LEGAL NOTES VOL 8/2020

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CENTRE FOR CHILD LAW AND OTHERS v MEDIA 24 LTD AND OTHERS 2020 (4) SA 319 (CC)

Criminal procedure — Protection of children — As victims of crime — Protection of anonymity — Section 154(3) of Criminal Procedure Act 51 of 1977 constitutionally invalid to extent that it fails to protect identity of child victims of crime — Section also invalid to extent that its protection of children, either as accused or victims, not extending beyond age of 18.

The applicants sought the confirmation of an order by the Supreme Court of Appeal declaring s 154(3) of the Criminal Procedure Act 51 of 1977 unconstitutional to the extent that it failed to protect the anonymity, in criminal proceedings, of child victims of crime. They also sought leave to appeal against that part of the order of the court that dismissed an appeal challenging the constitutionality of s 154(3) on the basis that it did not extend its protection to children over 18. The section expressly provided anonymity directions for child accused or witnesses that prevented the publication of any information that disclosed the identity of such children. The protections could only be lifted with the permission of a court on a case-by-case basis if it was just and equitable to do so. The protection, however, did not extend to child victims. Besides the scope of protection provided by s 154(3), there was the additional question of ongoing protection, and whether protection ought to extend into adulthood for child accused, witnesses and victims. Addressing these issues required balancing the best interests of children and their constitutional rights to dignity, privacy and equality with the right to freedom of expression and the principle of open justice (see [3] – [4]).
The application concerned one KL, who was kidnapped as a baby and found by her biological parents some 17 years later. Her abductor was criminally prosecuted. While KL was identified as a possible witness for the prosecution, she was to turn 18 before the beginning of the trial. The case attracted major media attention and KL,

[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!**

concerned about the publicity, approached the first applicant for legal help. The first applicant, unable to obtain undertakings from the media that they would protect KL's anonymity, together with the other applicants launched proceedings that culminated in the present application. The respondents were various media houses. They argued for a narrow interpretation of s 154(3) that would exclude child victims like KL from the ambit of its protection, particularly when they had reached 18.

Held per Mhlantla J (Mogoeng CJ, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring)

Section 154(3) did not explicitly contemplate, or extend to, child victims not called as witnesses, and there was a lacuna in our law as it pertained to protecting the identity of child victims in criminal proceedings. (See [27] – [28].) Moreover, any protection against identification afforded to child accused or witnesses in criminal proceedings was also relevant to child victims, including those not called as witnesses. The exclusion of child victims did not appear to serve any legitimate government purpose, and the fact that the section did not offer equal protection and benefit of the law, and the resulting arbitrary differentiation between classes of children breached the right to equality. (See [35].)

Child victims were vulnerable to harm if publicly identified. They were no less deserving than those who had witnessed crime or those who were in conflict with the law. It was neither reasonable nor practical for child victims to bear the onus of approaching courts for an interdict against publication. The lacuna in the section ran contrary to the best interests of children and infringed s 28(2) of the Constitution. (See [41] – [43].) By excluding child victims from its protection, s 154(3) limited the right to equality, the best interests of children, and their rights to privacy and dignity. (See [51].) The limitation was not saved by s 36 of the Constitution, and in the result s 154(3) was declared constitutionally invalid to the extent that it did not protect the identity of child victims in criminal proceedings. (See [59].)

Restorative justice was a long-term process that required ongoing protection (see [81]). The promotion of agency and autonomy (in the form of consent and judicial oversight) would empower those who faced unwarranted stigmas (see [84] – [87]). Default ongoing protection for children over 18 would create a more meaningful engagement with agency, enabling personal choice and restorative justice. A child who had experienced trauma, whether as a victim, a witness or an accused, should not, by turning 18, have their story and identity exposed without their consent or judicial oversight. By limiting a person's agency and autonomy, a lack of ongoing protection would infringe the rights of dignity, privacy and the best interests of the child, and result in an unfair burden on child participants who had recently turned 18. While ongoing protection did curtail the principle of open justice and freedom of expression, the harm was minimal compared to the harm otherwise suffered by all classes of child participants. (See [87], [103] – [104].)

The limitation arising from a failure to provide ongoing protection was not justified, and although the purpose of freedom of expression and open justice were compelling, when it came to the balancing of those competing rights, the best interests of children, the right to dignity and privacy outweighed the subtle impediment to the principle of open justice. The serious harm caused to child participants outweighed the minimal harm to open justice. Nor would the granting of default ongoing protection present a severe incursion into media freedom. (See [112.)

The appeal on the issue of ongoing protection accordingly had to be upheld. (See [113].)

Held per Cameron J and Froneman J
The court should tip the scales in favour of knowledge and open justice, eschewing default anonymity. While s 154(3) was unconstitutional because it protected only child accused and child witnesses, courts should be cautious in using state power to limit knowledgen. Justifying the indefinite anonymisation in the case of adults who were, when children, witnesses to or victims of or accused of crimes, pointed hard-won process protections in an untoward direction. The court should rather take the risk of erring in the cause of openness and knowledge, and against stigma and shame, and the appeal accordingly should be dismissed. (See [134], [137, [140] – [141].)
Held per Jafta J
Section 154(3) did not violate the privacy and dignity rights of children or the right guaranteed by s 28(2) of the Constitution, but was invalid for being inconsistent with s 9(1) of the Constitution to the extent that it differentiated child victims from child accused and witnesses in affording protection against publicity. It was, however, for Parliament to extend the scope of protection afforded by s 154(3). (See [142] – [143] and [185].)

MAGNIFICENT MILE TRADING 30 (PTY) LTD v CELLIERS NO AND OTHERS 2020 (4) SA 375 (CC)

Minerals and petroleum — Mining and prospecting rights — Transition to new order under MPRDA — Transmissibility, after death of holder, of right arising from MPRDA — Mineral and Petroleum Resources Development Act 28 of 2002, sch II, item 8.

Administrative law — Administrative action — Invalidity — Consequences — Where invalid grant of prospecting rights under Mineral and Petroleum Resources Development Act 28 of 2002 competing with holder of pre-existing old order mineral right — Whether Oudekraal rule applicable, so that invalid grant first having to be set aside before pre-existing old order right could be asserted.

The first respondent was the executor of the estate of the since also deceased surviving spouse of one Mr Gouws. The executor opposed relief sought by the applicant (MMT) relating to a prospecting right first applied for by Mr Gouws — by way of application for conversion of his old order mineral rights in respect of coal deposits on his farm Driefontein, Middelburg, Mpumalanga — and shortly afterwards also applied for by MMT.
Mr Gouws passed away before his application was decided. When it did so, the Department of Mineral Affairs (the Department) granted Mr Gouws prospecting rights over the wrong land, subsequently also granting prospecting over Mr Gouws' farm to MMT. The Department then attempted to undo its error by amending the Gouws prospecting right to reflect the correct land, and by substituting 'the Beneficiary, Late Estate Nicolaas Petrus Gouws' as the grantee of this prospecting right. It however failed to make the amendment applicable to the whole of the land (see [10]). Then, on 2 November 2011, pursuant to her application for cession in terms of s 11 of the MPRDA, the Department registered the prospecting right in the name of Mrs Gouws, but only in respect of one portion of Driefontein; and on 10 April 2013 refused MMT's application for a mining right, on the basis that the Gouws prospecting rights were granted under a prior application.
It was these departmental decisions that gave rise to the present Constitutional Court case; this after MMT had been successful in its High Court bid to have them

set aside on review and that decision was reversed by the Supreme Court of Appeal (see [14] – [17]). The first aspect of the case concerned the transmissibility, after the death of the holder, of a right arising from the MPRDA; the second concerned two related issues arising from Mrs Gouws' counter-application for a declarator to the effect that MMT's application for a prospecting right was void and that of Mr Gouws valid as either having been granted or still pending.

In regard to the first aspect, MMT contended that the right that Mr Gouws enjoyed at the time of his death, after he had lodged his application for a prospecting right, was only a right to a decision. In regard to the second aspect, MMT contended that the relief sought in the counter-application was outside the 180-day time limit stipulated by s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) so that their prospecting right could not be assailed, and that in the face of that right — which had not been set aside and therefore continued to exist in fact as per the *Oudekraal/Kirland* rule * — no right arising from the application for a prospecting right that had been lodged by Mr Gouws could be asserted (see [33] – [34]).

Held

Legal rights of a proprietary nature, ie rights having a value, were normally transmissible on death to heirs and legatees. The right that Mr Gouws had enjoyed at the time of his death was far more than only a right to a decision, and it had value. In addition, Mr Gouws' old order right remained valid once he lodged an application for a prospecting right, and as the holder thereof he enjoyed exclusivity to apply for a new-order title, which also had value. This was a limited real right, forming part of Mr Gouws' estate, and it therefore was transmissible. (See [25] – [32].)

Mrs Gouws' 'defensive challenge' was simply an assertion of a pre-existing right; it did not purport to be a review of the unlawful Magnificent Mile award (see [44].)

Oudekraal was not only about the continued existence of an unlawful administrative act for as long as it has not been set aside by a court; it also focused on acts that were consequent upon an initial unlawful administrative act, ie acts whose validity — even if only for a while — depended on the existence of the initial act (see [38]). Plainly, the validity of Mr Gouws' right did not hinge on the MMT award. Thus, unlike 'consequent' administrative acts that owed their existence to earlier unlawful administrative acts, Mr Gouws' right did not owe its existence to the unlawful award of a prospecting right to MMT (see [42]).

The prospecting rights granted to Mr Gouws did not relate to what Mr Gouws had applied for, which meant that his application was yet to be decided and his unused old order right continued to exist. That Mr Gouws' right was extant when MMT applied for and was awarded a prospecting right, meant that that award was invalid (see [44]). To say the later unlawful MMT award could effectively wipe out the pre-existing limited real right, would be turning the *Oudekraal* rule on its head. *Oudekraal* said no more than that if you want to nullify, or even avert, consequences that owe, or would owe, their existence to an initial unlawful administrative act, that initial act must be set aside. It was quite another to say that an unlawful administrative act — through the simple facility of applying the *Oudekraal* rule — can have the effect of obliterating a pre-existing right which did not owe its existence to the unlawful administrative act. This was not what was suggested by either *Oudekraal* or *Kirland*. (See [43]; see in this regard also the concurring minority judgment in [68] et seq, and the majority judgment's reply in [50] – [61].)

NORMANDIEN FARMS (PTY) LTD v SOUTH AFRICAN AGENCY FOR PROMOTION OF PETROLEUM EXPLORATION AND EXPLOITATION SOC LTD AND ANOTHER 2020 (4) SA 409 (CC)

Constitutional practice — Appeal — Leave to appeal — Mootness — Whether, despite issues having become moot since applying for leave to appeal, in interests of justice to grant leave — Factors to be considered restated — Conflicting judgments by different courts, where appeal court's outcome having binding implications for future matters — In casu, decision sought to be appealed against not having binding effect — Application for leave to appeal dismissed.

Constitutional practice — Costs — Punitive costs order — Against applicant for leave to appeal — Where, knowing that issues had become moot since application made, applicant persisting with application in hope of reaching favourable settlement offer as to costs of previous litigation — Such conduct amounting to abuse of process warranting punitive costs order.

Normandien Farms (Pty) Ltd (Normandien) was the owner of a number of farms in respect of which the first respondent, the SA Agency for Promotion of Petroleum Exploration and Exploitation (PASA), accepted an application for exploration rights under s 79 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), made by the second respondent, Rhino Oil and Gas Exploration South Africa (Pty) Ltd (Rhino). Normandien took issue with a number of formal defects in PASA's acceptance and publication of the application and was successful in its High Court application to have it set aside. The Supreme Court of Appeal, however, reversed that decision. Here Normandien applied for leave to appeal in the Constitutional Court.

After the application for leave to appeal was filed, Rhino formally withdrew its application for exploration rights over the Normandien farms. They then attempted to settle the dispute, Normandien agreeing that the underlying causa for the referral to the CC had in principle become moot but insisting that Rhino offer to pay the costs of the High Court and SCA proceedings as a precondition to its withdrawing the matter (as contemplated in the Constitutional Court Rules).

In the CC, Normandien argued that it was in the interest of justice to allow leave to appeal even if the application was moot, because the judgment of the Supreme Court of Appeal was incorrect and constituted binding precedent which would prejudice future litigants. Normandien also raised the issue of the costs order against it, contending that it was imperative that PASA conduct itself correctly in future matters and that the general public ought to know their rights. Rhino, in turn, asked for costs on an attorney and client scale, submitting that Normandien acted improperly by refusing to withdraw the matter if the costs order by the Supreme Court of Appeal were not reversed.

Held

It was clear from the factual circumstances that this matter was moot — once the application was withdrawn there was nothing to set aside or interdict. Where there were two conflicting judgments by different courts, especially where an appeal court's outcome had binding implications for future matters, it weighed in favour of entertaining a moot matter. Here the SCA did not decide Normandien's review application on the merits nor did it pronounce on the legality of the process; it dismissed the matter on preliminary issues such as ripeness and lack of prejudice. The complaint about the alleged non-compliance with the procedural requirements

was not decided by the SCA. Rhino would have to bring a new application should it wish to apply for an exploration right in the future and comply with the provisions of the MPRDA. It could not rely on the Supreme Court of Appeal's judgment to bypass the procedures that were set out in s 10 of the MPRDA. Neither were any of the other various factors present which courts have proffered for consideration on the question of whether it was in the interest of justice to hear a moot matter. Accordingly, the application for leave to appeal would be dismissed. (See [46] – [56] and [58].)
For the purposes of appealing to this court on the question of costs alone, the test was, again, whether the interests of justice permitted this. The facts of this case did not warrant this court's interference in the costs order issued by the Supreme Court of Appeal and the High Court. It was highly inappropriate for Normandien to leave litigation pending before this court with the knowledge that the case was moot on the facts. It was clear that Normandien's actions were merely a disguised attempt to recover costs. It knew that Rhino could not unilaterally withdraw this application before this court, and used this to its advantage in the hope that this would compel Rhino pay its costs. Normandien's dilatory conduct forced Rhino to pursue the litigation before this court, even though Normandien recognised that the case was moot. Its conduct was reprehensible and an abuse of process which warranted a punitive costs order. (Paragraphs [57] and [69] – [72].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v UNITED MANGANESE OF KALAHARI (PTY) LTD 2020 (4) SA 428 (SCA)

Minerals and petroleum — Mines — Taxation — Royalty payable by 'extractor' on 'transfer' of 'unrefined mineral resource' — Gross sales of unrefined mineral resource — Determination of — Meaning of 'without regard to any expenditure' in s 6(3)(*b*) of Royalty Act — Correctly interpreted, gross sales to be determined without regard to any expenditure incurred in respect of transport, insurance and handling of mineral — Mineral and Petroleum Resources Royalty Act 28 of 2008, s 6(3)(*b*).

Revenue — Fiscal legislation — Interpretation — Role of context in purposive interpretation explained and confirmed.

Section 6(2) of the Royalty Act 28 of 2008 (the Act) provides that royalties are payable on 'gross sales in respect of an unrefined mineral resource transferred'; and in terms of s 6(3)*(b)*, 'gross sales' is to be determined 'without regard to any expenditure incurred by the extractor in respect of the transport, insurance and handling [TIH expenditure] of an unrefined mineral resource after it has been brought to the condition specified [in sch 2 of the Act] or any [TIH] expenditure incurred . . . to effect [its] disposal'.
The respondent (UMK), a manganese miner, deducted TIH expenditure incurred after the manganese had been brought to the condition specified in sch 2, as well TIH expenditure relating to its disposal for the 2010 and 2011 years of assessment. The Commissioner, however, insisted that the exclusion of TIH expenditure in s 6(3)*(b)* was limited to TIH expenditure invoiced to the customers as part of the purchase price. Attempts at settling the dispute having failed, UMK approached the High Court for a declaratory order regarding the correct determination of 'gross sales' as contemplated in s 6(3)*(b).* The High Court held that the section could only be understood to provide for the exclusion of all expenditure relating to TIH costs

incurred by the seller of an unrefined mineral resource, regardless of whether or not the extractor had 'actually received' or was 'entitled to' recover the TIH expenditure from its customer.
In this case, Sars' appeal to the Supreme Court of Appeal (with its leave), Sars' stance was that where the price charged by UMK to its customers specified separate amounts for transport, insurance and handling (TIH costs) of the ore in arriving at the global price to be paid, the amounts so specified should be deducted in determining the amount of gross sales on which royalties would be paid (see [15]); UMK's stance was that it was not the price charged to customers that mattered but whether such costs had in fact been incurred in either of the circumstances described in s 6(3)*(b),* so that if they had been incurred then a deduction fell to be made for such costs in calculating its gross sales for royalty purposes (see [7]).
Held
The wording of the section may have been clumsy and inapt to perform the intended function, because it required expenditure to be disregarded when dealing with receipts and accruals, but once it was accepted — as Sars did — that this involved deducting the expenditure in question from the receipts and accruals, any difficulty arising from the wording evaporated. It was impossible to find any basis for this qualification in the language of s 6(3)*(b)*. The section said that 'any expenditure' incurred in respect of TIH costs should be disregarded. It said nothing about the manner in which UMK should determine the prices to be paid by its customers, much less did it require that those prices should specify separately amounts to be charged for transport, insurance and handling of the mineral. All it said was that expenditure incurred in respect of TIH costs should be disregarded. (See [14].)
A consideration of the context of the Royalty Act and its provisions in regard to payment of royalties, points decisively away from the construction advanced by Sars. Context was as important in construing statutes as it was in construing contracts or other documents and the contrary suggestion is incorrect. It was proper then to approach the interpretation of s 6 on the basis that those responsible for drafting the legislation were aware that many contracts for the sale of minerals would be concluded at fixed prices, without the cost of transport, insurance and handling being separately specified. There was nothing to indicate why then, in providing that expenditure on TIH costs should be disregarded in determining the amount of gross sales, they would have in mind only those contracts — potentially very few in number — in which the price was divided into an amount for the mineral in question and separate amounts for transport, insurance and handling. (See [17] – [19].)
Sars' approach was not a sensible construction of the section, did not accord with the purpose of the Royalty Act and disregarded the section's history. For these reasons, the appeal would fail (see [20] – [23] and [25]).

SANDVIK INTELLECTUAL PROPERTY AB v OUTOKUMPU OYJ AND ANOTHER 2020 (4) SA 441 (SCA)

Patent — Validity — Lack of inventiveness (obviousness) — Properly qualified expert able to assist court even though he or she was not expert at priority date of patent — Trial court dismissing application for revocation of patent, finding, inter alia, that patent contained inventive step not obvious to person skilled in art — SCA finding that evidence and prior art sufficient to sustain revocation on ground of

obviousness — Appeal upheld and patent revoked — Patents Act 57 of 1978, ss 25(1) and (10).

Section 25(1) of the Patents Act 57 of 1978 provides that '(a) patent may . . . be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture'; and s 25(10) that 'an invention shall be deemed to involve an inventive step if it is not obvious *to a person skilled in the art*'.
In this appeal against a judgment in the Court of the Commissioner of Patents (the CCP) in which it dismissed an application for the revocation of a patent on grounds of lack of clarity, novelty and obviousness, the issue before the SCA fell to be decided on the basis of the ground of obviousness only. In particular, the question was whether the appellant (Sandvik) had discharged the onus of showing that the impugned patent was obvious to a person skilled in the art. The priority date was 31 January 2000. The evidence regarding obviousness that Sandvik placed before the CCP included that of an engineer, one AB, who gained experience in the field from 2001 to the date of litigation. In the CCP it was submitted on behalf of the respondents that AB's evidence was not admissible or had no value because he was not skilled in the art of the patent since he had had no experience in it at the priority date. The CCP rejected the submission and it was not persisted with on appeal.
Held
The respondents were correct in not persisting with the above-mentioned submission. There was no authority for the view that a properly qualified expert could not be of assistance to the court because he or she was not such an expert at the priority date of the patent (see [21]). The ostensible distinction in relation to the prior art (a broader range of perforations in a conveyor belt) would have been obvious to a person skilled in the art (see [22] – [24]). The CCP should have concluded that the challenge to the patent on the basis of obiousness was well founded, and that Sandvik had therefore discharged the onus. (See [25].) The appeal would accordingly be upheld (see [26]).

SOUTH DURBAN COMMUNITY ENVIRONMENTAL ALLIANCE v MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCIAL GOVERNMENT AND ANOTHER 2020 (4) SA 453 (SCA)

Administrative law — Administrative action — Review — After failure of internal appeal — In most cases, both decisions to be challenged — Whether twin challenges required depending on circumstances

Costs — Public interest litigation — Unsuccessful private litigant seeking environmental protection for poor community — No undue delay — Should not be mulcted in costs — Application of Biowatch principle against private entities — Court's discretion in terms of National Environmental Management Act 107 of 1998, 32.

Environmental law — Protection of the environment — Unsuccessful challenge to development proposal — Costs.

The appellant, an environmental NGO, citing increased air pollution, objected to the proposed construction by the second respondent (Capital) of a logistics park in the Durban Industrial Basin. But the responsible provincial government department (the Department) nevertheless granted authorisation under s 24 of the National

Environmental Management Act 107 of 1998 (NEMA). The appellant then pursued an internal appeal to the first respondent (the Department's MEC) under s 43 of NEMA. Its objection was based on the effect of vehicular emissions on a community which had had a history of serious air pollution from oil refineries and a pulp-and-paper manufacturer in the area. This appeal was, however, dismissed by the MEC. The applicant then launched an application in the Durban High Court under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review and setting-aside of the MEC's decision. The High Court handed down judgment dismissing the review application a year after the matter was argued. The appellant appealed to the Supreme Court of Appeal. A large part of the SCA judgment dealt with costs and the application of s 32(2) of NEMA and the *Biowatch* principle.

In the main judgment by Swain JA (Ponnan JA concurring), the SCA dealt, firstly, with the failure of the appellant to seek the review of the Department's initial decision to grant the authorisation, it having sought only the review of the MEC's subsequent decision in the internal appeal. The court held that the present case could well be one where both decisions should have been challenged, resulting in the failure of the appellant's High Court application. The court, however, made no firm finding in this regard (see [14]), and proceeded to a consideration of the substantive merits of the application. It held that the appellant had failed to establish a basis for the review on any of the four grounds on which it had based the appeal. (See [29], [32], [35] and [38].)

In respect of costs, the main judgment held a minority view. It found that the appellant's failure at the outset to seek an interdict restraining Capital from proceeding with the construction was to the prejudice of the local residents in whose cause it claimed to have acted. Judges Swain and Ponnan were not persuaded that the appellant had acted reasonably and had to be absolved from paying the costs of Capital, a private litigant which the appellant, by seeking costs against it, had forced to court. Having failed against Capital, the applicant could hardly escape a costs order. (The first respondent, acting in terms of the *Biowatch* principle, had abandoned the costs order in its favour in the High Court and did not seek costs on appeal.) (See [41] – [43].) In the judges' opinion there was no authority for the proposition that *Biowatch* also applied to private litigants. The applicant should have realised the weakness of its case by the time it launched the review application, and Capital, which had twice prevailed and throughout conducted itself as a constitutionally compliant citizen, could not in these circumstances be expected to pay its own costs (see [46] – [50]). Hence the usual rule that costs follow the result should apply even on the assumption that the *Biowatch* principle extended to private litigants such as Capital (see [51]).

The majority of the court (per Nicholls JA, Petse DP and Makgoka JA concurring), while agreeing with the main judgment on the dismissal of the appeal, diverged on the issue of costs in two separate but concurring judgments. The appellant did not pursue the litigation for its own self-interest or private commercial interests but rather in an attempt to achieve a cleaner environment for a marginalised community which had been the victim of apartheid spatial planning over many years. Section 32(2) of NEMA (which buttressed *Biowatch*) gave the court a discretion not to award costs against the appellant, who had acted in the interests of protecting the environment. The Durban High Court had, in relying on the appellant's delay in bringing the application, erred in the exercise of its discretion and reached an unjustifiable conclusion. The delay was not exceptional, it being common cause that Capital had commenced construction less than three months after the review application was

launched. A public-interest litigant in the position of the appellant, who had brought the application within the 180 days required in terms of s 7(1) of PAJA, should not be mulcted in costs. (See [56], [65] – [66].) The appellant's technical lapse in failing to interdict the works at the outset was insufficient to remove the *Biowatch* shield, and despite having been unsuccessful, its case could not be classified as having been hopeless from its inception (see [72]). The chilling effect of a costs order against the appellant on non-governmental environmental organisations also had to be taken into account (see [74]). Hence each party should be ordered to pay its own costs.

TELKOM SA SOC LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (4) SA 480 (SCA)

Revenue — Income tax — Deductions — Losses on foreign exchange transaction — Proviso to s 24I(10) not self-standing provision for deducting commercial loss unconnected to foreign exchange currency differences — Income Tax Act 58 of 1962, s 24I(10).

Revenue — Fiscal legislation — Interpretation — No general distinction between interpretation of fiscal statutes and other statutes — Application of contra fiscum rule — Continued role in constitutional dispensation of common-law presumption that statute law not unjust, inequitable or unreasonable, and when to apply it.

Statute — Interpretation — Distinction between interpretation of statutes, contracts and other documents — Purposive interpretation unitary but not uniform exercise.

In 2007 and 2009 Telkom International (Pty) Ltd (Telkom International) acquired the full share capital in Multi-Links Telecommunications Ltd (Multi-Links), a company registered and tax-resident in Nigeria. The appellant, Telkom SA Soc Ltd (Telkom), a wholly-owned subsidiary of Telkom International, advanced a USD 877 022 900,86 loan to Multi-Links, denominated in US dollar (USD), as capital to make it commercially viable, of which USD 346 000 000 was converted into preference share equity, the balance remaining outstanding on the loan account. Multi-Links, however, failed as a business, and in the 2012 year of assessment Telkom and Telkom International disposed of their equity interests in Multi-Links to an unrelated third party; Telkom also of its rights in respect of its loan to Multi-Links, which was sold for USD 100.
Telkom then claimed a deduction in the amount of R3 961 295 256 as a foreign exchange loss in terms of s 24I(3) of the Income Tax Act 58 of 1962 (the Act) which, as it read at the relevant time, provided for foreign exchange gains and losses arising from 'exchange items' to be included in determining taxable income, but subject to s 24I(10) which provided for when such deduction may *not* be made. Section 24(I)(10) was also subject to a proviso (quoted at [24]*(b)*)
which *allowed* such deduction 'where that exchange item [was] realised during any year of assessment', and provided further 'that the exchange difference in respect of that exchange item shall be determined by multiplying that exchange item by the difference between the ruling exchange rate on the date on which that exchange item is realised and the ruling exchange rate on transaction date'.
The Commissioner disallowed the claimed deduction, instead assessing Telkom for tax in the amount of R425 188 643 as a foreign exchange gain. The Tax Court rejected Telkom's appeal against this additional assessment, concluding that s 24I of

the Act was not a self-standing deduction provision, and that Telkom had impermissibly invoked the provision involving exchange rate gains and losses in order to deduct a commercial loss, which was completely unconnected to foreign exchange currency differences (see [30] – [34]).

At the centre of the dispute was the determination of the 'ruling exchange rate' on the the realisation date of the loan. The definition of the 'ruling exchange rate' (quoted at [24]*(d)*) is subject to proviso that 'where the rate prescribed in respect of a loan or advance . . . is the spot rate on the transaction date or the spot rate on the date on which such loan or advance or debt is realised, and any consideration paid or payable or received or receivable in respect of the acquisition or disposal of such loan or advance or debt was determined *by applying a rate other than such spot rate* on transaction date or date realised, such spot rate shall be deemed to be the acquisition rate or disposal rate, as the case may be; . . .'. Telkom submitted that the consideration of USD 100 was determined by applying a 'rate', and the 'disposal rate' was to be used in lieu of the 'spot rate' because the 'disposal rate' was another 'rate', which was used to determine the consideration payable for the loan (see [27] – [28]).

These contentions also raised issues around interpretation of fiscal statutes, more specifically whether a distinction was to be drawn in the interpretation of contracts, statutes and other documents * ; the role of the contra fiscum rule in the interpretation of fiscal legislation; whether, apart from the contra fiscum rule, any general distinction should be drawn between the interpretation of fiscal statutes and other statutes; and the role the common-law presumption that statute law was not unjust, inequitable or unreasonable, in the constitutional dispensation.

Held

Endumeni did not suggest that it was irrelevant whether particular words were to be construed as part of a contract, statute or other document; it emphasised that context was all important, regardless of the nature of the document. While the process which culminated in the conclusion of a contract was quite different from the legislative process which culminated in an enactment, the same fundamental interpretive technique was applied, but always allowing for context. The statement in *Endumeni*, that 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results', meant that in the process of attributing meaning to the words used in legislation (having regard to the words used, the context and the purpose of the legislation) one possible meaning would be preferred over another possible meaning, because the one meaning yielded a commercially insensible result, for all subjects and in the appropriate context (for example commercial legislation). (See [14] – [16].)

The contra fiscum rule should only be invoked after an interpretational analysis resulted in an irresoluble ambiguity as to the meaning of the particular provision in the fiscal statute (see [18] – [20]).

No general distinction should be drawn between the interpretation of fiscal statutes and other statutes; the correct approach was that the ordinary principles of interpretation of statutes fell to be applied (see [21]).

There was no reason why the common-law presumption that statute law was not unjust, inequitable or unreasonable, may not be used as a useful aid in purposive statutory interpretation — it may facilitate resort to constitutional values in statutory interpretation. The enquiry was not whether this result was produced after the application of the section to the particular facts of this case, but rather whether this result was produced after the application of the fundamental interpretive technique to the section. (See [22].)

Telkom arguments fells to be rejected for the following reasons: in the context of the section as a whole, the use of the word 'rate' meant a currency exchange rate, and not a discount rate; the section dealt with losses or gains caused by foreign exchange fluctuations and was not applicable to a 'business' loss of the kind incurred by Telkom; the proviso required that the consideration must be 'determined' by 'applying' the rate but it was clear that the consideration for the loan of USD 100 was agreed by reference only to the perceived value of the loan. (See [34].)
The Tax Court therefore correctly dismissed Telkom's appeal against the additional assessment issued by the Commissioner in respect of the foreign exchange dispute, and Telkom's appeal on this aspect would therefore be dismissed. (See [47] and [57].)

VAN ZYL v ROAD ACCIDENT FUND 2020 (4) SA 503 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Prescription — Regulated exclusively by Road Accident Fund Act 56 of 1996, s 23 — Provisions of Prescription Act 68 of 1969 not applicable — No exception for incapacitated persons.

On 1 May 2010 one KJ was involved in a motor vehicle accident. He sustained serious head injuries that resulted in organic brain syndrome. His claim against the respondent (the RAF), lodged seven years later, was repudiated on the ground it had prescribed under s 23 of the Road Accident Fund Act 56 of 1996. Despite the effects of his injuries, KJ did not fall into the classes of persons in s 23(2) of the Act against whom prescription did not run, namely minors, persons detained under mental-health legislation and persons under curatorship.
A year later the appellant, having been appointed KJ's *curatrix ad litem* by order of court, claimed damages from the RAF on KJ's behalf. The appellant argued that the claim had not prescribed because the Prescription Act 68 of 1969 applied to it, so that the running of prescription was delayed under its s 12 or s 13 due to KJ's incapacity. The Grahamstown High Court disagreed and upheld the special plea, ruling that s 23 of the RAF Act applied to the claim to the exclusion of s 13(1) of the Prescription Act.
In the present appeal, counsel for the appellant argued that upholding the High Court judgment would result in the unjust exclusion of mentally incapacitated persons, specifically those not detained under mental-health legislation or under curatorship, from protection by s 13(1)*(a)* of the Prescription Act. He relied on *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA) ([1998] 4 All SA 429), which held in comparable circumstances that the Prescription Act saved the claim; and on *Van Rooyen obo Motau v Road Accident Fund* 2019 (2) SA 290 (GP), which held that *Smith* still stood since it was not expressly overruled by the Constitutional Court in *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18). He argued in the alternative that *Mdeyide* was distinguishable from the present case because it concerned a claimant who was found to be of sound mind, with the result that it did not deal with the applicability of s 13(1)*(a)* of the Prescription Act.
Held
It was clear that KJ could not claim compensation under the RAF Act unless the Prescription Act also applied to his claim (see [5]). In *Mdeyide* the Constitutional Court ruled that the Prescription Act was inconsistent with the RAF Act, and that s 12(3) of the former could therefore not apply to claims under the latter. Therefore,

the appellant's contention that *Smith* was not overruled by *Mdeyide* was unsustainable (see [27]). *Van Rooyen* was wrong to the extent that it sought to create an exception, in respect of incapacitated persons, to the rule in *Mdeyide* (see [31]).
Section 23 of the RAF Act did not affect mentally incapacitated persons' right of access to court provided they were detained patients as stipulated. In the present case the incidence of prescription should have been managed by the timeous detention of KJ in terms of mental-health legislation or by the appointment of a *curator ad litem* who could have instituted his claim timeously, thereby suspending the running of prescription in terms of s 23(2)*(c)* of the RAF Act (see [33]).
Regrettable as the result was, the Constitutional Court had in *Mdeyide* already considered the matter and held that claims under the RAF Act were governed exclusively by that Act to the exclusion of any other law, with the result that the Prescription Act did not apply to claims for compensation under the RAF Act (see [33] – [34]). Appeal dismissed.

BAE ESTATES AND ESCAPES (PTY) LTD v TRUSTEES, THE LEGACY BODY CORPORATE AND ANOTHER 2020 (4) SA 514 (WCC)

Administrative law — Review — Administrative action — What constitutes — Decision of body corporate of sectional title scheme — Decision having effect on third parties external to body corporate — Decision having public effect and reviewable as administrative action under Promotion of Administrative Justice Act 3 of 2000.

Sectional title — Body corporate — Decisions of trustees — Review — Decision having effect on third parties external to body corporate — Decision having public effect and reviewable as administrative action under Promotion of Administrative Justice Act 3 of 2000.

The applicant was appointed by the owner of a sectional title unit to find a tenant for the unit, who would then be entitled to sublet it as an Airbnb facility. The applicant found a suitable tenant and a lease agreement was entered into between the owner and the tenant. When nuisance issues attributable to the Airbnb customers arose, that were not resolved over a period of nine months, the first respondent took a decision that the owner would no longer be permitted to carry out short-term letting of his unit. The second respondent, the managing agent of the sectional title scheme, wrote to the owner informing him of the first respondent's decision, and a resolution to restrict the applicant from operating within the scheme in terms of rule 37 of the scheme's rules of conduct. Rule 37.3 provided that short-term holiday letting would be permitted, provided the letting was managed through a letting agency considered to be reputable for such purpose in the sole discretion of the trustees of the scheme. The communication in question urged the owner to find a reputable letting agency to manage long-term rentals of his unit. The applicant immediately objected to the decision and advised the second respondent that it had nothing to do with the short-term letting of the unit, which was handled by the tenant, and threatened legal action if the resolution were not revoked. When no retraction was forthcoming, the applicant applied for the review and setting- aside of the first respondent's decision.

Held

The decision taken by the first respondent was not limited in its effect to owners or occupiers of the scheme but had a direct and significant impact upon the applicant, a

party external to any contractually based arrangements administered by the body corporate acting through the trustees. The withdrawal of the applicant's right to engage in short-term holiday letting on behalf of its client and potentially on behalf of all the owners in the scheme by the body corporate's resolution, harmed the applicant's reputation, lost the owner as a client, and reduced its potential client base and accordingly had a direct, external legal effect. As such, the impugned decision, at least vis-à-vis the applicant, constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (See [26] – [27] and [32].) In the circumstances, where the resolution was not preceded by even a basic investigation by the first and second respondents of the underlying facts; the applicant or the owner was not afforded any prior opportunity to make representations regarding the proposed decision, which went well beyond the provisions of conduct rule 37.3; and there had been no basis upon which the problems arising from the Airbnb occupants could be ascribed to the applicant, the decision was not rationally connected to the purpose for which it had been taken, was unreasonable, unlawful or had been taken because the relevant considerations had not been taken into account (see [35], [41]). The applicant had accordingly succeeded in establishing that the decision amounted to administrative action and had to be reviewed and set aside.

COMPETITION COMMISSION v WILMAR CONTINENTAL EDIBLE OILS & FATS (PTY) LTD AND OTHERS 2020 (4) SA 527 (KZP)

Competition — Competition Commission — Search and seizure — Ex parte order — Reconsideration application — Application for reconsideration of order authorising Competition Commission to conduct raid — Failure by Commission to place material facts before court — Lack of bona fides — Application granted — Competition Act 89 of 1998, s 46; Uniform Rules of Court, rule 6(12)(*c*).

The second and third respondents (A & B) * sought reconsideration, under rule 6(12)(*c*) of the Uniform Rules of Court, of ex parte search-and-seizure orders obtained by the Competition Commission under s 46 of the Competition Act 89 of 1998 (the Act). The Commission requested the orders after it initiated a price-fixing complaint against five firms, among them A & B. The Commission stated in its founding affidavit that it had a reasonable belief, grounded on information on oath, that the prohibited practice of price-fixing (a practice prohibited under s 4(1)(*b*) of the Act) was taking place on the firms' properties. The source of the information on which the Commission based its investigation was said to be a firm called Sea Lake. But it appeared that the price-fixing allegation was double hearsay since it emanated from an unidentified source who was not the person who deposed on behalf of Sea Lake, Mr Essack (see [22] – [30]). There was no confirmatory affidavit by Mr Essack, who in fact subsequently denied that any price-fixing took place (see [54]). Judges granted the various applications and the Commission conducted dawn raids on the firms' properties, seizing documents and electronic records. In the present application for reconsideration A & B alleged that the Commission had failed to meet the jurisdictional threshold in s 46 of the Act by neglecting to set out on oath or affidavit that there were reasonable grounds to believe that a prohibited practice was taking place or likely to take place on the applicants' premises. They also argued that the Commission failed to comply with the standard of uberrimae fides (utmost good faith) applicable in ex parte applications by withholding relevant information from the court and mischaracterising the true facts.

The issues for determination were therefore (i) whether the Commission made out a case for the search warrant to be issued in terms of s 46 of the Act; and (ii) whether it disclosed the material facts required to obtain the orders made.

Held

The first question was whether there was sufficient information on oath to justify an investigation and the issue of a search warrant. Section 46(1)*(b)* required the Commission to show the court that there were reasonable grounds to believe that items connected with an investigation under the Act were in the possession or under the control of a person at the premises in question (see [21]). A search of A & B's premises entailed the infringement of their right to privacy and the issue and execution of the warrant had to be carefully scrutinised (see [34]). Nor could hearsay information be lightly admitted (see [36]).

Failure to disclose material facts would result in the setting-aside of an ex parte order. The non-disclosure or suppression need not be wilful or mala fide (see [41]). Here, it was apparent from the evidence that the warrants were granted on incomplete information. The material facts were known to the Commission and it should have disclosed them to the court (see [43] – [44]).

The lack of a confirmatory affidavit by Mr Essack impacted negatively on the existence, not to mention the reasonableness, of the grounds on which the Commission based its belief in the prohibited act, and that information connected to its investigation would be found on A & B's premises (see [53]). By not disclosing in its founding affidavit Essack's equivocation on collusion, the Commission was guilty of lack of bona fides and hence a breach of its duty in ex parte applications (see [54] – [55], [60]). Based as they were on double hearsay, the Commission's allegations could not ground a reasonable belief in collusive dealings or price-fixing (see [56] – [57]). Since the Commission failed to satisfy any of the jurisdictional requirements for s 46(1), the search warrant for A & B's premises would be set aside and the Commission ordered to return all seized materials (see [60] – [61]).

FARMERS TRUST v COMPETITION COMMISSION 2020 (4) SA 541 (GP)

Competition — Competition Commission — Search and seizure — Ex parte order — Reconsideration application — Application for reconsideration of order authorising Competition Commission to conduct raid — Commission to be given latitude to conduct proper investigation — Provided Commission had reasonable grounds, aggrieved party need not be notified of intended raid — Lack of bona fides may be addressed by way of subsequent claim for damages — Application refused — Competition Act 89 of 1998, s 46; Uniform Rules of Court, rule 6(12)(*c*).

The Competition Commission obtained an ex parte order for a warrant under s 46 of the Competition Act 89 of 1998 (the Act). Acting in terms of the order, the Commission conducted a dawn raid on one of the respondents, Farmers Trust, which here sought reconsideration of the order under rule 6(12)*(c)* of the Uniform Rules of Court.

The Commission claimed that it had received and investigated a complaint of cartel conduct and price-fixing — a practice prohibited under s 4(1)*(b)* of the Act — by the respondents and that it required warrants to raid the respondents' premises. The Commission had alleged that cartel conduct was by its nature secretive and that search and seizure was the only effective method of investigation, less invasive methods being also less effective. A judge considered the Commission's submissions and authorised the warrants.

In its reconsideration application Farmers Trust complained about the way the raid was conducted. It objected that it was not informed of the application, was not heard, and that the affidavits before the court contained inadmissible hearsay. The Commission argued that the Act set a low bar for the obtaining of a warrant since it was merely the starting point of the investigative process. *

Held

The Commission's argument made sense in the context of an investigation into the possibility of prohibited practices which the Act sought to prevent. Despite Farmers Trust's protestation against the fact that it was not given notice or given an opportunity to be heard, such notice was not required (see [30]). The Commission had, on the facts, reasonable grounds to suspect that the respondents were engaged in prohibited practices, which belief required an investigation into whether further action had to be taken and the application for a warrant under s 46 (see [31]). It was established law that the Commission's decision to investigate did not constitute an administrative action and was not reviewable or appealable (see [34] – [38]). The following principles had to be kept in mind when its investigative processes were considered: (i) the decision to investigate and the process of investigation did not have a direct and external effect on the rights of the respondents; (ii) the nature of the envisaged investigation required the Commission to gain access to documents without suspected firms being given prior warning; and (iii) a suspected firm would be able to exercise its right to be heard in the event of the Commission issuing a notice of referral (see [33], [39]).

The Act aims to serve the greater good and therefore the Commission should be allowed to investigate complaints properly. It would be counterproductive to require the Commission to inform a party about the possibility of a search and seizure since it will defeat the purpose of an investigation. If it turned out that the investigation was vexatious or mala fide, the suspected firm could in due course sue for any damages it may have incurred (see [41]).

Application for reconsideration accordingly dismissed (see [48]).

HLUMISA TECHNOLOGIES AND ANOTHER v NEDBANK LTD AND OTHERS 2020 (4) SA 553 (ECG)

Company — Winding-up — Rescission — Application for rescission not automatically suspending operation and execution of final winding-up, which remains in place — Affected party may approach court under rule 45A of Uniform Rules to suspend execution of final winding-up pending finalisation of application for rescission.

Insolvency — Compulsory sequestration — Rescission — Application for rescission not automatically suspending operation and execution of final sequestration order, which remains in place — Affected party may approach court under rule 45A of Uniform Rules to suspend execution of final winding-up order pending finalisation of application for rescission.

An application for the rescission of a final winding-up or sequestration order does not automatically suspend its operation and execution. If this were the case, respondents or defendants could, by applying for rescission, frustrate the liquidation process, leaving successful parties without the protection afforded to them, in the event of an application for leave to appeal or the noting of an appeal, by s 18 of the Supreme Courts Act 10 of 2013. Respondents or defendants may, however, approach the court under rule 45A of the Uniform Rules of Court to suspend

execution pending the finalisation of an application for rescission. (See [4] and [20] – [21].)
The court, applying these principles, dismissed an application for an order directing that the directors of a company in liquidation be placed in control of the company's bank account pending an application for the rescission of the final winding-up order (a final winding-up order places company assets in the hands of the liquidator and discharges the directors) (see [1], [3], [14], [21] and [23]).

HOUTBOSPLAAS (PTY) LTD AND ANOTHER v NEDBANK LTD 2020 (4) SA 560 (GP)

Financial institution — Compliance — Fica verification — Existing clients — Financial institution may not demand from existing account-holders that they submit identification documents on pain of restriction of access to their accounts — Information may be obtained from other sources — Requirements in respect of entities representing legal persons — Financial Intelligence Centre Act 38 of 2001, s 21B(4).

The business relationship between a financial institution and a customer does not entitle the former to restrict access to or freeze an account of the latter, even where there is a suspicion that a transaction involves unlawful activity (s 29). Nor does the Financial Intelligence Centre Act 38 of 2001 (Fica) allow financial institutions to demand from existing customers that they submit identity documents on pain of the restriction of access to, or the freezing of, their accounts. By not specifically providing that financial institutions should obtain identification only from customers, Fica has left room for financial institutions to access other sources from which such documents and/or information could be obtained, such as the office of the Companies and Intellectual Property Commission (CIPC), the office of the Master of the High Court in respect of trusts (s 21B(4)) and the personal identity documents of individuals and partners to a partnership from the Department of Home Affairs. (See [20] – [21].)
Regulation 7 of the Fica regulations * provides that financial institutions must obtain particulars concerning persons representing legal persons like companies. In the case of trusts, reg 7(f) obliges financial institutions to obtain said particulars of trusts holding 25% or more of the voting rights at the general meeting of the company concerned (see [13] – [14]).
The court, applying the above principles, ordered the respondent bank to remove the restrictions it placed on the applicants' accounts in order to compel them to provide information of their shareholders for verification under the Fica Act.

JW v WILLIAMS-ASHMAN NO AND OTHERS 2020 (4) SA 567 (WCC)

Will — Revocation — Statutory revocation on divorce — Constitutionality — Wills Act 7 of 1953, s 2B — If person dies within three months of divorce, prior will to operate as if ex-spouse predeceased him or her, unless will expressly providing that ex-spouse should benefit despite divorce — Provision, while effectively disinheriting ex-spouse, serving legitimate social purpose — Not infringing right to property (s 25 of Constitution), right of access to courts (s 34 of Constitution) or public policy — No extraneous evidence of contrary intention on part of testator permitted.

Section 2B of the Wills Act 7 of 1953 (introduced into the Act in 1992) provides that if a testator dies within three months after divorcing, a will made by him or her before the divorce must be given effect to as if the surviving spouse had died first, before

the divorce, unless it appears from the will that the deceased spouse intended the surviving spouse to benefit despite the divorce. It effectively disinherits the surviving spouse and results in the inheritance going to the deceased spouse's intestate heirs (see [109]).
The applicant's former wife, who had made a will leaving her estate to the applicant, died less than three months after they were divorced, which meant s 2B disinherited him in favour of his ex-wife's parents, her intestate heirs. * To reinstate himself as heir, the applicant sought an order declaring s 2B unconstitutional because it (*a*) sanctioned an arbitrary deprivation of property contrary to the property clause in s 25 of the Constitution; and (*b*) restricted his right of access to court under s 34 of the Constitution in various ways, in particular by preventing the court from hearing extraneous evidence regarding the testator's intent and forcing it to operate under the 'false fiction' that he had predeceased his ex-wife.

Held
According to governing precedent, the protection of property in s 25 was not absolute but subject to 'societal considerations' (see [85]). Deprivation would be arbitrary if there was no 'sufficient reason' for it, or it was procedurally unfair (see [89]). If the purpose of the deprivation was 'legitimate and compelling', there could well be sufficient reason for it (see [92]). Since the deprivation in s 2B substantially affected both testators and beneficiaries' property rights, proportionality was required (see [92], [95]). The purpose of s 2B, which was to prevent an ex-spouse from unfairly benefiting * under a will made before a divorce or annulment, was a legitimate and compelling one that sought to give effect to important societal considerations (see [104], [107]). And although the extent of the resulting deprivation could be far-reaching, the actual ambit of s 2B was limited since it applied only where the testators died within three months of divorce, did not express an intention in their wills to benefit their former spouse notwithstanding the divorce, and did not execute another will post- divorce (see [112] – [118]).
The next question, namely whether s 2B was procedurally unfair because it did not permit extraneous evidence of the testator's intention, was inextricably bound up with the issue of its purported unconstitutional limitation of access to court guaranteed by s 34 of the Constitution (see [124]). Since s 2B did not contain an ouster clause or a time-bar clause, it did not constitute a breach of s 34 in the customary sense (see [127]). There was, moreover, no basis for the applicant's argument that s 2B contained a fiction that was contrary to public policy: it simply stated an indisputable conclusion that would take effect if the stipulated factual requirements were met, without importing artificiality or fiction (see [131] – [133]). Nothing in s 2B prevented a court from exercising its general powers of oversight, but it was bound to give effect to the testator's wishes as expressed in the will (see [134] – [135]). The legislature's decision not to make provision for proof outside the will (aliunde) of a testator's intention to benefit their former spouse was not disproportionate or procedurally unfair, or amount to a limitation of the applicant's right of access to court (see [157]). The application would accordingly be dismissed (see [159]).

MBUTHUMA AND ANOTHER v WALTER SISULU UNIVERSITY AND OTHERS 2020 (4) SA 602 (ECM)

Administrative law — Administrative action — Review — When competent — Action by juristic person that is not organ of state — Decision by university to suspend

students pending disciplinary proceedings — University's power to suspend located in statute — To be challenged under Promotion of Administrative Justice Act 3 of 2000.

Review — Legality or administrative — Applicant for review not having choice as to pathway to review — Legality review appropriate only in context of exercise of public power — Exercise of administrative power to be challenged by way of review under Promotion of Administrative Justice Act 3 of 2000 — Distinction between two types of review discussed.

Education — University — Student — Suspension pending disciplinary proceedings — Review — Applicability of PAJA — While not organ of state, university constituting juristic person with disciplinary power sourced in statute — PAJA applicable — Promotion of Administrative Justice Act 3 of 2000.

The two applicants, having been advised that they might be suspended from the University, and the first applicant having made representations in respect of the proposed suspension, were both subsequently suspended pending possible disciplinary action against them. They brought an urgent application for the review and setting-aside of the suspension as being unlawful, unconstitutional and a nullity, and sought an order that the University be interdicted from instituting a disciplinary hearing. The applicants contended that their suspension had to be set aside on the grounds that it was irrational, unreasonable and arbitrary and that it had not been preceded by a hearing, which amounted to an abuse of authority in violation of the Constitution. Their counsel argued that the respondents, in deciding to suspend them, were not performing judicial, quasi-judicial and/or administrative functions, and the university was not an organ of state. He argued that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) did not apply since the decision was not the exercise of a public power and because of the contractual nature of the relationship between the parties. Instead, he maintained, it was a legality review. Counsel for the respondents argued that the decision to suspend was an administrative action and that the application should have been brought under s 6 of PAJA.

Held

Judicial review has bifurcated into two genera: reviews under PAJA and those under the principle of legality (see [35]). Which type was indicated depended, inter alia, on the nature or source of the public power that was exercised: executive or administrative. When a power was sourced in legislation or subject to substantial constraints, it was likely to be administrative in nature (see [36], [39]). Despite the fact that the University was not an organ of state, it was a juristic person referred to in s 1*(b)* of PAJA and sourced its power from the provisions of the Higher Education Act 101 of 1997. An applicant for judicial review did not have a choice as to the 'pathway' to review, and the applicants should accordingly have acted in terms of PAJA in challenging both their suspension and the disciplinary hearing. Because of their failure to do so, the application should fail. (See [45] – [48].) Since the applicants had not satisfied the requirement of showing exceptional circumstances for the review and setting-aside of the disciplinary hearing, or done so in respect of the lifting of the suspension, the application would be dismissed. (See [53] – [55].)

UITZIG SECONDARY SCHOOL GOVERNING BODY AND ANOTHER v MEC FOR EDUCATION, WESTERN CAPE 2020 (4) SA 618 (WCC)

Appeal — Leave to appeal — Application — Effect — Suspension of decision — Also applying to decision dismissing claims or applications — Superior Courts Act 10 of 2013, s 18(1).

The first and second applicants, a school governing body and the school concerned, had earlier applied to the Supreme Court of Appeal for leave to appeal against a High Court decision dismissing their application to have an administrative decision, made by the MEC for Education, Western Cape (the respondent), set aside on review.

At issue in this case was whether, pending the SCA's decision in their application for leave to appeal, the MEC's administrative decision was suspended in terms of s 18(1) of the Superior Courts Act 10 of 2013. * The MEC relied on SCA precedent, that in cases where a claim or an application was dismissed, such order was not suspended pending an appeal.

Held

The reasoning for the common-law rule did not apply to s 18(1) with equal force. While the common law created a distinction between the orders that may be suspended pending an appeal, s 18(1) did not do so; it applied to all decisions or orders and not only to those that were granted. Also, the purpose of the suspension requirement in applications for leave to appeal would be frustrated if it were to operate in a discriminatory manner to granted orders only. The purpose of s 18(1) was to provide protection to a litigant pending a full investigation of the matter by the court on appeal. An approach in terms of which the suspension concept would only apply to orders that were granted, would strip a litigant in the position of the applicants of that protection; and it would introduce a discriminatory criterion between litigants that would fundamentally offend the constitutional right to equality before the law and the right to equal protection and benefit of the law. (See [12].)

ZIEGLER SOUTH AFRICA (PTY) LTD v SOUTH AFRICAN EXPRESS SOC LTD AND OTHERS 2020 (4) SA 626 (GJ)

Company — Business rescue — Business rescue or liquidation — Ailing state-owned airline — Applicant submitting evidence that (1) airline would trade profitably if properly managed; (2) liquidation would have disastrous effects on company, economy — Reasonable-prospect threshold met — Business rescue practitioners should be given opportunity to investigate company's affairs and implement rescue plan — Companies Act 71 of 2008, s 131(4).

The issue in the present case was whether the court would exercise its discretion under s 131(4) of the Companies Act 71 of 2008 (the Act) to place SA Express, a state-owned airline, under business rescue, or whether it should instead wind it up (liquidate it). Under s 131(4), a court 'may' make a business-rescue order if it was satisfied that (i) the company is financially distressed; (ii) failed to pay a debt; or (iii) it was otherwise just and equitable to do so (see [5] of the judgment for the wording of the provision). Ziegler, an unpaid creditor that provided logistical services to SA Express, alleged that there was a reasonable prospect of saving SA Express's business, and that it was therefore a preferable option to its alternative claim for liquidation. Ziegler argued that while SA Express currently relied on taxes, government-guaranteed debt and resources from outside the aviation industry, it was

inconceivable that it would not be able to trade profitably if properly managed. Ziegler pointed out that SA Expresss had substantial assets, including a fleet of 24 aircraft and a valuable flight route network, and argued that it could not, on the information available, be concluded that SA Express was terminally ill. Ziegler emphasised the disastrous economic and financial effects of a liquidation (see [57]). None of the affected stakeholders, including the government as shareholder, the employees or creditors of SA Express opposed the application, this signaling at least acquiescence if not support for the attempt to rescue the company (see [59]).
SA Express, while admitting that it was indeed financially distressed and, in fact, commercially insolvent, opposed the application on various grounds. The high-water mark of its case was that it was able to secure an additional cash injection of R164 million from government for the 2020/2021 financial year and that its business plan and strategy plan indicated that it was on a growth path. Its answering affidavit was, however, silent on its finances and plans. It denied that Ziegler had showed a reasonable prospect that the objectives of business rescue could be achieved but put up no facts to contradict Ziegler's averments.

Held

By failing to deal with the factual averments made by Ziegler or to disclose its finances and instead challenging the reasonable prospects of its rescue, SA Express inexplicably condemned itself to liquidation (see [48] – [49]). But Ziegler had shown that while SA Express was currently reliant on taxes, government-guaranteed debt and resources from outside the aviation industry, it was inconceivable that SA Express would not be able to trade profitably if properly managed (see [52]). Under s 131(4) the court had a discretion (in the loose sense) which required it to render a value judgment as to whether there was a reasonable prospect of rescuing the company (see [61]). In the light of the facts outlined by Ziegler, the answer was 'Yes': it would be in the interests of justice and in the public interest to afford business rescue practitioners the opportunity to investigate SA Express's affairs and formulate an appropriate business rescue plan (see [62]). In such an investigation its liquidity and funding requirements could be assessed, and equity partners identified and additional funding procured (see [53]).
There was, moreover, merit in Ziegler's contention that even if the business rescue practitioners were unable to secure sufficient funding for a successful rescue, the sale of SA Express could well yield a better return for creditors than its immediate liquidation (see [57]).
Chapter 6 of the Act provided sufficient safeguards to protect the rights and interests of all affected persons and ensured that the business rescue proceedings would be terminated if they proved to be a fruitless endeavour (see [63]). While Ziegler's criticism of SA Express's conduct in opposing the application on unconvincing grounds while manifestly failing to address the relevant issues, including its financial position, was deserved, the matter of costs would be held over (see [71], [73]).
Application for an order placing SA Express under supervision with a view to the commencement of business rescue proceedings accordingly granted.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA v BUTHELEZI 2020 (2) SACR 113 (SCA)

Rape — Sentence — Life imprisonment — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Charge-sheet incorrectly referring to s 51 and sch 2 to Criminal Law (Sentencing) Amendment Act 38 of 2007 — Defect mere typographical error — Accused aware of possible imposition of life imprisonment and no prejudice suffered.
Appeal — By Director of Public Prosecutions in terms of s 311(1) of Criminal Procedure Act 51 of 1977 — Appeal lay as of right and leave to appeal in terms of s 16(1) of Superior Courts Act 10 of 2013 not required.

The respondent was convicted in a regional court of the rape of a 13-year-old girl and was sentenced to life imprisonment. The charge-sheet referred to s 51 and sch 2 to the Criminal Law (Sentencing) Amendment Act 38 of 2007, instead of Act 105 of 1997. When the matter came on appeal to the High Court, the High Court set aside the sentence and substituted it with a sentence of 15 years' imprisonment on the basis that the charge-sheet erroneously referred to the wrong legislative provision. The Director of Public Prosecutions (the DPP) appealed against this decision in terms of s 311 of the Criminal Procedure Act 51 of 1977 (the CPA). The respondent contended that s 311 created unjust consequences, unfair procedure and built inequity before the law between the accused person and the DPP. This created an infringement of the accused's right to equal protection of the law as envisaged by s 9 of the Constitution and, even if the DPP had an automatic right of appeal, the court should interpret the section to require that special leave had to be sought in terms of s 16(1) of the Superior Courts Act 10 of 2013.
Held, that the court was bound by earlier authority that the provisions of the Superior Courts Act requiring special leave to appeal were not applicable and that s 311 gave jurisdiction to the SCA when a High Court, on appeal, gave a decision in favour of the person convicted on a question of law. (See [8].)
Held, further, that the wording of s 311 of the CPA was clear and that the right of appeal relating to a sentence imposed by a High Court sitting as a court of appeal arose only where the High Court had given a decision in favour of the convicted person on a question of law. Accordingly, the court could only enter into the merits of the appeal if it was satisfied that the ground of appeal relied upon by the DPP involved a question of law. (See [10].)
Held, further, that the reference to the incorrect Act, being a mere typographical error, could not without more amount to a misdirection, and to hold otherwise would be to put form over substance. The respondent's right to a fair trial was not infringed in any way and he was fully aware that the charge he was facing carried a minimum sentence of life imprisonment. (See [15].)
Held, further, that it was clear that the High Court had committed an error in law by concluding that the provisions of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, were of no application. It therefore followed that the present case fell within the purview of s 311 of the CPA, and the sentence imposed by the High Court had to be set aside. (See [18].)

S v MADLALA 2020 (2) SACR 120 (GP)

Bail — Pending application for leave to appeal to Constitutional Court from refusal of petition by Supreme Court of Appeal — Test for.
Legal practitioners — Duties of — Duties toward client — Duty to avoid running up unnecessary costs — Code of Conduct for Legal Practitioners, clause 3.3.
The appellant was convicted in a magistrates' court of one count of rape and one count of assault and sentenced to an effective sentence of 10 years' imprisonment. He applied for leave to appeal but this was dismissed by the magistrate, as was a petition to the Judge President of the relevant division of the High Court. His application to the Supreme Court of Appeal for leave to appeal was also dismissed and he subsequently filed a petition for leave to appeal to the Constitutional Court, which petition was still pending. He applied to the High Court for bail pending the petition to the Constitutional Court.
Held, that the appellant was required to convince the court that there was a reasonable possibility that the appeal would avert imprisonment in order to be granted bail. On a cursory consideration of the evidence before the magistrate, it did not appear likely that the appeal would succeed to the point that the appellant would avert a conviction on both counts. The factors that the appellant mentioned in his application did not justify such a finding and the reasoning of the magistrate in that regard could not be faulted. The application accordingly fell to be dismissed. (See [35] and [38] – [39].)
The court remarked further at the end of its judgment that counsel and attorneys had to avoid running up unnecessary costs for their clients. In the present case this could have been avoided by the appellant's legal team in the circumstances where the appellant's counsel was a practising advocate at the Cape Town Bar and had to fly to Johannesburg on three occasions. Counsel had also referred the court to the record and the petitions while not putting the court in possession of the documents he was referring to, which caused another postponement in the matter. This was against the spirit of the Code of Conduct of Legal Practitioners, specifically clause 3.3 and its subclauses. The conduct of counsel bordered on being unethical and dishonest and they were requested to reflect on their conduct in the matter and advise their client as required in terms of the Code of Conduct. (See [49] – [52].)

VAN DER WALT v DIRECTOR OF PUBLIC PROSECUTIONS, MPUMALANGA 2020 (2) SACR 132 (MM)

Bail — Pending application for leave to appeal to Supreme Court of Appeal against dismissal of appeal by High Court — Decision on bail application requiring consideration of prospects of success on appeal, which was solely preserve of judges of Supreme Court of Appeal — High Court not having jurisdiction — Superior Courts Act 10 of 2013, ss 16(1)(*b*) and 17(1)(*a*)(i).
The applicant was convicted in a regional magistrates' court of culpable homicide and was sentenced to five years' imprisonment. The regional magistrate granted him leave to appeal to the High Court and extended his bail pending finalisation of that appeal. The High Court dismissed the appeal and the applicant was ordered to report to serve his sentence, but he obtained a suspension of the order pending a substantive application for the extension of his bail pending an application to the Supreme Court of Appeal (the SCA) for leave to appeal.

Held, that, in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013, an appeal against a decision of the High Court on appeal to it lay to the SCA upon special leave having been granted by the latter court, and, in terms of s 17(1)*(a)*(i) of the Act, such could only be given where the judge or judges concerned were of the opinion that the appeal would have reasonable prospects of success. (See [2].)
Held, further, that any consideration of the prospects of success by the High Court in the application for the extension of bail was excluded by s 16(1)*(b)*. It would result in an untenable situation for the present court to express itself on such prospects in the petition or intended appeal to the SCA, and would amount to second-guessing the decision of that court, which the High Court did not have the competence to pronounce upon. (See [9].)
Held, further, that the SCA was best suited to deal with the extension of bail, and the application accordingly had to be dismissed, on the basis that the court had no competence to deal with the application for extension of bail and the consideration of reasonable prospects of success on appeal. (See [15] and [17].)

MAHLANGU AND ANOTHER v MINISTER OF POLICE 2020 (2) SACR 136 (SCA)
Damages — For unlawful arrest and detention — For period after appearance in court — Majority of court holding that, where incarceration based on inadmissible confession, defendant liable for damages up until time when could have made application for bail.
The appellants appealed against the dismissal by the full court of their appeal against the quantum of damages awarded them by the High Court in their action for damages for wrongful arrest and detention. The High Court found that their detention was based on a confession extracted by the police induced by assault, and their unlawful detention came to an end once they were detained in terms of a court order after their first appearance in court. They were therefore only entitled to damages in respect of the period spent in custody until they appeared in court and the court awarded them damages of R90 000 and R50 000, respectively. On appeal,
Held, per Koen AJA (Cachalia JA and Dolamo AJA concurring) that, on the probabilities, if the plaintiffs had applied for bail, the magistrate hearing the bail application, just like the judge in the trial court, would have had no difficulty in concluding that the confession was inadmissible and that there would be no justification for their continued detention. They would have been released, whether on bail or otherwise, if the charges were not withdrawn. The onus was on the plaintiffs to prove why they did not pursue a bail application. Public-policy considerations limited liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued a bail application to finality and, in the present matter, there was no indication that a bail hearing could not have been held and pursued to finality on 14 June 2005. (See [39] – [42].)
Held, accordingly, that an appropriate award of damages for the period of two weeks' detention up to 14 June 2005 would be an amount of R100 000, which had to be added to the amounts awarded by the trial court in respect of the damages suffered preceding their detention. (See [43].)
Held, per Van der Merwe JA, dissenting, that gross police impropriety informed the decision of the prosecutor and tainted the magistrate's remand orders. In those circumstances constitutional values and public policy required that the respondent be held liable for the post-appearance detention, and the respondent was liable to compensate the appellants for the infringement of their personality rights for the full period of their detention, a period of eight months and 10 days. (See [74] – [75].)

Held, per Petse DP, concurring with the judgment of Van der Merwe JA, that the arresting officer, in flagrant disregard of his duty to scrupulously uphold the law, deliberately suppressed the truth in order to secure the further arbitrary detention of the appellants. He knew full well that, absent the appellant's inculpatory statement, there was no other incriminating evidence. This notwithstanding, he orchestrated the further detention of the appellants through his unconscionable machinations. In these circumstances the appellants ought to be compensated for the damages relating to the full period of their incarceration. (See [87]–[90].)

STANDARD BANK OF SA LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2020 (2) SACR 169 (WCC)

Prevention of crime — Restraint order — Variation of — Final order — No provision in Prevention of Organised Crime Act 121 of 1998 for creditor to obtain partial discharge of final order — More careful examination of order should be done before order made.

The applicant applied for leave to intervene in an application in which the first respondent, the National Director of Public Prosecutions, had obtained a restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA) against the estate of the second and third respondents and three other respondents, companies under his control. In seeking such leave, the applicant sought a variation order to secure the release of two motor vehicles and an immovable property. It was the owner of the motor vehicles under an instalment-sale agreement and the immovable property served as security for loans advanced by the applicant to one of the companies. The second respondent opposed the application, despite the fact that he was insolvent, and the trustees of his insolvent estate were cited as respondents in the matter. It appeared that there was no realisable value, as defined in POCA, in respect of any of the assets in question. The applicant relied on a report of the curator bonis that the only assets with realisable value in the insolvent estate of the second respondent, were three insurance policies. The criminal case against the second respondent had commenced earlier in 2019 and had been postponed to February 2020, and the second respondent contended that the applicant should rather await the outcome of the criminal proceedings.

Held, that, notwithstanding the inconvenience to the applicant and other creditors who found themselves in a similar position to it, there appeared to be no provision in POCA for a creditor to obtain what was in effect the partial discharge of a final restraint order in the circumstances pertaining in the present matter. A portion of a said order could not be varied or discharged solely on the basis of an accounting exercise which determined that certain assets subject thereto had no realisable value for the purposes of a possible confiscation order. (See [24] and [26].)

Held, further, that there were several possible ways to forestall the dilemma which presents itself in the current matter. Restraint orders could be more carefully examined and worded before being made, to ensure that assets which could not contribute to any confiscation order, and against which creditors should be allowed to proceed, were not frozen. Furthermore, creditors, who found themselves in the position which the applicant did, needed to be astute in asserting their rights prior to any restraint order being made final. (See [28].) The application for leave to intervene was granted, but the application for substantive relief was dismissed.

S v DELPORT AND OTHERS 2020 (2) SACR 179 (FB)

Sentence — White-collar crime — Large-scale enterprise of fraudulent *VAT* claims perpetrated by father and son amounting to R60 million in fraudulent refunds over period of more than six years — Father, 68-year-old first offender who played lesser role in enterprise, showed true remorse and was beset by ill health, given non-custodial sentence — Son, however, not showing remorse, delaying trial unnecessarily and not disclosing full involvement in enterprise, sentenced on each count involving amount of over R500 000 to 15 years' imprisonment, ordered to run concurrently.

The first and third accused, father and son, respectively, were convicted in the High Court on their pleas of guilty and statements in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) of 136 charges of contravening s 59(1)*(d)* of the Value Added Tax Act 89 of 1991 (the VAT Act) and s 235(1)*(e)* of the Tax Administration Act 28 of 2011 in respect of the first accused, and 136 counts of fraud, of which 104 fell under s 52(2) of the Criminal Law Amendment Act 105 of 1997, in respect of the third accused. It appeared that the accused had made incorrect and/or fictitious VAT claims in respect of two trusts and one company which netted them over R60 million in fraudulent VAT refunds. The Sars officer who investigated the matter stated that this particular case was the largest VAT fraud investigated and brought to court in the Free State and the Northern Cape. The offences had been committed over a period of six and a half years and the fraudulent claims only stopped when Sars detected and acted upon the irregularities. A presentence report by a correctional officer was handed into court in respect of the first accused, which indicated that he was 68 years old and that he had worked for the railway police and subsequently two other companies before his retrenchment, after which he was employed by his son, the third accused. The first accused, suffered a lot of pain due to knee problems and ulcers and suffered from high blood pressure, and struggled with lung problems. He had lost everything as a result of his participation in the crime and he and his wife had to survive on South African Social Security Agency grants which were their only income. They stayed in a one-room flat in the back yard of his daughter's rental house. He was a first offender.

The court accepted the first accused's age and poor health, as well as his sincere remorse and acceptance of his blame, his clean record and all the mitigating factors that had to be taken into account in his favour. Considering his lesser role in the commission of the offences, the court was of the view that he should not be physically imprisoned. In the circumstances, a sentence in terms of s 276(1)*(b)* of the CPA, to five years' imprisonment on each of the 136 counts, all to be served simultaneously, and with the effective sentence of five years wholly suspended, would be both appropriate and proportionate.

In respect of the third accused, who later attempted to change his plea (which application was refused), the fact that he had not disclosed to the court his full involvement in the matter and had not shown any true remorse, and had made numerous attempts to delay the trial, were all aggravating circumstances which cumulatively far outweighed the mitigating circumstances.

There was accordingly no justification for finding substantial and compelling circumstances justifying a lesser sentence than the prescribed one of 15 years' imprisonment for each of the counts involving more than R500 000. On the lesser counts a sentence of 10 years' imprisonment was imposed. All sentences were to be

served simultaneously, so as to constitute an effective sentence of 15 years' imprisonment.

S v SALZMANN 2020 (2) SACR 200 (SCA)

Appeal — To Supreme Court of Appeal — Leave to appeal — Effect of s 16(1)(*b*) of Superior Courts Act 10 of 2013 — Special leave — Provisions of s 52 applicable to trial proceedings pending at commencement of Act — Not applicable to subsequent appeal proceedings in High Court.
Electronic communications and transactions — Offences — Unlawfully accessing computer network without authority and causing data to be modified, altered, destroyed or rendered ineffective — Sentence — Appellant gaining access to former employer's national cellular network resulting in partial network failure — Serious offences that invaded privacy — Custodial sentence of three years' imprisonment confirmed on appeal — Electronic Communications and Transactions Act 25 of 2002, ss 86(1) and (5).
The appellant was charged in October 2005 in the Specialised Commercial Crimes Court (the SCCC) with various contraventions of s 86 of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act). He was convicted in January 2015 on two counts, namely a contravention of s 86(1), by having unlawfully accessed Cell C's computer network without authority or permission, and a contravention of s 86(5), by unlawfully causing data on Cell C's system to be modified, altered or destroyed, or rendered ineffective, which resulted in a partial network failure and constituted a denial of service to the legitimate users of the system. He was sentenced to a fine or 12 months' imprisonment on the first count and to three years' imprisonment on the latter count. He appealed without success to the High Court, which dismissed his appeal in March 2017. He appealed to the Supreme Court of Appeal (the SCA), leave to appeal having been granted by the High Court in June 2018.
The trial in the SCCC was still proceeding when the Superior Courts Act 10 of 2013 replaced the Supreme Court Act 59 of 1959 with effect from 23 August 2013. Up until then, a High Court hearing an appeal from a lower court (the SCCC being such a court) was competent to grant leave to appeal further to the SCA if it dismissed the appeal, but s 16(1)*(b)* of Act 10 of 2013 required special leave granted by the SCA to appeal against a decision of a division in an appeal to that division. Confusion appeared to exist, arising from the effect of s 52 of Act 10 of 2013, in terms of which proceedings pending in any court at the commencement of that Act had to be continued and concluded as if the Act had not been passed, and proceedings were deemed to be pending if, at the commencement of the Act, a summons had been issued, but judgment had not been passed.
Held, that the proceedings pending when Act 10 of 2013 came into effect were the appellant's trial itself and those proceedings terminated when the appellant was convicted and sentenced. The deeming provision in s 52(2) therefore had no relevance to the appellant's subsequent appeal to the SCA following the dismissal of his appeal in the High Court. The latter court accordingly had no jurisdiction to grant leave to appeal to the SCA. Without the SCA having given leave, the appeal was not properly before the court and it had no jurisdiction to hear it. (See [16].)
The parties to the appeal had agreed, with the consent of the President of the SCA, in the circumstances to argue the matter on the basis that the proceedings before the court would be regarded as an application to the court for special leave to appeal

against both the appellant's convictions and sentences and that the merits of the appeal would be considered.
Held, that from the evidence, the inference was irresistible that the appellant, as a former employee of Cell C, with extensive knowledge of its network, intentionally and without authority made a dial-up to Cell C using another person's credentials, and issued commands that deleted the configuration data on Cell C network devices. There had been no misdirection relating to his conviction on either count and there were no circumstances that justified him being granted special leave to appeal against his convictions. (See [38].)
As regards sentence on the second count (the appellant having conceded that the sentence on the first count was appropriate), the majority of the court, per Leach JA and Mokgohloa JA (Saldulker JA concurring), held that the offence was by its very nature a severe one. It invaded the privacy of others, something which our law earnestly protected, and could have far-reaching consequences. In the present case it had affected some 80% of the network of a large mobile cellular operator and it had taken a week to restore the mischief that had been done. The cost to the network operator was not trifling and his actions had been directed at the appellant's former employer, which indicated at least a hint of malice. What was also aggravating was that the appellant had breached the trust his ex-employer had in him, and he had betrayed his former colleague by using his credentials during the attack to cover his own tracks. The appellant had failed to show that a manifest failure of justice would occur if he were obliged to serve the period of three years' imprisonment. Special leave to appeal against the sentence would accordingly not be granted. (See [40] and [43].)
Held, per Molemela JA (Mbatha JA concurring), dissenting, that, in view of various misdirections by the trial court in imposing sentence on the second count, and the disparity between the sentence imposed and that which the court would have imposed on appeal (namely that the sentence of three years' imprisonment be suspended on condition that the appellant paid compensation to the complainant in the amount of R100 000), it would grant special leave to appeal and uphold the appeal against the sentence. (See [68] – [69].)

S v THOBELA 2020 (2) SACR 222 (GJ)
Sentence — Globular sentence — When to be imposed — To be reserved for exceptional circumstances, but mere practice thereof not misdirection per se warranting interference — Such sentence, however, not competent where globular sentence exceeding court's jurisdiction in respect of one of offences.
Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(1) and (2) of Firearms Control Act 60 of 2000 — Enquiry into fitness to possess firearm in terms of s 103(2) — When necessary — Enquiry to be held, even if accused previously declared unfit to possess firearm.
The accused was convicted in a magistrates' court on single counts of theft, malicious damage to property, and trespassing in contravention of s 1(1)*(a)* of the Trespass Act 6 of 1959 (the Trespass Act). The magistrate imposed a globular sentence of three years' imprisonment without the option of a fine. In the course of a routine judicial-quality inspection, another magistrate submitted the matter on special review to the High Court, on the basis that the sentence imposed was not competent and that no inquiry had been conducted in terms of s 103 of the Firearms Control Act 60 of 2000 (the Firearms Act). It appeared that the accused had already been declared unfit to possess a firearm in respect of an earlier contravention.

Held, that the practice of imposing globular sentences had to be reserved for exceptional circumstances, but the mere practice thereof was not a misdirection per se warranting interference. It was, however, desirable that each separate offence should be punished separately. In the present case, the sentence of three years' imprisonment for trespassing was not competent because it exceeded the maximum period prescribed by s 6 of the Trespass Act, and that incompetent sentence rendered the globular sentence a nullity. (See [9].)
Held, further, that, although the accused may have been declared unfit to possess a firearm in a previous case, that did not mean that no inquiry should be held when further convictions calling for an inquiry materialised. The Firearms Act had no provision that excused the court from holding such inquiry, and it was relevant that the declaration of unfitness only remained in place for a period of five years, and not indefinitely. Therefore, an inquiry should be held on each occasion when an accused was convicted. (See [18] – [19].)

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Associated Portfolio Solutions (Pty) Ltd and another v Basson and others [2020] 3 All SA 305 (SCA)

Corporate and Commercial – Company law – Debarment of representative and key individual of financial service provider under Financial Advisory and Intermediary Services Act 37 of 2002 – Fairness of decision to debar – Misconduct established at prior disciplinary hearing not to be regarded as separate to debarment proceedings, and consideration of such factor not unfair.

The first respondent ("Mr Basson") was one of the four founder-shareholders, directors and employees of the first appellant ("APS"), a fund management business, and the second appellant ("Pentagon"), a financial services provider. The two businesses operated as a quasi-partnership and Mr Basson was a "registered representative" and a "key individual" in both of them under the Financial Advisory and Intermediary Services Act 37 of 2002.

In 2016 there was a falling out between Mr Basson and his fellow directors, and in September of that year Mr Basson stopped going to work. Subsequently, evidence of wrongdoing on his part was brought to the attention of another director, and a disciplinary inquiry was scheduled in which Mr Basson was charged with ten counts of misconduct. He responded by instituting proceedings against the other directors, under section 163 of the Companies Act 71 of 2008, alleging oppressive and unfair conduct by them. He sought an order that they be directed to purchase his shares in the quasi-partnership at a fair value. He alleged that their conduct, in laying unfounded misconduct charges against him, was motivated by the desire to devalue his shares so as to acquire them for far less than their fair value. The matter was referred to arbitration.

Whilst the arbitration was pending, the disciplinary enquiry against Mr Basson proceeded. He was found guilty of five of the charges. The chairperson of the disciplinary enquiry found that dismissal was warranted.

Advice was sought by the appellants from the third respondent ("Moonstone"), being the appellants' compliance officer under the Financial Advisory and Intermediary Services Act 37 of 2002, on how to proceed, now that Mr Basson had been found

guilty in the disciplinary enquiry. Acting on the advice received, the appellants convened a directors' meeting, at which it was resolved that Mr Basson be debarred.

Mr Basson launched review proceedings in the High Court seeking that the decision taken by the appellants to debar him be set aside. Setting aside Mr Basson's debarment and dismissing the appellants' counter-application, the High Court found that because the disciplinary proceedings were regulated by provisions of the Labour Relations Act 66 of 1995, the results thereof could not inform the debarment proceedings as the latter fell under the Financial Advisory and Intermediary Services Act.

On appeal, the appellants took issue with the key finding of the High Court – that the disciplinary and debarment processes were separate and distinct and that the earlier process could not inform the later one.

Held – Mr Basson's review ground that he was not given a fair opportunity to make representations could not be supported. He was found to have fully participated in the enquiry.

The second ground of review was that the debarment decision had been prejudged and tainted by bias. The Court rejected the allegation of unfairness in that regard.

The appeal was upheld.

Mazizini Community v Minister of Rural Development and Land Reform and others [2020] 3 All SA 318 (SCA)

This is the appeal from the Land Claims Court Randburg, against the finding of Barnes AJ, (sitting as a court of first instance) in the case of *Mazizini Community and others v Minister for Rural Development and Land Reform and others* [2018] 3 All SA 164 (LCC)

Property – Land – Restitution of land rights – Community claiming dispossession of land – Meaning of "community" – Meaning is not rigid, and the important factor is an accepted, co-ordinated way of life amongst a group of people that guides their access and utilisation of the land and natural resources within their environment.

Property – Land – Restitution of land rights – Proof of previous enjoyment of land rights, after 19 June 1913, of which community was dispossessed as a result of racially discriminative laws or practices – Where there was no evidence of community's occupation of land during relevant period, no rights were established.

An appeal was brought against the Land Claims Court ("LCC") order in terms of which rights in certain land (the "subject land") were awarded to the second respondent (the "Prudhoe Community").

In February 2008 the Regional Land Claims Commission ("RLCC") referred to the LCC a land claim in which the appellant ("AmaZizi") claimed restitution of its rights in 27 896 hectares of land comprising 85 farms located in the area between the Fish and Mpekweni Rivers up to Gqutywa River in the Eastern Cape Province. A portion of the land claimed by AmaZizi was, at the time of lodgment, the subject of a land claim by the Prudhoe Community. The Prudhoe claim had also been lodged timeously with the

RLCC on 10 December 1998 in terms of the Restitution of Land Rights Act 22 of 1994 (the “Restitution Act”).

In challenging the award of the subject land to the Prudhoe Community, AmaZizi maintained that, firstly, the Prudhoe Community was not a community as defined in the Restitution Act, and should therefore not have been awarded any land. They contended that the members of the Prudhoe Community were descendants of individuals who were farm labourers on the subject land.

Held – Each of the competing claimants had to show that it satisfied the requirements for a valid land claim under section 2(1)(d) of the Restitution Act, and prove entitlement to the remedy of restoration of the subject land in terms of section 35(1)(a) of the Act, having regard to the factors listed in section 33. Therefore, in line with their pleadings in relation to the subject land each party

had to show that it was a community or part of a community that after 19 June 1913, was dispossessed of rights that it had enjoyed, as a result of past racially discriminatory laws or practices, and that it had lodged a claim for restitution of such rights not later than 31 December 2008. The only issues were whether Prudhoe was a community as envisaged in the Restitution Act and whether each party had proved previous enjoyment of land rights, after 19 June 1913, of which it was dispossessed as a result of racially discriminative laws or practices.

The Court found that Prudhoe established satisfactorily that it was a community as envisaged in the Restitution Act.

The precursor to restitution of land under the Act is previous enjoyment of rights in the land sought to be reclaimed. The evidence showed that the Prudhoe Community members had the full run of the entire farms during the period between the departure of the white farmers in the 1970s and their forced removal of Prudhoe’s members in 1986/1987. There was no evidence of AmaZizi occupation of that land during the relevant period.

The powers of the present Court to interfere with findings of fact, the inferences to be drawn from those findings, and the remedy granted on the basis of those findings by the LCC are circumscribed. An appellate court is, as a matter of principle, reluctant to upset the factual findings of the trial court because that court heard and observed the witnesses.

Satisfied that the findings by the LCC were correct, the Court dismissed the appeal.

Minister of Safety and Security v Lincoln [2020] 3 All SA 341 (SCA)

This is the appeal from the Western Cape Division, Cape Town against the finding of Allie and Parker JJ (sitting as a court of first instance) in the case of *Lincoln v Minister of Safety and Security* [2019] 1 All SA 454 (WCC)

Personal Injury/Delict – Claim for damages – Malicious prosecution – Requirements – In order to succeed in a claim for malicious prosecution a plaintiff must establish that the defendant set the law in motion (instituted or instigated the proceedings); acted without reasonable and probable cause; acted with malice (or animo injuriandi); and that the prosecution failed – Defendant must have been actively instrumental in the prosecution of the charge.

The respondent ("Lincoln") was charged in the Regional Court on 47 charges, including numerous counts of fraud. He was convicted on 17 counts, 15 of which related to fraud, and sentenced to nine years' imprisonment. However, on appeal, the High Court set aside the convictions and sentence. Lincoln then sued the appellant (the "Minister") for damages arising from an alleged malicious prosecution. Although the trial court dismissed the action, the Full Court upheld an appeal in respect of all but two of the charges brought against him. That resulted in the noting of the present appeal.

Prior to 1994, Lincoln had been an intelligence operative in the African National Congress ("ANC"). He was integrated into the newly formed South African Police Service ("SAPS") as a director. In 1996, Lincoln received information relating to Mr Vito Palazzolo, allegedly a highly placed member of the Italian mafia, who was resident in Cape Town. It suggested the existence of mutually beneficial and corrupt relationships between him and a high ranking officer in the SAPS, as well as a Minister in the National Cabinet. Lincoln's reporting that to the President led to a Presidential Investigative Task Unit ("PITU") being established, with Lincoln as the commander of the unit. In mid-1996, the Commissioner of Police ("Fivaz") instructed an officer ("SS Bouwer") to conduct an efficiency assessment of the PITU. He was to team up with a superintendent (jointly referred to as the "evaluation team"). In the course of their investigation an officer ("Smith") appointed by Lincoln contacted the team and made a number of serious incriminating allegations against Lincoln and the PITU. Smith had had an unhappy tenure with the PITU and numerous altercations with Lincoln and had left the PITU. The evaluation team recommended that the PITU be investigated with another director ("Knipe") conducting the investigation. Knipe enlisted the assistance of Superintendent Rossouw, an experienced investigator, to conduct the investigation. The upshot of the investigation was the decision to charge Lincoln.

Held – At issue was whether the employees of the Minister instigated the prosecution of Lincoln, and whether they had reasonable and probable cause to do so.

The cause of action relied upon was the *actio iniuriarum*. In order to succeed in a claim for malicious prosecution a plaintiff must establish that the defendant set the law in motion (instituted or instigated the proceedings); acted without reasonable and probable cause; acted with malice (or *animo injuriandi*); and that the prosecution failed.

The defendant must have been actively instrumental in the prosecution of the charge. The test is whether the informer did more than tell the police the facts and leave the police to act on their own judgment. While it was alleged that Smith was the instigator of the charges, the evidence showed that it was the further investigation which followed as a result of Smith's affidavit that gave rise to the charges that Lincoln faced. In carrying out his investigation, Knipe had also not actively sought to persuade the Attorney-General to institute the prosecution. Lincoln was required to prove that members of the SAPS – in particular Knipe and Rossouw – had acted without reasonable and probable cause The Court found that Lincoln had not *prima facie* established the absence of reasonable and probable cause. Consequently, the Minister ought to have been absolved from the instance.

The thrust of Lincoln's case related to the conduct of Knipe and Rossouw, as set out in the particulars for trial, and was aimed at establishing that they acted with *animus*

injuriandi without an honest belief in Lincoln's guilt. He failed to establish the alleged conduct attributed to Knipe and Rossouw in his pleadings.

In the premises, the appeal was upheld.

Petropulos and another v Dias [2020] 3 All SA 358 (SCA)

This is the appeal from the Western Cape Division, Cape Town against the finding of Bozalek J (sitting as a court of first instance) in the case of *Dias v Petropulos and another* [2018] 4 All SA 153 (WCC)

Property – Neighbour law – Adjacent properties – Duty of lateral support – Duty of lateral support owed to an adjacent landowner corresponds with the neighbour's entitlement to such support, and extends beyond land in its natural state to buildings on land – Excavations by property owner which destabilises neighbour's property is in breach of duty to provide lateral support to it.

The first appellant, the respondent and three others (Messrs Venter, Wentzel and Babrow) owned adjoining properties in Camps Bay, Cape Town, on a steeply sloping mountainside. The respondent's property was situated on a road on the upper end of the mountain, and shared a boundary with the properties of the first appellant and Mr Venter, both of which were situated downhill.

In March 2008, the first appellant and Mr Venter each undertook excavations on their respective properties, near the respective boundaries with the respondent's property. The excavation on the first appellant's property involved fairly substantial excavations to produce three tiers, and for a lift shaft. To provide lateral support, the three levels were each secured by a retaining wall. From May 2008, problems became evident on the respondent's property, and between 23 July and 1 August 2008, there was a major movement in the underlying ground. The entire slope on which respondent's property was situated, subsided, and the property moved laterally and downwards towards the excavation on the first appellant's property, resulting in extensive structural damage to the property. There were problems on Mr Venter's property, too. The property subsided and cracks appeared.

The respondent attributed the damage to his property to the excavations undertaken by the first appellant and Mr Venter on their respective properties. He instituted a claim for damages against both, based on strict liability, for breach of the duty to provide lateral support. The Court held that the first appellant and Mr Venter owed the respondent a duty to provide lateral support to his property; the excavations undertaken on their respective properties breached that duty, as a result of which the slope on which the respondent's property was situated, mobilised and subsided.

Held – On appeal it was held that the duty of lateral support owed to an adjacent landowner corresponds with the neighbour's entitlement to such support. That means that the right to lateral support is reciprocal between neighbouring landowners. However, the application of the principle to situations where land has been improved with buildings or structures on it, and where excavation causes subsidence and damage to buildings, has given rise to contrasting views. Examining the different opinions, the court confirmed that the court *a quo* was correct in holding that the duty of lateral support was not limited to land in its natural state, but extends to buildings on the land. However, the court *a quo* described an exception to the general principle – stating that a duty of lateral support extends not only to land but also to buildings, save where such land has been "unreasonably loaded so as to place a

disproportionate or unreasonable burden on the neighbouring land". Pointing to the practical difficulties in the application of the exception, the Court rejected the application thereof.

Turning to the expert evidence in this case, the Court found that the respondent succeeded in establishing that the slope mobilisation had resulted from a breach of the duty to provide lateral support due to the excavation on the first appellant's property. Given the objective facts, it had to be found that the excavations by the first appellant destabilised the respondent's property and thus breached the duty to provide lateral support to it.

In deciding on the issue of factual causation, the Court a direct and probable chain of causation between the excavation on the first appellant's property and the slope failure which caused damage to the respondent's property. In determining the presence of legal causation, the question was whether, having regard to the considerations alluded to, the harm was too remote from the conduct or whether it was fair, reasonable and just that the first appellant be burdened with liability. The question was answered against the first appellant.

South African History Archive Trust v South African Reserve Bank and another [2020] 3 All SA 380 (SCA)

Constitutional and Administrative Law – Access to information – Information held by South African Reserve Bank – Refusal of access – Promotion of Access to Information Act 2 of 2000 establishes default position that access to records must be granted unless Chapter 4 of the Act provides one or more grounds for a refusal.

Constitutional and Administrative Law – Access to information – Information held by organ of State – Promotion of Access to Information Act 2 of 2000, section 47 deals with notice to third parties where request for access to information is received – Section 49(2) providing that where it is not possible to inform all third parties, despite taking reasonable steps to do so, a decision must still be made – In absence of all reasonable steps being taken to inform relevant persons of request, the organ of State will not be empowered to make any decision under section 49(2), and its refusal of access will lack a valid legal basis.

The appellant lodged a request with the respondents (the "SARB") under the Promotion of Access to Information Act 2 of 2000. It sought access to records concerning evidence obtained by the bank at any time as part of investigations into any substantial contravention of, or failure to comply with, the law in terms of significant fraud, gold smuggling or smuggling of other precious metals from 1 January 1982 to 1 January 1995 in relation to certain listed persons. The information was sought in the process of collecting material for a book which was to deal with *apartheid* era procurement practices and public accountability. It was to include analysis of abuses of the financial rand, corruption and foreign exchange transactions under *apartheid*. The refusal of the request led the appellants to apply to the High Court for relief in terms of section 78(2) of the Act. The dismissal of the application led to the present appeal.

On appeal, the issues were limited to those records which related to three of the individuals from the list. The SARB mounted opposition to the appeal on two bases. The first was that two of the listed persons had not been joined in the application. The second was that it was justified in its refusal to provide the records sought.

Held – The Act was enacted to give effect to section 32(1) of the Constitution which provides that everyone has the right of access to any information held by the State. The default position is that access to records must be granted unless Chapter 4 of the Act provides one or more grounds for a refusal. As a refusal constitutes a limitation of the right of access to information, a case must be made out that the refusal of access to the requested records is justified.

Records sought from public bodies may contain information about third parties. Such third parties would be unaware of a request for access, and their rights might be affected if access is given. For that reason, the Act has been carefully crafted to ensure that such a third party is given opportunities to be heard on the request. Our common law also requires that parties must be informed if a court order affecting them might be granted. Section 47 of the Act deals with the required notice to third parties. When a request is received concerning a record which might fall under sections 34(1), 35(1), 36(1), 37(1), or 43(1), the provisions of section 47 are triggered. All public bodies are required to have a designated information officer ("IO") who deals with requests. Third parties have the right to be notified of a request, if reasonable steps taken by the IO would achieve that. They then have the right to make representations opposing disclosure or to consent thereto in writing. If consent is given, the IO has no discretion to refuse access. Even if a third party is not notified, they may make representations or so consent if they become aware of the request. Decisions on requests to which section 47 applies, can be made only under section 49(1) or (2). Under section 49(1), a decision is required if either representations have been made or if none have been made after the third party has been informed. In other words, third parties do not have a power of veto over the decision of the IO. Their representations must simply be given the weight that they deserve. Section 49(2) deals with the situation where it is not possible to inform all third parties, despite taking reasonable steps to do so – in which case a decision must still be made. The exception allowed under section 49(2) arises only if all reasonable steps were taken to notify a third party; despite such steps, the third party was not informed; and the third party did not make representations in terms of section 48. SARB was found not to have taken all reasonable steps to inform the relevant persons of the request. It was therefore not empowered to make any decision under section 49(2), and its refusal of access to the documents lacked a valid legal basis.

The Court went on to consider the remaining provisions of the Act in respect of which the SARB claimed to have refused the request. It concluded that none of the records sought satisfied the requirements of any of the named sections of the Act.

The appeal was thus upheld with costs.

Valor IT v Premier, North West Province and others [2020] 3 All SA 397 (SCA)

Constitutional and Administrative law – Procurement – Award of contract – Unlawfulness of contract due to failure to follow applicable legal prescripts – Agreement entered into in settlement of dispute regarding termination of unlawful agreement not cap ble of recognition as it gave effect to the unlawful arrangement.

The appellant ("VIT") was one of a number of entities that were accredited by the State Information Technology Agency ("SITA") as approved suppliers to Organs of State of information technology requirements. In 2011, VIT submitted an apparently unsolicited proposal to the Department concerning an enterprise content management ("ECM") system, to manage its records. A few months later, the Department directed a request

for quotations for the rendering of services on a “Records Management solution” to entities that were accredited by SITA. One of them was VIT. In August 2011, VIT was informed of its successful bid. VIT and the Department signed an agreement that they called a service delivery agreement (“SDA”). The fee that VIT would be entitled to for the work was R498 000. However, the contract price escalated over about three years from that to R41 729 647.

At the heart of this matter lay the question of whether the contractual relationship between VIT and the Department was lawful. That was because following the termination of the contractual relationship by the provincial government, VIT applied for a declaratory order that the termination was unlawful and that it was entitled to payment of a further amount of R146 473 747,49 as damages.

Held – Provincial government’s prospects of success on the merits were strong. The scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish.

Section 217 of the Constitution requires organs of State such as the Department, when it procures goods and services, to do so in terms of a system that is fair, equitable, transparent, competitive and cost-effective. In this case, no public tendering process was ever held in respect of the SDA or any of the agreements that followed it. The SDA was awarded to VIT after it and two other firms had responded to a closed request for quotations.

The subsequent entering into of a settlement agreement by the parties was unlawful. The settlement agreement sought to give effect to the unlawful arrangement, and was correctly rescinded by the court below.

The appeal was dismissed with costs.

Cape Bar v Minister of Justice and Correctional Services and others (National Bar Council of South Africa and others as *amici curiae*) 2020] 3 All SA 413 (WCC)

Legal Practice – Regulation of legal profession – Establishment of Provincial Councils – Regulations and Rules published under Legal Practice Act 28 of 2014 – Constitutionality – Allegation of unfair discrimination – When a measure is challenged for violating an equality provision, its defender may meet the challenge by showing it as that which is contemplated in section 9(2) of the Constitution, in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination – Electoral scheme for Provincial Councils not discriminatory or reviewable.

In an attempt to facilitate transformation of the legal profession, the Legal Practice Act 28 of 2014 (the “Act”) was brought into effect. It served as a single statutory dispensation providing a legislative framework, geared at transforming and restructuring the governance and regulation of the legal profession, broadly representative of the demographics of South Africa, under a single national regulatory body, the South African Legal Practice Council (the “Council”).

The applicant (the “Cape Bar”) challenged the constitutionality of the Regulations and Rules published under the Act, and in particular, the provisions relating to the composition of the Provincial Councils provided for. It brought the challenge of unfair discrimination in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and simultaneously a review under the Promotion

of Administrative Justice Act 3 of 2000, alternatively in terms of the doctrine of legality. The applications were consolidated.

Regulations 4(3) and 4(4) of the Regulations and Rule 16.15.3 of the Rules were specifically challenged by the Cape Bar. The Regulations require 50% of the Provincial Council to be male and 50% to be female and it is specified how composition of Provincial Councils will be structured in each province. Essentially, the provisions create 6 seats for attorneys (8 in Gauteng) and 4 seats for advocates in each Provincial Council. The 4 seats for advocates must be composed of one white male, one white female, one black male and one black female. The Cape Bar submitted that those provisions comprise a formula which was rigid and, while ostensibly aimed at affirming black and female representation in order to rectify past and present discrimination, it capped such representation, which was inimical to the objective. According to the Cape Bar, while it welcomed the mechanism to ensure representation of black people and women on the Provincial Council and the intention behind the Rules and Regulations, the practical consequence of the impugned provisions was a perverse one. Instead of increasing representation of categories of people who have historically and continue to suffer disadvantage, the effect was to limit their participation and to ensure representation by categories of people who have suffered no similar disadvantage. That occurred because, by capping the seats which black people and women could occupy to 50%, and reserving a seat for white men who were not historically disadvantaged, the provisions blocked opportunities for groupings which suffered from continuing disadvantage. The contention was that the provisions thus lent themselves to irrationality, arbitrariness and unreasonableness.

Held – The case turned on the determination of the objectives of the electoral scheme.

The Act provides that when the composition of Council is considered, the racial and gender composition of South Africa is a factor to be considered.

The first question was whether a *prima facie* case of discrimination had been established. If discrimination occurred on a prohibited ground, the Minister and the Council could defend it on grounds that it was permissible under section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act. When a measure is challenged for violating an equality provision, its defender may meet the challenge by showing it as that which is contemplated in sec tion 9(2) of the Constitution, in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. The test to determine whether a measure falls within section 9(2) is threefold: whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; whether the measure is designed to protect or advance such persons; and whether the measure promotes the achievement of equality. The Court found that test to have been fulfilled in this case.

Contrary to the submission of the Cape Bar, the scheme was not intended to prefer white men at all, but to make them equal contributors and partners in the governance of the legal profession. The electoral scheme in no way unjustifiably or disadvantageously targeted black people and women, nor did it seek to impair them.

The Court went on to address the Cape Bar's contention that the Minister's decision to promulgate the impugned Regulations, the decision to issue the impugned Rules, and the Council's application of the impugned Rules, all constituted administrative action which was subject to review under the Promotion of Administrative Justice Act.

However, the Court held that Regul ations 4(3) and 4(4) which related to the composition of the representative advocates to be elected to the Provincial Councils did not appear to be dealing with matters that were administrative in nature. The Rules were closely related to the impugned Regulations. As such, the Promotion of Administrative Justice Act would not be applicable.

The Cape Bar also contended that the Minister acted *ultra vires* his powers, which were said to be limited to establishing the Provincial Councils, but not the election procedure. That was shown not to be correct as the relevant powers and functions of the Minister were enabled by sections 94 to 97 of the Act.

Arguments by the Cape Bar based on arbitrariness, rationality and reasonableness were all found to be unsustainable.

In the premises, the applications were dismissed.

Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality and another [2020] 3 All SA 445 (GJ)

Civil Procedure – Application to amend counterclaim – Objection to amendment based on prescription – Provided that the substance of the matter claimed in an amendment, as opposed to its precise legal characterisation, is set out in the original claim then it will remain the same "debt" for purposes of avoiding prescription.

Civil Procedure – Plea and counterclaim – Application for leave to amend – An amendment will generally be granted to enable the real issues between the parties to be properly ventilated, but where amendment results in prejudice that cannot be cured by an award of costs or a postponement, it will be refused.

The respondent municipality had sued the applicant ("Ergo") for payment of close to R73,5 million plus interest in respect of charges for electricity which it alleged it had been supplying to Ergo since the end of November 2014. Ergo disputed the claim and raised a number of defences which included a denial that the municipality had been supplying it with electricity. Ergo maintained that it received its supply of electricity from Eskom and had been paying the municipality only the amount it claimed it was liable for in terms of Eskom's applicable tariff rates. The municipality's claim therefore was for the difference between the Eskom tariff and what it had been charging Ergo.

Ergo also instituted a claim in reconvention for an amount of just under R89,5 million. That represented the difference between the amount it had in fact paid the municipality between the period December 2008 to November 2014 and the amount which the municipality was liable to pay over to Eskom. The municipality raised a special plea of prescription on the grounds that the amount claimed was a debt within the meaning of the Prescription Act 68 of 1969. It also pleaded over on the merits.

In June 2018, Ergo gave notice under rule 28(1), of its intention to amend the plea and counterclaim.

Held – An amendment will generally be granted to enable the real issues between the parties to be properly ventilated. Thus, a pleading which does not disclose a cause of action or defence will not qualify. An amendment will also not be granted if it results in prejudice that cannot be cured by an award of costs or a postponement.

Provided that the substance of the matter claimed in an amendment, as opposed to its precise legal characterisation, is set out in the original claim then it will remain the same "debt" for purposes of avoiding prescription.

The Court examined each of the grounds for objecting to the amendments and found none to have any merit. The application for leave to amend was granted.

FourieFismer Incorporated and others v Road Accident Fund and others and related matters [2020] 3 All SA 460 (GP)

Constitutional and Administrative Law – Road Accident Fund – Contracts with service providers – Cancellation of contract – Lawfulness of shortening of notice period for termination of contract – Unilateral prescription by Fund of terms of agreement, constituting unfair administrative action and an abuse of Fund's power in performing a public duty.

Three review applications brought by attorneys contracted to the Road Accident Fund ("RAF") were heard simultaneously. Such attorneys (commonly known as "panel attorneys") were selected after the adjudication of a tender procurement process in terms of section 217 of the Constitution, which had to be fair, equitable, transparent, competitive and cost-effective. The selected attorneys formed a panel contracted to the RAF for a period of five-years, and the RAF from time to time would select an attorney from the panel to provide specialist litigation services in the various courts. The relationship between the RAF and the panel attorneys was governed by an agreement (the "SLA") which was to lapse with the effluxion of time on 29 November 2019. On 30 November 2018, tender RAF/2018/00054 was published. Whilst still busy with the adjudicating of tender RAF/2018/00054, two addendums were made to the SLA to extend the contract period between the panel attorneys and the RAF until 31 May 2020. The initial SLA catered for notification 4 months before the SLA would come to an end. By way of a second addendum, the RAF reduced the notification period to 1 month.

As a result of ongoing severe financial constraints experienced by the RAF, it was decided that legal services be sourced internally and no longer outsourced. That led to the decision to cancel tender RAF/2018/00054.

The panel attorneys in the three applications sought the review, setting aside and declaration as constitutionally invalid, the RAF's decisions to require the panel attorneys to hand over their files which were not finalised; to cancel a tender; and to dispense with the services of the panel attorneys from 1 June 2020.

Held – The RAF is a social security scheme, acting on behalf of the State to protect the freedom and security of persons and is obliged to afford an appropriate remedy to victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence.

The first question addressed by the Court was whether the second addendum was valid and lawful. Recognising that the contract between the parties was governed by administrative characteristics, the court rejected the RAF's contention that it was exercising its contractual rights in a private law relationship. The administrative characteristic still remained as it performed its social duty for the State and was bound to exercise its contractual rights in a procedurally fair and lawful manner. The fact that the contractual rights arose from a tender was irrelevant. The unilateral prescription by the RAF of the terms of the addendum was found to be an abuse of its power in performing a public duty.

The RAF's power to procure the services of the panel attorneys derived from section 217 of the Constitution, and insofar as the second addendum would have been

imposed upon the panel attorneys in contravention of section 217, it was invalid and unlawful.

The Court concluded that the notices to cancel and the cancellation of the contract were reviewed and set aside on the ground of invalidity. The RAF was ordered to fulfil all of its obligations to the panel attorneys in terms of the existing SLA, and the said order was to operate for six months from date of issue.

Lekeka v S [2020] 3 All SA 485 (FB)

Criminal law and procedure – Criminal charges – Combining of separate charges – Where appellant was charged on two separate counts, each of which constituted a separate and distinct offence, there was no basis upon which the trial court could have combined the two counts to form only one count.

Criminal law and procedure – Sentencing – Distinction between attempted rape and actual rape – The fact that section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that a person who attempts to commit a sexual offence in terms of the Act may be liable to the punishment to which a person convicted of actually committing that offence would be liable, cannot be interpreted to mean that the prescribed minimum sentences in the Criminal Law Amendment Act 105 of 1997 are applicable in such an instance.

Although having pleaded not guilty, the appellant was convicted of housebreaking with the intention to contravene section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and contravention of section 55 of the Act. The court clarified that the offences were housebreaking with the intent to rape and attempted rape of the 13-year old complainant. The appellant was sentenced to life imprisonment.

Exercising his automatic right of appeal, the appellant appealed against both conviction and sentence. The grounds of appeal were that the State had failed to proof its case beyond reasonable doubt and the version of the appellant should have been accepted as reasonably possibly true; that the trial court had over-emphasised the seriousness of the offence and the interests of society at the expense of the personal circumstances of the appellant; that it erred in failing to warn the appellant of the possibility of life imprisonment in terms of sec tion 51(1) of the Criminal Law Amendment Act 105 of 1997; that it erred in finding no substantial and compelling circumstances which necessitated the deviation from the prescribed sentence of life imprisonment; and that the sentence was shockingly harsh or severe.

Held – Evidence adduced by the State witnesses included that of the complainant, and two other children who were in the house at the time of the incident. Both those children served as eye-witnesses to the assault on the complainant, and pointed out the appellant in court, as the perpetrator of the offence. The Court emphasised the fact that the evidence of children should be approached with caution. The court *a quo* not only referred to the said rules of caution, but duly applied them. The evidence included the fact that a window in the complainant's home had been broken, allowing the perpetrator to enter. The eye-witnesses testified that the appellant had exited through the same window. The Court held that the reasonable inference to be drawn from the appellant's choice of exit, was that he must have entered the house through the window, which he broke for purposes of entering the house. Furthermore, the com plainant's description of the assault was corroborated by the medical evidence and the

evidence found at the scene. The court *a quo* therefore rightly found that the version of the appellant was to be rejected in so far as it differed from the version of the State. However, the trial court erred in convicting the appellant on one "combined" count. The appellant was charged on two separate counts, each of which constituted a separate and distinct offence. There was no basis upon which the court *a quo* could have combined the two counts to form only one count. A judgment or verdict had to be pronounced on each of the counts.

Turning to the appeal against sentence, the court found the trial court to have erred in treating the offence of attempted rape on the same footing as actual rape. The mere fact that section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that a person who attempts to commit a sexual offence in terms of the Act may be liable to the punishment to which a person convicted of actually committing that offence would be liable, cannot be interpreted to mean that the prescribed minimum sentences in the Criminal Law Amendment Act 105 of 1997 are applicable in such an instance. The misdirection by the trial court entitled the present Court, as a court of appeal, to consider sentencing afresh. In considering an appropriate sentence, the elements of sentencing had to be considered. Those were the personal circumstances of the appellant, the nature and seriousness of the offences of which he was convicted and the interests of society.

In light of the manner in which the charge sheet was drafted by charging the appellant with two separate counts, it was necessary to approach sentencing in a manner which would not prejudice the appellant as a result of him having been so charged. The Court decided to take the two counts together for purposes of sentence, and sentenced the appellant to 10 years' imprisonment.

Matshazi v Mezepoli Melrose Arch (Pty) Ltd and another and related matters [2020] 3 All SA 499 (GJ)

Corporate and Commercial – Company law – Applications by company managers to place companies under business rescue – Defence of force majeure in that national lockdown excused companies from their obligations to their employees and other creditors, who therefore had no locus standi to bring the business rescue applications – Where provision is not made contractually by way of a force majeure clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement – Requirements for defence not fulfilled and court finding reasonable possibility that companies could be rescued.

In each of the four applications before the court, orders were sought placing the first respondent in each application under supervision and commencing business rescue proceedings under section 131(4)(a) of the Companies Act 71 of 2008. The applicants were each employed as managers of the respondent companies.

The defences raised by the respondent companies were that as a result of the national lockdown, *force majeure* presented, excusing the respondent companies from their obligations to their employees and their other creditors, who therefore had no *locus standi* to bring the applications. It was also disputed that the companies (other than one of them) were not financially distressed.

Held – As business rescue aims to facilitate rehabilitation, it seeks the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation.

Section 131(4)(a) of the Act provides that a court may make an order placing a company under supervision and commencing business rescue proceedings if it is satisfied that the company is financially distressed; or the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters or it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect of rescuing the company.

The respondents appeared to be raising force majeure only in respect of their employment contracts. The defence was not raised when payment was demanded by other creditors. If provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Such impossibility was not proven in this case.

The Court found that the respondent companies had failed to pay over an amount in terms of their obligation under the employment contracts, and that they were shown to be financially distressed.

The directors appeared to move funds between all the entities which they controlled and a trust, without disclosing a complete financial picture, notwithstanding that they were all separate companies that were all financially distressed. Placing the respondent companies under business rescue would allow the business rescue practitioner to attain a clear and complete understanding of the financial positions of the respondent companies, so that an attempt can be made to rescue them or, if that is not possible, wind them up. The Court was satisfied that there was a reasonable possibility that the companies could be rescued.

The applications accordingly succeeded.

Member of the Executive Council for Economic Opportunities, Western Cape v Auditor-General of South Africa and another [2020] 3 All SA 524 (WCC)

Constitutional and Administrative Law – Application for review of Auditor-General's findings – Retrospectivity – Rule of law requires that the exercise of public power must be predictable and not retrospective in its operation – Impermissible for government to create a situation in which subject reasonably expects that government will deal with a matter in a particular way, and acts on that expectation and then changes its position when too late for subject to tailor conduct accordingly.

Local Government – Annual financial statements of provincial department – Auditing by Auditor-General – Review of Auditor-General's findings on grounds of retrospectivity, misdirection and misinterpretation of Regulations, which resulted in incorrect audit finding.

Payments made by the Western Cape Department of Agriculture to two support service providers for, *inter alia*, farmer settlement, were classified by the Department in its 2016/2017 annual financial statements as "subsidies and transfers". That was in keeping with the way in which it had classified and accounted for such expenditure since the 2007/2008 financial year. The respondent (the "AGSA") had never objected thereto, and had given the Department's financial statements an unqualified audit. However, in respect of the 2016/2017 financial year, the AGSA qualified his audit on the grounds that the Department had not accounted for payments made to the support service providers ("Casidra" and "Hortgro") in accordance with the requirements of a

reporting standard known as the Modified Cash Standard. He found that the relationship between the Department and Casidra and Hortgro was a relationship of principal and agent, and that on that basis, the payments should have been classified as goods and services, or capital expenditure.

As the political head of the Department, the applicant (the "MEC") sought to have the AGSA's findings set aside on review.

Held – Insofar as the AGSA's function is to administer, by auditing the accounts and financial statements of the relevant Organs of State, his office fits squarely into the institutions of public administration. The AGSA's decisions therefore constitute administrative action, and are subject to the Promotion of Administrative Justice Act 3 of 2000.

On the issue of procedural unfairness, the Court noted the lack of objection by the AGSA to the Department's classification of the payments all the way back to the 2007/2008 financial year. That continued to be the case even after the Modified Cash Standard was issued on 1 April 2013, and updated in December 2016. In May 2018, the AGSA warned the Department of a new Accounting Manual being drafted by the National Treasury, and which could potentially affect the classification of the services in question. By that time, the 2016/2017 financial year was over, and it was no longer possible to amend the recording and accounting of those transactions. The 2017/2018 financial year was also over, and the Department's financial statements for that year had already been submitted. The AGSA's subsequent issuing of the impugned audit findings in respect of the two years which had passed was challenged by the MEC on the ground that the decision was taken with retrospective effect, which was irrational and illegal. The Court considered those submissions against the backdrop of relevant legal principles. Our State is founded on the rule of law, which, in its public law application, requires that the exercise of public power must be predictable and not retrospective in its operation. It is therefore not permissible for government to create a situation in which the subject (including another Organ of State) reasonably expects that government will deal with a matter in a particular way, and acts on that expectation – and then changes its position at a time when it is too late for the subject to tailor its conduct accordingly. As a result, the conduct of the AGSA was unconstitutional and invalid and the audit findings could not stand and were set aside.

The Court then proceeded to consider the statutory framework within which the AGSA conducted the audits and expressed the qualified opinions. The Public Finance Management Act 1 of 1999 provides for the establishment of the Accounting Standards Board (the "ASB") which must set standards of generally recognised accounting practice as required by section 216(1)(a) of the Constitution for the financial statements of departments. The ASB had not set standards of generally recognised accounting practice which contained a definition of "goods and services" or "transfer payments" which departments were required to apply in their annual financial statements. The National Treasury is authorised to make regulations or issue instructions concerning any matter that may be prescribed for departments in terms of the Act, or regarding the treatment of any specific expenditure. Two Treasury regulations were relevant in this matter. The first regulation ("Treasury regulation 18.2") required the Department to prepare its statements on a modified cash basis. The Modified Cash Standard was a guide to the preparation of accounts on a modified cash basis. The AGSA conflated the two concepts, wrongly asserting that regulation 18.2 prescribed the Modified Cash Standard. The Court confirmed that the Modified

Cash Standard was not legally binding on the Department, and although the Department had complied therewith, if it had not, that would not form a basis for the impugned findings of the AGSA. The second regulation ("Treasury regulation 6.7.1(b)") referred to the New Economic Reporting Format, a reference guide for Departments. On the Court's interpretation thereof, the payments to Casidra and Hortgro were transfer payments and not for goods and services, as the AGSA asserted.

The AGSA also contended that the Department acted as a principal, while Casidra and Hortgro represented it as its agents, and therefore, the funding should have been described in the Department's financial statements as "goods and services". The Court held that such characterisation of the relationship was incorrect.

The impugned findings of the AGSA were reviewed and set aside.

National Director of Public Prosecutions v Gumede [2020] 3 All SA 554 (MM)

Civil Procedure – Ex parte application – In an ex parte application, a litigant must say why notice to the other party is unnecessary or not required or must be dispensed with.

Civil Procedure – Urgency – In terms of Rule 6(12) of the Uniform Rules of Court, an applicant in an urgent application must establish urgency and the urgency must be to such a degree that the court is prepared to allow for a relaxation in respect of the normal requirements that are listed in sub-rule 6(12).

Criminal law and procedure – Organised crime – Restraint of property – Prevention of Organised Crime Act 121 of 1998 – The proceeds of unlawful activities may be seized, restrained, confiscated and realised by the State even if a conviction for such unlawful activity does not follow – Having regard to section 37A(1) of the Pensions Fund Act 24 of 1956, accused's pension fund not susceptible to a restraint order in terms of section 26 of the Prevention of Organised Crime Act.

Employee Benefits and Retirement – Pensions – Pension benefit – Susceptibility to restraint order in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 – Having regard to section 37A(1) of the Pensions Fund Act 24 of 1956, accused's pension fund not susceptible to a restraint order in terms of section 26 of the Prevention of Organised Crime Act.

In the wake of two white rhino being killed and maimed for their horns in a national park, the defendant was found with two fresh white rhino horns, as well as equipment usually associated with rhino poaching, in his vehicle. He was arrested and charged with rhino poaching. He was also dismissed from his employment with the South African National Parks.

As rhino poaching constitutes organised crime, the Prevention of Organised Crime Act 121 of 1998 applied. In terms of the Act, no one may benefit from unlawful activities. The proceeds of unlawful activities may be seized, restrained, confiscated and realized by the State even if a conviction for such unlawful activity does not follow.

The applicant (the "NDPP"), in terms of the provisions of the Act, approached the Court on an urgent basis and without notice to the defendant, for an order restraining the defendant's pension fund (it being stated that that was the only realisable property of the defendant). The Court ordered that the defendant's pension benefit be kept in

the fund and that no money could be paid from the fund to any person pending final judgment in the matter.

Held – Section 26 of the Act provides for the restraint of realisable property held by a person against whom the restraint order is made.

The nature of urgent and *ex parte* applications was explained by the Court. An *ex parte* application is not always urgent and an urgent application is not always brought without notice. Each of those applications have their own requirements that must be complied with by a litigant. Ultimately, the circumstances of each matter will dictate whether notice is required to the other party and if the matter is urgent. In terms of rule 6(12) of the Uniform Rules of Court, an applicant in an urgent application must establish urgency and the urgency must be to such a degree that the court is prepared to allow for a relaxation in respect of the normal requirements that are listed in sub-rule 6(12). If an applicant fails to establish urgency, the usual order is to strike the matter from the roll.

In an *ex parte* application, a litigant must say why notice to the other party is unnecessary or not required or must be dispensed with. Section 26(1) permits the NDPP to apply to court for a restraint order on an *ex parte* basis.

Although the NDPP was entitled to immediately upon the defendant's arrest, approach the court in terms of section 26(1), it delayed and only approached the court more than a year later and only when the defendant wanted to withdraw his pension benefit from the pension fund. It was therefore not justified in bringing the application on an urgent basis.

As the application lacked urgency, it was struck from the roll.

In any event, having regard to section 37A(1) of the Pensions Fund Act 24 of 1956, the defendant's pension fund was not susceptible to a restraint order in terms of section 26 of the Prevention of Organised Crime Act.

Organisation Undoing Tax Abuse and another v Myeni and others [2020] 3 All SA 578 (GP)

Corporate and Commercial – Company director – Declaration as delinquent director – Section 162(5) of the Companies Act 71 of 2008 – A court must make an order declaring a person a delinquent director if while a director, he grossly abused the position; took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company; or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust or in a manner contemplated in section 77(3)(a), (b) or (c) of the Act – Although a declaration of delinquency under section 162(5) has the effect that a person may not serve as a director of a company for a minimum of 7 years, court imposing lifetime ban in present case.

The first defendant ("Myeni") was chairperson of the board of the second defendant ("SAA") until 2017.In the present proceedings, the plaintiffs sought an order declaring Myeni a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008. Four sets of transactions were relied on to support their claim. To expedite matters, the plaintiffs only led evidence on two of those.

Held – Section 162(5) states that a court must make an order declaring a person a delinquent director if while a director, he grossly abused the position; took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company; or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust or in a manner contemplated in section 77(3)(a), (b) or (c) of the Act.

A declaration of delinquency under section 162(5) has the effect that a person may not serve as a director of a company for a minimum of 7 years – although the court has the power to relax the order after 3 years. Where the grounds for delinquency have been established, the court has no discretion and must grant the order. The only discretion given to the court concerns the conditions that may be attached to the order. It has been stated in case law that the four grounds for delinquency under section 162(5)(c) all share the common feature that they involve serious misconduct on the part of the director. That implicates a person who grossly abuses the position of director and acts in a way tantamount to recklessness. Objectively, Myeni's conduct had to be weighed against the standards expected of a reasonable director in her position. Subjectively, her conduct had to be weighed against the skills, qualifications and experience she possessed.

The Court considered the duties imposed on a director under the Companies Act, as amplified by the Public Finance Management Act 1 of 1999. In terms of section 50 of the latter Act, all directors of SAA were subject to heightened fiduciary duties. The said legislative instruments and SAA's corporate policy documents formed the background against which Myeni's conduct had to be evaluated.

Turning to the first transaction (the "Emirates deal") referred to by the plaintiffs, the Court noted the range of benefits posed by the deal for SAA. Despite those benefits, Myeni thwarted the signing of the deal. She was shown to have acted dishonestly, stating false facts to support her stance, and grossly abused her powers in blocking the deal. In Court, Myeni's explanation of her actions was nonsensical and contradictory. She had no reasonable grounds for blocking the Emirates deal, and was found to have breached her fiduciary duty to act in good faith, for a proper purpose and in the best interests of SAA. The failure of the deal led to irreparable harm for SAA and the country.

The second transaction referred to (the "Airbus swap") involved an agreement between SAA and Airbus to cancel their old agreement (involving onerous obligations for SAA) and to substitute it with a new deal for SAA. The new deal would have significant benefits for SAA. However, that deal was also thwarted by Myeni, who delayed the matter, and then undid the work already done in the deal and began to renegotiate the deal unilaterally – backtracking on the resolution to proceed and altering the terms. The Court expressed its displeasure with the conduct of Myeni in the trial. She was found to be a dishonest and unreliable witness. Her explanations for the inexplicable course of actions taken by her at SAA were unconvincing. Her conduct satisfied several grounds for delinquency.

Issuing a declaration that Myeni was a delinquent director, the Court ordered that the order subsist not just for 7 years, but for Myeni's lifetime.

END-FOR-NOW