LEGAL NOTES VOL 6/2020

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SA LAW REPORTS JUNE 2020

BENHAUS MINING (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (3) SA 325 (SCA)

Revenue — Income tax — Deductions — Capital expenditure in mining operations — Mining operations — What constitutes — Whether taxpayer, by excavating and digging mineral-bearing ore for fee on delivery to entity processing such ore, undertaking 'mining operations' — Income Tax Act 58 of 1962, s 1 sv 'mining operations'; ss 15*(a)* and 36(7C).

The principal issue in this appeal (from the Tax Court to the Supreme Court of Appeal) was whether the appellant taxpayer (Benhaus) derived income from mining operations in the tax years 2005 – 2009, such that it was entitled to claim deductions of capital expenditure in those years in terms of s 15 read with s 36(7C) of the Income Tax Act 58 of 1968 (the Act). Benhaus was a contract miner: it entered into contracts with third parties that held mining rights, rendering various services to them for a predetermined fee without itself trading in the mineral extracted. The essence of the contracts was that Benhaus would extract chrome-bearing ore on behalf of the client in return for a fee calculated at a rate per ton thereof delivered to the client's processing plant. Benhaus claimed that it was mining the ore, and claimed deductions in each year of the capital expenditure on the machinery used in extracting the mineral-bearing ore.

The Commissioner issued additional assessments for the years in question on the basis that ss 15 and 36(7C) did not apply. This because, in the Commissioner's view, Benhaus was not engaged in mining as it did not itself process the mineral-bearing ore or trade in it; and its income was not derived from mining but from fees for related services (see [12] and [36]).

[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!**

Held
It had long been recognised that the process of extraction amounted on its own to a mining operation, and that the processing of the ore was a different one (see [33]). And, it must be so that the expression 'mining operations' covered work done on mineral-bearing property in preparation for winning of the mineral, otherwise miners would not be able to recover expenditure on capital assets laid out before, even long before, a mine started producing (see [36]).
A company that excavated ground and dug up mineral-bearing ore for a fee on delivery to another entity that processed the ore, undertook mining operations within the meaning of ss 1 and 15*(a)*. Benhaus was thus entitled to claim deductions in terms of s 36(7C) of the full amount of capital expenditure on mining equipment in the tax year in which they were incurred. The appeal would accordingly be upheld.

MEYERS v MEC, DEPARTMENT OF HEALTH, EC 2020 (3) SA 337 (SCA)

Medicine — Medical practitioner — Malpractice — Negligence — Surgical operation — Bile duct injured during gallbladder removal — Whether evidence establishing negligence.

Respondent MEC's servant, a surgeon, operated on appellant, Ms Meyers, to remove her gallbladder (see [2], [15] and [70]). During the operation, two small injuries were done to appellant's bile duct, causing infection.
Appellant later sued respondent, claiming the injury was negligently caused (see [3] and [70]). A High Court dismissed the action on the basis that negligence was not proven; and appellant, with the High Court's leave, appealed unsuccessfully to the full court. Here, with special leave, appellant appealed to the Supreme Court of Appeal.
That court was divided in its assessment of whether the evidence suggested negligence.

Ponnan JA, writing for the majority, upheld the appeal (see [83]). In his view, while extent of the effect (major or minor injury) might well in the case of major injury suggest a negligent cause, minor injury did not negate the possibility of its cause being negligent (see [80]). In this instance, at the close of appellant's case, the evidence suggested negligence, and this inference was unmoved by respondent's evidence (see [82]).

Plasket JA, writing for the minority, would have dismissed the appeal.
In coming to do so, he considered expert evidence on appellant's part, that any injury to the bile duct would suggest negligence, as against evidence for respondent that only major injuries would. Plasket JA favoured the latter: authority was to the effect that the mere fact of injury during surgery would not suggest negligence, and that injury could occur despite reasonable care being taken by the surgeon (see [58]). Here, the surgeon had taken such reasonable care, by applying the rules for this particular operation (see [64]).

Ordered, that the appeal was upheld; the full court's order was set aside; and replaced with an order setting aside and substituting the High Court's order, to hold respondent liable for any damages resulting from the injury (see [83]).

AS AND ANOTHER v GS AND ANOTHER 2020 (3) SA 365 (KZD)

Constitutional law — Legislation — Validity — Matrimonial Property Act 88 of 1984, s 21(2)*(a)* — For black couples married under s 22(6) of Black Administration Act 38 of 1927, their marriage, subject to limited exceptions, automatically out of community of property, which discriminatory against them, in that denied benefits of marriage in community of property granted to other race groups — Despite such section's repeal in 1988, s 21(2)*(a)* of MPA retaining, to extent, default of marriage out of community of property for black couples who married under BAA — In doing so, perpetuating discrimination against such persons — Section declared unconstitutional and invalid for breaching s 9 equality provisions of Constitution — Constitution, s 9.

Section 22(6) of the Black Administration Act 38 of 1927 (BAA) used to regulate the matrimonial regime of black spouses. It provided that their marriages would be *out of community of property*, except in certain limited circumstances. This was out of step with the position in respect of marriages between non-black persons, which were by default marriages in community of property. The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 (Amendment Act) repealed, among other things, the aforementioned subsection of the BAA. However, the default status applicable to black spouses married before 1988 was to an extent retained. That was apparent when considering the provisions of ss 21(2)*(a)* and 21(1) of the Matrimonial Property Act 88 of 1984 (MPA).

Section 21(2)*(a)* provides that —

'the spouses to a marriage out of community of property . . . entered into before the commencement of the [Amendment Act], in terms of section 22(6) of the [BAA], as it was in force immediately before its repeal by the said [Amendment Act], may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry . . . within two years after the commencement of the said [Amendment Act, 1988], as the case may be, or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect'.

Section 21(1) provides that —

'(a) husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that [various conditions have been met] order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit'.

In the present application before the Durban High Court, the applicants — a private citizen and the Commission for Gender Equality — sought declaratory relief to the effect that such provisions were unconstitutional and invalid to the extent that they maintained this default in respect of black persons married under the BAA. They further sought an order declaring that all marriages concluded out of community of property under s 22(6) of the BAA were deemed to be *marriages in community of property*, subject to the proviso that couples were able to opt out of this position and

alter the matrimonial property system applicable to their marriage by executing and registering a notarial contract to this effect.
The court acknowledged the benefits offered by a marriage in community of property, in that a woman in such a marriage would become a co-owner of assets acquired with her husband's income, which fell into the joint estate. By contrast, in respect of marriages out of community of property, the assets amassed in the husband's separate estate. The wife had no right of ownership in respect of those assets and the husband was able to use and dispose of them without the consent of his wife. This may impact negatively upon the rights, interests and security of the wife. (See [54].) The court held that s 22(4) of the BAA in fact discriminated against black spouses, especially black women, in only affording the protection and benefit of a marriage in community of property to other race groups (see [46], [53] and [58]).)

The court further held that s 21(2)*(a)* of the MPA, in retaining the default of a marriage out of community of property in respect of black spouses married prior to 1988, perpetuated the discrimination against them created by s 22(6) of the BAA (see [58]). The court approved the arguments of the applicants that the measures taken to remedy the discriminatory legacy of s 22(6) of the BAA were inadequate. The ability of a woman to change the matrimonial regime governing her marriage was dependent on her obtaining the consent of her husband. Further, the protection provided by s 7(3) of the Divorce Act — ie the ability to have matrimonial assets distributed between the parties — while made available to spouses married under the BAA, would be of no use to those who could not divorce for religious, social or financial reasons. (See [55].)

The court concluded that, in breach of the s 9 equality provisions of the Constitution, s 21(2)*(a)* amounted to unfair discrimination, on the grounds of race, against black spouses married prior to 1988; gender, against female spouses married under the BAA; age, against elderly black women married prior to 1988; and marital status, and was accordingly invalid. (See [60] – [63].) (The court, however, held that the applicants had failed to make out a case for the declaration of s 21(1) of the MPA to be inconsistent with the Constitution and therefore invalid, on the basis that it was applicable to all spouses in South Africa, irrespective of the matrimonial regimes of their respective marriages (see [64] – [65]).)

The court went on to grant an order declaring, inter alia, the provisions of s 21(2)*(a)* of the the MPA to be unconstitutional and invalid; and that all marriages of black persons concluded out of community of property under s 22(6) of the BAA before 1988 were marriages in community of property, but that a spouse in such a marriage may nevertheless apply to the High Court for an order that the marriage shall be out of community of property.

COPPERMOON TRADING 13 (PTY) LTD v GOVERNMENT, EASTERN CAPE PROVINCE AND ANOTHER 2020 (3) SA 391 (ECB)

Waiver — By conduct — Determination of intention — Conduct to be consistent with intention to waive or make election — Must be clear and unequivocal — Onus on party alleging waiver.

Waiver — Election — Two valid inconsistent rights required — Choosing between alternative remedies not amounting to election consistent with waiver.

Legal advice — Mistake — Reliance on erroneous legal advice — Mistake, whether in fact or in law, excusable if just — No general principle that conduct based on faulty legal advice never constituting just mistake.

Evidence- further evidence after the close of pleadings- must be considered if appropriate-dismissed

In this application to introduce further evidence after the close of pleadings in an action, the issue for determination was whether the plaintiff (the present respondent) had, by electing to proceed on a deed of settlement, abandoned or waived its right to proceed with its action based on an earlier deed of sale. The defendants (the present applicants) argued — based on plaintiff's conduct — that this was the case, and sought to introduce waiver as an additional defence in the action. In the alternative they requested that the issue of waiver be referred for the hearing of oral evidence. In the meantime another court had ruled that the deed of settlement was void and unenforceable.

The plaintiff argued that its decision to abandon its action based on the deed of sale and instead enforce the deed of settlement was made on the recommendation of its legal advisors and was therefore an excusable mistake. The defendants submitted that such a mistake was no answer to a defence of waiver.

The court, having emphasised that the defendants had circumvented the Uniform Rules of Court by raising the alleged waiver in the way they did (they should have sought an amendment of their plea or used rule 33(4) — see [15] – [20]), held that the exercise of its discretion to depart from the court rules depended on whether the issue of waiver could be determined on the pleadings (see [22]). The court set out the established principles of waiver and election. It pointed out that an election generally involved a waiver in that one right is waived by choosing to exercise another right inconsistent with the former, and that the onus of proof was always on the party who alleged that an election was made or a right waived. Clear proof was required.

The court proceeded to reason as follows: Since there was no inconsistency involved, the making of a choice between alternative remedies, like the plaintiff's choice to proceed on the settlement and not the sale, was not an election in law. And since another court had ruled the settlement void and unenforceable, there had in any event been no election to make.

As to plaintiff's alleged mistake or ignorance of the law and the defendants' submission that it was no answer to the defence of waiver: An error of law or fact was excusable if it was just, and there was no general principle that conduct based on faulty legal advice could never constitute a just and probable mistake. The extent to which a reliance on legal advice would bind a party had to be determined in the context of the established requirements for election and waiver. The need to prove full knowledge of allegedly waived rights applied equally where the alleged waiver (or election) was performed by the party's agent (the legal advisor). (See [36] – [39].)

Where, as here, reliance was placed on a party's conduct, the question was whether it was consistent with an intention to waive, the onus, as always, being on the party alleging waiver. The conduct relied on had to show a clear and unequivocal intention to waive. (See [42] – [43], [46].)

The nature of the onus on the defendants and the factual nature of the enquiry needed to assess the plaintiff's intention did not allow the determination of the question of waiver in the manner proposed by the defendants. The plaintiff's statements in the settlement application did not amount to an unequivocal expression of an intention to fall back on the original action based on the deed of sale. Its evidence relating to its intention was relevant and had to be considered, in the interests of fairness, in proceedings in which the defence raised was properly pleaded. Nor was the present application an appropriate one to refer to oral evidence. The defendants therefore had to plead their defence in terms of the rules of court. Application to introduce further evidence dismissed.

CT v MT AND OTHERS 2020 (3) SA 409 (WCC)

Marriage — Divorce — Rule 43 proceedings — Constitutionality of rule — Uniform Rules of Court, rule 43-it is constitutional

Applicant and first respondent were married and first respondent later instituted proceedings for divorce. Pending the divorce, first respondent obtained an order under rule 43 that applicant maintain her and their child. The couple were later divorced. (See [1], [7] and [11].)

Here applicant, who appeared in person, challenged the constitutionality of rule 43. He asserted the rule was unconstitutional because it 'contain[ed] no guidelines, timelines, [was] indefinite and non-appealable' (see [14]).
The court considered: the nature of the challenge (it related to detriment allegedly caused by the rule 43 procedure, rather than the order, which was sourced in substantive law) (see [21]); the constitutional rights said to be infringed (see [25]); and each of an appealability, guidelines and time-line challenge (see [26], [27] – [29] and [30] – [37]). It ultimately dismissed the application (see [40]).

GLENCORE AFRICA OIL INVESTMENTS (PTY) LTD v RAMANO AND OTHERS 2020 (3) SA 419 (GJ)

Costs — Liability for — Matter unopposed — No principle that costs order against respondent cannot be made — Court's discretion.

There is no principle that a costs order cannot be made against a respondent in an unopposed matter. While there might be sound policy considerations why, for example, the respondent in a review application (who may be a public body, a magistrate, a Master, or an arbitrator) would not be required to pay the costs of the application, save in the event of opposition, the same considerations do not apply to applications for relief against ordinary commercial entities. The statement in Cilliers Law of Costs that 'where there is a complete lack of opposition in litigation, there is no need for a costs order — and, except perhaps in exceptional circumstances, perhaps even no scope' is not supported by the cases there cited and does not reflect current practice in the Johannesburg High Court.

GPCM v MINISTER OF HOME AFFAIRS AND OTHERS 2020 (3) SA 434 (GP)

Persons — Gender — Official description — Application for alteration of — Delay in processing — State's failure to make decision set aside on review — Its obstructive

conduct in elevating spousal consent to requirement for successful application criticised and met with punitive costs order — State ordered to effect requested alterations — Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).

Births and deaths — Birth — Registration — Alteration of sex description — Application for — Delay in processing — Attempt by state to elevate spousal consent to requirement for successful application criticised — State's failure to make decision set aside on review — State ordered to effect requested alterations — Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).

Costs- punitive costs order-against state

Section 2(1) of the Alteration of Sex Description and Sex Status Act 49 of 2003 (the Alteration Act) provides that '(a)ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register'.

The applicant was born a man and issued with a corresponding birth certificate and ID document. While she thought of herself as a girl from an early age, she lived like a man and eventually married a woman. Later she began openly living as a woman. She separated from her wife and instituted divorce proceedings, which were still pending.

In July 2015 the applicant, acting in terms of s 2(1) of the Alteration Act, applied to the Department of Home Affairs for the alteration of her gender description in the birth register. This was in order to obtain a passport to travel to Thailand for gender-reassignment surgery. Despite having been repeatedly told that her gender-reassignment application was being attended to, the applicant was in April 2017 informed that her passport application could not be processed because the gender-reassignment application was still pending. She was then told that her gender-reassignment application could, in turn, not be processed because she was still married and spousal consent was required.

In July 2017 the applicant lodged the present urgent application for the review of the respondents' failure to make and communicate decisions on her application. She argued that the fact that she was still married was irrelevant to her application and that her right to dignity was being violated by the unexplained delay on the part of the respondents. The respondents offered a defence of non-joinder, arguing that the applicant's estranged wife should have been joined. They also argued that their failure to alter the birth register was not administrative action and that there was no decision to review. Lastly, they argued that the law as it stood did no allow such alteration where the applicant was married.

Held

The applicant had submitted all the required documentation for a gender-reassignment application, while all the respondents did was to raise the obstacle that the applicant was married, as well as the fact that the application presents certain challenges in relation to legislation governing marriages and civil unions. The Director-General (the second respondent) simply refused to make a decision, and the applicant could not be expected to invoke the Act's appeal process, which dealt with refusal (see [28]). In any event, the circumstances in which the applicant was forced to approach the court were compelling enough to warrant review in the interest of justice (see [29]). Marital status was not a factor to be considered in an application under the Alteration Act, and the respondents' contention that it was, was wrong (see [30] – [33]).

There was no legal obstacle to the alteration of the applicant's gender from male to female, and the applicant was entitled to the relief sought. Given the respondents' attitude, it would serve no purpose to remit the matter to them. The court would make the decision. (See [34].)
The Department of Home Affairs was not entitled to extend its legislative tentacles into the privacy of the homes of the public it serves. It had to be alive and sensitive to the fact that the public had rights. It could not be prejudiced; had to ensure the self-realisation of those who approached it; uphold equality before the law; protect freedom of choice; and treat the public with requisite promptitude and dignity. (See [35].)
The applicant was entitled to the order applied for, and the lax attitude of the respondents, which forced the applicant to seek the assistance of the court on an urgent basis, warranted a punitive costs order against them (see [37]). Second respondent ordered to effect the amendments sought within three weeks (see [1]).

KLIPRIVER TAXI ASSOCIATION AND OTHERS v MEC FOR TRANSPORT, KZN AND ANOTHER 2020 (3) SA 447 (KZP)

Roads — Public transport — Violence, unrest or instability — MEC's power to close transport routes — Whether lawful to use power to eradicate dual membership of taxi associations or to compel associations to enter into agreement — National Land Transport Act 5 of 2009, ss 91(1) and 91(2).

In this matter the first respondent MEC, using the powers in s 91(2) of the National Land Transport Act 5 of 2009, suspended long-distance taxi routes of the Klipriver Taxi Association (Klipriver) and the Sizwe Transport Association (Sizwe) (see [2] and [16]). (Section 91(1) provides inter alia that where there is 'violence, unrest or instability in . . . the public transport industry', the MEC for Transport may under s 91(2) close routes.)
Here, Klipriver came to apply for the review and setting aside of the suspension (see [3]).
Held, that it should be (see [49]):

- The s 91 powers were intended to be used to address 'violence, unrest or instability' but here they were being used to eliminate dual membership of Klipriver and Sizwe (see [18]). The action was thus not authorised by the empowering provisions (see [24]).
- The MEC's hypothesis that dual membership caused violence between Klipriver and Sizwe and which informed the suspension was speculative and an irrelevant consideration (see [25]).
- The suspension notice failed to specify the routes suspended and so was impermissibly vague (see [26]).
- The use of suspension to compel the associations to enter an agreement was ultra vires and an infringement of the principle of legality (see [27], [30] and [37]).

MARSHALL v BAKER NO AND OTHERS 2020 (3) SA 463 (WCC)

Will — Validity — Acceptance of document as will — Deceased entitling document 'Latest Updated Will' and signing it — Deceased moments later photographing document and sending it by WhatsApp to his attorney with message 'here are some

thoughts regarding an updated Will which has not been legalized yet' — Wills Act 7 of 1953, s 2(3).

In late September 2018 Mr Van Heerden underwent a medical test which revealed he had a serious heart condition requiring surgery (see [9]). On 3 October he learnt the date he would be admitted to hospital (7 October) and of the operation (8 October). On 5, 6 and 7 October he drafted, and at about 11h00 on 7 October signed, a document he titled 'Latest Updated Will' (see [10] and [12]). He then photographed the document, and at 11h17 sent it by WhatsApp, to his brother in law, Mr Baker, an attorney, along with the message 'Bakes, here are some thoughts regarding an updated Will which has not been legalized yet. For the record if something should happen, I would like my ashes scattered on the Bushmans river. Kins' (see [14]). At 11h23 Mr Baker replied 'OK — will arrange accordingly — will finalize with you over Christmas — will also need to decide how you will deal with the bond on the property — thinking of you tomorrow — sure all will be well' (see [15]). At about 12h00 Mr Van Heerden left for the hospital (see [13]). The surgery was performed on 8 October and Mr Van Heerden died on 17 October (see [10]).
Here, applicant, who was Mr Van Heerden's life partner, applied for a declaration that the document was the deceased's will, and an order, under s 2(3) of the Wills Act 7 of 1953, that the Master accept it as such (see [1] and [2.3]). Section 2(3) provides: 'If a court is satisfied that a document . . . drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will . . . the court shall order the Master to accept that document . . . as a will, although it does not comply with all the formalities for the execution . . . of wills . . . .' (see [30]).
The High Court dismissed the application (see [54] and [56]), and in coming to do so, considered the approach a court should adopt in applying the section (see [33] – [36]); whether the *Natal Joint Municipal Pension Fund* case had altered this approach (see [37] – [39]); and the significance inter alia of the document's title and signature in light of the Whatsapp messages (see [50] – [52]).

MEC, DEPARTMENT OF POLICE ROADS AND TRANSPORT, FREE STATE v ROBERTS AND ANOTHER 2020 (3) SA 478 (FB)

Evidence — Judicial notice — Nature of facts court may take notice of — Procedure to be followed before doing so.

While driving, first respondent's car had been struck by a kudu which jumped from the road reserve (see [2]). First respondent was injured and he sued appellant MEC for his damages, claiming appellant's servants had negligently and wrongfully omitted to keep the road reserve clear of vegetation, and that the omission had caused the collision and his injury (see [4]).
A High Court upheld the claim and appellant appealed to the Full Bench (see [1]).
It upheld the appeal, finding that the High Court had erred in concluding the omission was the cause of the accident (see [31] and [33]). This conclusion, it *held*, was based on speculation, rather than proven fact (see [28]); and on judicial notice of facts which it ought not to have taken (see [16] and [21]).
In this regard the Full Bench considers the nature of facts a court may take notice of (general information within the knowledge of a person of ordinary intelligence, which is readily available and reliable) (see [19]); and the procedure it should follow before doing so (informing the parties of the information the court possesses, and inviting them to make submissions thereon)

PHILIPPI HORTICULTURAL AREA FOOD AND FARMING CAMPAIGN AND ANOTHER v MEC FOR LOCAL GOVERNMENT, WESTERN CAPE AND OTHERS 2020 (3) SA 486 (WCC)

Environmental law — Protection of environment — Environmental authorisation — Failure to take into account relevant considerations — Effect of proposed residential development on aquifer not adequately considered when environmental authorisation granted — Decision to grant environmental authorisation set aside on review — National Environmental Management Act 107 of 1998, ss 24O(1) and 24(4).

Local authority — Town planning — Town-planning and zoning schemes — Rezoning and subdivision — Granting and refusal of applications — Desirability — Terms of approval not adequately considering preservation of environment — Land Use Planning Ordinance 15 of 1985, ss 36(1) and (2).

The first applicant is a voluntary association, the Philippi Horticultural Area Food and Farming Campaign; the second its convenor, Mr Sonday. They (together referred to as the PHAFFC) oppose the residential development by the eighth respondent, Oakland City Development Company (Pty) Ltd (Oakland), of 479 hectares of land it owns bordering the Phillippi Horticultural Area (the PHA).

In their commentary on the development's draft environmental impact assessment report, one of the concerns the PHAFFC raised was the impact of the proposed development on the aquifer sustaining the PHA's irrigation (see [61]). Aggrieved that these concerns were not adequately addressed by the second respondent, the Western Cape Department of Environmental Affairs and Development Planning (the Province), when its Director of Development Management approved the final environmental impact assessment report (the EIA report), the PHAFFC unsuccessfully appealed to the first respondent, the MEC for Local Government, Environmental Affairs and Development Planning in the Western Cape (the MEC). Here the PHAFFC applied, inter alia, to set aside on review both the Province's approval of the EIA report and the MEC's dismissal of their appeal against the development's environmental authorisation. The review of these decisions, in broad terms, was sought on the basis that, in terms of s 6(2)*(e)*(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), relevant considerations were not taken into account in granting environmental authorisation in relation to the impacts of the proposed development, inter alia on aquifer/groundwater, climate change and food security; and that the decisions were irrational in terms of s 6(2)*(f)* in that they were not rationally connected to the information before the decision-maker. With regard to the aquifer, the PHAFFC took issue with the fact that the environmental authorisation was granted without a specialist aquifer impact assessment or a suitable specialist study having been undertaken to assess the impact of the proposed development on the aquifer, its state and recharge requirements.

The PHAFFC also applied to have set aside on review decisions of the Interim Planning Committee of the City of Cape Town (sixth respondent) to approve the rezoning and subdivision of the Oakland land, and of the City's general appeals committee's dismissal of Mr Sonday's appeal against the approval of the rezoning and subdivision of the Oakland land. In this regard, the PHAFFC's complaint was that in taking the rezoning and subdivision decisions it did, the City failed to take into account relevant considerations related to the importance of the PHA as a dedicated agricultural development zone of horticultural value to Cape Town, the importance of the aquifer and issues of food security. This raised the issue of whether, in granting

the application, the City had given due regard to the desirability of the development, as required by s 36(1) of the provincial Land Use Planning Ordinance 15 of 1985 (LUPO), and to 'the preservation of the natural and developed environment concerned' as required by s 36(2) of LUPO (see [126] and [128]).

Held

As to the MEC's appeal decision

There was no merit in the PHAFFC's contentions that the MEC did not have regard to all relevant considerations (see [91] – [93]). There was however merit in the applicants' complaint that the groundwater study conducted was wholly inadequate for the purpose of assessing the development's impact on the aquifer. While it was apparent that MEC appreciated that the impacts on the aquifer were relevant and had not been sufficiently assessed by the Director, the impacts then considered by the MEC were constrained by the limitations apparent from the reports before him on the issue. The hydrological studies considered by the MEC were all many years old when the MEC made a final decision to dismiss the appeal. No report more recent than those prepared in 2014, which were three years old by the time that the appeal was determined, assessed the state or recharge requirements of the aquifer. Furthermore, the focus of the engineering services report as it pertained to the aquifer was primarily on pollution prevention and the appropriate management of stormwater and not on the broader consideration of the preservation, health and recharge of the aquifer in the context of water scarcity and climate change, so as to enable the decision-maker to assess the impact on the aquifer as one of the relevant considerations in deciding whether to grant the environmental authorisation in respect of the development. (See [100] – [101].)

In the circumstances, key relevant factors to be considered were not before the decision-maker in relation to the impact of the development on the aquifer and its concomitant impact on climate change and water scarcity. This was a consideration wider than simply a focus on stormwater and pollution of the aquifer. What was required was a more recent assessment of the health of the aquifer and the impact that the proposed development would have on the aquifer given climate change and water scarcity in the area. The lack of this information limited the ability of the MEC to have regard to relevant considerations in the manner contemplated in ss 24O(1) and 24(4) of NEMA (quoted at [73] and n37, respectively).

For these reasons, the decision taken by the MEC on appeal fell to be reviewed in terms of s 6(2)*(e)*(iii) of PAJA, on the basis that relevant considerations were not considered in the determination of the appeal in relation to the aquifer. Given the limitations in the information before the MEC in this regard, the decision arrived at was neither rational nor reasonable, which made it reviewable also under s 6(2)*(f)*(ii) of PAJA. (See [102] – [103].)

The MEC's appeal decision would accordingly be set aside and remitted back to the MEC for reconsideration (see [107] and [109].

As to the City's appeal decision

Where a decision-maker is directed by law to consider particular issues when considering an application, a risk-averse and careful approach, especially in the face of incomplete information, should be adopted; failure to take relevant considerations into account risked a determination that the decision reached was irrational or unreasonable. The information before the decision-makers related to stormwater and the prevention of aquifer pollution, and the conclusion in various reports that urban development as opposed to agriculture would be beneficial to the aquifer. What was required of the decision-makers was a consideration of relevant considerations

concerning the preservation of the natural environment and the effect of the application on existing rights. In relation to the aquifer, an assessment of the impact of development on it, having regard to the rights set out in s 24 of the Constitution and the provisions of NEMA and its regulations, required consideration of the impact of the rezoning and subdivision sought in relation to the aquifer as a large underground natural resource, its state, future and impact on issues related to water scarcity and climate change. Had a more recent professional report which focused on the impact of the development on the aquifer been before the decision-makers, the relevant considerations as to the preservation of the natural environment and the effect of the application on existing rights would have been capable of consideration (see [130]).

It followed that the City of Cape Town's general appeals committee misconstrued the nature of their obligations under LUPO, and as a consequence failed to apply their minds to issues in relation to the aquifer, a matter which, as it concerned the natural environment and impacted on existing rights, was a matter which they were required to consider. Accordingly, its decision would be set aside on the basis that, in terms of s 6(2)*(e)*(iii) of PAJA, relevant considerations were not considered in the determination of the appeal in relation to the aquifer; and because this resulted in a decision which was neither rational nor reasonable having regard to the material before the general appeals committee, their decision also was reviewable under s 6(2)*(f)*(ii) of PAJA. (See [133] – [134].)

It would be a just and equitable to remit the matter to the City's general appeals committee for a reconstituted appeal process to take place, restricted to consideration of the desirability of the applications in the context of the preservation of the natural environment and the effect of the application on existing rights in relation to the aquifer in the context of climate change and water scarcity in the City.

STEVE'S WROUGHT IRON WORKS AND OTHERS v NELSON MANDELA METRO 2020 (3) SA 535 (ECP)

Practice — Pleadings — Exception to particulars of claim — Whether out of time — Exception on ground that particulars vague and embarrassing — Notice of exception delivered in response to notice of bar and within stipulated five-day period — Such proper response to notice of bar — Exception not out of time.

The plaintiffs instituted an action against the defendant. Summons was issued on 25 February 2019. On 3 May 2019 the plaintiffs delivered a notice of bar under rule 26 of the Uniform Rules of Court requiring the defendant to file its plea within five days. Rule 26 provides that, where a party fails to deliver a pleading within the time allowed by the Uniform Rules, the other party may require it to deliver the pleading within five days (known as a notice of bar). On 6 May the defendant filed a rule 23 notice asserting that the plaintiffs' particulars were vague and embarrassing and giving them the stipulated 15 days to fix them. When the plaintiffs failed to respond to this notice, the defendant on 30 May filed its exception to the particulars. The plaintiffs objected to the exception on the ground that it was late and therefore fell to be struck out.

The court reasoned as follows in rejecting plaintiffs' objection: In the case of all pleadings except a replication or subsequent pleading, the bar occurs only upon lapse of the notice of bar, ie within five days of its receipt. If within the five-day period a pleading which the party is entitled to file, is filed, there is no bar. A notice of exception is a proper response to a notice of bar. The contrary view, viz that the

notice of exception is not a pleading and that only the exception itself is a proper response to the notice of bar, would defeat the purpose served by the process of excepting to a pleading. Therefore, the plaintiffs' objection to the defendant's exception had to be rejected. (See [13] – [18].)

Cases cited

WORLD NET LOGISTICS (PTY) LTD v DONSANTEL 133 CC AND ANOTHER 2020 (3) SA 542 (KZP)

Magistrates' court — Jurisdiction — Maritime claim — Jurisdiction of magistrates' court to hear maritime claim where court otherwise having parochial jurisdiction to hear action — Magistrates' court lacking jurisdiction to hear maritime claims — Having no option but to dismiss claim once it decides it qualifies as maritime claim.

Shipping — Admiralty jurisdiction — Magistrates' court — Jurisdiction to hear maritime claim where court otherwise having parochial jurisdiction to hear action — Magistrates' court lacking jurisdiction to hear maritime claims — Having no option but to dismiss claim once it decides it qualifies as maritime claim.

The issue in the present appeal against a decision in a magistrates' court was whether magistrates' courts had admiralty jurisdiction to hear maritime claims. The claim in question (the forwarding claim) was based on a freight- forwarding agreement in which the appellant (World Net) agreed to supply freight-forwarding services to the first respondent (Donsantel). In the agreement Donsantel consented to the jurisdiction of the magistrates' courts even if the claim against it exceeded their monetary jurisdiction (the jurisdiction clause). An ancillary suretyship agreement also contained a consent to magistrates' courts' jurisdiction. In a special plea before the magistrate the second respondent argued that the court lacked jurisdiction because the claim was a maritime claim as intended in s 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act), so only a High Court exercising its admiralty jurisdiction could determine the dispute.

Section 1 of the Act defines a 'maritime claim'. Section 7(2) provides that when the question arises whether a matter pending or proceeding before it is a maritime claim, the High Court seized with the matter must decide it forthwith. Section 7(1)*(a)* provides that the High Court may decline to exercise its admiralty jurisdiction if it is of the opinion that 'any other court in the Republic . . . will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court' (see [22] for the wording of s 7).

The magistrate upheld the special plea and dismissed World Net's claim. The present appeal was against that order. It was common cause on appeal that World Net's claim was a maritime claim as defined in s 1 of the Act and that it was subject to the jurisdiction clause.

The High Court had to decide two issues: (i) whether magistrates' courts had jurisdiction to hear a maritime claim; and (ii) whether a magistrate could ignore an objection to the magistrates' courts' jurisdiction and proceed to hear the claim, if it was otherwise within its jurisdiction.

Held per Lopes J, Vahed J concurring

Arguments favouring the conclusion that the magistrates' courts lacked jurisdiction to hear maritime claims outweighed those suggesting the opposite (see [23] – [25]).

Had the magistrate been sitting in the High Court, he would have referred the matter to the admiralty court, but sitting in a magistrates' court he could not do so, and was

obliged to hear or dismiss the action (see [25]). The magistrate therefore correctly dismissed the claim (see [27]).
Summarised, the position in the magistrates' court was as follows: If no objection to jurisdiction was raised on the basis that the claim was a maritime claim, then the magistrate could continue to hear the matter if it was otherwise in the court's jurisdiction. If the defendant objected to jurisdiction (or the magistrate mero motu raised the issue), the court had to determine whether the claim was a maritime claim and, if it was, dismiss the action for want of jurisdiction. If no objection was raised, then the issue of jurisdiction could not later be raised on appeal by either party. (See [28].)
Held per Olsen J dissenting
The effect of s 7 of the Act was that it brought about the continued availability of parochial jurisdiction to determine maritime claims. Just as the Act did not exclude the parochial jurisdiction of the High Court to hear maritime claims, so too was it silent on excluding that jurisdiction from the magistrates' courts where the requirements for the jurisdiction of those courts were otherwise satisfied, as was the case here (see [39]). There was no answer to the proposition that, had the legislature wanted to deny magistrates jurisdiction to hear maritime claims, it would have expressly done so (see [40]). And if the parochial jurisdiction of the magistrates' courts was not disturbed by the Admiralty Act, then there was no need similarly to provide that the provisions of the Admiralty Act should not derogate from the ordinary jurisdiction of the magistrates' courts to determine maritime claims (see [41]). Hence the appeal should have been upheld (see [40], [42], [46]).

UNEMPLOYED PEOPLE'S MOVEMENT v EASTERN CAPE PREMIER AND OTHERS 2020 (3) SA 562 (ECG)

Local government — Provincial supervision — Intervention — Discretionary intervention — Dissolution of council and appointment of administrator in terms of s 139(1)*(c)* of Constitution — Whether province can be directed by court to take such measures — Constitution, s 139(1)*(c)*.

Constitutional law — Local government — Provincial supervision — Intervention — Mandatory intervention — Imposition of recovery plan in terms of s 139(5) of Constitution — Whether province can be directed by court to take such measures — Constitution, s 139(5); Local Government: Municipal Finance Management Act 56 of 2003, s 139 and s 140.

Constitutional law — Local government — Powers and duties — Local municipality — To ensure provision of services to community in sustainable manner — To promote safe and healthy environment for its community — To structure and manage its administration, budgeting and planning processes in order to give priority to basic needs and promote social and economic development of its community — Consequent to Makana Local Municipality failing, over extended period, to provide basic services and to meet its financial obligations, due to number of financial and operational crises, court declaring municipality to have breached Constitution, and ordering province to intervene under s 139(5) of Constitution — Constitution, s 152(1) and s 153*(a)*.

The applicant in the present matter heard before the Grahamstown High Court was the Unemployed People's Movement (UPM), a non-profit human rights organisation

operating in the Eastern Cape, and concerned with improving the situation of the unemployed. A number of its members lived in Makhanda, on whose behalf it was authorised to litigate, and whose plight serves as background to this matter. The Makana Local Municipality governing them had been plagued by a number of financial and operational crises which had led to its failing, over a significantly extended period, to provide basic services and to meet its financial obligations. This remained so despite various interventions by the provincial executive, under s 139 of the Constitution, as well as numerous engagements by the UPM with local and provincial authorities, pleading with them to remedy the situation. In the present matter the UPM sought declarators to the effect that Makana was in breach of s 152 of the Constitution, in that it had failed to ensure the provision of services to its community in a sustainable manner, and had failed to promote a safe and healthy environment; and of s 153*(a)* of the Constitution, in that it had failed to structure and manage its administration, budgeting and planning processes in order to give priority to basic needs and promote the social and economic development of its community. Following on from such relief, the UPM also sought an order declaring that all the jurisdictional facts for an intervention by the Eastern Cape Provincial Executive *in terms of s 139(1)(c) of the Constitution*, and s 139 and s 140 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), were present. In this regard, s 139(1)*(c)* of the Constitution provides that where a municipality has failed to fulfil an executive obligation in terms of the Constitution (such as above), the relevant provincial executive *may dissolve such municipal council and appoint an administrator until a newly elected council had been declared elected*, if exceptional circumstances warrant such a step. The UPM then finally sought an order directing the Executive Council for the Eastern Cape to so intervene in terms of the abovementioned provisions, and to appoint a competent and experienced administrator for Makana forthwith.

The respondents included the Eastern Cape premier, the Executive Council for the Eastern Cape, the provincial MECs for Cooperative Governance and Traditional Affairs (CoGTA) and Treasury, Economic Development and Tourism; and the Makana Municipality, the executive mayor and the municipal mayor. They did not dispute the applicant's factual allegations, but opposed the relief sought. Critical to their arguments were events taking place after the bringing of the application, namely a recommendation by the Minister of CoGTA to the provincial executive council that it impose a recovery plan, pursuant to the *provisions of s 139(5) of the Constitution*, read with s 139 and s 140 of the MFMA; and the subsequent resolution taken by the provincial executive to do so. Section 139(5) of the Constitution provides that where the municipality, *as a result of a crisis in its financial affairs*, is in serious or persistent breach of its obligations to provide basic services or meet its financial obligations, the provincial executive *must* impose a financial recovery plan on a municipality, aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitment. The respondents argued that the applicant was barred from seeking the relief they did in terms of s 139(1)*(c)* of the Constitution. Those provisions were clearly discretionary, they argued, and a court could accordingly not direct the provincial executive to act in terms thereof, especially where it had already taken mandatory action in terms of s 139(5) of the Constitution. The provincial respondents added that the doctrine of separation of powers militated against this court becoming involved to the extent prayed for by the applicant, particularly since the executive council has invoked its own authority *to remedy the situation which had prompted the present application*.

The applicant in answer insisted that s 139(1)*(c)* may be interpreted to include a mandatory intervention, in the sense that this court had the power to direct the respondents to resort to it. The applicant further argued that the course of action proposed by the respondents based on s 139(5) would not address the continued violation of the rights of the community of Makana. In its view, any solution which did not dissolve the municipal council — whose conduct it stated was the cause of the various crises afflicting Makana — and implement effective administration in the municipality in the form of an administrator empowered to give effect to proper administrative policies, pursuant to the provisions of s 139(1)*(c)* of the Constitution, was doomed to failure. This, it argued, was demonstrated by the previous failed interventions by the provincial executive in merely putting the municipality under administration. It questioned the efficacy of the proposed s 139(5) procedure, where such a procedure had in fact years previously already been invoked by the provincial executive, and in terms of which a financial recovery plan was drafted and approved by the relevant municipal council; but nothing came of that; no evidence was presented that the plan had ever been implemented by council. The applicant further submitted that the s 139(5) intervention was solely designed to address financial crises, whereas Makana's breach of its obligation arose also from its management and administrative failures.

The court *held* that it was clear from the answering papers and from the respondents' contentions that the parties were agreed that Makana was experiencing a crisis in its financial affairs, and that it was not meeting its obligations to provide basic services or meeting its financial obligations (which constituted a serious and persistent breach of its constitutional obligations). It went without saying that it was not in dispute that s 172(1)*(a)* of the Constitution was relevant, and that this court was obliged to declare Makana's conduct constitutionally invalid. (See [15] and [55].) The court accordingly granted the relief sought by the applicant in its first two prayers.

The court expressed itself as being 'alive' to the respondents' contentions that s 139(1)*(c)* purported to provide for discretionary intervention, and that a court could not direct the provincial executive council to intervene under those provisions. (See [57] – [58].) The court further agreed with the respondents that a mandatory intervention under s 139(5) was the sensible, logical, practical and obvious course of action (see [52]) in the present circumstances, the 'serious times' calling for the serious measures offered by this intervention (see [88] – [89]). In this regard the court referred to academic authority describing the intervention as a powerful one, providing the provincial executive with the tools, in the form of a financial recovery plan, to reshape how the municipality was governed and how it delivered services (see [49]). The court also accepted that this form of intervention did not only address financial problems (see [89]).

Despite the respondents' having purported to have already commenced processes in terms of s 139(5) of the Constitution, the court was still of the view that court intervention was called for. The court questioned the likely effectiveness of the proposed intervention for purposes of relieving the present difficulties faced. In this regard the court highlighted that it had been presented with no evidence of any practical measures taken since the passing of the resolution by the provincial executive (see [15] and [35]). Further, as noted by the applicant, the provincial executive had previously intervened in Makana's affairs, based on the very provisions (s 139(5)) on which it now sought to rely, to no avail. (See [34] – [36], [46], [89] and [92].)

The solution of the court was to direct the provincial executive to intervene in accordance with s 139(5) of the Constitution, despite the assurance of the respondents that such an intervention was already under way (see [90] and [97]). To grant such relief was not in conflict with the doctrine of separation of powers, given the presence of the jurisdictional facts necessary for such an intervention and the failure of the provincial executive to consistently comply with its duties under s 139(5) (see [92], [93], and [97]). The court directed the province to forthwith implement a financial recovery plan aimed at securing the municipality's ability to meet its obligations (see [90] and [97]). The court further directed the province to have due regard to the financial recovery plan already in place, which it described as following a logical, well-thought-out process, as a holistic one and one meeting the criteria for such plans set out in s 142 of the MFMA. (See [90].) The court further held and declared that the dissolution of the municipal council by the provincial executive was warranted under s 139(5)*(b)* of the Constitution, given the failure of Makana to implement the plan that had been in place (see [92]), and so ordered the provincial executive to give effect to such dissolution and appoint an administrator until a new municipal council was declared (see [97]).

SACLR JUNE 2020

S v OOSTHUIZEN AND ANOTHER 2020 (1) SACR 561 (SCA)

Evidence — Witness — Credibility — Single witness — Two witnesses testifying to separate incidents, but material discrepancies in evidence of time spent together and subsequent events — Court should not have accepted their evidence.

In a matter that attracted much media attention involving the forcing of one of the two complainants into a coffin, the two appellants were convicted in the High Court of two counts of assault with intent to do grievous bodily harm, kidnapping, attempted murder, intimidation and defeating the ends of justice. The second appellant was also convicted of the unlawful possession of a firearm. The court sentenced the first appellant to a total of 16 years' imprisonment, of which five years were suspended, and the second appellant to a total of 19 years' imprisonment, of which five years were suspended. Their application for leave to appeal against their convictions and sentences was dismissed, but they were successful on petition. On appeal it was contended for the appellants that each of the two complainants was a single witness and their evidence did not pass the litmus test for the acceptance of that evidence.

Held, that it was clear from a reading of the judgment on conviction that the trial court failed to apply the cautionary rule that applied to the evidence of single witnesses. Given the many improbabilities and contradictions in the complainants' account, the court could not have accepted their evidence because it could not be said to have been satisfactory in all material respects. The court a quo should have determined the matter on the version of the appellants which was corroborated by the video recordings and photographs. (See [16] and [20].)

Held, further, that the appellants' convictions of assault with intent to do grievous bodily harm, which were competent verdicts to a charge of attempted murder in terms of s 258*(b)* of the Criminal Procedure Act 51 of 1977, and kidnapping, as well as the second appellant's conviction of defeating the ends of justice, had to be confirmed. The convictions in respect of all the other offences had to be set aside. (See [24].)

Held, further, that, having considered and balanced the personal circumstances of the appellants, the nature and seriousness of the offences they had committed and

the interests of society, in respect of the offence of kidnapping, a sentence of one year's imprisonment would be appropriate; in respect of assault with intent to do grievous bodily harm, a sentence of five years' imprisonment would be appropriate; and in respect of defeating the ends of justice, one year's imprisonment. The shorter sentences were to run concurrently with the five-year sentence, with the result that both appellants would be sentenced to an effective five years' imprisonment. (See [34].)

PIPERDI v MINISTER OF POLICE 2020 (1) SACR 572 (ECG)

Search and seizure — Search without warrant — Validity of — Police alleging that plaintiff consented — Evidence indicating, however, that plaintiff not really given opportunity to refuse — Circumstances such that opportunity to obtain warrant, but police failing to do so — Search and seizure unlawful — Criminal Procedure Act 51 of 1977, ss 22*(a)* and *(b)*.

The appellant appealed against the dismissal by a magistrate of his action for damages for unlawful search and seizure. He testified that two police officers arrived at his premises and told him: 'You say you are innocent so you do not mind if we walk through.' He stated that he gave way to the will of the policemen because he felt scared and was intimidated by their presence. The police officers did not ask for his permission. A third police officer dispossessed him of two cellphones and took him to their offices where they connected the phones to a laptop. He told them that he needed the phones for his business. It subsequently became necessary for him to contact an attorney for assistance to retrieve the phones and he incurred legal expenses in the amount of R5750 in this respect.

Held, that the contention advanced on behalf of the appellant, that consent to conduct the search was not obtained and that his conduct was not voluntary, was correct.

Held, further, that, considering that the one police officer had spent approximately an hour and a half at the appellant's premises, it was concerning that no evidence was elicited from him as to why he could not have secured the premises while his colleague, or perhaps some other member, applied for a search warrant. In the circumstances, the actions of the police officials were not reasonable and justifiable, whether in terms of s 22*(a)* or *(b)* of the Criminal Procedure Act 51 of 1977. (See [13] – [14].)

Held, accordingly, that the magistrate's rejection of the appellant's version of the seizure was erroneous and no evidence had been led by the respondent's witnesses which would have justified the seizure under s 22*(b).* The appeal had to be upheld and the matter remitted to the magistrate for determination of general damages.

S v AR AND OTHERS 2020 (1) SACR 580 (WCC)

Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(2)*(a)* of Firearms Control Act 60 of 2000 — Minors convicted of offences involving violence or dishonesty and sentenced as contemplated by para 7*(c)* of sch 2 — Inappropriate to make declaration that accused 'not unfit to possess firearms'.

Three matters came before the court on automatic review in which minors were convicted of crimes involving either violence or dishonesty and in each of the matters a sentence was imposed as contemplated by para 7*(c)* of sch 2 to the Firearms Control Act 60 of 2000 (the Act). The magistrates in two of the cases recorded on the J15 form that the accused was 'not unfit to possess a firearm' and, in the other,

recorded that no order was made in terms of s 103(1) of the Act. The court queried the appropriateness of making such orders.
Held, that, on conviction in all three cases, the court was required in terms of s 103(2)*(a)* to enquire and to determine whether the person involved was unfit to possess a firearm, and such enquiries were conducted, albeit cursorily. The Act, however, did not require a declaration that a person was 'not unfit' to possess a firearm, or indeed that such person was 'fit' to possess a firearm. Where unfitness was determined, a declaration was required, but the converse did not apply, and it was in the interests of justice that any declaration be limited to that which was expressly required by s 103(2)*(b).* It was further relevant that the matters involved the conviction of child offenders. The effect of making a 'fitness' order was that it risked sending an inappropriate message to young offenders that, despite violent criminal conduct, they were considered fit to possess a firearm. In the context of the serious challenges faced by this country, of violent crime, this was not in the interests of justice. (See [20] – [22].) The sentences in each case were altered accordingly to read that no order was made in terms of s 103(2)*(b)* of the Act.

S v HORWITZ 2020 (1) SACR 587 (ECG)
Crimen injuria — Sentence — White woman resident of retirement village calling black employee of complex 'stupid' and 'k' word — Fine of R2000 or four months' imprisonment suspended for three years confirmed on appeal.
The appellant was convicted in a magistrates' court of crimen injuria and common assault and was sentenced to a fine of R2000 or four months' imprisonment suspended for three years, the offences being taken together for the purposes of sentence. She appealed against both convictions and the sentence and, on appeal, the state conceded that the appeal against the conviction for assault had to be upheld. The incident that gave rise to the convictions occurred at a retirement home where the complainant, an adult male, worked as a handyman. He was sent to the house of the appellant to do some repair work. The appellant was an adult woman, a financial advisor, who occupied the house with her 88-year-old mother. It needs to be said that the appellant was a white woman and the complainant a black man. The appellant initiated the incident by approaching the complainant and stating that he should have come to the house earlier. When he explained that it had rained on the previous days and he could not have done the work then, she remarked that he was stupid, could not use his common sense and then used the 'k' word. After considering the evidence, the court held that the magistrate had correctly arrived at the correct verdict and that the appeal against the conviction had to be dismissed as without merit. In respect of the appeal against sentence,
Held, that the impugned words used by the appellant were completely unsolicited and unwarranted and the level of education the appellant possessed should have made her appreciate the hardship and the indignity of her utterances on the person of a different race. She was completely lacking in remorse and, given that there had previously been a pleasant history and relationship between the two, it was unacceptable that she had not offered a genuine apology to him, to demonstrate that her error was not actuated by malice, disrespect or racism. The appeal against the sentence accordingly also had to be dismissed.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v BOTHA NO AND ANOTHER 2020 (1) SACR 599 (CC)

Prevention of crime — Forfeiture order in terms of ch 6 of Prevention of Organised Crime Act 121 of 1998 — Application for order of civil forfeiture — Proportionality test — Property used as instrumentality of offence — Inappropriate to apply proportionality analysis where person from whom proceeds taken not having any lawfully recognised interest in property.

Prevention of crime — Forfeiture order in terms of ch 6 of Prevention of Organised Crime Act 121 of 1998 — Application for order of civil forfeiture — Whether s 25(1) of Constitution protected property — Proceeds of unlawful activities did not and could not constitute property as envisaged by section.

The applicant applied in the High Court for a forfeiture order in terms of s 48(1) and s 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of the renovations carried out on the property of a person (the deceased) whom it alleged had received the proceeds of unlawful activities from a company (Trifecta). The court granted an order in terms of s 50 for the forfeiture of the entire property.

On appeal against that order the Supreme Court of Appeal (the SCA) agreed that the renovations were the proceeds of corruption and money-laundering, and then conducted a proportionality analysis to determine whether the grant of the forfeiture order would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution. It held that it was wrong to have forfeited the entire property, which had been acquired by means of a legitimate bank loan long before the criminal activities involved, and that the applicant had in any event applied only for the forfeiture of the value of the renovations. The court held further that, because the deceased had repaid funds amounting to some R411 000 to Trifecta, that amount had to be deducted from the value of the renovations that had to be repaid. The applicant applied for leave to appeal against the decision of the SCA and contended that the whole value of the renovations had to be forfeited in terms of s 50 of POCA.

In a minority judgment per Victor AJ (Froneman J and Khampepe J concurring) the court held that, when the deceased availed herself of her rights under the provisions of s 25(1) of the Constitution, she did not do so to found a right to unlawful proceeds, but rather sought to assert a right against the state and to ensure that the actions of the state, the National Director of Public Prosecutions (the NDPP) and the courts, in granting the forfeiture order, were not arbitrary. The question was not how she acquired the property, but rather whether the order was arbitrary in requiring her to forfeit the entire value of the renovations when she had repaid some of that value. In order to be constitutionally compliant such an order could not be arbitrary, and s 25(1) requiring the same, regardless of whether the underlying property was lawfully acquired or not. Therefore, unlawful proceeds within the meaning of s 50(1)*(a)* of POCA fell within the scope of s 25(1) of the Constitution. (See [61] – [67].)

The minority judgment held furthermore that s 50(1) of POCA required a court to conduct a proportionality analysis, regardless of whether forfeiture was sought of proceeds of an offence, or the instrumentality of an offence. (See [74].) It held that it was a fallacy to consider the deceased as having 'repaid' Trifecta: she was rather attempting to obfuscate the unlawful origin of the proceeds and in the circumstances of the case the forfeiture of the entire value of the renovations was proportionate. (See [90] and [97].)

In the majority judgment, Jafta J (Madlanga J, Mhlantla J, Mogoeng CJ and Theron J concurring) held that there was a logical difficulty in the proposition of the minority

judgment that the deceased's criminal conduct in acquiring and keeping the proceeds of unlawful activities triggered the protection-of-property rights in s 25(1). Once it was accepted that the deceased had no rights in the proceeds in issue and that s 25 did not give her any rights in those proceeds, it was logical to conclude that she had property that was protected against arbitrary deprivation. The protection against deprivation related to an individual's right to property. In the present case, on all accounts, the deceased had no claim to the proceeds to be forfeited. Section 25 did not itself regulate process in terms of which deprivation of property might occur. What the section required was that deprivation of property had to be effected only in terms of law of general application and that the law in question could not authorise arbitrary deprivation. This meant that a law that allowed arbitrary deprivation would be inconsistent with the section, but the deceased had not contended that POCA permitted arbitrary deprivation. There was therefore no legal basis for concluding that she had a right against the state 'to ensure that the actions of the state were not arbitrary'. It was settled that s 25 did not create property rights, but protected existing ones. The deceased had no such existing right in the proceeds of unlawful activities and consequently there was no right in property that could be protected by s 25(1) against arbitrary deprivation. Proceeds of unlawful activities did not and could not constitute property as envisaged in s 25(1). (See [115] – [121].)
In respect of the application of a proportionality exercise to the forfeiture of property that was used as an instrumentality of an offence being equally applicable to forfeiture of proceeds of an unlawful activity, it was inappropriate to apply such in circumstances where the person from whom the proceeds were taken did not have any interest which was lawfully recognised. (See [131].) The majority judgment concurred in the order of the minority judgment, that the entire amount of the value of the renovations had to be forfeited to the state.

S v TN AND OTHERS 2020 (1) SACR 633 (LP)
Rape — Proof of — Child offenders — Sensitivity required in assessment of evidence — Matter ought not to have gone beyond stage of discharge of accused in terms of s 174 of Criminal Procedure Act 51 of 1977.

The four offenders were convicted in a regional court of rape, and three of the offenders were minors who were sentenced to five years' imprisonment in terms of the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977. They appealed against their conviction, and challenged the court's evaluation of the evidence of the complainant and the magistrate's finding that the state had proved a lack of consent on the part of the complainant.
Held, that it could not be said that the state had discharged its onus of proving the guilt of the child offenders beyond reasonable doubt, and the case should not have gone beyond an application for discharge of the offenders in terms of s 174 of the Criminal Procedure Act 51 of 1977. (See [26].)
Held, further, that it was desirable that sexual-offence cases in general, and where children were victims in particular, be prioritised and accorded the sensitivity that they deserved. It was established that courts should play an active role in curbing the escalation, but in doing so they should guard against going beyond what was legally acceptable and the established principles governing evaluation of the evidence presented before them. There was a thin line between what was legally wrong and what was morally unacceptable. The conduct of the accused and the complainant in the present matter was clearly abominable, but it was discriminatory to punish the

offenders alone, who themselves were children, when the complainant was also a willing party in what had happened. The moral blameworthiness of the offenders did not necessarily translate into criminality. The conviction of the offenders had to be set aside. (See [27] and [30].)

S v GUMEDE AND OTHERS 2020 (1) SACR 644 (KZP)

Plea — Plea of guilty — Summary conviction after plea of guilty in terms of s 112(1)*(a)* of Criminal Procedure Act 51 of 1977 — For which cases procedure appropriate — Charges of shoplifting — Not inappropriate to use s 112(1)*(a)* for such cases.

Seven cases were placed before the court on special review by the senior magistrate of Durban, in which an additional magistrate had convicted the seven accused in separate cases of shoplifting, after having accepted a plea of guilty in each case under s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977. The senior magistrate was concerned that offences of theft should possibly not be dealt with under the provisions of s 112(1)*(a).*
Held, that each of the seven cases illustrated the proposition that it was simply incorrect to state that a charge of theft (or theft by shoplifting) could not be within the magistrate's discretion to accept a plea of guilty under s 112(1)*(a)* of the Criminal Procedure Act. The sentences imposed in each case fell well below the limits set by the section and none of the sentences was out of the ordinary. Each of the cases constituted what had traditionally been called 'petty theft', and, although theft was a serious matter, and regarded as such by the public, if its seriousness were to be judged by the sentences imposed for the crimes then the law did not regard it as serious in all cases. It had long ago abandoned an inclination to impose horrible punishments for the theft of a loaf of bread. (See 40].) The court certified that the proceedings in the seven criminal cases were in accordance with justice.

MARSLAND v ADDITIONAL DISTRICT COURT MAGISTRATE, KEMPTON PARK AND ANOTHER 2020 (1) SACR 659 (GJ)

Extradition — Under Southern African Development Community Protocol on Extradition, art 10(5)*(a)* — Receipt of request for extradition — Article 6 of Protocol providing for different manner of receipt of request for extradition transmittable through diplomatic channel to any other authority designated by state parties — Section 4 of Extradition Act 67 of 1962 subject to art 6.

The applicant applied on an urgent basis for the review of a decision of a magistrate not to release him from his provisional arrest in terms of art 10(5)*(a)* of the Southern African Development Community Protocol on Extradition. He had been arrested in Johannesburg at the airport as he was about to board a plane for Germany. The arrest was under a warrant issued by the magistrate in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act). Interpol had issued a 'Red Notice' for the applicant to be provisionally arrested pending his extradition to Botswana where a warrant for his arrest had been issued on charges of money-laundering. The applicant contended that it was only the Minister who should receive the request for

extradition and that, until such time that the Minister had issued the s 5(1)*(a)* notice, no extradition request could be said to have been received.

Held, that s 4 of the Act was subject to art 6 of the Protocol which provided for a different manner of receipt of the request for extradition, which could also be transmitted through the diplomatic channel to any, other authority designated by the state parties, and, in the present case, was directed to the Department of International Relations and Co-operation, which in turn duly forwarded it to the Director-General of the Department of Justice and Constitutional Development.

There was no requirement in the Protocol that the Minister had to issue a s 5(1)*(a)* notice as proof of such receipt, where the arrest was pursuant to a warrant issued by the magistrate in terms of s 5(1)*(b)* of the Act. (See [22].)
Held, accordingly, that the magistrate had not erred in concluding that the applicant was not entitled to be discharged on the basis that the Minister did not issue a notice in terms of s 5(1)*(a)* of the Act. (See [28].) The application was dismissed.

S v MAINGA 2020 (1) SACR 666 (GJ)

Review — Special review in terms of s 304(4) of Criminal Procedure Act 51 of 1977 — In what cases — Magistrate imposing sentences on six offences totalling 55 years, and cumulative sentence, if calculated correctly and taking into account concurrency of some offences, 45 years' imprisonment, but magistrate concluding that sentence was 40 years' imprisonment — Two attempts at appeals failing, both assuming sentence was one of 40 years' imprisonment — Appropriate matter for application of s 304(4).

The applicant had been convicted in a regional court in 2008 of six offences, all of a serious nature. The offences were committed on three separate occasions and the magistrate imposed sentences totalling 55 years, but certain of the sentences were to be served concurrently with other sentences which, if calculated correctly, amounted to a total sentence of 45 years' direct imprisonment. However, in concluding her judgment on sentence, the magistrate stated that the total sentence was one of 40 years' imprisonment. The applicant's appeal against conviction and sentence was dismissed by the High Court as was an application for leave to appeal by the Supreme Court of Appeal. The appeal proceedings were both based on the assumption that the sentence was one of 40 years' imprisonment. The regional magistrate subsequently submitted the matter on special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA) because of the discrepancy between the sentence as formulated and the correct calculation of the total sentence.
Held, that, if the sentence were to be corrected as suggested by the regional magistrate to a sentence of 45 years' imprisonment, that would result effectively in an increase in the applicant's sentence, which would be innately unfair and inherently unjust. Furthermore, setting aside the effective sentence of 40 years' direct imprisonment and remitting the case to the trial court to reconsider the effective sentence after giving the applicant an opportunity to make representations, would also not be suitable. (See [20] – [21].)
Held, further, that the submission by the state that the present review was incompetent in terms of s 302(1)*(b)*(iii) of the CPA could not be sustained. That

section expressly related to an 'automatic review' and had no bearing on a special review as envisaged by s 304(4). The jurisdictional requirements for a special review were simply that the regional court had imposed a sentence and it had been brought to the High Court's attention that the proceedings in which the sentence was imposed were not in accordance with justice. In the present case both those requirements had been met and the sentence therefore stood to be reviewed. (See [22].)
Held, further, that an important consideration was that the High Court and the Supreme Court of Appeal had already had an opportunity to consider the appropriateness of the sentence imposed, and the accused and his co-accused had been sentenced as far back as 2008. It would appear innately unjust and unfair to delay giving the applicant a definitive answer as to whether he had been sentenced to 40 or 45 years' imprisonment. If the court accepted that the sentence imposed was effectively 45 years' direct imprisonment there could be no doubt that the proceedings in the regional court were not in accordance with justice, and on that basis alone the sentence had to be set aside in terms of s 304(4). (See [31] – [32].) The sentences were accordingly amended in order to provide for a total of 40 years' imprisonment.

All SA [2020] Volume 2 June

Bergh and others v Agricultural Research Council [2020] 2 All SA 637 (SCA)

Intellectual Property – Copyright – Computer programme – Ownership – Entitlement to copyright – Copyright Act 98 of 1978 defines the author of a computer programme as the person who exercised control over the making of the computer programme – Copyright vesting in person who authored programme independently, bringing his own skills and experience to bear and who reserved ownership in the programme.

The respondent, the Agricultural Research Council (the “ARC”) obtained interdictory relief against the appellants in respect of breach of copyright and unlawful competition in relation to a computer programme that served as a cattle or herd management tool.

The objects of the ARC are, through research, development and technology transfer, to promote agriculture and industry. Animal improvement was within the ARC’s remit under the Animal Improvement Act 62 of 1998. In terms of its statutory mandate and powers, the Arc operated an integrated registration and genetic information system (“INTERGIS”), commissioned and developed by the State, to integrate the pedigrees and performance data of animals as envisaged in the Animal Improvement Act.

In fulfilling its statutory role, the ARC utilised, inter alia, a cattle or herd management system, the aforesaid computer programme (“BeefPro”), which, it was claimed, it developed and introduced to the market in 2005. The ARC’s complaint was the “misappropriation” of BeefPro by the appellants, which it alleged the appellants were utilising for purposes of conducting a parallel system to INTERGIS, called Logix. The appellants, so the ARC claimed, were employing BeefPro for financial benefit and consequently undermined the ARC in the performance of its statutory duties. All the more so, it was contended, because cattle farmers presently supplied data that ought to be destined for the INTERGIS system to the appellants, which the appellants then used in their Logix system, rendering INTERGIS redundant.

Held – On appeal that the parties were agreed that a finding on entitlement to copyright was dispositive of the appeal. The ARC sought relief on the basis that it owned the copyright in BeefPro. The question to be addressed was whether it discharged the onus of proving its ownership.

The Copyright Act 98 of 1978 defines the author of a computer programme as the person who exercised control over the making of the computer programme. The onus to prove that it exercised control over the making of BeefPro rested on ARC.

The evidence established that the programme had been authored by a person who worked on it independently, bringing his own skills and experience to bear, only seeking certain information from the ARC in order to ensure that the programme served its purpose. He did not follow instructions from, or work under the supervision of anyone at the ARC, and also reserved ownership in the programme. In the premises, the appeal was upheld.

City of Cape Town v JB and others [2020] 2 All SA 784 (WCC)

Immigration – Refugees – Rights of refugees – Demand by refugees to be moved from their ordinary places of residence in the country to another area where they would be provided with accommodation by the government, or be taken out of the country at State expense and be moved to another country to improve their standard of living – Insofar as demands had nothing to do with the country's responsibilities to give effect to international legal instruments, principles and standards or national prescripts to regulate matters connected with refugees, such demands were refused.

The respondents were refugees occupying the streets in the City of Cape Town, while waiting for compliance by the City of their demand to be moved from their ordinary places of residence in the country to another area where they would be provided with accommodation by the government, or be taken out of the country at State expense and be moved to Canada or another country in Europe. They essentially sought to be moved to another area or country in order to improve their standard of living.

Held – The respondents were not forced by circumstances not to return to their ordinary places of residence in South Africa. They chose not to return and elected to move elsewhere. They were drawn to housing or another country because of the prospect of and a desire to escape the social and economic situation in their ordinary places of residence in South Africa.

The Court was critical of the respondents' demands. Their request did not engage humanitarian issues but was simply based on economics. They refused to subject themselves to the country's laws and procedures. Their conduct had the potential to undermine the legitimate concerns of refugees, asylum seekers and migrants in the country. The Court therefore confirmed the interim order made in favour of the City.

Democratic Alliance and others v Premier for the Province of Gauteng and others [2020] 2 All SA 793 (GP)

Local Government – Municipal council – Dissolution of council in terms of section 139 of the Constitution – Judicial review – Jurisdictional fact necessary to invoke section 139 of the Constitution was either the inability to fulfil an executive obligation or the failure of the Municipal Council to fulfil an executive obligation – Where decision to

dissolve council was not linked to fulfilment of any recognised executive function, the exercise of power was not lawful.

The first applicant was a political party (the "DA"), and the remaining applicants were three councillors, who were its members, serving in the City of Tshwane. They sought to review and set aside the decision to dissolve the sixth respondent which was the City of Tshwane Metropolitan Municipality (the Municipal Council).

Held – It was common cause that the Municipal Council had reached a deadlock. No parties therein could win an argument or gain an advantage and no action could be taken by the Municipal Council. The council had no Mayor, Mayoral Committee or Municipal Manager. It was unable to conduct its business and could not serve its residents. The reason for the deadlock was located in the Municipal Council's inability to convene and run council meetings to transact and take necessary decisions in line with its responsibilities. That situation existed as a direct consequence of the disruption of its meetings due to the walkout from council meetings by councillors from two political parties (the ANC and EFF) thus depriving the Municipal Council of the necessary quorum. The result of the dissolution decision was that the Municipal Council was immediately dissolved, an Administrator was to take over the functions, and fresh elections throughout Tshwane would have to take place within three months.

The dissolution decision was taken in terms of section 139 of the Constitution. The jurisdictional fact necessary to invoke that provision was either the inability to fulfil an executive obligation or the failure of the Municipal Council to fulfil an executive obligation. Section 139(1)(c) has an additional jurisdictional fact in that it provides that dissolution can only be resorted to should there be exceptional circumstances warranting it. A court can interfere with the dissolution decision if objectively the jurisdictional facts were not present at the time the decision was made, thus a review based on the principle of legality. That meant that there must be a direct correlation between the exercise of the power, i.e. the decision to dissolve the Municipal Council, and the objective sought to be achieved ie the fulfilment of the stated executive obligation. For a court to decide whether an executive obligation was breached the executive obligation must be identified. It was found that the decision was not linked to fulfilment of any recognised executive function. The court also found merit in the DA's submission that less restrictive means should have been resorted to instead of the drastic measure of dissolving the Council. The decision was reviewed and set aside, and ancillary relief was granted.

Discovery Ltd and others v Liberty Group [2020] 2 All SA 819 (GJ)

Intellectual Property – Trademark – Alleged infringement – In order to provide a basis for an infringement under section 34(1)(a) of the Trade Marks Act 194 of 1993, the use complained of must be "trade mark use", and not every use of the trade mark by a competitor will fall within the ambit of section 34(1)(a) and thus constitute an infringement – Question was whether, through the impression created by its use of the trade mark, the third party was misappropriating the proprietor's badge of origin ascribed to the proprietor's own goods or service – No infringement found where use of trademark by third party was not trade use.

The first applicant ("Discovery") was the sole shareholder of the second and third applicants (respectively "Discovery Life" and "Discovery Vitality"). Discovery owned two trademarks, *viz*. Discovery and Vitality – registered in relation to insurance

services, among others. Discovery permitted Discovery Life and Discovery Vitality to use the trademarks under section 38 of the Trade Marks Act 194 of 1993. Discovery Vitality's primary business comprised the Vitality wellness and rewards programme (the "Vitality programme"), which it administered. Any member of a medical scheme offered within the Discovery group could elect to become a member of the Vitality programme. That involved payment of a monthly membership fee. The programme encouraged members to lead a healthy lifestyle. Vitality members earned Vitality points for taking steps in that regard. The more points a member earned, the higher her Vitality status became.

The business of the respondent ("Liberty") included the sale of life insurance and related products. It was therefore a direct competitor of Discovery Life in that regard. In terms of an additional feature added to a policy marketed by Liberty, a "Wellness Bonus" was introduced Qualifying customers could elect to disclose to Liberty their existing membership of an external wellness programme in order to add the Wellness Bonus to their Liberty Plan policy. If the wellness programme was one recognised by Liberty, the Wellness Bonus permitted a policyholder to receive a portion of the premiums they paid under their Liberty Plan policy back from Liberty. Discovery Vitality was one of the external wellness programmes recognised by Liberty for purposes of the Wellness Bonus.

Contending that Liberty had unlawfully linked its insurance offering, based on the Wellness Bonus, to the Vitality Wellness programme, the applicants stated that Liberty had infringed Discovery's Vitality and Discovery trademarks. Secondly, the applicants contended that Liberty made unlawful and unfair use of the Vitality programme, its reputation and the behind-the-scenes operations, information and know-how that went into maintaining and developing the Vitality programme. Interdictory and other relief was sought.

Held – In order to provide a basis for an infringement under section 34(1)(a) of the Trade Marks Act 194 of 1993, the use complained of must be "trade mark use". While the proprietor of a registered trademark has a monopoly over its use, it is not an unlimited monopoly. Not every use of the trade mark by a competitor will fall within the ambit of section 34(1)(a) and thus constitute an infringement. An infringement occurs when the use of the trade mark "affects or is likely to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods". The protection of trade marks under the Act is not designed to silence commercial speech. The question was whether, through the impression created by its use of the trade mark, the third party was misappropriating the proprietor's badge of origin ascribed to the proprietor's own goods or services. Examining Liberty's use of the words "Discovery" and "Vitality" in the context in which they were used, the Court found Liberty's use of the trademarks not to be trade use for the purposes of section 34(1)(a). No infringement under section 34(1)(a) was found.

Under section 34(1)(c), an infringement will occur if the trade marks in question are well known in the Republic, and if the unauthorised use will take unfair advantage of, or be detrimental to the distinctive character or repute of the registered marks. It is not necessary to establish that the use of the trademarks is likely to cause deception or confusion. No evidence was adduced in support of the asserted likelihood of significant detriment to the applicants' reputation.

The Court was satisfied that Liberty had established that its use of the trademarks is *bona fide* and in accordance with fair practice within the ambit of section 34(2)(b).

Unable to find that Liberty's conduct was wrongful, the court also dismissed the arguments based on unlawful competition.

Mahlangu and another v Minister of Police [2020] 2 All SA 656 (SCA)

Personal Injury/Delict – Judicial detention – Claim for damages – In respect of an unlawful arrest, the actio iniuriarum is subject to special features, namely that liability for wrongful arrest is strict – Onus of proving that deprivation of liberty was not wrongful resting on police – Confession obtained through police assault – Inclusion of inadmissible confession in docket with intention that it be relied upon, found to be factual cause of further detention from first appearance until appearance in court, but not legal cause of detention beyond date of appearance in court.

The appellants were arrested without a warrant on four counts of murder on 29 May 2005. They were brought before a magistrate's court, for their first court appearance, on the morning of 31 May 2005. They were remanded in custody until 14 June 2005, pending the prosecutor's request to allow for further investigation and the bail hearing. Subsequent appearances before the magistrate's court on numerous remand dates resulted in their further detention. They remained in custody until 10 February 2006, when they were released after the Director of Public Prosecutions had decided to withdraw the charges against them.

Arising from their arrest, subsequent detention until their first appearance in court (the police detention), an alleged assault by the police on the first appellant, and their detention in terms of various court orders from the time of their first appearance in court until their release (the judicial detention), the appellants claimed damages for infringement of their *dignitas*, *fama*, bodily integrity and their right to freedom. That claim was based on the *actio injuriarum*.

It was common cause that a confession was extracted from the first appellant through torture by police officials.

The trial court held that the arrest and police detention were unlawful, and awarded damages to the appellants. No damages were awarded in respect of the claims for alleged loss of income and earning capacity, nor in respect of the claim for non-patrimonial damages in respect of the plaintiffs' judicial detention. The Court held that the appellants' unlawful detention came to an end once they were detained in terms of a court order after their first appearance in court.

On appeal, the Full Court confirmed the trial court's refusal to award the appellants damages for the period of their judicial detention and dismissed the appeal with costs. The present appeal was against that decision.

Held – In respect of an unlawful arrest, the *actio iniuriarum* is subject to special features, namely that liability for wrongful arrest is strict. Neither fault nor awareness of the wrongfulness of the arrestor's conduct is required. The onus of proving that the deprivation of liberty was not wrongful was on the police.

Section 12(1)(a) of the Constitution guarantees the right of security and freedom of the person, which includes the right not to be deprived of freedom arbitrarily and without just cause. Section 35(1) provides that anyone who is arrested for allegedly committing an offence has the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day

after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and to be released from detention if the interests of justice permit, subject to reasonable conditions.

The Court had to decide whether the inclusion of an inadmissible confession in the docket at the first appearance factually and legally caused the appellants to be detained thereafter. Assuming in favour of the appellants, that the factual cause of their detention for the remainder of their entire judicial detention after 14 June 2005 was the inadmissible confession, the decisive enquiry was whether legal causation was proved, and whether the Minister should be held liable for the full period of their judicial detention. That enquiry raised the issue whether the appellants should have applied to be released on bail during the period of judicial detention, and what limits of liability the legal convictions of the community and legal policy determined.

The inclusion of the inadmissible confession in the docket with the intention that it be relied upon, was the factual cause of the appellants' further detention from their first appearance until they appeared in court on 14 June 2005. However, it was not the legal cause of their detention beyond 14 June 2005, on which date they could on probability have applied for bail, and would have been released – that is, after a period of some two weeks' judicial detention.

In addition to the amounts awarded by the trial court in respect of the damages suffered preceding their judicial detention, the majority of the appeal court awarded R100 000 as damages for the above period of two weeks' detention.

Mohamed and others v President of the Republic of South Africa and others (United Ulama Council of South Africa and another as amici curiae) [2020] 2 All SA 844 (GP)

Constitutional and Administrative Law – Religion – Right to religious practices – Congregational worship – Suspension of right during national state of disaster declared during pandemic – Lockdown Regulations issued under Disaster Management Act 57 of 2002 – Refusal to allow exemption to permit congregational worship – Whether reasonable and justifiable – Objective of combatting virulent, high-risk spread of infection during pandemic justifying sacrificing of certain constitutional rights.

In March 2020, the World Health Organisation recognised the disease known as COVID-19 as a pandemic. In South Africa, a state of disaster was declared and a national lockdown put into effect. Regulations were promulgated (the "Lockdown Regulations") pursuant to that declaration, enacting a range of measures designed to slow the spread of the virus. People were confined to their place of residence and prohibited from moving around, unless to perform or procure essential services and goods, to access social grants or medical care. All gatherings were strictly prohibited, and places at which people congregated were expressly required to remain closed.

That led to the present urgent application by the applicants. They contended that it was obligatory, in terms of their religious beliefs, to perform the five daily prayers in congregation and at a mosque. They therefore argued that that the Lockdown Regulations violated their constitutional rights to freedom of movement, freedom of religion, freedom of association (including religious association) and the right to

dignity. As relief, they sought a declaration that the Lockdown Regulations were unconstitutional and invalid to the extent that they failed to allow congregational worship. It was also sought to have the Lockdown Regulations amended to allow for place of religious worship to remain open subject to conditions.

The respondents' position was that whilst the Lockdown Regulations entailed serious rights limitations, they constituted a reasonable and justifiable limitation and were thus constitutionally permissible under section 36 of the Constitution.

Held – The question was whether Regulations 11B(1)(a)(i) and (ii) issued under the Disaster Management Act 57 of 2002, and in particular, the refusal to allow an exemption to permit congregational worship, were reasonable and justifiable in the circumstances under which the Regulations were promulgated.

The virulent nature of the pandemic, the rate of infection, and the high risk of exponential infection meant that the social distancing measures put into place had to be enforced as far as possible. Making allowances of the nature sought, would be tantamount to opening the floodgates. The call to every citizen to make sacrifices to their fundamental rights entrenched in the Constitution was essential in stemming the tide of the insidious and relentless pandemic.

It could not be found that the restrictions imposed were either unreasonable or unjustifiable. The application thus failed.

President of the Republic of South Africa and another v Public Protector and others (Information Regulator as amicus curiae) [2020] 2 All SA 865 (GP)

Public Protector – Powers of – Conduct of political party members in conformity with their party structures falls in the private domain and beyond the sphere of competence of the Public Protector.

Constitutional and Administrative Law – Public Protector – Report of – Application for review – As Public Protector's reports do not amount to administrative action, but involve an exercise of public power, they are reviewable under the rule of law.

A question posed to the President in the National Assembly concerning payment of R500 000 into an account allegedly for the President's son, was answered by the President on the spot. The payment was alleged to have been made by the CEO ("Watson") of a company ("BOSASA") mired in corruption allegations. However, a week later, the President wrote to the National Assembly stating that he had provided incorrect information in response to the question. He explained that the payment had been made on behalf of Watson, to the campaign (the "CR17 campaign") supporting the President's candidature for the position of president of the African National Congress.

Two complaints were then filed with the Public Protector, who investigated the complaints and issued her Report making three serious findings against the President. It was stated that the President had misled Parliament; that he failed to disclose donations to the CR17 campaign; and that the Public Protector had a *prima facie* suspicion of money laundering.

In the present application, the President sought to have the Report reviewed and set aside. He denied any conflict of interests between his official duties and his private

interests, or that he had used his position to enrich himself or his son. He alleged that he was unaware of the donation at the time it was made, but contended that he had no duty under the Executive Code to disclose donations made to the CR17 campaign.

Held – The Public Protector's reports do not amount to administrative action. As they involve an exercise of public power, they are reviewable under the rule of law. The grounds of review included arguments that the Public Protector's findings were based on a material error of law, and that it was tainted by irrationality and unlawfulness.

Regarding the finding that the President had misled Parliament, the court found that the Public Protector appeared confused about the legal foundation of such finding. Her finding was based on the Executive Code which prohibits the wilful mispleading of Parliament. However the Public Protector expanded on the element of wilfulness by including the inadvertent misleading of Parliament.

That was at odds with the express provision of the Code and led to the Public Protector applying the wrong test. The finding was thus fatally flawed due to a material error of law. The Court highlighted the confusion displayed by the Public Protector, who appeared to accept the *bona fides* of the President in her report but then backtracked on the issue. She was held not to have approached the issue with an open mind.

The next question was whether the Public Protector had jurisdiction to investigate the CR17 campaign donations. Setting out the wide powers of the Public Protector, the court found that the conduct of political party members in conformity with their party structures falls in the private domain and beyond the sphere of competence of the Public Protector.

The Court also confirmed that the President was under no duty under the Executive Code to disclose donations made to the CR17 campaign.

In making a finding of money laundering, the Public Protector cited the basis of the allegation as the Prevention and Combatting of Corrupt Activities Act 12 of 2004. However, that Act does not deal with money laundering. In any event, the facts before the Public Protector did not support the very serious finding she made.

The Report contained remedial action to be taken by the Speaker of the National Assembly and the National Director of Public Prosecutions ("NDPP"). The Court found the remedial action to lack clarity and as regards the NDPP, to be beyond the limits of the Public Protector's powers.

The review application was granted, and a punitive costs order was made against the Public Protector.

Quad Africa Energy (Pty) Ltd v Sugarless Company and another [2020] 2 All SA 687 (SCA)

Intellectual Property – Copyright – Establishment of copyright infringement – Requirements – To establish copyright infringement under the Copyright Act 98 of 1978, party must establish that it was the owner of an original work; which qualified for protection under the Act and that third party carried out an act in respect of which copyright owner enjoyed an exclusive right in terms of the Act.

Intellectual Property – Trademark – Alleged infringement – Endorsement of trademark with disclaimer in respect of exclusive rights in word which was merely descriptive – Section 15 of the Trade Marks Act 194 of 1993 permits for a trade mark registration to

be endorsed with a disclaimer if it contains matter which is not capable of distinguishing within the meaning of section 9, which deals with whether a mark is capable of distinguishing.

The first respondent ("TSC") was an Australian company which obtained registration of its S SUGARLESS logo in South Africa and became the proprietor of a trade mark in class 30, for a broad range of goods, including confectionery. Shortly before then, the appellant ("QAE") was appointed the exclusive distributor of TSC's confectionery products in South Africa.

On 16 April 2018, QAE gave notice to TSC of its intention to terminate the distribution agreement. Subsequent to the notice, but prior to the termination of the agreement, it came to TSC's attention that QAE had launched a competing brand called SUGARLEAN confectionery. The competing brand's packaging (the first infringing packaging) was identical to TSC's packaging, save that the S SUGARLESS logo had been replaced with the S SUGARLEAN logo.

In response to a demand from TSC, QAE stated that it had stopped using the first infringing packaging, which it was in the process of changing, and would commence distributing its products in new packaging, which would not infringe TSC's trademarks or intellectual property. However, the new packaging, despite being markedly different from the original packaging, did not appease TSC.

Approaching the High Court, TSC contended that QAE's conduct was unlawful on at least four fronts. It alleged that QAE's conduct infringed TSC's registered trade mark; infringed TSC's copyright; purported to pass off its product as TSC's product and amounted to unlawful competition.

QAE brought a counter-application to have its S SUGARLESS CONFECTIONERY logo to be endorsed with the following statement: "Registration of this trade mark shall give no right to the exclusive use of the word 'sugarless', separately and apart from the mark".

The High Court dismissed the counter-application and found in TSC's favour. Leave was granted to QAE to appeal to the Supreme Court of Appeal against the dismissal of the counterclaim; the declaration that the new packaging and future packaging (as defined) constituted copyright infringements; the declaration that the future packaging constituted passing off; the interdicting of the use of the trade mark "SUGARLESS" and "SUGARLESS CONFECTIONERY"; and the granting of relief under the Counterfeit Goods Act 37 of 1997 in respect of the new and future packaging. TSC was granted leave to cross-appeal against the exclusion of the SUGARLEAN logo from the relief granted in three of the prayers.

Held – In respect of the counter-application, it was noted that section 15 of the Trade Marks Act 194 of 1993 permits for a trade mark registration to be endorsed with a disclaimer "if it contains matter which is not capable of distinguishing within the meaning of section 9". Section 9 deals with whether a mark is capable of distinguishing. The term "sugarless" was merely descriptive and inherently incapable of distinguishing one person's confectionery goods from another's. The counter-application should not have been dismissed, and the interdicts against the use of the mark "SUGARLESS" and "SUGARLESS CONFECTIONERY" could not stand.

To establish copyright infringement under the Copyright Act 98 of 1978, TSC had to establish that it was the owner of an original work; which qualified for protection under

the Act and that QAE had carried out an act in respect of which TSC enjoyed an exclusive right in terms of the Act. The present court again disagreed with the High Court, finding no objective similarity between the parties' packaging. The same finding was made in respect of passing off and in TSC's cross-appeal based on alleged trademark infringement.

Finally, the Court found that the High Court had failed to consider the requirements for counterfeiting. The appeal was also upheld in that regard.

Rand West City Local Municipality v Quill Associates (Pty) Ltd and another [2020] 2 All SA 921 (GP)

Civil Procedure – Claim for interest – Entitlement to claim interest on amounts awarded by court a tempore morae, ie from the date upon which the summonses were served, and entitlement to claim compound interest confirmed by court.

Civil Procedure – Writ of execution – Issue of writ by Registrar – Application for review – When a Registrar does not apply his mind or makes another mistake in respect of which grounds for review are present, the decision to issue the writ must be reviewed and set-aside.

In August 2016, two municipalities merged and the applicant became their successor-in-title. The first respondent ("Quill") initiated proceedings against the two former municipalities and in the consolidated action, the court granted judgment in favour of Quill in the amounts of R4 750 000 and R5 750 000, plus interest *a tempore morae* at a rate of 15,5% per annum. The applicant made payment in an amount of R11 533 260,17 to Quill on 20 December 2016.

In July 2018, Quill requested the second respondent (the "Registrar") to issue a writ of execution, in terms of Rule 45(1) of the Uniform Rules of Court in an amount of R7 965 470,56. A writ of execution was issued on 10 July 2018, and the Deputy Sheriff of the Court executed the writ by attaching an amount of R7 965 470,56 in the applicant's bank account.

In the present application, the applicant sought an order reviewing and setting aside the decision of the Registrar to issue the writ of execution directing the Sheriff to attach and take into execution the sum of R7,965,470,56 plus interest thereon at the rate of 15,5% calculated per annum and compounded monthly as from 11 July 2018 to date of payment, and other taxed costs and charges, against the incorporeal property of the applicant held at its bank. The review application was brought in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000. In the alternative, it was sought to have the writ and the notice of attachment in execution set aside.

According to the applicant, as Quill was aware that there was a dispute with the applicant regarding the calculation of interest, it had to give notice to the applicant of its intention to apply for the issue of the writ and it had to serve the affidavit on the applicant to enable the latter to make representations to the Registrar about its view of how the interest had to be calculated. The applicant also argued that the Registrar should have realised that such a dispute existed and should have notified the applicant of the application for the writ of execution.

Held – The case raised various interesting legal questions.

One of the issues to be addressed related to the addition by the court of Value-Added Tax ("VAT") to the amounts ordered to be due and payable. The applicant contended that Quill did not attach a copy of the VAT invoice to its affidavit and it was

therefore wrong to add VAT to such amounts. It argued further that the summons claimed only a "reasonable royalty" in respect of damages, and that such reasonable royalty had to be taken to include VAT. In establishing whether VAT was payable on the amounts awarded by the Court, the nature of Quill's claims which formed the subject matter of the Court's judgment had to be identified. It was found that the claims were based on a royalty and monthly payment due in respect of the extension of certain licences to the two municipalities. The amounts awarded were for the infringement of copyright. The starting point in determining liability for VAT is section 7(1)(a) of the Value-Added Tax Act 89 of 1991, which provides that VAT is levied on the supply by any vendor of goods or services in the course or furtherance of any enterprise carried on by him. The term "services" is defined in section 1 of the Act as "anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage". The court held that Quill's contractual rights were surrendered and replaced by the award which occurred in the course of the furtherance of Quill's enterprise or normal business activities. There was therefore no basis upon which to conclude that Quill would not be liable for VAT on the amount awarded by the Court.

The finding that VAT was payable by Quill, led to the questions of whether the Court's award should have mentioned VAT; and the effect of the Court's award not mentioning anything in that regard. The conclusion was therefore that VAT was payable by the applicant on the amount that was awarded by the Court in its judgment.

The next question was whether Quill was entitled to claim interest on the amounts awarded by the court *a tempore morae*, ie from the date upon which the summonses were served. That required determining what the words "*a tempore morae*" meant in the present context. Translated, the words effectively mean "for the period of default", thus leading to the question of when the period of default commenced. Following case law, the Court held that Quill was reimbursed or compensated as from the date upon which the summonses were served ie 17 July 2013, and if everything went according to plan, would have earned the royalties and monthly licence payments of R57 000 per month. Its calculation of interest from 17 July 2013 was thus correct.

A related question was whether Quill was entitled to claim compound interest (interest on interest). It was accepted that Quill suffered further damage by the applicant's failing to effect payment of the royalties and the monthly licence fee since the date upon which the combined summonses was served. *Mora* interest remains a specie of damages which Quill was entitled to recover from the applicant. It was thus entitled to claim compound interest.

In respect of the application for review of the Registrar's decision to issue the writ, the court had to decide whether such decision was susceptible to review in terms of the Promotion of Administrative Justice Act 3 of 2000. Not all acts by State entities are administrative acts that fall within the ambit of the latter Act and are reviewable under the Act. The Court accepted that when a Registrar does not apply his mind or makes another mistake in respect of which grounds for review are present, the decision to issue the writ must be reviewed and set-aside. However, in this case, the Registrar did not err in issuing the writ. The application for review was thus refused.

South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another [2020] 2 All SA 713 (SCA)

Environment – Establishment of logistics park – Authorisation of – Appeal against dismissal of review application – No case established in support of contention that relevant environmental impact factors were not taken into account in issuing authorisation of logistics park, resulting in dismissal of appeal.

The second respondent ("Capital") wished to construct a logistics park comprising of warehouses, vehicular parking and a distribution yard, to service heavy haulage vehicles transporting containers to and from the logistics park. It applied for and received authorisation from the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs (the "Department") in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA"), to do so. The appellant (the "Alliance") was an environmental justice non-governmental organisation, which sought to promote and achieve environmental justice for residents and communities of the South Durban area. It initially opposed the grant of the authorisation, and thereafter pursued an internal appeal to the first respondent (the "MEC"), in terms of section 43 of NEMA.

The Alliance alleged that the logistics park would produce vehicular emissions of disproportionate scale and that the area and the communities residing within it, which had a negative history of serious air pollution from heavy industry, were at high risk for exposure to significant levels of ambient air pollution. After its internal appeal was dismissed, the Alliance launched an application in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), before the High Court, for the judicial review and setting aside of the decision of the MEC, and for the remittal of the matter to the MEC for reconsideration. The review application was dismissed with costs. Leave to appeal to the present Court was thereafter granted by the High Court.

A preliminary issue raised by the Court with the parties at the hearing of the appeal was that the appellant had only sought a review of the MEC's appellate decision and had not sought a review of the decision of the Department, granting the authorisation.

Held – Although it might be true that both decisions should have been challenged, the Court made no firm finding in that regard and proceeded to a consideration of the substantive merits of the application.

The Alliance's case was based on the assertions that the MEC had failed to properly take account of the findings and recommendations of an entity called the South Durban Health Studies; that the receiving environment with reference to air quality and health was not properly described; that the air quality impact study conducted was inadequate; and that the MEC failed to consider and apply the principle contained in section 2(c) of NEMA. The court found no merit in any of those contentions. Based on the evidence, it was accepted that the effect of the proposed logistics park, including its cumulative effect, was likely to be negligible.

The appeal was thus dismissed.

Staufen Investments (Pty) Ltd v Minister of Public Works and others [2020] 2 All SA 738 (SCA)

Expropriation – Lawfulness of decision to expropriate – Where expropriation was clearly for a public purpose and in the public interest (specifically, the provision of electricity), pre-existing unlawful use and occupation of property irrelevant and expropriation confirmed as appropriate remedy to correct previous unlawful situation.

The issue in this appeal was whether the first respondent's decision of 30 September 2016, to expropriate certain servitudes over the appellant's farm in favour of the second respondent ("Eskom"), was lawful. The appellant unsuccessfully sought to review the decision in the High Court.

Appealing against the High Court decision, the appellant contended that the court had erred as the expropriation decision was taken for an improper and unlawful purpose, and in bad faith; the description of what was to be expropriated was unclear; the expropriation decision contravened section 6 of the Promotion of Administrative Justice Act 3 of 2000; the expropriation decision was procedurally unfair; the facts material to the circumstances in which the expropriation decision was given, gave rise to a reasonable apprehension of bias; and that the amendment of the expropriation decision by the court a quo was irregular.

In 1997, the then owner of the farm concluded a notarial deed of servitude with Eskom, granting Eskom and its successors in title and assigns, the perpetual right to a right of way (6m wide) over the farm; the perpetual right to a portion not exceeding 1240 square meters for the purpose of erecting an electrical substation; and an exclusive perpetual right to lead electricity over the land. The farm was sold several times before being sold to the appellant. In each title deed giving effect to the successive transfers, only the 6m right of way servitude was carried forward as a title condition.

By the time the appellant purchased the farm in 2014, Eskom's substation had existed thereon for some 17 years. The substation had however expanded beyond the area originally provided for in the notarial deed. A challenge to Eskom's rights led to the discovery that such rights were personal in nature and enforceable only against the owner with whom Eskom had contracted in 1997. The parties therefore agreed that the substation and the overhead power cables across the farm were erected unlawfully. In August 2014, the appellant demanded that Eskom cease its unlawful occupation. It eventually launched an application to evict Eskom. Eskom responded by launching an application for expropriation. The latter application was approved by the first respondent (the "Minister").

The issue in the present appeal concerned the lawfulness of the Minister's decision.

Held – The first question was whether the expropriation decision was taken for an improper or unlawful purpose. The expropriation had as its purpose, the regularising of Eskom's unlawful use of part of the farm. The Court rejected the proposition that an expropriation could not occur, if there was a pre-existing unlawful use and occupation of the land. The application to expropriate was clearly for a public purpose or in the public interest, *viz* the provision of electricity. Expropriation was correctly contemplated as a remedy to regularise the situation.

The Court confirmed that what was to be expropriated was adequately described. It also rejected various allegations of procedural irregularity, and concluded that the Minister's decision was lawful.

Telkom SA SOC Limited v Commissioner for the South African Revenue Service [2020] 2 All SA 763 (SCA)

Tax – Income Tax – Losses or gains caused by foreign exchange fluctuations – Section 24I, Income Tax Act 58 of 1962 – Interpretation of – Section 24I deals with losses or gains caused by foreign exchange fluctuations and is not applicable to a commercial loss which was completely unconnected to foreign exchange currency differences.

The appellant ("Telkom") and a subsidiary acquired the entire share capital in a Nigerian company ("Multi-Links") between 2007 and 2009. In order to make Multi-Links commercially viable, Telkom advanced the company a number of loans in US dollars until October 2011 at which point it disposed of its interest to a third party. As part of the sale, Telkom also sold its rights in respect of its loan to Multi-Links, for USD 100 in its 2012 tax year of assessment.

In its income tax return for the 2012 year of assessment delivered to the respondent (the Commissioner), Telkom instead of reflecting the realisation of the loan as a foreign exchange gain, claimed a deduction in the amount of R3 961 295 256 as a foreign exchange loss, in terms of section 24I of the Income Tax Act 58 of 1962. The effect was that what would have been reflected as a taxable income of R3,12 billion, with a resultant tax liability of R875 million, was then reflected as a tax loss of R106 billion, with the result that Telkom was due a refund of the provisional tax paid for that year, in the amount of R822 million. The Commissioner issued an additional assessment for the 2012 tax year, disallowing the deduction of R3 961 295 256 and assessing Telkom for tax in the amount of R425 188 643, as a foreign exchange gain in terms of section 24I of the Act. Telkom also claimed a deduction of R178 788 421 in respect of cash incentive bonuses paid to a company ("Velociti"), pertaining to the connection of initial subscriber contracts for a specific tariff plan, which Velociti made on behalf of Telkom Mobile. The Commissioner, however, only allowed a deduction R42 256 879.

Telkom appealed to the Tax Court, which dismissed the appeal the foreign exchange issue but upheld the appeal on the cash incentive bonus issue. In the present proceedings, Telkom appealed against the Tax Court's dismissal of its appeal on the foreign exchange issue, and the Commissioner cross-appealed against the upholding of Telkom's appeal on the cash incentive bonus issue.

Held – Section 24I of the Act deals with gains or losses on foreign exchange transactions. The resolution of the dispute as to the deduction of R3 961 295 256 by Telkom was to be found in section 24I, because the loan to Multi-Links in US dollars, constituted an "exchange item" as defined in section 24I(1), as it was an amount in foreign currency owing and payable to Telkom.

The loan was realised in terms of the definition, when Telkom received USD 100 in the 2012 year of assessment, when the loan was settled. When the loan (the exchange item) was realised by Telkom in its sale for USD 100, Telkom was obliged to determine an "exchange difference" in accordance with a proviso to section 24I(10) of the Act, in the 2012 year of assessment.

The determination of the ruling exchange rate, on the realisation date of the loan, lay at the heart of the dispute between the parties. It was held that the Tax Court correctly dismissed Telkom's appeal against the additional assessment issued by the Commissioner, on the basis that Telkom invoked the provision involving exchange rate gains and losses in order to deduct a commercial loss which was completely unconnected to foreign exchange currency differences. Telkom's appeal was dismissed.

The Tax Court however, erred in concluding that there was no basis to add back and disallow R136 531 542 of the cash incentive bonus expenditure by the application of section 23H, in the 2012 year of assessment. The respondent's cross-appeal was thus upheld.

End-for now