LEGAL NOTES VOL 7/2020

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MASWANGANYI v MINISTER OF DEFENCE AND MILITARY VETERANS AND OTHERS 2020 (4) SA 1 (CC)

Defence force — Member — Service — Termination — When jurisdictional fact for termination of service (sentence of imprisonment) removed, member's service reinstated retrospectively — Defence Act 42 of 2002, s 59(1)*(d)*.

Applicant, Mr Maswanganyi, a member of the South African National Defence Force, was convicted of rape and sentenced to life imprisonment, but obtained the setting-aside of the conviction and sentence on appeal (see [3] and [4]).
He then applied to the Defence Force for reinstatement to his former position, but it refused to do so based on s 59(1)*(d)* of the Defence Act 42 of 2002, which provides, inter alia, that a member's service terminates on his being sentenced to imprisonment (see [2]).
This caused Mr Maswanganyi to apply to the High Court for reinstatement retrospective to the date of termination of his service, being the date of sentence (see [3] and [6]). He was successful, and was ordered reinstated retrospectively, but the Defence Force obtained leave to appeal from the Supreme Court of Appeal, which upheld the appeal, causing Mr Maswanganyi to seek leave to appeal from the Constitutional Court (see [13] – [14]).
The court found that it had jurisdiction, granted leave to appeal, and upheld the appeal (see [34] – [35] and [50]).
It *held* that, once the jurisdictional fact of sentence was removed by successful appeal, termination of service was reversed retrospectively by operation of law (see [45] – [46]).
For were it that the trial court's sentence was conclusive, in the sense that even on successful appeal the termination would remain extant, this would negate the right of appeal to a higher court in s 35(3)*(o)* of the Constitution (see [39] – [40]).

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2020 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

The Supreme Court of Appeal's order set aside and substituted with an order declaring applicant's service did not terminate under s 59(1)*(d)*, and that he continued in the position he was in on date of sentence (see [3] and [51]).

AIRPORTS COMPANY SOUTH AFRICA SOC LTD v IMPERIAL GROUP LTD AND OTHERS 2020 (4) SA 17 (SCA)

Government procurement — Procurement process — Organ of state issuing request for bids (RFB) to public for opportunity to hire car-rental kiosks and parking bays at airports it owned, and be granted car-rental concessions in return — Whether s 217 of Constitution applicable — Language used in s 217 clear and unambiguous — Section applicable when organ of state contracting for goods or services, even where not incurring expenditure — Preferential procurement policy reflected in RFB in question found to be in breach of legislation envisaged in s 217(3), and irrational — RFB declared invalid — Constitution, s 217.

Government procurement — Procurement process — Procurement — Whether 'procurement' in s 217 of Constitution including the hiring out of car-rental kiosks and parking bays at airports, and granting of rental concessions to lessees — Meaning of in Constitution, s 217(1)

Words and phrases — 'Procurement' — Meaning of in s 217 of Constitution — Whether including the hiring out of car-rental kiosks and parking bays at airports, and granting of rental concessions to lessees — Constitution, s 217.

The appellant, Airports Company South Africa SOC Ltd (ACSA), a public company created in terms of the Airports Company Act 44 of 1993, was an organ of state as envisaged in s 239 of the Constitution. In 2017 ACSA issued a 'request for bids' (RFB) from the public for the opportunity to hire car-rental kiosks and parking bays at airports which it owned and operated, and be granted car-rental concessions in respect thereof. The first respondent, Imperial Group Ltd (Imperial), was a car-rental company, and had operated at ACSA's airports for over 32 years. In terms of the RFB, in order to retain its presence, Imperial had to bid anew. It did so. It, however, challenged a number of provisions in the RFB reflecting ACSA's preferential procurement policy: a pre-qualification requirement, non-compliance with which meant immediate disqualification, that large entity bidders had to be at least 30% black owned and at least 15% black women owned; the method of assessment in terms of which 50 points were awarded for price, and 50 points for BEE status; and the provision that a bid might be awarded to a bidder other than the highest scoring bidder, *where transformation imperatives allowed*. Imperial argued that such requirements were unlawful for being in breach of s 217 of the Constitution. Such section, headed 'Procurement', provided in ss (1) that where an organ of state contracted for goods for services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. Subsection (2), read with ss (3), allowed the implementation of procurement policies providing for categories of preference in the allocation of contracts, and the advancement of groups disadvantaged by unfair discrimination, but only if it was done within a framework prescribed by national legislation. Imperial argued that ACSA's preferential policy captured in its RFB was not in compliance with the legislative framework as envisioned by s 217 of the Constitution, namely the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) and the Preferential Procurement Policy Framework Act 5 of 2000 (PP Act), and was also irrational.

Consequently, in the High Court, Imperial, relying on the Promotion of Administrative Justice Act 3 of 2000, alternatively on the principle of legality, sought the review and setting-aside of ACSA's decision to issue and publish the RFB. The High Court granted the relief sought. ACSA subsequently appealed to the Supreme Court of Appeal.

ACSA principally argued that s 217 did not apply to the RFB, because it was merely granting concessions to bidders who were paying it for those concessions and not 'procuring anything from the bidders' or 'contracting for goods and services'. It added that s 217 of the Constitution was only applicable where an organ of state was incurring an expense, which was not the case here. ACSA went on to argue that, even if s 217 did indeed apply to the RFB, the PP Act certainly did not, in circumstances in which ACSA was not paying for goods and services. [This would mean that Imperial would be left with impermissibly challenging the RFB directly under the Constitution. (See [62].)]

The court handed down two judgments, the first by Molemela JA (with Tshiqi JA concurring) and the second by Ponnan JA (Cachalia JA and Wallis JA concurring). While in emphasis different, they both reached the conclusion that the appeal should be dismissed, and that the High Court was correct in reviewing and setting aside the RFB.

Both judgments held that s 217 did apply to the RFB. They noted that the language in s 217 was clear and unambiguous. It was clear from its terms that it would apply *whenever an organ of state contracted for goods or services, whether for itself or for somebody else*. (See [21] and [63].) There was no restriction upon the means by which goods or services were acquired (see [22]) and [63]). To the extent that it was argued that the ambit of s 217 was limited by the reference to the word 'procurement' in the heading and in s 217(2), the judgments pointed out that the ordinary meaning of 'procure' was 'obtain' (see [22] and [63]), and s 217 spelt out what was meant by 'procurement', namely to 'contract for goods or services' (see [22] and [63]). Procurement was not limited to 'state expenditure' (see [22]). In response to ACSA's argument that the RFB was not directed at procurement but only at contracts for the lease of premises to car-rental companies, the judgments stressed that what was determinative of the question whether a transaction was one for procurement in terms of s 217 of the Constitution, was the true nature of the entire transaction (the real substance), and not the form or label attached thereto (see [26] and [63]). Here, the substance of the transaction was that ACSA contracted with car-rental companies to, in accordance with its mandate, provide a public service at its airports; that placed it within the contemplation of s 217 of the Constitution. (See [25] and [63].)

Molemela JA held that ACSA's preferential procurement policy as reflected in its RFB bore no relation to the requirements of s 217 of the Constitution, and the B-BBEE Act and the PP Act, being the legislation enacted to fulfil the obligation imposed by s 217(3) of the Constitution. (See [52].)

- In breach of the B-BBEE Act [see ss 9(6), 10(1) and 10(2)*(a)*], ACSA had, without having obtained the consent of the Minister of Trade and Industry to do so, set out qualification criteria in its preferential procurement policy that went beyond that set out in the code of good practice binding its sector. (See [34] – [41].)
- Clause 1.7 of the RFB, in permitting ACSA to, *when transformation imperatives allowed*, award the contract to a bidder other than the highest scoring one, breached s 2(1)*(f)* of the PP Act. The latter permitted such an award only if *justified by*

objective criteria; the RFB or the policies it incorporated gave no indication as to what would constitute transformation imperatives. (See [48] – [49].)
Molemela JA added that ACSA had failed to show that all the qualification criteria embodied in the impugned provisions of the RFB were rationally connected to the purpose for which they were intended (see [52]).
Molemela JA went on to hold that, as the impugned provisions of the RFB had materially tainted the decision to issue and publish the RFB, that decision was unlawful both in terms of PAJA and the principle of legality. (See [52].) A just and equitable award in the circumstances of the case was to, as the High Court had done, set aside ACSA's decision to issue and publish the RFB, and to find the latter unlawful and set it aside. (See [54].)
Ponnan JA noted that, while s 217(2) of the Constitution allowed organs of state to implement a preferential policy, s 217(3) required that it may only be implemented within the framework prescribed by national legislation (see [64]). The legislation, Ponnan JA held, was the PP Act (see [65]). The failure of ACSA to comply with the requirements of s 2 of the Act was dispositive of the appeal (see [66] and [73]).
Ponnan JA rejected ACSA's claim that s 2 of the PP Act did not apply to the RFB. In this regard, ACSA had argued that s 2, in demanding that a preferential procurement policy apply a point system in terms of which lower prices received higher scores, clearly contemplated the conventional transaction by which an organ of state purchased goods or services at the lowest possible price; not that contemplated by the RFB, which sought instead to elicit bids for leases at the highest possible rental (see [66]). However, Ponnan JA held that s 2 of the PP Act had to be read and understood to be applicable to the transaction in question, because, to do otherwise, would lead to an absurdity that could not have been contemplated by the legislature (see [67], [69]).The SCA accordingly dismissed the appeal.

BEUKES v SMITH 2020 (4) SA 51 (SCA)

Medicine — Consent — Requirements for informed consent.

Respondent, Dr Smith, performed a laparoscopic hernia repair on appellant, Ms Beukes (see [4]). In the course of the surgery her bowel was perforated, and this necessitated several further operations, and a lengthy convalescence (see [6] – [7]).
Beukes instituted a delictual claim for damages, alleging, inter alia, that Dr Smith's negligence was responsible for the injury, and, moreover, that he had failed to obtain her informed consent to the laparoscopic procedure (see [8] and [18]). This because he had not fully informed her of the treatments available and of their risks and benefits (see [19]).
The High Court dismissed the claim, accepting that Smith had indeed sufficiently explained. Beukes, with the High Court's leave, appealed to the Supreme Court of Appeal (see [19]). There the issue was whether Smith obtained informed consent to the laparoscopy (see [20]).
The SCA *held* in this regard, that where a patient was informed of a treatment and its material risks, yet consented to the treatment and injury resulted, that wrongfulness would be excluded (see [25]).
It further concluded that Dr Smith had in fact informed Beukes of the material risks of laparoscopy (bowel perforation) and laparotomy (infection) before she consented to the former procedure (see [26] and [32]).
Appeal dismissed (see [34]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v ATLAS COPCO SOUTH AFRICA (PTY) LTD 2020 (4) SA 61 (SCA)

Revenue — Income tax — Deductions — Expenditure incurred in production of income — Trading stock — Valuation of stock at year end — Just and reasonable allowance — Determination of — Income Tax Act 58 of 1962, s 22(1)*(a)*.

Section 22(1)*(a)* of the Income Tax Act 58 of 1962 (the Act) allows the deduction of a 'just and reasonable' allowance from the valuation of trading stock held and not disposed of at the end of a tax year, in four specified circumstances: damage, deterioration, change of fashion or decrease in market value or for any other reason satisfactory to the South African Revenue Service (Sars).
Here, the taxpayer, implementing a group policy, wrote down its closing stock by different fixed percentages depending on whether such closing stock had not been sold in the preceding 12 or 24 months. It included these in its 2008 and 2009 tax returns as amounts by which value of its trading stock had diminished during those years of assessment. Sars took the view this did not comply with the provisions of s 22(1)*(a)* of the Act since there was no diminishing in value at year end for a deduction to be claimed as a result of any of the specified circumstances, added back these amounts and assessed the taxpayer to tax thereon.
The taxpayer contended that it was entitled to write down items by fixed percentages, by applying International Accounting Standard 2 (IAS2) to determine a new 'net realisable value' (NRV), which it claimed was the same as the reference to 'market value' in s 22(1)*(a)*. The Tax Court agreed and set aside the additional assessments. In the Commissioner's appeal to the Supreme Court of Appeal.
Held
The Tax Court had erred. This court in *Csars v Volkswagen* confirmed that s 22(1)*(a)* was not concerned with contrasting cost price with the value determined by an appropriate method by which to determine the actual value of trading stock. The cost price of the goods, and not the actual or anticipated value on their sale, was the benchmark against which any claimed diminution in value was to be measured. (See [9] – [11].)
The group policy was simply a time-based approach, which was not entirely consonant with the requirements of s 22(1)*(a)* of the Act. The taxpayer's approach to the valuation of its trading stock was flawed. It was a fixed, rigid company policy, and it was arbitrary — it did not present the most reliable evidence available at the time in respect of any diminution in value. It was difficult to discern the basis on which the taxpayer contended for a diminution in the value of its trading stock. The taxpayer appears to have taken no account of any diminution in value; the write-off was thus at best an unmotivated guesstimate. (See [11] – [14] and [17].)
It could not be said that Sars had failed to exercise the discretion conferred by s 22(1)*(a)* reasonably and properly. It followed that the judgment of the Tax Court could not stand. (See [23].)

STAUFEN (PTY) LTD v MINISTER OF PUBLIC WORKS AND OTHERS 2020 (4) SA 78 (SCA)

Expropriation — Legality — State expropriating part of farm on which state electricity utility Eskom had unlawfully built substation — No authority for proposition that

expropriation cannot be used to regularise unlawful occupation — Responsible minister having lawfully approved expropriation of servitude rights — Occupation no longer unlawful — High Court having correctly dismissed review of minister's decision to expropriate — Appeal against Hight Court order dismissed save for minor amendments — Constitution, s 25; Electricity Regulation Act 4 of 2006, s 26; Expropriation Act 63 of 1975, s 2(1).

Administrative law — Administrative action — Review — Decision of functionary — Acting under specialised legislation — Deviation from general requirements for administrative action — Principle of deference — Promotion of Administrative Justice Act 3 of 2000, s 6.

The present judgment dismissed an appeal against *Staufen Investments (Pty) Ltd v Minister of Public Works and Others* 2019 (2) SA 295 (ECP), in which the High Court in a review application found that the state had lawfully expropriated various servitudes over part of appellant's farm in order to accommodate an electrical substation and transmission lines Eskom had unlawfully erected there before. The state's decision to expropriate was made by the first respondent minister in September 2016. The appeal focused on two matters: (1) the lawfulness of an expropriation that regularised Eskom's unlawful occupation and (2) whether it constituted fair administrative action under s 6 of the Promotion of Administrative Justice Act 3 of 2000. The appellant argued throughout for the relocation of the substation to adjacent state-owned land (the 'alternative land' argument).

Held

There was no authority for the appellant's proposition that an expropriation could not occur if there was pre-existing unlawful use and occupation was a novel one: the sole consideration was whether it was for a public purpose or in the public interest, and it was not disputed that the substation indeed served the local public (see [31]). Hence the application to expropriate was for a 'public purpose' or in the 'public interest', namely the provision of electricity (see [32]). The minister correctly used expropriation to regularise Eskom's position (see [36]).

Generally, fair administrative action would require providing any person whose rights or legitimate expectations were materially and adversely affected with adequate notice of the proposed action, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review or internal appeal and to request reasons. Where, as here, government actors were empowered to follow procedures that deviated from these general requirements, no complaint could be raised, provided that the procedure adopted was fair. (See [46].)

It had to be borne in mind that the minister's decision was a multifaceted and polycentric one that required an equilibrium to be struck between competing interests. Although it was not immune from judicial review, the principle of deference to the expropriating authority's expertise applied. (See [48].)

The court analysed each of the appellant's complaints of unjust administrative action and found no merit in any of them (see [49] – [71]). It deferred to the first respondent's view that the relocation of the substation would have been irrational in view of the costs involved (see [64] – [65]).

Since the description of what was to be expropriated was inaccurate in the expropriation application, and the uncertainty perpetuated in the High Court's order, the latter had to be adjusted to correct this.

COMPETITION COMMISSION v BANK OF AMERICA MERRILL LYNCH INTERNATIONAL LTD AND OTHERS 2020 (4) SA 105 (CAC)

Competition — Competition Tribunal — Jurisdiction — Peregrini not domiciled, carrying on business, or with physical presence in South Africa.

Appellant, the Competition Commission, initiated a complaint against respondent banks, of collusion to fix prices and divide markets in respect of the rand – dollar exchange rate (see [8]). Of those banks, certain of them were peregrini who were neither domiciled, nor carrying on business, nor with any physical presence in South Africa (see [15]).
The Commission later referred the complaint to the Competition Tribunal, and one of the issues in its judgment was its jurisdiction (see [15]). This in the light of s 3(1) of the Competition Act 89 of 1998, which provides, inter alia, that the Act applies to all economic activity which has an effect within the Republic (see [36]).
The Tribunal's finding was that s 3(1) did not repeal the common-law requisite of a forum having personal jurisdiction over those before it (see [22]); that it had no such jurisdiction over the peregrini (see [23]); but that it nonetheless had the power to issue a limited declarator (see [23]).
The peregrini then appealed the issue of the declarator, and the Commission cross-appealed the finding of no personal jurisdiction over the peregrini (see [30]).
The questions before the Competition Appeal Court were whether, given the presumption against extraterritoriality, the Act nonetheless applied extraterritorially; and whether the Tribunal required personal jurisdiction over the peregrini in order to hear the matter (see [35]).
The Competition Appeal Court found, following authority, that the Competition Act could apply extraterritorially notwithstanding the presumption against it (see [38] and [43]); and that, even absent submission, physical presence, or attachment of property, a court could have personal jurisdiction if the peregrine concerned were sufficiently connected to its area of jurisdiction (see [80] – [81]).
Appeal and cross-appeal upheld, and ordered, inter alia, that the Tribunal's order be set aside, and replaced with an order requiring the Commission to file a new complaint referral affidavit (see [82]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v PUBLIC PROTECTOR AND OTHERS 2020 (4) SA 133 (GP)

Public Protector — Powers — Investigation — What constitutes 'just cause' for not complying with Public Protector's subpoena — Whether statutory obligation not to disclose taxpayer information constituting 'just cause' for not complying with subpoena demanding such information — Public Protector Act 23 of 1994, s 11(3); Tax Administration Act 28 of 2011.

Costs — Costs de bonis propriis — When to be awarded — Against Public Protector — Where Public Protector litigated in bad faith and recklessly.

Revenue — Tax administration — Confidentiality of taxpayer information — Whether statutory obligation not to disclose taxpayer information constituting 'just cause' for not complying with Public Protector's subpoena demanding such information — Tax Administration Act 28 of 2011, s 69(1); Public Protector Act 23 of 1994, s 11(3).

Under s 69(1) of the Tax Administration Act 28 of 2011 (the TM) 'current or former SARS * official[s] must preserve the secrecy of taxpayer information and may not disclose [it] to a person who is not a SARS official'. Here the Public Protector (the PP), who was after certain taxpayer information relating to an investigation she was conducting, purported to exercise her subpoena powers under Public Protector Act 23 of 1994 (the PPA) when she directed the Acting Commissioner of Sars (the Commissioner) to appear before and provide her with requested taxpayer information.

The Commissioner would not comply, citing non-disclosure obligations under s 69(1) of the TM. Sars and the PP, though, agreed to jointly seek legal opinion on this issue. This opinion confirmed that there was no conflict between the two Acts — that properly interpreted the PP's subpoena powers did not include the power to compel disclosure of Sars' confidential taxpayer information. The PP however continued to insist that her subpoena powers under the PPA trumped the confidential status of the taxpayer information under the TM; obtained her own legal opinion to that effect; and some time later issued a second subpoena to the Commissioner, relating to the same investigation and taxpayer information.

This case concerned the Commissioner's response: an application for a declaratory order that s 69(1) of the TM constituted 'just cause' for his refusal as contemplated in s 11(3) of the PPA (quoted in [2.1]); and that the PP's conduct in this matter warranted that she pay 15% of the costs *de bonis propriis.* The High Court, granting the orders sought —

Held

As to the declaratory relief

The phrase 'just cause' as envisaged in s 11(3) of the PPA simply meant 'valid grounds' or 'reasonable grounds' or 'valid reasons'. One had 'just cause' if the underlying reason for doing or not doing something was based on or was consonant with the Constitution or the law. It meant that a person who was prevented by the law from disclosing any information, had a 'valid reason' or reasonable ground to refuse to cooperate with the PP. Here Sars was prevented by the provisions of s 69(1) from complying with the PP's subpoena.

The PP's power to subpoena a witness to give evidence or to produce a document may not be invoked to coerce that witness to violate the law under which such a witness operated. Once she was given this advice, the PP had a choice either to approach the court in terms of s 69(2)*(c)* of the TM or to approach the taxpayer in terms of s 69(6)*(b)* of the TM for their permission to obtain their taxpayer information from Sars. (See [13].)

The PP was required to act in accordance with the law. Her powers of subpoena, which emanated from the PPA and not from the Constitution, were accordingly subject to the law. They therefore did not trump the provisions of s 69(1) of the TM or 'just cause' as set out in s 11(3) of the PPA. The presence of the phrase 'just cause' in s 11(3) of the PPA was evidence enough that her powers were not limitless; the Constitution itself required that the PP's powers be regulated by national legislation. (See [36] – [37].)

As to costs

The PP was a public litigant. It was expected of her never to act mala fide or in bad faith or exhibit any gross negligence in her conduct. Her conduct was inexcusable — to agree to seeking counsel's opinion on a matter; to taking part in the identification of counsel whose opinion on the matter would be sought; to preside over the

identification of the topic; to reject counsel's opinion and to seek a different opinion without involving Sars, was a demonstration of negotiating and acting in bad faith. She acted recklessly by issuing the second subpoena much against advices without any attempt on her side to verify such advices. The circumstances under which public officials may be ordered to pay costs out of their own pockets existed in the present case. (See [16], [23], [39] and [50] – [52].)

DISCOVERY LTD AND OTHERS v LIBERTY GROUP LTD 2020 (4) SA 160 (GJ)

Intellectual property — Trademark — Infringement — Deceptive use of mark — Ambit of protection — Not designed to silence commercial speech — Applicant contending that respondent's use, in insurance offering, of its DISCOVERY and VITALITY marks constituting deceptive use — External provenance of marks made clear — Their use not misleading — No use contrary to Trade Marks Act 194 of 1993, s 34(1)*(a)* established.

Intellectual property — Trademark — Infringement — Unfair or detrimental use of well-known mark — Ambit of protection — Not designed to stifle competition — Complainant must show unfair advantage to user or significant harm to its own reputation — Trade Marks Act 194 of 1993, s 34(1)*(c)*.

Delict — Specific forms — Unlawful competition — Respondent's use, in developing own insurance product, of members' health data gathered by applicant — Applicant's data and back-office work used to calculate wellness rewards for respondent's clients — Whether contra bonos mores — Applicant's right to property, respondent's right to trade and public interest (right of applicant's members to use their data as they wished) considered — Respondent not competing unlawfully.

Discovery sought interdicts prohibiting Liberty from continuing its alleged infringements of Discovery's DISCOVERY and VITALITY trademarks and its unlawful competition with Discovery. Discovery's trademarks were registered, inter alia, in relation to insurance services. It was common cause that DISCOVERY was a well-known trademark in South Africa.
Discovery's subsidiary, Vitality (the second applicant), offered a wellness and rewards programme to its members in return for a monthly membership fee. By leading a healthy lifestyle, Vitality members could earn Vitality points towards obtaining a certain Vitality status: the more points, the higher the status. It was common cause that members' Vitality status was not confidential and could be made publicly available (see [78]). Discovery had a life-insurance arm, Discovery Life (the third applicant), which linked an insured person's Vitality status to their insurance risk and allowed them to receive discounts on their premiums.
The respondent, Liberty, which also sold life insurance, had a policy called its Lifestyle Protector Plan. In May 2019 it introduced a feature called the Wellness Bonus to this policy. Under it, policyholders could elect to disclose their membership of external wellness plans like Vitality in return for a so-called Wellness Bonus. The size of the Wellness Bonus was determined by the status the policyholder had achieved on the external plan.
Discovery argued that, by introducing this plan and using the disclosed information, Liberty —

(a) unlawfully linked its insurance offering, based on the Wellness Bonus, to the Vitality Wellness programme and in so doing, infringed Discovery's VITALITY and DISCOVERY marks; and
(b) made unlawful and unfair use of the Vitality programme, its reputation and the 'back office' — the behind-the-scenes work, information and know-how — that it entailed. This, argued Discovery, amounted to the delict of unlawful competition.
As to *(a)*, Liberty acknowledged unauthorised use of Discovery's trademarks in advertising and selling its Lifestyle Protector Plan, but denied that it amounted to an infringement. Discovery based its case on the Trade Marks Act 194 of 1993 (the Act), s 34(1)*(a)* (which prohibited deceptive use of a mark) and s 34(1)*(c)* (which prohibited unfair or detrimental use of a well-known mark). Discovery argued that Liberty was taking unfair advantage of its trademarks by selling its insurance products to Vitality members, and by using the VITALITY and DISCOVERY marks to do so.
As to *(b)*, Discovery's complaints were that Liberty, instead of developing its own system, misappropriated the Vitality status system for its own commercial purposes, and that it appropriated goodwill in the Discovery and Vitality names without acquiring a licence to do so. Discovery was particularly irked by the fact that Liberty was using its trailblazing efforts in linking insurance to wellness rather than sickness as a shortcut to making its own offering (see [76]).
Held, as to trademark infringement
Trademark protection was not designed to silence commercial speech (see [24]). For use of a mark to constitute an infringement of s 34(1)*(a)*, it had to affect the functions of the mark, in particular that of guaranteeing the origin of goods (see [22], [24] – [25]). Since trademark use was established if a substantial number of customers would be deceived by the use of the mark, the context in which the mark was used had to be considered (see [26]). Here Liberty's limited use of Discovery's marks constituted mere descriptive use since the reasonable customer would not get the impression that Liberty was the source of the Vitality programme. Absent such usurpation, the applicants' complaint of an infringement under s 34(1)*(a)* would fail. (See [22], [30], [39] – [41].)
This finding was also relevant to the s 34(1)*(c)* enquiry because it went to the fairness of the advantage Liberty allegedly took of Discovery's marks. Additional case-specific facts were required to establish *unfair* advantage to Liberty, but none had been provided by Discovery. (See [49].) Discovery's broad assertion that Liberty's use of its mark would be to Discovery's detriment because it would lead to the sale of Liberty policies, was insufficient because it ignored Liberty's relatively limited, descriptive reference to Discovery trademarks and the prominent use of its own trademark in the same documentation. Since Discovery failed to establish an unfair advantage to it or significant harm to Discovery's reputation that warranted the stifling of the competition between them, the applicants' complaint of an infringement under s 34(1)*(c)* would also fail. (See [53] – [55].)
Held, as to unfair competition
Misappropriation of a rival's performance and appropriation of goodwill did not, per se, constitute unlawful competition (see [67]). To find Liberty's use of publicly available information allegedly to the detriment of a non-competitor like Discovery, would entail extending the current common-law understanding of boni mores (see [70], [74], [78] – [79], [83]). The need to do so had to be considered in the context of the facts (see [81]). These included that Vitality members paid for their membership of the Vitality programme and were entitled to use their Vitality status as they saw fit

(see [88]). This was both in the interest of customers and in the interest of the insurance industry more broadly (see [89]). There was no reason to extend the common law to the present facts. Liberty's conduct was consistent with the prevailing boni mores of South African society, and not wrongful. (See [97].)

THE *FONARUN NAREE*
TRUSTEES, COPENSHIP BULKERS A/S (IN LIQUIDATION) AND OTHERS v AFRI GRAIN MARKETING (PTY) LTD AND OTHERS 2020 (4) SA 188 (GJ)

Court — Powers — Power to determine moot or academic issues — Discretion to decide such issues in interests of justice — Arising also where matter becomes academic after case instituted and argued but before judgment delivered.

Interpleader proceedings — Sheriff triggering interpleader proceedings in wake of arrest under s 5(3) of AJRA where third party making claim to property — Applicant's claim to hold property in security under s 5(3) constituting adverse claim sufficient to trigger interpleader proceedings — Position analogous to that obtaining where third party makes adverse claim to property seized by sheriff in execution — Admiralty Jurisdiction Regulation Act 105 of 1983, s 5(3); Uniform Rules of Court, rule 58.

A court's power to decide moot or academic issues in the interests of justice may arise not only on appeal but also where the matter becomes moot after a case was instituted and argued but before judgment (see [21]). Here the court decided to exercise the latter power in order to decide a matter that was rendered moot by a judgment of the Supreme Court of Appeal on the grounds that it (1) raised important issues for the development of admiralty law; and (2) the question of costs still had to be dealt with. (See [18] – [22].)

Rule 58 of the Uniform Rules of Court — 'Interpleader' — provides an expeditious procedure by which a party, who knows that two or more other parties intend making adverse claims on an asset controlled by it, can ask the court to decide who is entitled to it. Interpleader is often provided in execution where a third party makes an adverse claim to property seized by the sheriff. (See [24] and [28] – [31].)

The applicants sought to set aside interpleader proceedings commenced by the third respondent, the sheriff, in respect of moneys arrested at their instance under s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983. The arrested moneys were held in bank accounts and the applicants and the second respondent (on behalf of the first respondent) asserted rights to them. The applicants effected the arrest for the purpose of providing security for their claims against the first respondent in arbitration proceedings pending in London. The applicants opposed interpleader, arguing it was incompetent because the procedure was confined to *execution* whereas in the present case the moneys were arrested for purposes of *security* under s 5(3) of the Admiralty Act.

While there was no precedent in respect of interpleader proceedings initiated by a sheriff in the wake of the granting of an arrest order under s 5(3) where a third party made an adverse claim to the property, the second respondent submitted that the present case was nevertheless classically suited to interpleader proceedings. The applicants argued, per contra, that the jurisdictional facts to trigger interpleader proceedings were absent because the applicants made no claim to the moneys. Any claim, they argued, would only be made if the first applicant were successful in the London arbitration.

Held
The applicants' argument overlooked the fact that the applicants *did* assert a claim in respect of the moneys, namely their claim to hold the moneys as security under s 5(3). There was no material difference between the case of a sheriff who was directed by the court to attach property for sale in execution and was then faced by an adverse claim from a third party and the present case. In both cases control over the property, but not ownership, passed from the owner to the sheriff, who had no personal interest in it. (See [4], [34].)
Where the proceedings concerned property arrested as security, the sheriff would, as in the case of conflicting claims relating to property attached in execution, hold the position of an interpleader 'applicant', and the party who obtained an arrest order, that of a 'claimant', as defined in rule 58. Since it was therefore not irregular for the sheriff to have triggered interpleader proceedings as she did, the application to set them aside would be dismissed.

GOUWS AND ANOTHER NNO v BBH PETROLEUM (PTY) LTD 2020 (4) SA 203 (GP)

Lease — Eviction — Defences — Party failing to exercise option to renew lease, but later contending, in its defence against eviction, that its failure be condoned, and it be regarded as having done so.

Applicant, an owner of immovable property, had leased the premises to respondent, a company, for it to conduct a business thereon. The lease, which had a duration of several years, also gave respondent an option for its renewal (see [4]).
Toward the end of the lease period, respondent and applicant began to negotiate toward entering a new lease, or renewing the existing one, and this exchange continued past the lease's expiry date. At no instance did respondent exercise the option, and ultimately no agreement was reached. Applicant then instituted proceedings for respondent's eviction. (See [1], [5] – [6] and [20].)
Respondent's defence was that its failure to exercise the option should be 'condoned' and that it should be regarded as having done so (see [37]).
This defence was sourced in a Cape case, in which a failure to exercise an option for renewal of a lease was so condoned (see [39]).
Here, the court declined to follow the Cape case on the bases that it was wrongly decided (for the reasons at [38] – [61]) and also distinguishable. The court accordingly ordered respondent to vacate the premises.

GUPTA v KNOOP NO AND OTHERS 2020 (4) SA 218 (GP)

Company — Business rescue — Business rescue practitioner — Duties — Discussion of — Companies Act 71 of 2008, s 139(2).

The companies Islandsite and Confident Concept were placed under business rescue in terms of s 129(1), read with s 129(2), of the Companies Act 71 of 2008, consequent to resolutions passed by their respective boards of directors recommending such a course, owing to their being in financial distress due to various banking institutions' refusal to do business with them. * The first and second respondents were subsequently appointed as business rescue practitioners (BRPs) for the companies. It was their view that they were rescuable against a careful cash-

flow structure, adherence by creditors to the moratorium set out in s 133 of the Act and amenable post-commencement finance under s 135.
Tension arose between the companies' shareholders and the BRPs. In the present matter, heard before the full division of the Pretoria High Court as a special motion application, the applicant — a shareholder of the companies — brought an application, in terms of s 139(2) of the Act, for the removal of the first and second respondents as BRPs, this being necessary in light of their failing to act in good faith (see [20]); their failing to perform the duties as BRPs as contemplated in s 139(2)*(a)*; their failing to exercise the proper degree of care in performing their functions as BRPs as contemplated in s 138(2)*(b)*; their conduct evidencing a conflict of interest or lack of independence contemplated in terms of s 139(2)*(e)*; and their conduct not being consistent with that of an officer of the court, as well as the responsibilities of a director of the companies in question, as contemplated in ss 140(3)*(a)* and 140(3)*(b)*, respectively. The vital question facing the court, it held, was whether the BRPs had executed their duties in accordance with the standard set not only by the Act but also by the courts as judicial officers (see [25]).
Held, that, as an officer of the court, it was an absolute requirement that a BRP execute his/her duties in good faith, bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith. Good faith implied that the BRP was obligated to execute his/her duties with the utmost trust, confidence and loyalty to the benefit of all stakeholders in the business rescue process. By virtue of their role, BRPs were therefore held to a higher professional and ethical standard. (See [26].)
Held, further, that, as judicial officers, the first and second respondents had failed to execute their duties with the highest level of good faith, objectivity and impartiality on several fronts (see [27]).

- They had unabatedly continued to sell off the assets of the companies and earn fees and commissions without having a plan regarding how the respective businesses were going to operate moving forward once the creditors had been paid. Business rescue proceedings were not intended to continue indefinitely. (See [27] and [28].)
- They had failed to make out a cogent case to support their opinion that reasonable prospects of rescue existed. Further, they had given no indication as to how they would secure a bank account with a licensed bank in order that the companies could continue with their business. (See [29].)
- They contended in their papers that there existed an element of criminal unlawfulness in the manner in which the board and shareholders had conducted the affairs of the companies. However, the first and second respondents, as judicial officers, were obliged to report suspicions of such activities to the relevant authorities. This they failed to do so, instead only raising their concerns at this late stage. This meant that not only was their investigation into the affairs of the companies tainted, so too was their impartiality as officers of the court. (See [30].) At the same time, this failure to have reported their findings in the past begged the question whether the allegations levelled at the board and shareholders were now truly being raised in good faith (see [31] – [32]).
- The first respondent had potentially placed himself in a position of conflict of interest in acting as BRP for both companies (see [32]).

Held, that a sufficient case had been made out justifying the removal of the first and second respondents as BRPs of the companies, based on the presence of two grounds set out in s 139(2), namely a failure to perform the duties of BRPs in terms

of s 139(2)*(a)*; and the presence of a conflict/lack of independence in terms of 139(2)*(e)*.

JACOBS AND OTHERS NNO v HYLTON GRANGE (PTY) LTD AND OTHERS 2020 (4) SA 234 (WCC)

Nuisance — What constitutes — Odiferous gases produced during manufacture of compost — Legal basis of and test for nuisance.

First respondent and third respondent owned farms on which grapes were grown (see [95]). This was the predominant form of agriculture in the area, which was characterised by small farms (see [91]).
Appellant trust owned a farm neighbouring first and third respondent's farms. It cultivated mushrooms (see [92] – [94]). As part of this, it made compost in which the mushrooms were grown (see [5] and [7]). This process produced gases with offensive odours, and this had caused the respondents to obtain an interdict of the compost production (see [4] – [5] and [77]).
The trust appealed this decision to the full bench (see [1]).
The full bench dismissed the appeal, and in doing so considered the law on nuisances (see [99] and [104]), inter alia, the delictual basis of a nuisance action (see [78]); the right impaired (see [79]); and determination of wrongfulness, including factors bearing on this (see [79] – [80]). It also considered whether a nuisance had to be continuous (see [83]); and the significance of a complainant 'mov[ing] to the nuisance' (see [84] – [85]).

KALISA v CHAIRPERSON, REFUGEE APPEAL BOARD AND OTHERS 2020 (4) SA 256 (WCC)

Immigration — Asylum seeker — Substitution of administrator's refusal of asylum — Whether delay and attendant prejudice justifying court in substituting an order granting asylum in place of administrator's decision refusing asylum.

Administrative law — Administrative action — Review — Remedies — Remittal — Test for — Consideration of — Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*(ii)(*aa*).

Applicant, a Burundian, had applied to second respondent Refugee Status Determination Officer for asylum, but the application had been refused, and applicant's appeal to the Refugee Appeal Board dismissed (see [1] and [3]). Here, he applied to the High Court to review the Board's decision, and to substitute it with a grant of asylum (see [8] – [9] and [46]).
Held, that the decision should be reviewed and set aside: the Board was non-quorate at the time of its making, and had failed to apply its mind to the appeal's merits (see [12] – [16] and [46]).
Held, further, as to substitution of an administrator's decision, that this was only available in an 'exceptional case', and where it would be just and equitable in that context, to substitute the decision (see [18]). In this regard, a court had first to determine if it was an 'exceptional case', and then whether substitution was just and equitable (see [23] and [25]). In the latter enquiry, the weightiest factors were whether the court was in as good a position as the administrator to make the

decision, and whether it was a foregone conclusion. Subordinate factors included delay, bias or incompetence on the functionary's part (see [22] – [23]).
Semble, that where a court was not in as good a position as the administrator, but the administrator's bias or incompetence rendered it unjust to remit, that a court might be required to devise a remedy not identified in s 8 of the Promotion of Administrative Justice Act 3 of 2000 (see [27]).
Moreover, in asylum matters, a delay's prejudicial consequences could not, in themselves, justify granting asylum, unless it was clear the applicant qualified therefor (see [35]). If this was unclear, any substituted order might fall short of the requirement of lawfulness applying to the decision being replaced (see [26], [32] and [36]).
Here, substitution was unjustified, in that the court was neither in as good a position as the functionary to decide, nor was the decision foregone (see [29] – [31]).
Ordered, that the matter be remitted, and that applicant be allowed to make a new application for asylum.

MACATSHA v ROAD ACCIDENT FUND 2020 (4) SA 275 (GJ)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Liability — Injuries arising out of driving of motor vehicle — Injuries sustained when plaintiff shot in vehicle and then ejected from it during hijacking — Gunshot injuries to be excluded as not arising from driving of motor vehicle — Road Accidents Fund Act 56 of 1996, s 17.

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Pleading — Incorrect pleading by plaintiff — RAF aware of plaintiff's real case — No prejudice to RAF — Matter adjudicated on basis of plaintiff's evidence even though it differed from her particulars.

On 2 December 2015 the plaintiff was injured when hijackers in the taxi in which she was a passenger shot her in the leg before pushing her out of the moving vehicle. Her injuries stemmed both from the gunshot and the fall. The defendant, the RAF, denied liability on the ground that the plaintiff's injuries did not arise from the driving of a motor vehicle.
Section 17(1) of the Road Accidents Fund Act 56 of 1996 states, as far as here applicable, that the RAF 'shall be obliged to compensate any person . . . for loss or damage . . . suffered as a result of a bodily injury . . . caused by or arising from, the driving of a motor vehicle . . . if the injury . . . is due to the negligence or other wrongful act' of the driver of the insured vehicle or its owner (see [8] – [9]).
There were several relevant precedents: * The court in *Philander* held that an injury sustained by the plaintiff as a result of being pushed from a moving bus by the conductor did arise from the driving of the bus, but the court in *Pillay*, where the facts were similar, disagreed. In *Steyn*, another hijacking case, the plaintiff was shot and then dragged by the motor vehicle. The court found that the gunshot injuries did not arise from the driving of the vehicle. In *Khumalo* the plaintiff was injured when the driver crashed after being shot at from another vehicle. The court found that the injury arose out of the driving of the second vehicle. In *Matinise* the plaintiff was injured when he fell from a moving lorry while attempting to walk to the rear of the lorry while under the influence of alcohol. The court found that the injury arose out of the driving of the lorry because its motion contributed to the severity of the plaintiff's injuries.

An additional issue was that the plaintiff's evidence differed materially from the allegations in her particulars of claim, the latter alleging that her injuries were the result of a 'collision' caused by the negligent driving of an unknown driver. There was no allegation of unlawful driving. The RAF pleaded that there was no collision and that the injuries were the result of a hijacking. The plaintiff, however, made a written statement before summons that accorded with her evidence in court.

Held

The judgments in *Steyn*, *Pillay* and *Matinise* led to the conclusion that the injuries sustained by the present plaintiff when she was pushed out of the moving car arose from the driving of a motor vehicle as required in terms of s 17(1) of the RAF Act (see [16]). The injuries resulting from the gunshot were, however, a different matter (see [17]). While *Khumalo* was distinguishable on the facts, the findings in *Steyn* applied to the present case and compelled a finding that the gunshot wounds fell outside the ambit of s 17(1) (see [18] – [19]).

Since there was, on a common-sense approach, a causal connection between the unlawful driving of the motor vehicle — it was being used in a hijacking or robbery — and the injuries sustained by the plaintiff, her injuries were 'due to the . . . wrongful act' of the driver as intended in s 17(1) (see [21]).

The court accordingly declared that the defendant was liable to compensate the plaintiff for her proved or agreed damages resulting from the incident of 2 December 2015, save for the injuries sustained as a result of the gunshot wound (see [31]).

The reference to a 'collision' in the particulars of claim was not due to the plaintiff changing her version, and it was not suggested that it was. It was clear from the cross-examination and the arguments presented on her behalf that the RAF was aware of the real issue in the matter. In the circumstances the RAF was not prejudiced by the incurred pleading, and the matter had to be adjudicated on the plaintiff's version even though it differed from her particulars. (See [28] – [29].)

NATIONAL ADOPTION COALITION OF SOUTH AFRICA v HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT FOR KWAZULU-NATAL AND OTHERS 2020 (4) SA 284 (KZD)

Children — Adoption — Application — Supporting documents — Letter by provincial head of social development recommending adoption — Delays by Head of Department of Social Development in finalising letter recommending adoption — Failure to consider relevant factors, but considering irrelevant factors — Breach of principle that best interests of child paramount, and of fundamental rights of adoptable child, as well as those of child's biological parents and prospective adoptive parents — Wide declaratory relief granted, including order directing that HOD finalise all outstanding applications within one month of present order, and supervisory order requiring HOD to report back to court on status of all adoption applications which had been submitted — Children's Act 38 of 2005, s 239(1)*(d)*; Constitution, s 28(2).

Constitutional law — Human rights — Rights of children — Paramountcy of child's best interests in every matter concerning child — Significant delays by KwaZulu-Natal Head of Department of Social Development in required letter recommending adoption — Failure to consider relevant factors, but considering irrelevant factors — Breach of principle that best interests of child paramount, and of fundamental rights of adoptable child, as well as those of child's biological parents and prospective adoptive parents — Wide declaratory relief granted, including order directing that HOD finalise all

outstanding applications within one month of present order, and supervisory order requiring HOD to report back to court on status of all adoption applications which had been submitted — Children's Act 38 of 2005, s 239(1)*(d)*; Constitution, s 28(2).

In terms of s 239(1)*(d)* of the Children's Act 38 of 2005, applications for adoption, which are made to the children's court, must, inter alia, be accompanied by a letter by the provincial head of social development recommending the adoption of the child. The present matter, brought by the National Adoption Coalition of South Africa to the Durban High Court, concerned the issuing of letters of recommendation in KwaZulu-Natal. There the procedure in place was that an adoption application would first be considered by an 'adoption panel', after which the application would be referred to the provincial head of social development for a decision on recommendation. The applicant alleged that such processes were characterised by unreasonable delays, and that the HOD considered irrelevant factors in making a decision. The adoption panel (as represented by its chairperson in these proceedings) and the HOD, the applicant argued, had, as a result, disregarded the best interests of children, in breach of s 28 of the Constitution, and infringed the fundamental rights of the adoptable child, and also those of the child's birth parents as well as potential adoptive parents, and they sought declarators to such effect.
The court, in dealing with this application, considered the expert evidence presented to the effect that the institutionalisation of orphaned and abandoned children for an extended period, and particularly where such took place during the first 1000 days of their lives, resulted in irreparable harm to them in terms of their development. (See [42] – [44] and [50].) The court held, accordingly, that, in order to obviate such harmful effects, adoptable children should be placed in the care and security of their prospective parents without delay (see [44] and [50]). The principle — protected in s 28(2) of the Constitution — that the best interests of the child were paramount, the court went on to hold, demanded that the HOD make a decision as soon as possible once favoured with a report from the adoption panel (see [51]).
Held, that the adoption panel and the HOD had a tendency to ignore relevant issues, such as the informed consent of birth parents, and to focus on unnecessary and irrelevant issues, resulting in inordinate and *unreasonable* delays * in the issuing of a letter of recommendation (see [63]). In relation hereto, having regard to sections of the Children's Act comparable to s 239 — which did not provide any time frames — and national and provincial policies and guidelines, a period of 30 days from the date of submission of the adoption application to the appointed and appropriate persons at the DSD, KwaZulu-Natal, to the date of the letter being received by the adoption social worker was a reasonable time for the purposes of s 239(1)*(d)* (see [53] – [61] and [78.4]).
Held, further, that, in acting in the manner they had, they had breached the principle, as protected in s 28 of the Constitution, that the best interests of the child were paramount (see [63] and [78.1]); and had breached —

- the adoptable children's rights to dignity (Constitution, s 10); to freedom and security (Constitution, s 12); to equality (Constitution, s 9); to access to court, and to just administrative action;
- the biological parents' rights to dignity, to freedom and security, to equality, to privacy (Constitution, s 14); to freedom of religion, belief and opinion (Constitution, s 15); and to the right of language and culture (Constitution, s 30); and
- the prospective adoptive parents' rights to access to court and to just administrative action. (See [68] – [69] and [78.1] – [78.3].)

Held, further, that in addition to declarators in respect of the above findings, the applicant was deserving of, inter alia, an order directing the HOD to finalise outstanding applications within one month of the present order (see [71]) and [78.6], and a supervisory order (as set out in [78.8] – [78.9]), requiring, inter alia, the HOD to report back to it on the status of all adoption applications which had been submitted, as well as on a plan of improvement for the adoption panel.

SA CRIMINAL LAW REPORTS JULY 2020

MINISTER OF POLICE v K 2020 (2) SACR 1 (GJ)

Damages — Victims of crime — Claim that police failed to properly search for complainant after she had been held captive and then failed to properly investigate and locate offender — Court's findings incorrect on evidence and failed to consider whether reasonable to impose liability on police for harm suffered — To impose liability in such circumstances would make it difficult for police to conduct their investigations and expose them to potential risk of civil litigation where any rescue, search or investigations were negligent, even if only to slight degree.

The appellant appealed against a finding by the High Court that after the respondent was assaulted, held captive and raped in a clearing between bushes in sand dunes near a beach, the actions of the police in failing to find her in their search for her, and the police investigations conducted after she was found, amounted to a negligent breach of their duties. She contended that these failures caused her to suffer additional psychopathology. The High Court held the appellant liable for 40% of the damages that the respondent would be able to prove. On appeal,
Held, that, the High Court's finding that the respondent would have been saved from suffering further trauma had she been found earlier was inconsistent with the opinion of the expert witnesses whose evidence made it clear that no quantifiable psychiatric loss or contribution to her psychopathology could be attributed specifically to this. The decision to call off the helicopter search was based on safety considerations and was reasonable; the police had mobilised all the available resources at their disposal at that time; and had taken all reasonably practicable and appropriate precautions to carry out an effective search. No negligence was proved. (See [37] – [40].)
Held, further, that the High Court's finding that the police were negligent in failing to search for bush dwellers living in the sand dunes was not a complaint by the respondent, who was satisfied with the work that the particular police official had performed. The court's inference that the investigating officer's failure to review the entire CCTV footage was grossly negligent was wrong, in that the police officer had made available to the respondent's own private investigator the disks containing the footage. The delay in having the DNA analysis conducted, criticised by the High Court, was not one of the grounds on which the respondent sought to rely in establishing negligence on the part of the appellant.
Held, as to wrongfulness, that the court a quo had erred in failing to consider whether it was reasonable, in the circumstances of the case, to impose liability on the police for the harm suffered by the respondent. To impose liability for such harm would make it difficult for the police to conduct their investigations in the future and would expose them to the potential risk of civil litigation in every case where any rescue search or their investigations were negligent, even if only to a slight degree, and a successful arrest and conviction of the perpetrators of serious crimes did not ensue. (See [54] – [55].)

Held, further, that the High Court had erred by making findings which flew directly in the face of the joint minute of the expert witnesses regarding the issue of causation, as well as the respondent's own expert witness's concession that it did not matter what the correct diagnosis was relating to her psychopathology, since the pathology flowed directly from the brutal assault and rape, and future treatment would be very similar. Causation had accordingly not been established on a balance of probabilities and the claim ought to have been dismissed.

BUTHELEZI v MINISTER OF POLICE 2020 (2) SACR 21 (GJ)

Search and seizure — Search — Without warrant — Consent to search — Must be informed consent — Police accompanied by violent mob entering plaintiff's premises in search of missing child and warning plaintiff of consequences of not allowing search — Such search not with informed consent.

Search and seizure — Search — Without warrant — Validity of — Police searching for missing child — Owner of premises obliged in circumstances to render assistance in search for child and give consent for search.

Search and seizure — Search — Without warrant — Validity of — Police searching for missing child but another policeman entering premises to ascertain whether owner of premises had been licensed to sell liquor — Such further search wrongful and owner entitled to compensation of R30 000.

The appellant appealed against the dismissal by a magistrate of his claim for damages against the respondent for an allegedly unlawful entry into his home and illegal search without a warrant in full view of members of the community who had gathered around his house. The magistrate, without giving her reasons for so finding, found that the search was lawful. The presence of the police in the area was motivated by a report of a missing child, and, in following up on the report, the police went to the area to search for the child. They were accompanied by an angry mob of people who pointed out places where the child had last been seen. They pointed out the appellant's premises from where he conducted a shop and sold liquor, having a licence to do so. Entry was gained to the premises by a police officer who put it to the appellant that the angry crowd demanded that the police search his premises. On this basis the appellant allowed the police to search his premises. They did not find the child, but during the search they discovered the liquor on the premises and contacted a colleague who dealt with liquor-licensing issues. Said colleague arrived and asked the appellant to produce his liquor licence, which he did.

Held, that the search of the appellant's premises did not meet the requirements of either s 25 or 26 of the Criminal Procedure Act 51 of 1977 and to the extent that the magistrate relied on those sections as the basis for her finding that the search was lawful, she was in error. (See [11].)

Held, further, that in circumstances where the appellant was told by the police that he had to consent or suffer the consequences of an angry crowd that demanded the police search his house, and where he had a right to be protected by the police from the crowd threatening violence against him, consent in those circumstances had not been freely given and did not render the search lawful. (See [19].)

Held, however, that the police had a duty to look for the child, and in the circumstances of a search for a missing child, where time was of the essence, the information given to the police that the child had been seen at his shop sufficed to warrant looking for the child in his house. Provided that the police then conducted the search for the child in a careful and respectful way, the intrusion was not modest,

and the potential gain was great in the interest of the child's safety. The police had done their duty and the appellant had complied with his duty in assisting the police to help find the missing child, and there was accordingly no injuria. (See [24] – [25].)
Held, further, that there was no basis for the search of the appellant's house to be used to question him and seek verification that he held a valid liquor licence. There was no suggestion that the appellant had ever consented to the liquor-licence officer entering the premises for that purpose. It was abusive and amounted to an unreasonable and wrongful entry into the appellant's home. In the circumstances, compensation in an amount of R30 000 would be appropriate for the wrongful search.

S v LE ROUX 2020 (2) SACR 30 (ECG)

Maintenance — Failure to pay — Defence that child had attained majority, although still at school — Appellant having relied on advice of layperson — Never having stated that held bona fide belief that no longer needed to pay maintenance — Duty of support owed by parent to child not terminating when child reached particular age, but continuing after majority — Conviction upheld on appeal.
In an appeal against a conviction in a magistrates' court for failure to pay maintenance for his daughter after she had reached the age of 18 years, but was still at school, the appellant contended that he had taken advice from an unqualified layperson who advised him that, as the order was in respect of 'the minor child', and there were no words to the effect that the order applied until she became self-supporting, the obligation lapsed when his child turned 18.

Held, that, under the common law, the duty of support owed by a parent to a child did not terminate when the child reached a particular age, but continued after majority.
Held, further, that a reading of the appellant's testimony reflected that in accepting the advice of the layperson he consciously exercised a choice to suit his own purpose, and had not done so out of ignorance or error. Contrary to what was stated in his heads of argument, nowhere did he state that he held the bona fide or reasonable belief that such advice was sound. In the circumstances the magistrate had correctly found that the appellant had not acted out of ignorance or error, and the appeal against the conviction had to be dismissed. (See [21].)

S v TSHABALALA AND ANOTHER 2020 (2) SACR 38 (CC)

Rape — Elements of — Penetration — Doctrine of common purpose — Application of — Instrumentality approach — Such having no place in modern society founded upon Bill of Rights and had to be discarded — Foundation of approach embedded in system of patriarchy where women treated as mere chattels and ignoring fact that rape could be committed by more than one person as long as others had intention of exerting power and dominance over such woman, just by their presence.

The two applicants in separate cases relating to the same incidents applied for leave to appeal from their convictions in the High Court for rape. Their convictions arose from a violent rampage embarked upon late one night in September 1998 when nine young men attacked nine separate homes, broke down doors and assaulted the occupants they found inside. They raped eight female occupants, some of them

repeatedly by several members of the group. The youngest of the victims was 14 years old and another was visibly pregnant. Whilst some of the men raped the victims, other members were posted outside to act as lookouts. The members of the group, including the applicants, were arrested and subsequently convicted of rape on the application of the doctrine of common purpose.

In the High Court the applicants contended that the common-law crime of rape was not an offence for which an individual could be convicted through the application of the common-purpose doctrine, but the court rejected that argument in convicting the applicants who were sentenced to effective life sentences.

One of the group appealed to the Supreme Court of Appeal which held that, to convict him on the basis of his mere presence, was to subvert the principles of participation and liability as an accomplice in criminal law. The court found further that there was no evidence to prove that that member of the group had been present at the scene of violence where rapes, assaults, housebreakings and robberies were committed, other than at one particular household, and therefore concluded that no common purpose with the other members of the group had been established.

In the present application, the respondent supported the findings of the High Court and that the group responsible for the attacks had acted as a cohesive unit. It contended that applying the doctrine was not out of the ordinary, but was in keeping with modern international standards. The first amicus curiae contended that the instrumentality approach adopted by the Supreme Court of Appeal was fundamentally flawed. It was both artificial and unprincipled, as there was no reason why the use of one's body should be determinative in the case of rape, but not in the case of assault or murder. The fallacy in the approach was that it sought to carve out crimes of a sexual nature and to exclude the application of common purpose to such crimes, and that this inhibited the state's ability to prevent and combat gender-based violence.

Held, that, on the evidence, it was difficult to fathom that the rapes of the complainants were unexpected, sudden or independent acts of one or more of the perpetrators, which the others neither expected nor were aware of, even after they happened. It was also not probable that they were unaware of what was happening or about to happen. It was necessary that the relationship between rape and power had to be considered when analysing whether the doctrine applied to the common-law crime of rape: to charac- terise it simply as an act of a man inserting his genitalia into a female's genitalia without her consent was unsustainable in instances of group rape, the mere presence of a group of men resulting in power and dominance being exerted over women victims. (See [51].)

Held, further, that the instrumentality argument had no place in our modern society founded upon the Bill of Rights. It was obsolete and had to be discarded because its foundation was embedded in the system of patriarchy where women were treated as mere chattels. It ignored the fact that rape could be committed by more than one person for as long as the others had the intention of exerting power and dominance over the women, just by their presence. In the present case the perpetrators overpowered their victims by intimidation and assault, and the manner in which the applicants and the other coaccused moved from one household to the next indicated meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible. (See [54].)

Held, further, that the High Court's conclusion, that the applicants and their coaccused had acted in the furtherance of a common purpose, could not be faulted.

The applications for leave to appeal were granted but the appeals dismissed. (See [59].)
Held, per Khampepe J (Froneman J, Jafta J, Madlanga J, Mothapo AJ, Mhlantla J, Theron J and Victor AJ concurring), that addressing rape and other forms of gender-based violence required the effort of the executive, the legislature and the judiciary, as well as our communities. The structural and systemic nature of rape emphasised that it would be irrational for the doctrine of common purpose not to be applicable to the common-law crime of rape, while being applicable to other crimes. (See [78].)
Held, per Victor AJ, that the common-law crime of rape was one that had to be developed to meet the obligations imposed by international law whose protocols placed an obligation on the state, including the court, to develop the domestic laws to ensure that women were protected from sexual violence. Our constitutional duty and international obligations provided the legal and logical basis to confirm the application of the doctrine of common purpose to the common-law crime of rape.

S v LANGALITSHONI 2020 (2) SACR 65 (ECM)

Trial — Assessors — Absence of — Magistrate enquiring of legal representative of accused whether he wanted to use services of assessors in case where assessors otherwise required in terms of s 93*ter*(1) of Magistrates' Courts Act 32 of 1944 — Legal representative's answer in negative not indicating that accused, with full knowledge thereof, waived right to trial presided over by properly constituted court consisting of regional magistrate and two assessors — Proceedings nullity.
Trial — Presiding officer — Duties of — Accused not legally represented — Trial before assessors — Section 93*ter*(1) of Magistrates' Courts Act 32 of 1944 — Most convenient time to address provision was after charges put but before accused invited to plead to charge.

The appellant was charged in a regional magistrates' court with murder, robbery and rape. After the charges had been put to him and before he pleaded thereto, the magistrate informed the appellant of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997, and the possibility of being convicted on lesser charges if the state did not prove all the elements of the offences he had been charged with. The magistrate then addressed his legal representative because there was a murder count at which assessors should be present, and asked him whether he was going to use the services of the assessors, to which the legal representative answered in the negative. The trial continued, with the appellant eventually being convicted. On appeal,
Held, that the magistrate's question to the legal representative was asking whether he wished to invoke an additional right, whereas it should have been clear that what was required was an indication of whether or not the appellant elected to waive an existing right. The magistrate's question and the legal representative's answer did not indicate that, with full knowledge thereof, the appellant waived the right to a trial presided over by a properly constituted court consisting of a regional magistrate and two assessors. That being so, the proceedings were a nullity. (See [11] – [12].)
Held, further, that, given that the provisions of ss 93*ter*(1)*(a)* of the Act refer to 'before any evidence has been led', and the fact that assessors played no role in the adjudication of proceedings until after an accused person had pleaded, even where a plea of guilty was tendered in accordance with the provisions of s 112 of the Criminal Procedure Act, it would be competent for a regional magistrate to address

the provisions of s 93*ter*(1) with the accused person at any stage prior to evidence being led. However, where a regional magistrate was presiding over a trial in which the accused person was unrepresented, the most convenient time to address the accused on all issues pertaining to the conduct of the proceedings, and thereby to ensure that the accused person received a fair trial, was after the charges had been put and before the unrepresented accused was invited to plead to the charges.

CHANG v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2020 (2) SACR 70 (GJ)

Extradition — Review of — Decision made in conflict with article 4*(e)* of SADC Protocol on Extradition, in that person entitled to immunity in requesting country — Decision ultra vires and set aside.
Extradition — Application for — Person subject to — Whether person an 'accused' — Purposive interpretation required.
Extradition — Nature of — Proceedings in terms of s 10 of Extradition Act 67 of 1962 — Magistrate not trier of fact — Function merely to determine whether person was accused by requesting state of crimes for which extradition sought, and to satisfy himself that sufficient evidence to warrant prosecution in foreign state — Inquiry not involving determination of veracity of facts and magistrate able to accept certificate as 'conclusive proof' in terms of provision.

Two competing claims were made for the extradition of the former Minister of Finance in Mozambique (the applicant) who served as such between 2005 and 2015, after which he became a member of Parliament in Mozambique. These claims resulted in two applications which were combined in a special hearing before the full court. It was alleged by the United States that the applicant had participated in schemes whereby loans for the development of maritime projects were diverted to government officials. The applicant was arrested in South Africa on 27 November 2018 in terms of an extradition treaty with the United States for trial in the US, on the basis that the majority of investors affected by the scheme were based there. The Mozambican request for the extradition of the applicant followed a few days after the US's request, it requesting the extradition of the applicant for trial in Mozambique in terms of the Southern African Development Community Protocol on Extradition. The former Minister of Justice in South Africa, faced with the two competing requests, decided to extradite the applicant to Mozambique, based on legal advice prepared by a South African government official who appeared to have been deliberately misled by the Mozambican authorities as to the immunity attaching to members of Parliament in that country, and that the applicant, by virtue of his position as a member of Parliament, would not be immune from arrest and prosecution in Mozambique.
In the present matters, the applicant applied for the setting-aside of the warrant of arrest issued by a magistrate in terms of s 10 of the Extradition Act 67 of 1962 (the Act) and the new Minister of Justice counter-applied for the review and setting-aside of his predecessor's decision to extradite the applicant to Mozambique. In respect of the decision of the magistrate in the proceedings under s 10 of the Act, the new Minister contended that art 4*(e)* of the Protocol creates a prohibition on the extradition of the applicant to Mozambique in the light of his immunity under Mozambican law, whereas the applicant contended that the immunity did not subsist but was only constituted once the National Parliament was called on to consider

charges against a member. He also argued that, given the fact that the immunity could be lifted, it was not of the nature of immunity contemplated in art 4*(e)* and was therefore not hit by the prohibition in the article. The applicant in the second matter, a group of civil-society organisations (FMO), argued that, while the applicant was immune from prosecution, he could axiomatically not be 'a person accused' and that the magistrate could therefore not entertain the inquiry, as it was required as a jurisdictional fact for the extradition inquiry that the applicant be a person accused of extraditable offences.

Held, that, in determining whether a person was an accused for the purposes of extradition, one had to adopt a purposive interpretation of 'accused' in order to accommodate the differences between legal systems. The applicant's immunity from prosecution did not prevent him from being accused of the crimes set out in the warrant. The accusation and prosecution stood apart from one another. In terms of Mozambican law, the very procedures which could bring about a lifting of his immunity presupposed that he was accused of the offences for which he would ultimately be charged and prosecuted if the immunity were lifted. (See [53] – [55].)

Held, further, that the s 10 decision of the magistrate was only to commit or discharge: if the person was committed, then it was the Minister who decided whether the person should be surrendered to extradition. The magistrate was not a trier of fact. His function was merely to determine whether the person was accused by the requesting state of the crimes for which his extradition was sought, and had to satisfy himself that there was sufficient evidence to warrant a prosecution in the foreign state. This second inquiry did not involve a determination as to the veracity of the facts, and the magistrate in terms of s 10(2) merely accepted as 'conclusive proof' a certificate which appeared to them to be issued by an appropriate authority in charge of the prosecution in the foreign state, stating that it had sufficient evidence to warrant the prosecution of the person for the crimes in question. The magistrate had conducted the inquiry in accordance with the Act and his decision did not fall to be set aside by the court. (See [58] – [59] and [62].)

In respect of the former Minister's decision to extradite the applicant to Mozambique, *Held*, that South Africa's Constitution revealed a clear and uncompromising commitment to ensure that the Constitution and South African law were interpreted to comply with international law and, in particular, international human-rights law. Its courts had been committed to exacting compliance with its obligations under international law. South Africa was a signatory and member state of the Protocol, and accordingly bound by it. Therefore, whether the former Minister's failure to comply with art 4*(e)* contravened s 7(2) and s 8 of the Constitution, which required him to 'respect, protect, promote and fulfil' South Africa's international-law commitments to access to justice for its people, had to be examined. (See [67] – [71].)

Held, further, that the Protocol had to be interpreted so as to allow empowerment in terms of and compliant with South Africa's international obligations. As a starting point, the former Minister did not have the power to extradite the applicant to Mozambique because this was prohibited by his immunity, and the decision was accordingly ultra vires. In reality there was no choice to make between the US and Mozambique. The Minister did not have the option to extradite the applicant to Mozambique and was faced with only one valid request, namely that of the US. The decision to extradite the applicant to Mozambique accordingly had to be set aside. (See [80] and [82].) The decisions were remitted to the new Minister for determination.

S v NSOFOR 2020 (2) SACR 92 (GJ)
Sentence — Factors to be taken into account — First offender — No principle of law that certain categories of offender ought not be given advantage of status of being first offender.
Prevention of crime — Prevention of Organised Crime Act 121 of 1998 — Racketeering — Sentence — Criminal enterprise involving importation of drugs by using mules sent to foreign countries to collect drugs — Enterprise carried on over number of years and one shipment involving 1529 grams of cocaine with value of R764 595 — Effective sentence of 25 years' imprisonment imposed on appeal.

The appellant, a foreign national who had continued to stay in the country illegally after his temporary-residence permit expired, was convicted in a regional magistrates' court of numerous offences, including conducting or participating in an enterprise through a pattern of racketeering under the Prevention of Organised Crime Act 121 of 1998; five counts of dealing in various quantities of drugs in contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, including one of dealing in 1529 grams of cocaine with a value of R764 595; and a contravention of s 49(6) of the Immigration Act 13 of 2002. Some of the sentences imposed were ordered to run concurrently and the effective term of imprisonment was one of 30 years' imprisonment. He appealed against the sentence. Evidence was led at the trial that the appellant had run a criminal enterprise for approximately five years and had dispatched numerous drug mules to collect drugs from various countries, including Argentina, Brazil and Holland. The appellant appeared to be untouchable and police dockets incriminating him would disappear.
On appeal it was contended on his behalf that the cumulative effect of the sentence of the trial court was unjust and that a sentence of 10 – 15 years' effective imprisonment would be appropriate. It was also contended that the magistrate had erred in not viewing the appellant as a first offender, but the state argued that, on the basis of the evidence, this simply meant that he had not been arrested for his wrongdoing by the time that he was finally arrested and brought to trial.
Held, that the trial court had misdirected itself in two respects, namely in applying a legal principle that certain categories of wrongdoers such as kingpins or smugglers or persons who were not easily detectable should not have the advantage of being treated as first-time offenders; and by sentencing the appellant to equal sentences of 10 years' imprisonment in respect of four counts of dealing in drugs, even, though there were significant differences in the quantity and value of the drugs involved in each of those counts. (See [34].)
The court upheld a sentence of 20 years' imprisonment for racketeering and a sentence of 15 years' imprisonment for dealing in cocaine with a value of more than R500 000, but reduced the sentences of 10 years' imprisonment on each of the four lesser drug-dealing offences to two years' imprisonment each, and ordered the sentences to run concurrently in such a way that the appellant would have to serve a sentence of 25 years' imprisonment.

S v NYAKU 2020 (2) SACR 102 (GJ)
Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—Regional magistrate imposing sentence of life imprisonment where accused charged with rape in contravention of s 51(2)*(b)*, but evidence indicating that complainant raped by more than one person and charge

summarily changed to contravention of s 51(1)—Court on appeal holding that regional magistrate not empowered to sentence in terms of more serious charge, but in exercise of court's common-law jurisdiction it imposed sentence of life imprisonment in view of circumstances of case.

In an appeal against a sentence of life imprisonment imposed in a regional court for multiple rape, where the appellant was charged in terms of s 51(2)*(b)* of the Criminal Law Amendment Act 105 of 1997 (the Act), the charge was summarily amended to one in terms of s 51(1) of the Act when the appellant confessed to the rape and testified that his companion had also raped the complainant. It appeared that the two perpetrators were members of a gang. They had first demanded money from the complainant, and her cellphone, and one had a panga and the other a knife. When she could not comply, they took her 2-year-old child from her, put him on the ground and covered him with a blanket, and then both proceeded to rape her.
The appellant was 20 years old and lived with his mother, but had a previous conviction for rape. The magistrate could not find any circumstances that justified imposing a lesser sentence than life imprisonment.
Held, that the regional court was not empowered to sentence outside of the section convicted of and, since s 51(1) could not be invoked or applied in terms of the dictum in Mahlase,* it could only convict in terms of s 51(2)*(b)*. In the exercise of the court's common-law jurisdiction it was free on appeal to impose any sentence in excess of the minimum sentence and, having regard to all the circumstances, including the fact that the complainant was gang-raped, that the only appropriate sentence was that of life imprisonment.

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Administrator of Dr JS Moroka Municipality and others v Kubheka [2020] 3 All SA 96 (ML)

Legal Practice – Legal representatives' appearance in court – Regulation of litigation during national State of disaster – Regulations issued by Minister of Co-Operative Governance and Traditional Affairs restricting movement of persons and goods from within disaster-stricken area – Permits required by legal representatives in terms of directives, which restricted access to courts to persons with a material interest in a case, subject to certain exceptions and social distancing requirements – Non-compliance with regulations – Practitioners who acted recklessly by travelling across border in breach of regulations, not permitted to charge clients any fees for preparation, travelling or appearance in court.

In an application involving the lack of potable water for residents of a municipality, the litigation commenced against the backdrop of directives governing the State of Disaster which was declared in South Africa in March 2020. In terms of the declaration, a national lockdown was decreed, in an effort to combat the spreading of the Corona Virus ("COVID-19").

Regulations were issued by the Minister of Co-Operative Governance and Traditional Affairs (the "Minister") restricting the movement of persons and goods from within the disaster-stricken area. In terms of the Regulations, all persons were for the period of lockdown confined to his/her places of residence, unless strictly for the

purposes of performing an essential service obtaining an essential service or goods, collecting a social grant or seeking an emergency, life-saving or chronic medical attention. Gatherings, apart from funerals were prohibited, and the movement between provinces and between metropolitan and district areas was prohibited.

The present judgment dealt with the presence of the various legal representatives in court in the matter referred to above. Four advocates appeared as well as other individuals and attorneys who indicated that they were legal practitioners involved in the matter, and indicated that they were in possession of permits. Those that were not in possession of permits at court undertook to provide such permits before 12pm on 1 April 2020, but failed to do so.

Held – Services of legal practitioners and the courts were declared essential services, acknowledging that legal practitioners could be required to travel from their homes to court to attend to urgent and essential matters. The normal business activities of legal practitioners were also disrupted as they, as well as their staff, in terms of the regulations, were restricted to their places of residence for the duration of the lockdown. Only in exceptional circumstances could legal practitioners leave their residences, other than to purchase food, medicine or attending medical emergencies. In order to avoid personal contact between any of the role players in the justice system, to avoid, combat and prevent the spread of COVID-19 in courts, the directives restricted access to the court precincts and justice points to persons with a material interest in a case, subject to certain exceptions and social distancing requirements. Entering into courts and court precincts would be permitted only in essential and urgent matters. The permits relied on by the practitioners who did have them in court were found to be non-compliant with the regulations. Several practitioners acted recklessly by travelling across the border in breach of the regulations and openly defied the regulations and directives in terms of the Disaster Management Act 57 of 2002. Those who acted contrary to the regulations were not permitted to charge their clients any fees for preparation, travelling or appearance in court on the relevant date.

Bill v Waterfall Estate Home Owners Association NPC and another [2020] 3 All SA 115 (GJ)

Property – Residential estate – Alleged breach of rules – Deactivation of biometric access to estate –Availability of mandament van spolie – Requirement of peaceful and undisturbed possession of the property or right – Biometric access exercised by property owner an incident of his possession of the property and, thus, constituting a possessory right protectable by the *mandament*.

The applicant was a lessee of a unit on lifestyle residential estate in which the first respondent was the homeowners association. The applicant thus became a member of the first respondent, and was bound by the Estate's memorandum of incorporation ("MOI") and the conduct rules.

When the applicant became a member of the first respondent, the latter had already imposed commencement and completion penalties in respect of the property as a consequence of the failure of the previous lessee to comply with the rules by commencing construction within twenty-four months of registration of the lease and completing construction within forty-eight months of registration of the lease. In terms of the rules, the applicant was required to commence construction within twelve months from 7 April 2016 and complete construction within twenty-four months of 7 April 2016, failing which certain penalties would be imposed.

The applicant only commenced construction on the property on or around 23 July 2018 due to the local municipality's failure to approve his plans. The second respondent, as the association's property manager, refused the applicant's request to be allowed to proceed with construction until municipal approval was obtained. The applicant failed to pay the penalties imposed and the directors of the association instructed the second respondent to deactivate the applicant's biometric access to the Estate and to refuse his contractors' access to the Estate. The applicant sought an order *inter alia* directing the respondents to restore possession and unrestricted access to the property.

Held – *Mandament van spolie* is available where a person has been deprived unlawfully of the whole or a part of his possession of a movable or immovable; a joint possessor has been deprived unlawfully of his co-possession by his partner taking over exclusive control of the thing held in joint possession; a person has been deprived unlawfully of his *quasi-possessio* of a servitude right; or a person has been deprived unlawfully of his *quasi-possessio* of another incorporeal right.

In order to succeed, the applicant had to establish *inter alia* peaceful and undisturbed possession of the property or right.

It was common cause that the applicant exercised a right of access to the Estate through the biometric system linked to the property and that his contractors exercised a right of access to the Estate. The applicant contended that the rights of access were possessory rights which could be protected by a spoliation application.

The first question was whether the right of access was contractual or possessory in nature. The mere fact that the rights might be contractual in nature did not necessarily exclude them from being possessory. The Court held that the biometric access exercised by the applicant was an incident of his possession of the property and, thus, constituted a possessory right which could be protected by the *mandament*.

The deactivation of the biometric access to the property was an act of dispossession.

Insofar as the dispossession of the applicant's right of access was without an order of court or the consent of the applicant, it was unlawful.

The Court ordered that the applicant's biometric access to the Estate be restored.

CM v EM [2020] 3 All SA 1 (SCA)

Family Law and Persons – Divorce – Accrual – Spouse's living annuity – Whether ownership of funds invested in such annuities belonged to insurer with result that the annuities did not form part of spouse's estate for purposes of accrual – Right to future annuity payments constitute asset in spouse's estate, and is subject to accrual.

In an application for special leave to appeal which was referred for oral argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013, the applicant sought to challenge the Full Court's dismissal of the applicant's appeal against the judgment in the divorce action instituted by the applicant's husband, the respondent.

The Full Court held that the respondent's living annuities do not form part of his estate for purposes of calculating an accrual.

The parties married in December 1999, out of community of property and subject to the accrual system as defined in the Matrimonial Property Act 88 of 1984. The respondent purchased a living annuity from an entity ("Glacier") in 2008 and purchased a further two living annuities after that. In 2014, he instituted divorce proceedings against the applicant. In addition to a claim for spousal maintenance, he sought a declaratory order that the living annuities, which provided his monthly source of income, were not assets in his estate and were consequently not subject to the applicant's accrual claim.

The question of whether the living annuities acquired by the respondent formed part of his estate for purposes of calculating the accrual was decided separately from the merits of the action.

The respondent's case was that the living annuities were not subject to accrual because on a proper interpretation of the relevant legislation, they were not a pensionable interest as defined in the Divorce Act 70 of 1979. He argued further that the ownership of the capital value of the annuities vested in the insurer ("Sanlam") and that the respondent was entitled only to the annuity income.

The applicant's case, in the main, was that the court *a quo* erred in fact and in law in finding that ownership of the funds invested in the annuities belonged to Sanlam and that the annuities did not form part of the respondent's estate for purposes of accrual.

Held – A convenient starting point for determining whether a living annuity is susceptible to an accrual claim was to assess the precise nature of that type of investment. The Court found that the living annuities were contracts providing for Glacier by Sanlam to pay annuities, ie regular amounts at regular intervals, to the respondent. The annuity contracts stated that once a living annuity was purchased, the underlying capital in it was no longer accessible to the annuitant.

The proceeds or annuity income did not fall within the ambit of "pension interest" as defined in the Divorce Act. Thus, an annuitant cannot give part or all of the living annuities to an ex-spouse in terms of a divorce order or agree to split the annuity income with the ex-spouse.

The Court also held that the respondent had a clear right to the investment returns yielded by his capital re-investment with Sanlam, in the form of future annuity income which he drew from the agreement. Such annuity income was an asset which could be valued. The trial court erroneously considered the annuity income relevant only for purposes of a maintenance claim. It should have found it to be an asset in the respondent's estate, which was subject to accrual, and allowed the applicant's benefit valuation actuary to provide a valuation of that income stream.

Leave to appeal was granted and the appeal was upheld. The Court ordered a remittal of the matter to the trial court for the leading of evidence on the value of the respondent's right to receive future payments in respect of the living annuities.

Enoch Mgijima Local Municipality and another v Dingani and another and related matters [2020] 3 All SA 135 (ECG)

Local Government – Municipal council – Appointment of general managers – Invalidity of appointments to positions created in new organogram – Where organogram was not validly adopted as required by section 66(1) of the Local Government: Municipal

Systems Act 32 of 2000 as amended by the Local Government: Municipal Systems Amendment Act 7 of 2011, new appointments not clothed with legal validity.

The applicants were respectively a municipality and its administrator (by the Provincial Government to ameliorate the effects of the service delivery failures by the municipality, the sale in execution of some of its assets due to its inability to meet its financial commitments and other administrative lapses). They sought the removal of the respondents as the municipality's general managers in terms of sections 56(2) and 66(4) of the Local Government: Municipal Systems Act 32 of 2000.

The respondents were appointed by the erstwhile municipal manager ("Mr Magwangqana") after the introduction of a new organogram which created the positions to which the respondents were ultimately appointed. The applicants contended that that organogram did not comply with reg ulation 4(7) (Regulations: Appointment and Conditions of Employment of Senior Managers published in *Government Gazette* Number 37245 dated 17 January 2014). They also contended that the whole recruitment process was flawed for want of compliance with section 56 and various applicable regulations.

Held – In terms of the Local Government: Municipal Systems Amendment Act 7 of 2011, sections 56, 66 and 67 of the Local Government: Municipal Systems Act 32 of 2000 were amended. The present dispute had to be determined in terms of the amended sections.

Section 55 remained the same in that it was not affected by the amendments brought about by the Amendment Act. That was important because all the respondents stated that they were employed in terms of section 55, a point that was challenged by the applicants whose case was that both the first and second respondents were section 56 managers. It was common cause that the third and fourth respondents were not section 56 managers.

The respondents' case rested on the fact that the decision of the council in which the organogram that created their positions was approved had not been set aside. However, no attempt was made to show that the organogram was validly adopted in that it was a proper organogram that complied with legal prescripts. The Court pointed out that a staff establishment is not legally valid unless it is as envisaged in section 66(1). The staff establishment envisaged in section 66(1) is only clothed with legal validity if it has been developed in the manner prescribed. Even if a valid staff establishment had been developed by the municipal manager and adopted by council the respondents' employment still had to comply with section 56(2) in that they had to have the necessary prescribed skills and qualifications and be appointed by council. No facts were furnished to establish that requirement.

The Court agreed with the applicants that the entire recruitment process was flawed. It appeared that that Mr Magwangqana was determined to create positions for the respondents in total disregard of the legal and regulatory framework. The applicants were granted the relief sought.

Hewetson v Law Society of the Free State [2020] 3 All SA 15 (SCA)

Legal Practice – Attorney – Striking from roll – Appeal against sanction – Section 22(1)(d) of the Attorneys Act 53 of 1979 – Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he

practices if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney – Whether person should be suspended from practice or struck off roll is within the discretion of the court.

The appellant ("Mrs Hewetson") and her husband practised as attorneys in the Free State for many years. On 23 June 2016, the Law Society of the Free State (the "Law Society") obtained interim relief against them in the High Court pending an investigation into the financial affairs of their firm. They were subsequently struck from the roll of practising attorneys and the firm was placed in liquidation. The appellant appealed against the harshness of the sanction.

Held – The application in the High Court was brought in terms of sec tion 22(1)(d) of the Attorneys Act 53 of 1979, which provides that "any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practices. . .if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney." The test to determine whether a person is fit and proper is well established. The first enquiry is to determine whether the offending conduct has been proven on a balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice for a fixed period or should be struck off the roll. The last two enquiries are matters for the discretion of the court, which involve a value judgment. Only the final stage of the enquiry is relevant in this matter. The appellant, for the purposes of the appeal, conceded that she was not a fit and proper person to practise and, therefore, the only question that remained was whether the High Court was correct in striking her off the roll. The appellant contended that her suspension from practice would have been sufficient.

An appeal court has limited grounds to interfere with the decision of a High Court in matters such as this.

Taking into account the testimony of the appellant, the majority of the Court formed the view that she should be given an opportunity to give oral evidence on when she first became aware of the misappropriation of trust funds by her husband and co-director of the firm. The application to strike the appellant from the roll of attorneys was referred to a freshly constituted bench of the High Court for its determination after hearing such oral evidence.

Impilo Yabantu Services (Pty) Ltd v Tshokotshi [2020] 3 All SA 169 (ECL)

Personal Injury/Delict – Claim for damages – Defamation – A defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others – Once a defamatory statement has been found to have been published, the presumption that the publication of the defamatory material was made animus iniuriandi is triggered, and the defendant bears the onus of alleging and proving the absence of such intent.

Personal Injury/Delict – Claim for damages – Defamation – Defence of privileged disclosure – Privilege exists where someone has a right or duty to make, or an interest in making specific defamatory assertions, and the person or people to whom the assertions are published have a corresponding right or duty to learn or an interest in learning of such assertions – Defendant must show that the statements

were relevant and germane to the matter at issue, and plaintiff must show that defendant exceeded the bounds of privilege and acted with malice.

The defendant was the director of a franchise that entered into a contract with the plaintiff to perform work in schools listed in the main contract between a trust and another entity ("Amanz'Abantu").

Amanz'Abantu was appointed by the trust ("TMT") to implement the Eastern Cape Schools Water and Sanitation Operation and Maintenance Programme as a franchisor. In terms of their agreement, the franchisor would facilitate the creation of franchisee micro-businesses which would undertake the servicing of certain schools in the Eastern Cape and the franchisor would nurture the franchisees, progressively increasing their capacity and expertise throughout the course of phase 1 of the programme, by the end of which the franchisees had to be financially viable, sustainable and competent so as to be in a position to work post phase 1 for themselves, unassisted.

In furtherance of the objectives of the contract, Amanz'Abantu, through its subsidiary company (the "plaintiff"), entered into contracts with various locally based franchisees who were to perform the work as stipulated in the main contract entered into with TMT.

In the present action, the plaintiff claimed damages arising out of an affidavit by the defendant, embodying alleged defamatory statements of and concerning the plaintiff.

Held – It being common cause that the impugned statement was made and published by the defendant to the management of TMT and its support staff and further served before an adjudicator in arbitration proceedings, the issues to be determined by the court were whether the statement published against the plaintiff was defamatory; whether the statement was truthful and amounted to fair comment in the public interest and protected under the defence of privileged disclosure; and the appropriate award for damages.

Defamation consists of the wrongful and intentional publication of a defamatory statement of and concerning the plaintiff. A defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others. A plaintiff must, therefore, prove the words actually used, whilst the effect and meaning of the words used are a matter for the court to decide. Once a defamatory statement has been found to have been published, the presumption that the publication of the defamatory material was made *animus iniuriandi* is triggered. The defendant bears the onus of alleging and proving the absence thereof.

The Court found the defendant's statements to be defamatory of the plaintiff, and that they were not true. The defendant failed to discharge the onus of showing that the publication was in the public interest.

The Court then turned to the defence of privileged disclosure. Privilege exists where someone has a right or duty to make, or an interest in making specific defamatory assertions, and the person or people to whom the assertions are published have a corresponding right or duty to learn or an interest in learning of such assertions. A defendant does not, however, escape liability merely because the statements are made in judicial or *quasi*-judicial proceedings. He must show that the statements were relevant and germane to the matter at issue. A plaintiff in a defamation suit must show that the defendant exceeded the bounds of privilege; he acted with malice. The

defendant was unable to prove any entitlement to rely on the defence of privilege in this case. He was ordered to pay the plaintiff R90 000 as damages.

Khosa and others v Minister of Defence and Military Veterans and others [2020] 3 All SA 190 (GP)

Constitutional and Administrative law – National Defence Force – Powers of – Regulation of conduct during deployment to assist in enforcing national lockdown during national State of Disaster – Court confirming entitlement of all civilians to rights to human dignity, life, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman or degrading way, notwithstanding the declaration of the State of Disaster and the lockdown under the Disaster Management Act 57 of 2002 – Court issuing order defining competence, independence and capacity of existing institutions to receive and investigate complaints of torture, and brutality promptly, impartially and effectively.

In March 2020, the President of the Republic of South Africa declared a state of national disaster due to the spread of the virus known as COVID-19 ("coronavirus") and announced measures to combat the spread of the virus. The Minister of Cooperative Government and Traditional Affairs (the "tenth respondent"), acting in terms of section 3 of the Disaster Management Act 57 of 2002, issued Regulations implementing measures where movement would be severally restricted through a lock-down. The President then announced that the South African defence force ("SANDF") would be deployed to assist the police to enforce the lock-down Regulations.

The deponent to the founding affidavit in this case described the attack on her life partner (a civilian) by members of the SANDF during the lockdown. She described how members of the SANDF entered her home, damaged property, and assaulted her partner leading to his death. The applicants took issue with the Minister of Defence who seemed to lay the blame squarely at the feet of the civilians stating that they should not provoke the military forces. The Minister did not condemn the lock-down brutality. The deponents to the founding affidavit further stated that to their knowledge, no steps had been taken against the SANDF. It was said that the SANDF should not be left unaccountable and its use of force should be regulated. That was the point of the present application.

Held – In general, members of the SAPS and the SANDF may not use force. However, where force is necessary, it may only be minimum force. If it is the intention to secure the arrest of a person, force may only be used where it is reasonably necessary and proportional. Deadly force may be used only where there is a threat to life.

The Court agreed with the applicants' submission that there is no existing mechanism capable of conducting prompt, impartial and effective investigations of lock-down brutality and that the court has the duty and the power to order the Defence Minister and the Police Minister to establish one urgently. The Court was being asked to order the respondents to enhance the existing institutions and to give them what they currently lacked but constitutionally required *viz* the necessary competence, independence and capacity to receive and investigate complaints of torture, and brutality promptly, impartially and effectively. Such relief was competent, justified, appropriate, just and equitable as required by the Constitution. Lock-down brutality required a remedy.

It was declared that in terms of sections 38 and 172(1)(b), read with sec tion 21(1)(c) of the Superior Courts Act 10 of 2013, during and notwithstanding the declaration of the State of Disaster and the lockdown under the Disaster Management Act 57 of 2002, all persons present within the Republic of South Africa were entitled to the right to human dignity, the right to life, the right not to be tortured in any way, and the right not to be treated or punished in a cruel, inhuman or degrading way. The Court also issued orders regarding steps to be taken for infractions by members of the defence force or police during the lockdown.

Makeshift 1190 (Pty) Ltd v Cilliers [2020] 3 All SA 234 (WCC)

Property – Electricity supply – Discontinuation of – Spoliation action – Whether occupier of property in terms of a precarium has possession of an electricity supply in the sense required for spoliatory relief – Insofar as supply of electricity was an incident of the precarium in terms of which property was occupied, the right relied on was one enjoying the protection of the mandament van spolie.

The appellant ("Makeshift") was the owner of a farm on which the respondent occupied a building with her husband ("Tom") and children. The building was served by Eskom electricity. The Eskom contract was in Makeshift's name but Tom paid the bills, at least since the time he began occupying the store. On 20 or 21 December 2017, the Eskom electricity on the farm was disconnected. The only part of the farm served by Eskom electricity at that time was the building and its related facilities. The electricity was disconnected because Makeshift had cancelled its contract with Eskom. As a result of the cancellation, Eskom sealed the electricity box on the farm.

Flowing from an urgent *ex parte* spoliation application, an *ex parte* order was issued calling on the relevant respondents to show cause why final orders should not be granted ordering them to remove the locks on the electricity box or to provide the respondent with a key; ordering them to switch on the supply of electricity to the store or to authorise the respondent to do so; ordering them to restore the electricity supply to the property by not later than 4pm on 21 December 2017; prohibiting them from depriving the respondent of her possession and use of electricity and water without a court order.

The respondents did not comply with the interim order and litigation proceeded. Eventually, the magistrate's court granted final orders in terms of the rule *nisi* and ordered Makeshift to pay costs on the attorney and client scale.

On appeal, Makeshift disputed that the respondent had possession of an electricity supply in the sense required for spoliatory relief.

Held – A supply of electricity and water to a residential property is a practical necessity in order for an occupant to use the property as a dwelling. When such supply is terminated, the occupant experiences a significant disturbance in his occupation. However, that does not suffice to make the alleged right to electricity and water an incident of the possession or control of the property.

On the respondent's version, her family had permission to construct buildings and occupy it. In the absence of further facts, it could only be said that they occupied the store by virtue of a *precarium*, ie that Makeshift gave them a precarious right to construct and occupy the building, terminable on reasonable notice. Their alleged right to electricity would have been of a similar kind. In terms of the *precarium*, Makeshift permitted Tom and his family, as an incident of their occupation of the building, to use

the electricity supplied by Eskom to Makeshift, on the basis that Tom would pay the monthly bills.

A *precarium* is a contractual relationship. In the present case, the alleged contractual relationship embraced possession of the store and a right to Eskom electricity, provided that Tom and the respondent paid the Eskom bills. The supply of Eskom electricity was an adjunct to, or incident of, the *precarium* in terms of which Tom's family occupied the building. The alleged right to a supply of Eskom electricity was an incident of the respondent's possession of the building and was not a mere personal right. The alleged right was thus one enjoying the protection of the *mandament*.

Makeshift's appeal was thus dismissed.

Minister of Police and others v Silvermoon Investments 145 CC and others [2020] 3 All SA 250 (KZD)

Constitutional and Administrative Law – Breach of municipal by-laws – Right to seek relief – Doctrine of separation of powers – Granting of interdict at the instance of any other party would interfere with the powers or areas of competence of municipalities and would therefore violate the principle of separation of powers.

Personal Injury/Delict – Defamation – Right to sue – Organs of State – It is contrary to public policy or public interest for organs of government to have the right to sue for defamation, as it would impact on a citizen's right to freedom of speech.

In 2005, a lease agreement was concluded between the Department of Public Works and the respondents, in respect of certain structures on property owned by the respondents. Two Organs of State proceeded to occupy the leased property. Disputes subsequently arose with regard to the respondents' claim that they were due arrear rentals from the applicants. The claims were resisted by the applicants who alleged that they had overpaid approximately R37 million to the respondents in rentals, and that the amounts claimed by the respondents should be set off against the overpayment. The dispute turned acrimonious and eventually, the respondents, retaliating against the applicants' refusal to pay, erected a billboard on the property, containing signage which read, "SA government's first land grab in the new South Africa!!! This property has been hijacked by the Department of Public Works for the SAPS." The sign was erected without the consent of the municipality.

That led to the applicants approaching the Court for relief. In the first part of the application, an order was obtained for the removal of the billboard. What remained for determination was the prayer for an order restraining and interdicting the respondents from saying or publicising anything which the applicants would construe to be defamatory. According to the applicants, the second respondent (Naidoo) had no right to erect the billboard, nor did he have any right to use the billboard as a mechanism to disseminate information which was untruthful and false, and the respondents had no right to publish false information pertaining to the applicants. The applicants contended that they were suffering irreparable harm, particularly as Naidoo had threatened to publish similar messages and there was no alternative available to them to prevent a serious erosion of the public's confidence in them.

Amongst the defences raised by Naidoo was a reference to permission which the municipality had allegedly granted him for the erection of a billboard. However, no decision had been made in relation to his application for the erection of the board. He also misled the municipality regarding the purpose which the billboard was to serve.

Furthermore, the municipality requested him to remove the sign, and he refused. He then made a *post facto* application for the erection of the board. However, he contended that his actions were a reflection of the true position between the parties (defence of truth); that it amounted to fair comment and that he was correct in describing the conduct of the applicants as land grabbing and "hijacking".

Two points *in limine* were raised by the respondents. The first was that Organs of State, like the applicants, do not have a right to sue for defamation and accordingly have no *locus standi* to interdict the publication of an allegedly defamatory statement by the respondents. The second point *in limine* was that only the municipality could apply to court for an interdict in the event of a breach of the municipal by-laws.

Held – In respect of the second point, that the granting of the interdict at the instance of the applicants would interfere with the powers or areas of competence of municipalities and would therefore violate the principle of separation of powers. The Court upheld the point *in limine* that the applicants lacked the necessary *locus standi in judicio* to obtain an order for the removal of the billboard on the property of the respondent, as such action fell squarely within the authority of the municipality.

The Court then considered the application for an interdict based on the allegedly false and defamatory statements contained in the billboard. The applicants sought an interdict to restrain the respondents from publishing any material regarded by the applicants to be false or defamatory. The harm that the applicants submitted that they would suffer, was the serious erosion of public confidence in them – in other words, protection from reputational damage. The problem facing the applicants was that it is settled law that government or an Organ of State is not capable of being defamed. The Court referred to various judicial decisions confirming that it will be contrary to public policy or public interest for organs of government, whether central or local, to have the right to sue for defamation, as it would impact on a citizen's right to freedom of speech.

As an Organ of State is not capable of being defamed, the applicants failed to establish that they had a clear right to the interdictory relief and that they would suffer any harm. Consequently, no basis for an interdict was established, and the application was dismissed with costs.

Minister of Police v K [2020] 3 All SA 38 (SCA)

Personal Injury/Delict – Action against police by rape survivor – Claim for damages – Negligence – The test for negligence is that for purposes of liability culpa arises if a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence and the defendant failed to take such steps.

The respondent was abducted, robbed of her personal belongings and sexually assaulted by an unknown man or men on 9 December 2010. She was reported missing by a cousin that evening, and the police were given details of the respondent's vehicle. The vehicle was discovered by the police at the parking area of the beach where the incident took place at about 11h30pm that night. A police search for the respondent was launched but was aborted in the early hours of the morning of 10 December. In the meantime, the respondent managed to escape from at 6am on 10 December 2010, and ran to the beach in search of help. She received assistance from a group of men who were jogging along the beach.

On 14 November 2013, the respondent instituted action against the appellant, along with three individual members of the police service ("SAPS") involved in the investigation of her case. She claimed damages for the harm she allegedly suffered as a result of the relevant SAPS members' failure to conduct an effective search for her and to find her shortly after 11h30pm, and thereafter to conduct a reasonably effective investigation into the crimes perpetrated against her. The claim was based on a number of duties which the respondent alleged the police owed her.

The present appeal was against the High Court's upholding of the claim.

Held – The first question was whether the search and the investigation by the police were conducted negligently. The test for negligence is that for purposes of liability *culpa* arises if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps. Disagreeing with the High Court, the present Court found that the steps taken by the police to find the respondent were reasonable. They took all reasonably practicable and appropriate precautions to carry out an effective search and no negligence concerning the search was proved.

The respondent also did not convince the court that the investigation was conducted negligently. The Court found further that the High Court's determination of the element of wrongfulness was flawed. It did not consider whether it was reasonable, in the circumstances of this case, to impose liability on the SAPS for the harm suffered by the respondent.

It was concluded that the findings by the High Court that the elements of negligence, wrongfulness and causation were established could not be supported by the evidence proffered on behalf of the respondent and her claim should have been dismissed. The appeal was accordingly upheld with costs.

Natures Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality [2020] 3 All SA 57 (SCA)

Civil Procedure – Separation of issues – Rule 33(4), Uniform Rules of Court – Determination of scope of order of separation – Court setting out the principles which should apply to the making of orders of separation in terms of rule 33(4).

Local Government – Supply of water by municipality – Municipal water tariffs – Discovery of error in application of tariff – Claim for payment of correct amount due – Defence of prescription – Determination of when debt became due leading to conclusion that claim for payment had not prescribed in terms of Prescription Act 68 of 1969.

The appellant ("NCF") conducted business within the geographic jurisdiction of the respondent municipality ("Ekurhuleni"). It used a substantial quantity of water which was supplied by Ekurhuleni in the discharge of its statutory service delivery obligation.

An inspection and tests conducted on the water measuring assembly (the "assembly") at the premises of NCF in June 2010 revealed that NCF had consistently been billed for only 10 per cent of its actual water usage due to the incorrect factor attached to the water meter being recorded in the financial accounting system of Ekurhuleni. The error was corrected, and the finance department of Ekurhuleni was

instructed by Ekurhuleni's infrastructure department, to recover the amounts due in respect of the actual usage for the period of 36 months prior to the correction.

NCF resisted the demand and Ekurhuleni threatened to interrupt its water supply unless payment was made. That prompted NCF to obtain an interim interdict to prevent the interruption of its water supply and the institution of an action for a declarator that it was not indebted to Ekurhuleni in the amount claimed. It contended that the claim had become prescribed and unenforceable by the effluxion of time in terms of the relevant provisions of Ekurhuleni's schedule of tariffs for the supply of water. Ekurhuleni denied the contention and filed a claim in reconvention in which it sought payment of the disputed amount. NCF, in turn, raised a special plea of prescription and Ekurhuleni replicated to raise a number of defences to the special plea. The issue of prescription was dealt with in the High Court, and subsequently in an appeal before the Full Court, under rule 33(4) of the Uniform Rules. The High Court upheld NCF's contention that the debt had prescribed and ordered Ekurhuleni to reverse the charge. The Full Court, however, came to the contrary conclusion and set aside the order made by the High Court. The present appeal against the order of the Full Court was with the special leave granted by the present Court.

Held – Although the issue of the alleged prescription of Ekurhuleni's claim was dealt with in the High Court in terms of rule 33(4) and an order in terms of the rule was granted at the commencement of the trial, on appeal the parties were not in agreement as to the scope of the separation. The question was whether the issue of prescription was included in the separation order or was to be adjudicated in due course as submitted by Ekurhuleni. The Court referred to the principles which should apply to the making of orders of separation in terms of rule 33(4), and held that the order in this case made no attempt to circumscribe the separated issue at all. It provided for NCF's claim to be decided separately and before any evidence was heard in respect of the claim in reconvention. An examination of NCF's pleaded claim showed that it did not place any reliance on the provisions of the Prescription Act 68 of 1969, and relied solely on the interpretation of the schedule for its contention that the claim had become prescribed before Ekurhuleni billed for the disputed amount. Consequently, the issue of prescription raised in the special plea in reconvention was not before the court, and the order of the High Court could not be sustained.

The next issue was the construction to be placed on the relevant provisions of Ekurhuleni's schedule of tariffs for the supply of water. The schedule had its foundation in section 74 of the Local Government: Municipal Systems Act 32 of 2000, which enjoined Ekurhuleni to adopt and implement a tariff policy on the levy of fees for municipal services which complied with the provisions of the Act. In that regard section 74(2) sets out various principles which must be reflected in its tariff policy. Three of those principles were material to the present dispute. First, section 74(2) provides that the policy must reflect the principle that users of municipal services should be treated equitably in the application of tariffs. Second, section 74(2)(b) requires that the amount which individual users are to pay for services should generally be in proportion to their use of that service. Finally, section 74(2)(d) requires that tariffs must reflect the cost reasonably associated with the rendering of the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.

Paragraph 12 of the schedule allowed Ekurhuleni to recover what was due to it in respect of water consumed by users in circumstances where a *bona fide* error in the calculation of charges occurred due to a factor or coupling error. Where the error is

only discovered long after the use occurred, accurate measurements may not be available, and a formula was thus provided by which to determine a deemed volume of water. The provision limited the recovery of the rectified charge to the last 36 months, prior to the discovery of the error, during which the incorrect charge was levied. It accordingly related to the calculation of the rectified charge and had no bearing on when an invoice was rendered or when a claim for payment of the rectified charge would become unenforceable. The relevant period in the present case fell within the 36 months preceding the discovery of the error. The Court held that the schedule was not an Act of Parliament and found no application to the prescription of the claim. The issue of prescription had to be decided on the application of the provisions of the Prescription Act when the claim in reconvention was adjudicated. In the result NCF's assertion that Ekurhuleni's claim became unenforceable by virtue of the provisions of paragraph 12 of the schedule, whether by prescription or otherwise, could not be sustained. The Court considered the provisions of the Act regarding when a debt is due and the interruption of prescription, and ruled as follows. The amount claimed arose and became due upon discovery of the factor error. At that stage all the facts from which the rectified charge arose were known, the amount of the claim was liquidated and the debt was immediately payable. Ekurhuleni would immediately have been entitled to demand payment based on the actual water measurements in respect of water usage that had already occurred. On that basis, prescription began to run on 11 June 2010. The rendering of a consolidated invoice did not serve to interrupt prescription. In the circumstances the conclusion of the Full Court could not be sustained.

The appeal was accordingly upheld.

Oosthuizen t/a Wilger Motors v Puma Energy South Africa (Pty) Ltd and others [2020] 3 All SA 268 (FB)

Consumer – Consumer Protection Act 68 of 2008 – Whether protection afforded by Act extends to small business seeking not to be subjected to expensive arbitration proceedings in dispute with a supplier – Where evidence showed that, vis-à-vis the supplier, the small business was not a consumer but a retailer, the protection afforded to consumers did not apply and the arbitration agreement was binding.

The applicant was a retail outlet which on-sold fuel delivered by the first respondent, a manufacturer of petroleum products. Their business relationship was regulated by a "Dealer Agreement" entered into in November 2019. The dealer agreement contained two arbitration clauses. One of the clauses gave the first respondent the right to elect to handle disputes by way of litigation or by way of referral to arbitration. The other, the general arbitration clause ("clause 26"), determined that a dispute would, on written demand by any party to the dispute, be submitted to arbitration in Pretoria in accordance with the Rules of the Arbitration Foundation ("AFSA") of South Africa by arbitrators appointed by AFSA and agreed to by the parties.

A dispute arose between the parties over the faulty calibration of fuel pumps, resulting in less income for the applicant. The first respondent's failure to resolve the problem led to the applicant cancelling the dealer agreement based on section 14(2)(b) of the Consumer Protection Act 68 of 2008 which empowers a consumer, bound by a fixed-term consumer agreement, to cancel such agreement at any time by giving the supplier 20 business days' notice in writing.

Taking the stance that the applicant's cancellation of the agreement was a repudiation of the agreement, which repudiation it accepted, the first respondent elected to proceed with arbitration.

The applicant disputed the validity of the arbitration agreement contained in clause 26 of the dealer agreement on the basis that it was an unfair, unreasonable and/ or unjust term as envisaged in section 48 of the Consumer Protection Act. She stated that the effect of the clause, was that she was taken to have submitted to any future dispute being referred to private arbitration in Pretoria in accordance with the rules of the second respondent. Those rules were not attached to the dealer agreement when it was signed, and were incorporated by reference without her having seen them before. She was therefore subjected to terms presumed to be unfair under the Act and its regulations.

The first respondent disputed the suggestion that the dealer agreement between the applicant and the first respondent was a consumer agreement as contemplated in the Act. It also contended that regulation 44 of CPA was not applicable to the applicant and first respondent as that regulation contemplates consumers who acquire goods or services for personal/private use unrelated to their profession or business in order to protect the vulnerable individual consumers in their day-to-day transactions with suppliers for household goods which are usually acquired by consumers for domestic use.

In a preliminary point, the applicant argued that in the resolution of Part A of the present application, the court had determined, for purposes of these proceedings, that the applicant was a consumer as envisaged in the Act. It was argued that that aspect was therefore *res judicata* and dispositive of the dispute between the parties on the said point.

Held – Regarding the preliminary point, the judgment merely established that the applicant had a *prima facie* right. The issue of the applicant being a consumer for purposes of the Act was therefore live and not *res judicata* as alleged by the applicant.

The question raised by the applicant was whether, as a small sole proprietor in Brandfort, it would be afforded the protection of the Consumer Protection Act so that it would not be subjected to expensive arbitration proceedings in Pretoria (but would be able to litigate the dispute in the present Court in Bloemfontein).

A consumer is defined in section 1 of the Act as a person to whom goods and services are marketed in the ordinary cause of a supplier's business or who has entered into a transaction with a supplier in the ordinary cause of a supplier's business. There must be a transaction to which a consumer is a party, or the goods are used by another person consequent on that transaction. The Act defines a retailer as a person who, with respect to any particular goods and in the ordinary cause of business, supplies those goods to a consumer.

The evidence showed that, *vis-à-vis* the first respondent, the applicant was not a consumer but a retailer. It was not utilising the fuel products as a consumer but a retailer.

Interpretation is the process of attributing meaning to the words used in a document or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its

coming into existence. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The contract in this case was no more than a commercial agreement between two businesses: one supplying and the other reselling the supplied *merx*.

The next question was whether the applicant resorted within the protection afforded by regulation 44 of the Consumer Protection Act Regulations. Regulation 44 provides that a term of a consumer agreement between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his business or profession is presumed to be unfair if it has the purpose or effect of a term listed in sub-regulation 3 and does not fall within the ambit of sub-regulation 4. Again, the applicant was found not to be protected by the provisions of regulation 44 as it was not a consumer as required by the Act.

In the above circumstances, the arbitration clause contained in the dealer agreement was neither unconscionable, unjust, unreasonable nor unfair. The application was dismissed with costs.

Osman Tyres and Spares CC and another v ADT Security (Pty) Limited [2020] 3 All SA 73 (SCA)

Civil Procedure – Absolution from the instance – Absolution justified where no evidence existed on which a court acting carefully could or might find in claimant's favour in respect of personal claim.

Corporate and Commercial – Contract – Contractual claim arising from alleged negligent breach of contract by security service provider – Appeal against granting of absolution from the instance – Where contractual terms were clear and unambiguous in excluding liability for negligent conduct of service provider, no case could be found to have been made against company.

The first appellant (the "CC") and second appellant ("Mr Osman") instituted damages claims against the respondent ("ADT"). The CC's claim was for contractual damages based on a written agreement, concluded between the CC and ADT on 6 February 2005, for the rendering of security services at the CC's business premises. That agreement was admitted by ADT. All that remained to be considered to complete a cause of action for contractual damages were the breaches of the agreement and the damages caused by such breaches. By the time the matter was argued before the High Court, it was apparent that Mr Osman's claim was a delictual claim.

The High Court, despite applying the wrong test, correctly granted an order absolving ADT from the claim of Mr Osman. The material remaining question on appeal was whether an order of absolution was justified in respect of the CC's claim.

In deciding the appeal, the present court agreed on the fate of Mr Osman's claim, which was dealt with in the dissenting judgment. The majority of the court dealt only with the CC's claim.

Held – Mr Osman's claim hinged on allegations that ADT failed in its duty to protect the CC's premises. However, no evidence was given on which it could be found that ADT had acted wrongfully. Accordingly, there was no evidence on which a court acting

carefully could or might find in his favour in respect of his personal claim. That was sufficient reason on its own to justify the order of absolution in respect of Mr Osman's claim.

Agreeing with the minority ruling that the particulars of claim were not a model of clarity, the majority judgment began by confirming that the CC's claim was one in contract, and that reliance was placed on a written agreement. The entire agreement was annexed to the particulars of claim, but it was not stated which provisions of the written agreement were alleged to have been breached or in what respects. In the minority judgment, it was stated that he material issues relevant to the CC's contractual claim included, *inter alia*, the specific obligations undertaken by ADT as part of the service it would render to the CC in terms of the agreement, and details of the respects in which the CC contended that ADT had breached the agreement. Having regard to the agreement, the majority judgment highlighted the specific contractual terms relevant to the claims brought against ADT, and to the exclusionary clauses contained in the agreement. Such clauses were clear not ambiguous. It was clearly stated that while ADT would exercise reasonable care, it gave no guarantee; that the contract was not an alternative to insurance; and that ADT was not liable to the CC for any damage or loss incurred. Where a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. Testimony by Mr Osman of certain oral representations made by an ADT employee at the time of signing the agreement was therefore inadmissible.

In the minority ruling, it was stated that the court below was responsible for formulating clearly which issues were separated, but did not do so, and that the separation of issues was dealt with in a cursory matter, leaving uncertainty around what was to be included under the merits which were separated for hearing. However, the majority held that although no formal order issued in terms of rule 33(4), the CC could not have been under any illusion as to the elements of the claim that had to be satisfied to survive absolution

On a proper interpretation of the agreement, the CC was found by the majority of the court to have failed to make out a prima facie case. The appeal was accordingly dismissed with costs.

Toneleria Nacional RSA (Pty) Ltd v Commissioner of South African Revenue Services [2020] 3 All SA 281 (WCC)

Trade (Customs and Excise) – Customs duty – Tariff classification – Interpretation of tariff headings – Application of "always speaking" doctrine of interpretation, which states that whilst the meaning cannot change, since a statute is "always speaking", the context or application of a statutory expression may change over time.

Trade (Customs and Excise) – Customs duty – Tariff classification – Interpretation of tariff headings as appearing in Schedule 1 to the Customs and Excise Act 91 of 1964 – Classification as between headings involving three-stage process entailing ascertainment of meaning of words used in headings; consideration of nature and characteristics of goods; and selection of heading which is most appropriate to goods.

An appeal was noted against the classification for customs duty purposes by the respondent ("SARS") of certain wooden products imported by the applicant. The appeal was brought in terms of section 47(9)(e) of the Customs and Excise Act 91 of 1964. The goods in issue consisted of flat-planed planks of oak that were measured in various sizes and carpentered especially so that they could be suspended in containers of wine (usually steel containers) during the maturation process. They provided a cheaper alternative for winemakers to achieve certain flavouring and character effects than the more expensive oak barrels traditionally used for such purposes.

While the tariff classification adopted by the respondent would attract duty at 20% of the dutiable value of the products, the tariff classification contended for by the applicant would result in the goods being duty free. The tariff sought to be applied by the applicant was TH 4416.00 which relates to "Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves".

Held – The appeal turned on statutory interpretation, more especially, of the relevant tariff headings as they appeared in Schedule 1 to the Act.

The interpretation of any tariff heading or tariff subheading in Part 1 of Schedule 1 to the Act must take into account the section and chapter . The Court referred to case law which states that classification as between headings is a three-stage process. It begins with interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter) which may be relevant to the classification of the goods concerned. The second stage involves consideration of the nature and characteristics of the goods; and the third involves the selection of the heading which is most appropriate to the goods.

The applicant contended that the goods in question fell to be classified in terms of TH44.16 under the rubric "other coopers' products". The Court posed the question of whether a barrel substitute or alternative that is now commonly produced by coopers, using many of their traditional skills and methods, is not also a modern day "coopers' product", and whether the tariff heading Explanatory had the effect of precluding such a determination.

The use in legislation of a generic term like "coopers' products" makes the expression especially susceptible to construction in accordance with the "always speaking" doctrine of interpretation. The Court referred to English case law, in which it was stated that whilst the meaning cannot change, since a statute is "always speaking", the context or application of a statutory expression (in this case, "coopers' products") may change over time.

The Court concluded that the applicant's appeal should be upheld and an order made substituting the respondent's classification of the goods with a determination that they be classified under TH4416.

END-FOR-NOW