaced with a sentence of four years' imprisonment of which two years were suspended for five years. (See [22].)

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND ANOTHER v MINISTER OF JUSTICE AND OTHERS 2020 (1) SACR 139 (GP)

National security — Telecommunications — Interception of communications — State practice of 'bulk interceptions' of telecommunications traffic — Whether interpretation of National Strategic Intelligence Act 39 of 1994 providing authority — Practice unlawful, given absence of any law authorising such practice — National Strategic Intelligence Act 39 of 1994.
Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Failure of Act to provide right of notice to subject of interception order — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy and access to justice not justifiable — Constitution, ss 14, 34 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(7), 17(6), 18(3)*(a)*, 19(6), 20(6), 21(6) and 22(7).
Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — 'Designated judge' — Failure of Act to prescribe appointment process and terms for designated judge that ensured independence — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy not justifiable — Constitution, ss 14 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, s 1 sv 'designated judge'.
Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — No proper procedures in Act to be followed when state officials examining, copying, sharing, sorting through, using, destroying and/or storing collected data — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy not justifiable — Constitution, ss 14 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 35 and 37.
Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Journalist — Potential for exposure of confidential sources — Failure to expressly address circumstances where subject of surveillance is journalist — Less restrictive means existing to achieve objectives of Act — Unjustifiable breach of right to freedom of expression and of media — Constitution, ss 16(1) and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*.
Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Lawyer — Potential revealing of legally privileged communications — Failure to expressly address circumstances where subject of surveillance is lawyer — Less restrictive means existing to achieve

objectives of Act — Unjustifiable breach of right to privacy, freedom and fair-trial rights — Constitution, ss 14, 35(5) and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*.

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

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

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

(a) Lack of notice — RICA, in terms of s 16(7)*(a)*, expressly forbade any disclosure to the subject of the interception. In doing so, the court held, RICA violated the right to access to courts secured in s 34 of the Constitution, as the subject who might have wrongly had their privacy violated was denied the chance to seek redress (see [43]). The court noted that the approach adopted here was out of sync with other democratic countries, which had embraced the right to a *post-surveillance notice*, subject to the power of the relevant judicial officer to delay the granting thereof, should good cause be shown. (See [47] – [51].) Such a mechanism served to ameliorate the intrusion into the privacy of persons, because it afforded redress by a court if abuse occurred (see [48]). This mechanism, the court held, as contemplated by s 36(1)*(e)* of the Constitution, amounted to a less restrictive means to achieve the purpose of RICA, and the state had not justified its rejection (see [51] – [52]). The

court declared RICA, including ss 16(7), 17(6), 18(3)*(a)*, 19(6), 20(6), 21(6) and 22(7), unconstitutional to the extent that it failed to prescribe a procedure for notifying the subject of the interception. In addition, it declared that RICA should be deemed to read to include, inter alia, an obligation on the applicant who had obtained an interception notice to subsequently notify the subject of the interception. (See [53] – [54], and see [169] for full orders.)

(b) Designated judge and process of evaluation — The court held that the independence of the designated judge was compromised where their appointment — to perform, in secret, such an inherently contentious function, for which they received remuneration — was at the sole discretion of the Minister of Justice, and where their term of office was renewable (see [62] – [63]). It declared RICA (including the definition of 'designated judge' in s 1) unconstitutional in its failure to prescribe an appointment process and terms for the designated judge that ensured such judge's independence. The court left the question of the final choice — a question of policy — as to a more appropriate appointment process, in the hands of Parliament, but, as an interim measure, granted a declarator to the effect that the Chief Justice nominate the appointees for the role of 'designated judge' (to be appointed by the Minister for a non-renewable term). (See [70] – [71] and full order in [169].)

The court further held that the fact that the designated judge evaluated, alone, the applications for interception on a purely ex parte basis — and without any input from a third party — implicated the interception subject's rights to a fair hearing (see [72]). Less restrictive measures as envisaged in s 36(1)*(e)* of the Constitution existed to achieve the objectives of RICA (see [73]), which included the creation of the role of a public advocate to assist in the evaluation process (see [72]), or to have a panel of judges evaluate the interception application (see [80]). The court declared RICA unconstitutional (including s 16(7)) in its failure to provide for appropriate safeguards to deal with the fact that the orders in question were granted ex parte (see [81] and [82] and full order in [169]).

(c) Failure to provide adequate safeguards concerning the custody and management of information gathered by surveillance — As to the information that was obtained through interception, the court held that RICA failed to put in place safeguards to limit the potential impact on the right to privacy, in the form of prescribed proper procedures to be followed when state officials were examining, copying, sharing, sorting through, using, destroying and/or storing data. (See [90], [101], [108].) RICA (especially ss 35 and 37) was unconstitutional, the court held, and it granted a declaration to such effect. (See [108], and full order in [169].) The court rejected the state's answer that the SAPS had internal measures that set out appropriate guidelines and safeguards; that, the court held, could not be good enough; the statute that subtracted from privacy rights was the appropriate location to effect that subtraction, including the safeguards to limit the extent thereof. (See [101].)

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

The court also noted the potential, in circumstances in which *a journalist* was a subject of surveillance, of confidential communications with 'secret sources' being revealed. The right to freedom of expression and of the media in terms of s 16(1) of the Constitution, the court held, was implicated. The court acknowledged that s 16 of the Constitution did not expressly address the confidentiality of sources (see [131]);

however, if a purposive interpretation was applied to such section, one was compelled to conclude that such right also encompassed the rights that, except in extreme circumstances, journalists' confidential sources were protected from prying. (See [133].) This was in recognition of the critical instrumentality of confidential sources in enabling the media to fulfil their constitutionally protected role (see [131] and [133].)
The court held that, in line with the norm of minimum intrusion to meet an ad hoc need, a statutory obligation should exist, for those making application for an interception order, to disclose the status of the subject, and statutory allowance for the designated judge to impose appropriate conditions in acknowledgement of the subject's status, possibly providing for an intermediary to sift through the data if warranted. The court concluded that RICA's failure to provide therefor rendered it unconstitutional (see [127], [128], [136], [140] and full order in [169]), and the court declared it (ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*) as such. It in addition granted an order to the effect that, pending the enactment of legislation to cure the defect, RICA would be deemed to include provisions described in this paragraph (see full order in [169]).
Bulk interception — The court held that, in the absence of a law authorising it, the bulk surveillance engaged in by officials of the South African state was unlawful, and granted a declaratory order to such effect (see [147] and [165]). The court rejected the proposition that the National Strategic Intelligence Act 39 of 1994 authorised such conduct (see court's analysis in [150] – [165]).

S v MACHEKA 2020 (1) SACR 189 (FB)

Theft — Sentence — Theft by attorney of trust moneys — Fifty-year-old attorney convicted of stealing R50 000 payment from Road Accident Fund — Having been struck off roll of attorneys before commencement of trial — Court noting prevalence of offence but upholding sentence of 30 months' imprisonment on appeal.

The appellant, a 50-year-old attorney, was convicted in a magistrates' court of theft of money from his trust account in an amount of R49 702 that was due to the victim of a road accident. He was sentenced to 30 months' imprisonment. The appellant had been struck off the roll of attorneys before the trial. The court dismissed the appeal against the conviction, holding that the trial court had correctly found the appellant to be an untruthful witness and had rejected his version as false beyond reasonable doubt. In respect of sentence it was contended for the appellant that a sentence of correctional supervision would be more appropriate, as the appellant had already been punished by having been struck off the roll of attorneys. He had also been diagnosed with diabetes, high blood pressure and tuberculosis. His spouse was sick and had been diagnosed with cancer, but this information had not been substantiated with any evidence or the production of any medical certificate. The respondent contended that the theft of trust funds was a serious offence and that the 30 months' custodial sentence was actually too lenient.
Held, that the court had properly taken into account the prevalence of this particular type of offence and noted that the Attorneys Fidelity Fund had paid out huge amounts to the public, that had been lost by members of the profession. It could be accepted that the appellant's deed was motivated by greed and not need, and his lack of remorse for his actions impacted negatively on his chances of rehabilitation.

There were no reasons to tamper with the sentence imposed by the trial court. (See [31] – [32].) The appeal was dismissed.

S v MSOMI 2020 (1) SACR 197 (ECG)

Cybercrime — Sentence — Serious nature of offences emphasised — Such types of crime having far-reaching consequences for economy and public, and courts to impose sentences reflecting this — Interception of data communication to transfer funds from local authority to members of syndicate — Appellant, 42-year-old first offender with master's degree in computer science, sentenced to effective 10 years' imprisonment — Electronic Communications and Transactions Act 25 of 2002; Prevention of Organised Crime Act 121 of 1998.

The appellant was charged in the Specialised Commercial Court with two counts of fraud, three counts relating to contraventions of the Electronic Communications and Transactions Act 25 of 2002 and two counts of contraventions of the Prevention of Organised Crime Act 121 of 1998. It was alleged that he, together with other members of a syndicate, made use of Winspy to capture keystrokes for overcoming security measures designed to protect data or access to data, namely computer user names and passwords, without the authority of the local authority; the unlawful interception of random verification numbers required to effect electronic transfers from the local authority's bank account; gave out and pretended to Absa Bank that payments into mentioned beneficiary accounts were made by duly authorised municipal officials in the normal course of business and that the beneficiaries were entitled to the payments; and that aware of the fact that the funds were proceeds of criminal activities, entered into arrangements with the beneficiaries, which had the effect of concealing or disguising the nature, source or ownership of the funds and enabling the appellant and other syndicate members to remove the funds by making cash withdrawals or requesting transfers to various other bank accounts.
He pleaded guilty to all the charges and a written statement in terms of s 112 of the Criminal Procedure Act 51 of 1977 was handed in. The various counts were grouped and in respect of each group he was sentenced to 15 years' imprisonment, the sentences to run concurrently. He appealed against the sentence.
It appeared subsequent to the magistrate passing sentence that, in respect of some of the offences, the sentences imposed exceeded the maximum prescribed sentences for those offences and that, in respect of two of the counts, a prescribed minimum sentence of 15 years' imprisonment was applicable. The magistrate had accordingly been under a duty to consider whether there were any substantial and compelling circumstances which justified a lighter sentence, but there was no indication that the magistrate had given due consideration to this. It was submitted on behalf of the appellant that the mitigating factors which had been placed before the court a quo from the bar had not been disputed by the state, namely that the appellant was a first offender who was 42 years of age and had a master's degree in computer science; that he was not the initiator of the crimes and had been enticed by other members of the syndicate to become involved; the actual prejudice in consequence of all the counts was limited to R600 000 and the appellant himself benefited only to the extent of some R50 000; that he had performed a secondary role in the planning and execution of the offences; and that he had shown genuine remorse and had played open cards with the state and the police (he had also

assisted the police in successfully pursuing and prosecuting the case against other members of the syndicate).
Held, that the submission that the appellant played only a secondary role in the planning and execution of the offences and that he was consequently somehow less morally blameworthy could not be accepted. It was common cause that he played a central role in the execution of the crimes and it would not have been possible for the syndicate to execute their plans were it not for the appellant's exceptional expertise. (See [28] – [29].)
Held, further, that the offences of which the appellant was convicted were very serious. These types of cybercrimes had far-reaching consequences for the economy and the public, and the courts had to impose sentences that reflected the serious nature thereof. It was so that there was unfortunately a misguided perception that these crimes were somewhat less morally reprehensible than fraud and theft committed in the 'old-fashioned way', encouraged perhaps by films in which cyber criminals were portrayed as debonair and devil-may-care rebels who fought a lone and just battle against an evil system. The reality was, however, far uglier. (See [34].) In all the circumstances an effective sentence of 12 years' imprisonment, of which two years were suspended, would be appropriate. The appellant would therefore serve direct imprisonment of 10 years. (See [37].)

S v NKOSI AND ANOTHER 2020 (1) SACR 206 (GJ)
Evidence — Identification — Dock identification — Witness to traumatic cold-blooded murder making initial statement to police that unable to identify shooter but week later stating that could identify him and giving description of features — Witness subsequently recognising perpetrator from picture in newspaper placed by police seeking assistance from that person — Witness identifying accused in dock as shooter — Evidence of witness held to be reliable.
Evidence — Identification — Evidence of identification of person in newspaper photograph placed at request of police — Although dangers inherent in such identification, such constituting necessary means of apprehending criminals.

The first appellant was convicted in the High Court of murder and was given leave by the Supreme Court of Appeal to appeal against his conviction. The second appellant had not been granted leave and his name on the notice of set-down signed by the registrar appeared to have been based on an error. The appellant's conviction arose from an incident in which the deceased had been followed by two occupants of a Volkswagen Golf into his office parking lot. The passenger in the Golf got out of the car and approached the deceased and fired a few shots at him through the door and then, after the door was opened, the shooter fired several more shots at him. The incident was observed by the crucial state witness who had also just alighted from his own car and, when the shooter ran back towards the Golf, he saw the witness standing at his car, pointed his firearm at him, and got into the Golf which then drove off. Shortly after the incident the witness made a statement to the police in which he said that he would not be able to recognise the shooter. Less than a week later he changed his statement and said that he would be able to identify the shooter and gave a description of him. The appellant was only arrested some nine months later and did have the features described by the witness, who also testified that he recognised the appellant as the shooter from a photograph in a daily newspaper which described the person as someone who could assist the police in identifying a

second suspect. An identification parade was arranged. While the witness was travelling to the identification parade with a very experienced detective, however, he told him that he had seen the suspect's picture in the newspaper, and the detective then aborted the parade. At the trial, the witness identified the appellant as the shooter in the incident that he had observed.
On appeal, counsel for the defence challenged the reliability of the witness's identification of the appellant, particularly given the discrepancies in his statements.
Held, that, while there was no doubt that the evidence of a witness on identity, who had first claimed that he would not be able to identify a suspect, was to be treated with great circumspection, it did not per se render his evidence on identity untruthful. In the present case the witness claimed to be scared for his life, having witnessed what appeared to be the actions of a cold-blooded killer who had not concealed his identity, but had no compunction to kill in broad daylight in the proximity of others, and had in fact pointed the firearm he had just used to kill someone else. Accordingly, the explanation for not being willing to identify the shooter was understandable. (See [24], [28] and [29].)
Held, further, that there were further indications of the witness's trustworthiness in that he had subsequently provided detail regarding the appearance of the shooter nine months before his arrest; his unchallenged evidence that he recognised the appellant from a photograph in the newspaper; and the fact that the identification parade was aborted because of his statement that he had seen the photograph of the appellant in the newspaper. (See [31] – [35].)
Held, further, that there was a risk that a person seeing the photograph in the newspaper may be influenced into believing that the photograph was that of the suspect, and therefore an essential safeguard of an identification parade was absent, but, in the pursuit of apprehending an alleged criminal in the interests of justice, it might be the only course. There would be more and more occasions where the only reasonable means of locating a suspect was by circulating their photograph or police sketch in the print or electronic media, and it would be absurd to suggest that the only means of apprehending a suspect had in it the very seed by which that person would comfortably escape justice. (See [46] – [48].)
Held, accordingly, that the trial court's acceptance of the state witness's identification of the appellant had to stand, and the appeal against the conviction had to be dismissed. (See [50].)

MASINDI AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2020 (1) SACR 216 (GP)

Prosecution — Malicious prosecution — Damages — Quantum — Plaintiffs held for 16 days in very poor circumstances and subjected to sexual abuse by inmates in crowded cell that lacked privacy — First and second plaintiffs awarded R20 000 and R40 000 per day, respectively.

The plaintiffs instituted action for damages against the defendant for malicious prosecution arising from their arrest and detention for 16 days on a charge of rape. The respondent conceded the merits of the action and in the present proceedings the court was merely required to determine the quantum of damages.
The plaintiffs had been placed after their arrest in a 3 x 10 metre container cell situated on the premises of the police station. It had a small window with burglar bars

and there was only one toilet in the corner of the container. There were more than 20 arrested people inside the container and there was no privacy in relation to using the toilet. The plaintiffs were humiliated by the other inmates of the cell and sexually abused. It appeared that there was no evidence against the plaintiffs other than a DNA analysis which proved negative. They had also appeared at an identity parade but were not pointed out. Counsel for the respondent submitted that, in respect of the first plaintiff, the court should take into consideration that he had an extensive criminal record and should not be enriched by being awarded a large amount by way of general damages. There was no proof of the loss of future earnings or proof of past and future medical expenses.
Held, that, having assessed all the circumstances of the case, including the duration of detention and the emotional effect thereof, it would be fair and appropriate to award damages in the amount of R20 000 per day in respect of the first plaintiff, and R40 000 per day in respect of the second plaintiff, for the 16 days of their detention. (See [35].)

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FirstRand Bank Limited t/a Wesbank v Davel (University of the Free State Law Clinic as *amicus curiae*) [2020] 1 All SA 303 (SCA)

Consumer – Credit agreements – Cancellation of agreement on default and repossession of goods – Attachment and sale in execution of goods – Right of debtor to challenge estimated values and price realised upon a sale of goods after repossession by the credit provider – Section 128 of National Credit Act 34 of 2005 allows for a contestation in relation to a disputed sale of goods.

After confirming the cancellation of an instalment sale agreement in respect of a vehicle, and ordering the return of a motor vehicle purchased in terms thereof, the Court below made an additional order requiring the appellant ("Wesbank"), within ten business days after receiving the vehicle, to provide the respondent with a written notice in which it set out the estimated value of the vehicle, and informed the respondent that the vehicle would not be sold at a price less than such an estimated value unless so sanctioned by the Court, and then after a notice had been provided to the respondent. That order was at the centre of the present appeal.

Wesbank had sued the respondent for payment after the latter defaulted on the repayment obligations under the credit agreement. The Court had no difficulty in accepting that the bank, in the face of default, was entitled to cancel the instalment sale agreement and obtain the return of the vehicle, but expressed concern about the price at which the vehicle would later be resold by the bank.

Held – The concerns of the Court below were legitimate but the relevant part of the order as referred to above, was made without a proper appreciation of the architecture of the National Credit Act 34 of 2005 and was not in accordance with its provisions. The order required recrafting to protect the rights of both credit providers and consumers**.**

The relevant provisions of the Act establish that the Legislature was intent on ensuring that sufficient protections are provided to ensure that, upon termination of a credit agreement, a consumer is protected. The Act provides mechanisms for a consumer to challenge the estimated values and the price realised upon a sale of

goods after either a surrender of the goods by a consumer or the repossession of the goods after action has been taken by the credit provider. In terms of the Act, sellers in instalment sale agreements are entitled, in the normal course, upon default by purchasers, to claim from the latter the amount they would have received had the purchasers fulfilled their contractual obligations. The proceeds of the sale of the motor vehicles concerned would ultimately have to be brought into account in determining how much is still owing or, depending on the amount recovered, the surplus amount that accrued to the purchaser.

The Court below, in formulating the disputed part of its order, did not fully appreciate the architecture of the Act. More particularly, it did not have sufficient regard to the provisions of section 128, which allows for a contestation in relation to a disputed sale of goods. That contestation can take place by direct engagement with the credit provider, after referral of the dispute to the Tribunal, or after the submission of a complaint in terms of section 136 with the National Credit Regulator.

The appeal was upheld to the extent reflected in the substitution order crafted by the court.

Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd [2020] 1 All SA 314 (SCA)

Contract – Services rendered – Liability for payment disputed on ground that contractual terms were not fulfilled – Proof of contractual terms – Parol evidence rule – Where the parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction, and no evidence may be led to prove its terms other than the document itself nor may the contents of the document be contradicted, altered, added to or varied by oral evidence.

The appellant conducted business as a drilling and borehole contractor. In a quotation provided to the respondent, it undertook to drill a borehole for it on a farm, and guaranteed that if no water was found at 70m it would drill from 70m to 100m free of charge. That led to the appellant drilling a borehole on respondent's farm, to a depth of a little more than 70m. The borehole yielded approximately 4000 litres of water per hour.

When the respondent refused to pay the appellant for its services, the latter successfully sued in the Magistrate's Court. On appeal however, the High Court found for the respondent, stating that the appellant had not discharged the onus of proving it had provided sufficient water to comply with its contractual obligations and was therefore not entitled to receive any payment at all. The appeal against that decision was with the special leave of the present Court.

The respondent's case changed during the course of the proceedings. It finally contended that the appellant had guaranteed to provide a minimum water supply of 10 000 litres and that, as it had not done so, the respondent was excused from paying any sum at all.

Held – The respondent's allegation that the appellant had guaranteed a borehole with a yield of 10 000 litres per hour and that as the hole did not deliver such a yield, it was not obliged to pay, was not borne out by the evidence to find that there was agreement on such a guarantee would breach the rule of parol evidence which prescribes that where the parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction; and no evidence may be led to prove its

terms other than the document itself nor may the contents of the document be contradicted, altered, added to or varied by oral evidence.

The trial court was correct in concluding that the respondent's defence to the appellant's claim, namely that the appellant had guaranteed a yield of 10 000 litres per hour, could safely be dismissed. The High Court's decision was clearly wrong and it had no reason to interfere with the trial magistrate's careful analysis of the evidence and the conclusion that court reached.

The appeal was upheld, with costs.

Qwelane v South African Human Rights Commission and another (Freedom of Expression Institute and another as *amici curiae*) [2020] 1 All SA 325 (SCA)

Hate speech – In terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; or promote or propagate hatred – Overbreadth and vagueness – Section 10(1) constitutionally invalid insofar as it imposed a limitation on freedom of expression wider than section 16(2)(c) of the Constitution, and which limitation could not be saved by any interpretive exercise.

In July 2008, an article directed against the gay community was published in a national tabloid newspaper. It was penned by the appellant, a well-known anti-*apartheid* activist and journalist in South Africa. The publication was met with a huge public outcry and the first respondent, the South African Human Rights Commission (the "HRC") received 350 complaints in that regard.

The HRC instituted proceedings against the owner of the newspaper ("Media24") and the appellant in the Equality Court, alleging that the article contravened section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Media24 and the appellant launched an application in the High Court seeking to have section 10(1), read with sections 12 and 1 and 11 of the Act declared unconstitutional for being inconsistent with the provisions of section 16 of the Constitution. The proceedings in the High Court and the Equality Court were consolidated. The Court upheld the complaint against the appellant, finding that the offending statements against homosexuals were hurtful, incited harm and propagated hatred, and that they accordingly amounted to hate speech for purposes of section 10(1). The present appeal was then brought.

Held – Section 10(1) states that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; or promote or propagate hatred.

In examining the scope of section 10(1), the Court found that the Legislature sought to provide protection as broadly as possible, by imposing liability for expressions in any of the forms set out in the lead-in part of section 10(1). While the provisions certainly restricted the right to freedom of expression (guaranteed in section 16 of the

Constitution), the question was whether they extended beyond the provisions of section 16(2)(c) of the Constitution and, if so, whether they were justifiable. The Court held that section 10(1) was indeed a limitation of the freedom of expression wider than section 16(2)(c) of the Constitution, and that it could not be saved by any interpretive exercise.

The appeal was upheld with costs. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act was declared to be inconsistent with the provisions of section 16 of the Constitution and therefore unconstitutional and invalid. The order was referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

Salzmann v S [2020] 1 All SA 361 (SCA)

Criminal law and procedure – Leave to appeal to Supreme Court of Appeal – Jurisdiction of High Court to grant special leave to appeal to Supreme Court of Appeal – Where trial of accused commenced in lower court before commencement of Superior Courts Act 10 of 2013, and the conviction, sentence and unsuccessful appeal to the High Court taking place thereafter, High Court not competent to subsequently grant special leave to appeal to Supreme Court of Appeal.

In the wake of the hacking of the network of a leading mobile cellular company ("Cell C"), suspicion fell upon the appellant who, until some three weeks prior to the incident, had been employed by Cell C as an IT Remote Access System Administrator. He was charged in the Specialised Commercial Crimes Court, Johannesburg (the "SCCC") with various contraventions of section 86 of the Electronic Communications and Transactions Act 25 of 2002. Almost ten years later, he was convicted on two charges but acquitted on a third on the basis that it constituted an impermissible splitting of charges. It was found that he had contravened section 86(1) by having unlawfully accessed Cell C's computer network without authority or permission, and he was convicted of having contravened section 86(5) by unlawfully causing data on Cell C's system to be modified or altered or destroyed or rendered ineffective, which resulted in a partial network failure and constituted a denial of service to the legitimate users of the system. On 17 August 2015, the appellant was sentenced to a fine or 12 months' imprisonment on the first count and to three years' imprisonment on the other count.

He appealed against his conviction and sentence to the High Court, which dismissed the appeal. He now applied to the Supreme Court of Appeal ("SCA") for special leave to appeal against his conviction and sentence. Two issues arose. Those were whether leave to appeal to the SCA was properly granted; and whether the appeal against conviction and sentence should be granted.

Held – The appellant's trial in the SCCC was still proceeding when the Superior Courts Act 10 of 2013 came into operation. Up until then, a High Court hearing an appeal from a lower court (such as the SCCC) was competent to grant leave to appeal further to the Supreme Court of Appeal if it dismissed the appeal – and if it refused such leave, the appellant could then apply to the SCA for leave. However, that was altered with the commencement of the Superior Courts Act. Section 52 of that Act provides that proceedings pending in any court at the commencement of the Act, must be continued and concluded as if the Act had not been passed. Proceedings must, for the purposes of the section, be deemed to be pending if, at the commencement of the Act, a summons had been issued but judgment had not been passed.

The High Court did not have the jurisdiction to grant special leave to appeal to the present Court. The proceedings pending when the Superior Courts Act came into effect was the appellant's trial itself. Those proceedings terminated when the appellant was convicted and sentenced. The deeming provision in section 52(2) of the Superior Courts Act therefore had no relevance to the appellant's subsequent appeal to this Court following the dismissal of his appeal in the High Court. The latter accordingly had no jurisdiction to grant leave to appeal to this Court. Without this Court giving leave, the appeal was not properly before it and the Court had no jurisdiction to hear it.

Having determined that leave to appeal was required, and accepting that the failure to apply in time to the present Court for leave was to be condoned, the court turned to consider whether leave should be granted. The Superior Courts Act applied, and section 16(1)(b) thereof prescribes that an appeal against a decision of a Division of the High Court heard on appeal, lies to this Court with its special leave. What is meant by special leave requires more than merely the reasonable prospect of success on appeal. The party applying for such leave has already enjoyed, albeit unsuccessfully, a right of appeal to the High Court, and so must show special circumstances which merit a further appeal. Finding no special circumstances demanding the matter be heard, the Court struck the appeal from the roll.

Chard v Old Mutual Insure Limited (MV "Rascal") [2020] 1 All SA 381 (KZD)

Discovery – Application, in terms of rule 35(6) of the Uniform Rules of Court, to compel delivery of certain expert reports – Defence of litigation privilege – Party resisting furnishing of reports precluded from relying on litigation privilege to avoid furnishing the requested documents, where it had at all times shown an intention to attempt to resolve the claim.

The applicant was the owner of a vessel which partially sank in the Durban Marina, sustaining damage, including damage to its engines. In terms of a contract of insurance concluded between the applicant and the respondent ("Old Mutual"), the sinking of the ship was an insured peril.

The issue between the parties in the present action was whether the vessel, as a result of the sinking, became a constructive total loss, or whether Old Mutual was only liable to pay the applicant the reasonable cost of repair of the vessel, or the reasonable sound market value thereof, which Old Mutual contended was in the amount tendered.

Pursuant to the sinking of the vessel, various experts were appointed by both parties to investigate the cause of the sinking. Old Mutual's expert reports formed the subject the matter of the present application, with the applicant claiming, in terms of rule 35(6) of the Uniform Rules of Court, delivery of certain expert reports. Old Mutual maintained that it was not obliged to disclose any of the documents sought by the applicant because it was entitled to raise the defence of litigation privilege.

Held – A court will not lightly go behind the averments in a party's affidavit in order to investigate that party's intention when the report was requested. In the present case, Old Mutual could not rely on litigation privilege to avoid furnishing the requested documents, as it had at all times shown an intention to attempt to resolve the claim. Litigation was not contemplated.

The Court ruled that the applicant was entitled to most of the relief sought.

Furniture Bargaining Council v AXZS Industries (Pty) Ltd trading as Don Elly Enterprises [2020] 1 All SA 391 (GJ)

Compulsory winding up application – Impact of voluntary winding up application – Court satisfied that company was commercially insolvent and unable to pay its debts, and had opposed the compulsory winding-up application for the purpose of delay – Voluntary winding up application ruled to have no impact on the compulsory winding-up application.

A unique point of law raised in this matter related to the impact of a shareholders resolution to commence a voluntary winding-up on a pending compulsory winding-up application.

The applicant was a bargaining council for the furniture manufacturing industry established in terms of section 27 of the Labour Relations Act 66 of 1995. The respondent's business was regulated by the applicant and was within the applicant's area of jurisdiction. For a number of accounting periods, the respondent had deducted money from its employees' salaries, but had failed to pay over such money to the applicant as it was obliged to do under the main collective bargaining agreement. That led to an arbitration award where the respondent agreed to pay the money due to the applicant. It failed to comply with that undertaking and the applicant successfully applied to the Labour Court to have the arbitration award made an order of court. No portion of the indebtedness was then paid by the respondent to the applicant since the order was taken.

As a result, the applicant caused a writ of execution to be issued against the respondent's movable property, but a *nulla bona* return was received. The winding up of the respondent was then sought.

Held – By operation of section 345(1)(b) of the Companies Act 61 of 1973, the respondent had to be deemed unable to pay his debts. The Court was satisfied that the respondent was commercially insolvent and had simply opposed the winding-up application for the purpose of delay. A final winding-up order was granted. The attempt to commence a voluntary winding-up order was intended to frustrate the granting of a final winding-up order. The voluntary winding up application had no impact on the compulsory winding-up application.

Glencore South Africa Oil Investments Proprietary Limited v Ramano and others [2020] 1 All SA 403 (GJ)

Unopposed application – Liability for costs – Whether it is inappropriate to make a costs award where application is unopposed – Where applicant was found to have been entitled to bring the application, and to do so on an urgent basis, it was as a successful party, entitled to its costs despite application not being opposed.

As a result of the failure of the first to eighth respondents (collectively "the shareholder respondents") to give an undertaking that they would honour certain prior irrevocable undertakings relating to their shareholdings in the tenth respondent ("ALI"), the applicant ("Glencore") obtained an order directing the relevant respondents to remedy the situation. The costs of the application, including the costs of two Counsel, were to be paid by the first respondent ("Ramano"). Ramano maintained that, as none of the respondents had opposed the application, it was improper to make an adverse costs order against him. By agreement, an amended order was entered, providing for costs

to stand over for determination. The matter was set down in the motion court for argument on costs.

Held – The applicant, as a successful party, should be entitled to its costs unless there are good reasons for the court to exercise his discretion and refuse the costs order. The Court rejected the contention that it is inappropriate to make a costs award where the application is unopposed. It also found that Glencore was entitled to bring the application, and to do so on an urgent basis.

The first respondent was ordered to pay the costs of the application as set out in the order.

Gordhan v Malema (Freedom of Expression Institute as *amicus curiae*)
[2020] 1 All SA 417 (GJ)

Constitutional and Administrative Law – Hate speech – Whether utterances made in public forum contravened section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Test – Whether the utterances could reasonably be construed to demonstrate a clear intention to be hurtful, *harmful or incite harm*, *promote or propagate hatred is objective*, *in that the effect of the words on hearers or readers is what is relevant – Effect of an utterance on a particular person which vilifies that person*, *but does not vilify that person on the ground of one or another personal attribute*, *as defined*, *is not the subject matter of section 10*.

In a speech to a crowd of his supporters on 20 November 2018 outside the venue where the hearings of the Zondo Commission into State capture were being conducted, the respondent ("Malema") made certain utterances about the applicant ("Gordhan"). The issue before the Equality Court was whether the utterances contravened section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Section 10 contains a prohibition against hate speech.

Held – The test, as set out in section 10, is whether the utterances could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, promote or propagate hatred is objective in that the effect of the words on hearers or readers is what is relevant. The test seeks out the dominant impression reasonably created by hearing or reading the words. The question in the present case was whether the utterances were discriminatory within the meaning and purpose of the Act.

The objectives of the Act are to create measures to address the injustices that result from social inequalities by combating unfair discrimination. Its enactment is to give effect to section 9 of the Constitution as required by section 9(4). In particular section 9(3) and (4) deals with discrimination on a list of grounds which the definition of prohibited grounds in section 1 of the Act replicates. The effect of an utterance on a particular person which vilifies that person, but does not vilify that person on the ground of one or another personal attribute, as defined, is not the subject matter of section 10. While the respondent's verbal attack on the applicant was personal in nature, section 10 was not engaged.

The application was dismissed.

Minister of Police v Kunene and others [2020] 1 All SA 451 (GJ)

Judgment by consent – Authority to settle claim – State Attorney's authority – Ostensible authority may be used to hold the client, as principal, to a settlement or compromise of a claim even in circumstances where the attorney acted contrary to the direct instructions of the client, and the State Attorney's authority to bind clients to a settlement of a claim is broader than that of a private attorney – Exceptional circumstances of case leading court to rule that the Minister of Police should not be held to the settlement.

Civil Procedure – Judgment by consent – Rescission application based on common law – At common law, a judgment by consent may be rescinded on the grounds of justa causa, where there is an absence of a valid agreement to support the judgment.

An order granted in a civil action instituted by the first respondent as plaintiff directed the applicant (the "Minister") as defendant in the action, to compensate the plaintiff for all the proved and/or agreed damages arising from an unlawful assault perpetrated upon the plaintiff on 7 August 2013 by members of the South African Police Service (the "SAPS").

A second order was granted on 2 March 2018, on the basis of a stated case which included a tender by the Minister of an amount of damages in the sum of R34 077 000 and a recordal that the tender was acceptable to the plaintiff. The order was made, directing the Minister to pay that sum by way of damages. The tender had been made by the State Attorney. The Minister disputed the validity of the State Attorney's actions in that regard. According to the Minister, he was not lawfully bound by the concessions made which led to the two court orders. The present application was therefore for rescission of the orders.

The Minister cited the second and the fourth respondents in their personal capacities. The second respondent was the Head of the office of the State Attorney in Johannesburg and the fourth respondent was an admitted advocate. They both faced various investigations by different authorities regarding allegations of unprofessional, fraudulent and corrupt conduct on their part. The investigations arose from the manner in which they allegedly dealt with the plaintiff's case, but also extended to what was alleged to be similar conduct on their part in other matters involving, among others, the Minister.

Held – The rescission application was based on the common law. At common law, a judgment by consent may be rescinded on the grounds of *justa causa*, where there is an absence of a valid agreement to support the judgment. The Minister contended that in settling the case on the merits, the State Attorney acted without the consent of the Minister, and contrary to the directions of the SAPS Legal Service Department to defend the action, and to appoint counsel to do so. Accordingly, the Minister contended that the State Attorney did not have authority, as the agent for the Minister, to concede the merits and the *quantum* orders, and these orders should be set aside. It was also contended that the concession on the merits by the State Attorney was irrational and contrary to the principle of legality.

With regard to an attorney, the court stated that ostensible authority may be used to hold the client, as principal, to a settlement or compromise of a claim even in circumstances where the attorney acted contrary to the direct instructions of the client. The State Attorney's authority to bind clients to a settlement of a claim is broader than

that of a private attorney. Based on ostensible authority, it would ordinarily be difficult for an Organ of State to avoid being held bound by settlements reached by the State Attorney even if against its express instructions. However, the exceptional circumstances of the present case led the Court to rule that the Minister should not be held to the settlement. The rescission application was thus upheld.

Oosthuizen and others v Ethekwini Municipality and another
[2020] 1 All SA 472 (KZD)

Referral for oral evidence – Disputes of fact – Uniform rule 6(5)(g) – Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.

In December 2016, the first respondent municipality obtained an order evicting two entities ("P and D Cleaning Services CC" and "Judkins") and all persons occupying through them from certain properties. The order was obtained by consent between the municipality, P and D Cleaning Services CC and Judkins and referred to the portion of the property known as Newmarket Lodge. In obtaining the order, the municipality did not comply with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the "Act").

In June 2017, the applicants sought an urgent interdict, in the form of a rule *nisi,* against the respondents, preventing their eviction from the properties and disconnecting their water and electricity supply to the Newmarket Lodge pending determination of the present application. A consent order was taken by the municipality and the applicants, in terms of which the municipality undertook not to instruct the sheriff of the court to evict the applicants from the properties, and not to disconnect the water and electricity supply to the properties.

At the hearing of the matter, the applicants sought the referral of the matter for the hearing of oral evidence. The municipality opposed the referral for oral evidence as on the applicants' version, four occupants including the fifth, sixth and seventh applicants were commercial sub-tenants in respect of whom the municipality need not comply with the Act. Consequently, they were subject to the eviction order and had no right to the relief sought. The municipality submitted that the remaining applicants had not advanced any factual basis to support the contention that they resided on the properties. In addition, the fourth and ninth applicants took occupation of the properties after the grant of the eviction order.

The municipality alleged that no agreement of lease existed between the parties and further that the occupiers had no right to occupy any portion of its property.

The applicants' contended that the occupants of the properties did not obtain occupation of the premises through Newmarket Lodge CC nor through Judkins or P and D Cleaning Services and consequently did not have notice of the application for eviction (which had been served on those three entities). They also maintained that there had not been compliance with the provisions of the Act.

Opposing the application for the interdict, the municipality stated that the applicants were sub-lessees of a party or parties against whom the municipality obtained an eviction order; the eviction order was obtained against such parties as commercial tenants, and consequently the provisions of the Act did not apply; and that the

applicants had no right to occupy the properties and therefore could not obtain an interdict as they did not have a clear right.

Held – Amongst the issues for determination were whether or not there were disputes of fact, which ought to be referred for the hearing of oral evidence; whether the applicants resided at the properties and occupied the properties through Newmarket Lodge CC, P and D Cleaning Services CC and/or Judkins; whether or not the municipality was obliged to comply with the provisions of the Act prior to evicting the applicants from the properties; and whether Judkins acted as agent for the applicants and was authorised to consent to the December 2016 order.

The critical question was when, how and through whom the applicants had come to occupy the properties. The applicants failed to provide straight answers to those questions. The Court harboured strong suspicions that they derived their occupation from Judkins and appointed Judkins to act as their agent in negotiating a lease with the municipality. If that were true, then it would not be open to the applicants to contend that Judkins had no authority to act on their behalf when consenting to the order. However, the papers did not go far enough for the Court to make an order based thereon.

Uniform rule 6(5)(g) states that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. The rule sets out three options which a court can follow, namely, to dismiss the application, to refer the matter for the hearing of oral evidence and to refer the matter to trial. In deciding to refer a matter for the hearing of oral evidence a court has a wide discretion.

Only a court hearing oral evidence could determine how the applicants derived their occupation of the properties. The application was therefore referred for the hearing of oral evidence on the questions raised by the court.

Randgold and Exploration Company Ltd and another v Goldfields Operations Ltd and others, *In re*: Randgold and Exploration Company Ltd and another v Goldfields Operations Ltd and others [2020] 1 All SA 491 (GJ)

Evidence – Foreign witnesses – Procuring of evidence via video-link – Invocation of tools of compulsion – While the South African Foreign Courts Evidence Act 80 of 1962, the Protection of Business Act 99 of 1978 and section 40(1) of the Superior Courts Act 10 of 2013 empower a South African court to assist a foreign court to obtain evidence from a witness in South Africa, none of those Acts empowers a South Africa court to require a foreign court to assist it to obtain evidence from a witness who is outside South Africa.

The applicants sought an order authorising the issue by the court of the letters of request directed at obtaining evidence from certain identified foreign witnesses, through the medium of video-link. The letters of request were to be made to certain foreign authorities in respect of the identified foreign witnesses.

Essentially, the applicants sought the Court's approval to permit testimony to be given abroad and to be relayed to the Court through the use of video-link technology. Specifically, they asked that the Court invoke the assistance of, and the tools of compulsion, available to the foreign judicial authorities in question, to compel the witnesses to testify abroad and to provide documents to the applicants.

The applicants contended that the procedure or approach requested for securing the evidence was neither novel or out of the ordinary – and that precedent existed both in South Africa and in the foreign jurisdictions for the relief sought. The first respondent contended that no such precedent existed.

Held – The Court was not persuaded that it had the authority to direct foreign judicial authorities to give effect to the relief sought by the applicants. The order that the applicants sought was tantamount to the present Court requesting a foreign court to compel a witness to attend court proceedings in South Africa. The South African Foreign Courts Evidence Act 80 of 1962 does not empower a South African court to provide to a foreign court "the assistance" or any commitments that the applicants sought the Court, reciprocally, to request from the foreign judicial authorities. The South African Foreign Courts Evidence Act, the Protection of Business Act 99 of 1978 and section 40(1) of the Superior Courts Act 10 of 2013 empower a South African court to assist a foreign court to obtain evidence from a witness in South Africa. None of those statutes empowers a South African court to require a foreign court to assist it to obtain evidence from a witness who is outside South Africa. On the contrary, the Court was prohibited from extending reciprocity to a foreign court in the form requested.

The Court considered the position in each of the four foreign jurisdictions cited by the applicants. It found that compulsion based requests was not competent within any of the four foreign jurisdictions.

The right to procure examination by interrogatories is expressly catered for in the Superior Courts Act. The Uniform Rules of Court, which derive their validity from section 30 of the Superior Courts Act, provide for the right to procure evidence by commission *de bene esse*. The applicants opted not to use that option, stating that the procuring of evidence by way of a commission *de bene esse* was exceptionally costly.

The applicants were found not to have established any justiciable basis upon which the Court could make the representations of law and of fact detailed in the individual letters of request.

The application was dismissed.

Special New Fruit Licensing Limited and others v Colours Fruit (South Africa) (Pty) Limited and others [2020] 1 All SA 523 (WCC)

Agriculture – Breeding of plant materials – Ownership of plant materials bred – Acquisition of ownership through specification – Refers to the working of a thing belonging to another into a new product – As nothing had happened to the disputed plant material to make it difficult to identify as the plant material originally provided, acquisition of ownership through specification did not take place.

Intellectual property – Breeding of plant materials – Ownership of plant materials bred – Reliance on alleged tacit agreements – Test in determining existence of tacit agreements – Whether party alleging existence of tacit contract has shown on a balance of probabilities unequivocal conduct on the part of the other party that proves that it intended to enter into a contract with it – Unequivocal conduct by parties pointing to existence of contract on terms pleaded by plaintiff.

The plaintiffs claimed ownership and plant breeders' rights in respect of certain plant materials which they contended belonged to a company ("Vitis") registered in the

United Kingdom and subsequently liquidated. The first plaintiff ("SNFL") acquired the rights to the disputed plant materials from Vitis in terms of an asset sale agreement concluded with the second and third plaintiffs, the liquidators of Vitis.

According to the first, second and third defendants, the disputed plant materials were not created in terms of an agreement between Vitis and first defendant ("Colors SA"), but were created by Colors SA for its own account and benefit since the service agreement with Vitis was non-exclusive and was varied during January 2011.

Held – The issues for determination were whether the disputed plant materials were produced in terms of a Vitis breeding programme and for the benefit of Vitis or whether it was produced for Colors SA's own account and benefit with the knowledge and approval of Vitis and SNFL; and secondly, the ownership of the disputed plant materials and all intellectual property rights attached to it.

Vitis and Colors SA concluded a sub-licence agreement in terms of which Colors SA would render table-grape breeding and related services to Vitis. In terms of the agreement Colors SA conducted breeding projects for the benefit of Vitis. In evaluating the main witnesses, the Court found that the defendant's witness struggled to reconcile his evidence with the pleaded case, leading him to give contradictory and highly unsatisfactory evidence.

The plaintiffs' case was that a tacit agreement existed between Vitis and Colors SA in terms of which Colors SA agreed to carry out breeding and related services in South Africa on behalf of Vitis. In the event of the tacit agreement's termination or of Colors SA no longer providing services to Vitis for the purposes of the South African breeding programme, Colors SA would return all the South African plant materials and breeding records to Vitis. The test to be applied in determining the existence of a tacit contract is whether the party alleging the existence of the tacit contract has shown on a balance of probabilities unequivocal conduct on the part of the other party that proves that it intended to enter into a contract with it. On a conspectus of all the evidence the court found that the plaintiffs had shown, on a balance of probabilities, unequivocal conduct on the part Colors SA proving the existence of a contract on the terms and conditions pleaded by plaintiffs.

Colors SA raised further defences alleging lack of exclusivity in its relationship with Vitis and variation of the agreement so that it no longer bred on behalf of Vitis, but was only co-responsible for the maintenance of the existing Vitis assets and plant material. The Court rejected both submissions. An allegation that Colors SA undertook the breeding programme for its own benefit with the knowledge and approval of Vitis and SNFL was also unsustainable as no disclosure was made to the effect that Colors SA was breeding for its own account.

A further contention by Colors SA was acquisition of ownership of the plant materials through specification (ie working up a thing belonging to another into a new product). That argument was neither pleaded nor substantiated by the evidence. On the facts, nothing had happened to the disputed plant material to make it difficult to identify as the plant material provided by Vitis and no evidence of a *nova species* was presented. Acquisition of ownership through specification therefore did not take place.

SNFL was thus held to be the lawful owner of all the plant materials.A counterclaim by Colors SA was found to be unsupported by sufficient evidence and was dismissed.

Van der Merwe NO and others v Moodliar NO and another and related matters [2020] 1 All SA 558 (WCC)

Company law – Liquidation of company – Application for reconsideration of order extending liquidators' powers – Where order extending powers of liquidators was followed by a series of acts by the liquidators which could not be easily undone, court refusing reconsideration application.

Corporate and Commercial – Company law – Liquidation of company – Application for removal of liquidators – No entitlement to relief where no basis was established and where removal application was brought at an advanced stage of the liquidation process.

Corporate and Commercial – Company law – Liquidation of company – Application for re-opening of the first liquidation and distribution account – Where basis for application was vaguely pleaded, court refusing application with a punitive costs order.

In September 2014, the Standard Bank of South Africa Ltd (the "bank") obtained an order for the provisional winding-up of Zonnekus Mansion (Pty) Ltd (the "company") on the basis that it was unable to pay its debts. The bank was a secured creditor of the company. The provisional order was confirmed and a final order for the winding-up of the company was granted and final liquidators were appointed.

Various business rescue applications were then brought, having the effect of suspending the liquidation proceedings.

Three applications were subsequently brought, and were before the Court. The first was for the removal of the liquidators; the second was for the re-opening of the first liquidation and distribution account and the institution of an enquiry into the conduct of the liquidators; and the third was for reconsideration of an order granted more than 4 years earlier extending the powers of the liquidators under section 386(5) of the Companies Act 61 of 1973.

Held – The order extending the powers of the liquidators was followed by a series of acts by the liquidators, which could not now be easily undone. The Court was of the view, not only that no basis for reconsideration had been established, but that the application was an abuse of process on the part of those interests. The application was dismissed with a punitive costs order.

The application for the re-opening of the first liquidation and distribution account and the institution of an enquiry into the conduct of the liquidators was based on allegations of fraud and theft, which were vaguely pleaded. The Court was unimpressed with the allegations levelled against the liquidators and refused the relief, again with a punitive costs order.

Various grounds were set out in support of the application for removal of the liquidators. However, the Court found that no basis whatsoever had been established for the removal of the liquidators. The removal application was also brought at an advanced stage of the liquidation and it would not be in the interests of the general body of creditors (none of whom had lodged any complaints about the liquidators' conduct) to order a removal and reappointment of new liquidators at this stage. The application was dismissed.

World Net Logistics (Pty) Ltd v Donsantel 133 CC and another
[2020] 1 All SA 593 (KZP)

Shipping – Maritime claim – Jurisdiction – Whether Magistrate's Court can entertain a maritime claim – The Magistrates' Courts Act 32 of 1944, which prescribes the jurisdiction of the Magistrates' Courts makes no express or implied provision for the exercise of admiralty jurisdiction, and such courts have no jurisdiction to decide maritime claims – Magistrates' Court correctly dismissing action.

In September 2013, the appellant and the first respondent concluded a written agreement (the "service agreement") for the provision of freight forwarding services by the appellant to the first respondent. At the same time, the second respondent bound himself as surety and co-principal debtor (the "suretyship agreement") for all debts due by the first respondent to the appellant.

The service agreement contained the consent by the first respondent to the jurisdiction of the Magistrates' Courts.

Two special pleas were raised. The first was that the court *a quo* did not have jurisdiction to entertain the suit on the basis that the claim was a maritime claim as defined in section 1 of the Admiralty Jurisdiction Regulation Act, 1983 and that only the High Court exercising its admiralty jurisdiction could determine the dispute. The second special plea related to a contention that the appellant was obliged to register as a credit provider in terms of the relevant provisions of the National Credit Act, 2005 and that its failure to do so precluded it from recovering any debt alleged to be due to it where such debt arose from the provision of credit by it.

The first special plea was upheld, leading to the present appeal.

Held – The Magistrates' Courts have no jurisdiction to decide maritime claims. The Magistrates' Courts Act 32 of 1944, which prescribes the jurisdiction of the Magistrates' Courts makes no express or implied provision for the exercise of admiralty jurisdiction. The Court referred to the various aspects of admiralty practice which are not available in the ordinary jurisdiction of the Magistrates' Courts.

As the claim was a maritime claim, the magistrate could not have referred the matter to the admiralty court and was obliged to hear the action, or dismiss the action. Once his jurisdiction was challenged, he was compelled to decide whether the matter was a maritime claim. Having found that it was, it fell to be dealt with in terms of the Admiralty Jurisdiction Regulation Act, which he could not do. The magistrates' courts have no jurisdiction to apply the provisions of the Act, and there is no provision in the Magistrates' Courts Act, 1944, to transfer the matter to the High Court exercising its admiralty jurisdiction. The magistrate therefore had no option but to dismiss the action as he did.

The appeal was accordingly dismissed with costs.

End-for- now