LEGAL NOTES VOL 9/2020

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S v TSHABALALA AND ANOTHER 2020 (5) SA 1 (CC)

Criminal law — Rape — Elements — Penetration — Doctrine of common purpose — Application of — Instrumentality approach — To be discarded as unconstitutional — Rape can be committed by more than one person as long as others had intention of exerting power and dominance over victim just by their presence.

The issue in these applications for leave to appeal to the Constitutional Court was whether the doctrine of common purpose applied to the common-law crime of rape. The applicants argued that the doctrine cannot apply because common-law rape is an instrumentality offence that cannot be committed by an individual who was merely present when the offence was committed. The Johannesburg High Court disagreed and convicted the applicants together with their co-accused on the basis of the application of the doctrine.
The convictions arose from a violent rampage embarked on late one night in September 1998, when nine young men attacked nine separate homes, broke down doors and assaulted the occupants they found inside. They raped eight female occupants, some of them repeatedly by several members of the group. The youngest of the victims was 14 years old and another was visibly pregnant. While some of the men raped the victims, other members were posted outside to act as lookouts. The members of the group, including the applicants, were arrested and subsequently convicted of rape on the application of the doctrine of common purpose.
One of the group appealed to the Supreme Court of Appeal which held that, to convict him on the basis of his mere presence, was to subvert the principles of participation and liability as an accomplice in criminal law. The court found that there

[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!**

was no evidence to prove that that member of the group had been present at the scene of violence where rapes, assaults, housebreakings and robberies were committed, other than at one particular household, and therefore concluded that no common purpose with the other members of the group had been established.
In the present applications for condonation and leave to appeal, the state, opposing, supported the findings of the High Court, arguing that the group had acted as a cohesive unit. It contended that applying the doctrine was not out of the ordinary but in keeping with modern international standards. The first amicus contended that the instrumentality approach adopted by the Supreme Court of Appeal was fundamentally flawed. It was both artificial and unprincipled, as there was no reason why the use of one's body should be determinative in the case of rape, but not in the case of assault or murder. The fallacy in the approach was that it sought to carve out crimes of a sexual nature and to exclude the application of common purpose to such crimes, and that this inhibited the state's ability to prevent and combat gender-based violence.

Held per Mathopo AJ

It was difficult, on the evidence, to conclude that the rapes were unexpected, sudden or independent acts of one or more of the perpetrators, which the others neither expected nor were aware of, even after they happened. It was also not probable that they were unaware of what was happening or about to happen. It was necessary that the relationship between rape and power had to be considered when analysing whether the doctrine applied to the common-law crime of rape. To characterise it simply as an act of a man inserting his genitalia into a female's genitalia without her consent was unsustainable in instances of group rape, where the mere presence of a group of men resulted in power and dominance being exerted over their victims. (See [51].)
The instrumentality argument had no place in our modern society founded on the Bill of Rights. It had to be discarded because its foundation was embedded in the system of patriarchy where women were treated as mere chattels. It ignored the fact that rape could be committed by more than one person for as long as the others had the intention of exerting power and dominance over the women by their mere presence. Here, the perpetrators had overpowered their victims by intimidation and assault, and the way in which the applicants and the other co-accused moved from one household to the next indicated meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible. (See [54].)
The High Court's conclusion that the applicants and their co-accused had acted in the furtherance of a common purpose could not be faulted. Hence the applications for leave to appeal fell to be dismissed.

Held per Khampepe J concurring (with Froneman J, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ)

Addressing rape and other forms of gender-based violence required the effort of the executive, the legislature and the judiciary, as well as our communities. The structural and systemic nature of rape emphasised that it would be irrational for the doctrine of common purpose not to be applicable to the common-law crime of rape, while being applicable to other crimes. (See [78].)

Held per Victor AJ concurring

The common-law crime of rape was one that had to be developed to meet the obligations imposed by international law, whose protocols placed an obligation on the state, including the court, to develop the domestic laws to ensure that women

were protected from sexual violence. Our constitutional duty and international obligations provided the legal and logical basis to confirm the application of the doctrine of common purpose to the common-law crime of rape.

AQUARIUS PLATINUM (SOUTH AFRICA) (PTY) LTD v BONENE AND OTHERS 2020 (5) SA 28 (SCA)

Land — Land reform — Statutory protection of tenure — Requirements for eviction — ESTA requiring two consecutive steps to be taken before eviction order may be granted — First, occupier's right of residence must be terminated in terms of s 8 — Thereafter, notice of intention to obtain eviction order must be given to occupier in terms of s 9 — Failure to allege and prove termination of right of residence fatal to application for eviction — Extension of Security of Tenure Act 62 of 1997, ss 8 and 9.

When the employment of the 1st – 167th respondents (the occupiers) with Aquarius Platinum (South Africa) (Pty) Ltd (Aquarius) was terminated, the occupiers were served with notices of intention to obtain an eviction order against them in terms of s 9(2)(d)(i) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) — this without a separate notice of termination of their rights of residence having been served.

The Land Claims Court (the LCC) subsequently dismissed Aquarius' application for their eviction, on the basis that it did not meet statutory requirements in that ESTA envisaged a two-stage eviction procedure: first, notice of termination of the right of residence in terms of s 8; and next, notice of eviction in terms of s 9(2)(d). (See [9] where both sections are quoted in full.) In this case, Aquarius' appeal against the LCC's decision, the Supreme Court of Appeal —

Held

Section 8 provided for the termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least required that a decision to terminate the right of residence must be communicated to the occupier. Both the clear meaning of the language of ss 8 and 9 and their context — the need to protect the rights of residence of vulnerable persons — indicated a two-stage procedure. It was for Aquarius to allege and prove, in addition to the termination of the employment of the occupiers, that their rights of residence had been terminated. It followed that its case for eviction of the occupiers suffered from a fatal defect, and therefore the appeal would fail. (See [13], [14] and [16].)

CARATCO (PTY) LTD v INDEPENDENT ADVISORY (PTY) LTD 2020 (5) SA 35 (SCA)

Company — Business rescue — Practitioner — Whether s 143 prohibiting business rescue practitioner concluding remuneration agreement with third party — Companies Act 71 of 2008, s 143.

Appellant company agreed to pay respondent business rescue company a success fee if it were able to rescue company G (see [1], [5] and [8]). Appellant was a creditor of G (see [1]). Respondent was successful but appellant refused to pay (see [1] and

[4]). Respondent then sued appellant for payment, and the High Court ordered it to do so (see [1] and [5]).
Appellant asked the Supreme Court of Appeal for leave to appeal (see [1]). Appellant said, firstly, that s 143 of the Companies Act 71 of 2008 * was the sole means under which a business rescue practitioner could be paid and that it impliedly prohibited any fee outside of it (see [12]).
The Supreme Court of Appeal rejected the contention. Section 143 said nothing about fee arrangements between business rescue practitioners and third parties. So it did not apply here (see [13]). But even if s 143 was the only basis upon which a practitioner could be paid, there was nothing in it which suggested that a fee agreement falling outside of it was void (see [14]).
It was also asserted that respondent had breached the director's duties it was subject to under ss 75(3) and 76, and that this voided the fee agreement (see [15]).
The court dismissed the s 75(3) assertion on the basis that it applied only to the situation of an 'only director', which was not the case here (see [17] – [18]).
Moreover, even if it covered an agreement between a director and a third party, the company would need to have an interest in it for it to be impugned (see [18]). Here company G had no such interest (see [18]). Appellant had also failed to specify which subsection of s 75(3) applied and appellant had pleaded no facts bringing the agreement within its ambit (see [18]). Appellant had also not asserted the practitioner had an interest in the agreement (see [18]).
As for appellant's s 76 contention, it had not said which subsection it relied on nor had it detailed the facts bringing the agreement's conclusion within it (see [20] – [21]).
Appellant said further that because the agreement was illegal, the court ought to declare it void under s 218 (see [22]). Again, appellant had failed to specify which subsection of s 218 it relied on, and in any case, given that there was nothing in any of the contentions it had made, it was unnecessary for the court to consider its powers under s 218 (see [22] – [23]).
Appellant also asserted the fee agreement offended public policy because it entailed 'subverting [of] the democratic vote of the creditors' and a breach of the practitioner's duty of impartiality since the practitioner 'captured' the creditor it concluded the agreement with (see [25], [27] and [30]).
Both submissions were utterly devoid of merit. The facts supporting them were unpleaded and unproven, and the proven facts were against them (see [26] and [31]).
The application for leave to appeal accordingly dismissed (see [33]).

CM v EM 2020 (5) SA 49 (SCA)

Marriage — Divorce — Proprietary rights — Accrual system — Calculation of estate's accrual — Value of annuitant spouse's right to future annuity payments in respect of 'living annuity' — Whether forming asset in annuitant spouse's estate, subject to accrual.

EM had obtained a declaratory order on a separated issue stating that the living annuities which provided his monthly source of income were not assets in his estate and were consequently not subject to an accrual claim. Leave to appeal was granted and a full bench affirmed the trial court's decision on the strength of the Supreme Court of Appeal judgment in ST v CT, delivered before the hearing by the full court,

that the capital invested in a living annuity did not form part of the annuitant's estate for purposes of calculating an accrual.
ST v CT did not decide whether a married annuitant's right to future annuity payments was an asset which could be valued and included in their accrual upon divorce. The trial court's judgment had expressed the opinion that such income was only relevant for maintenance claims. The full bench did not consider this issue.
In this, an appeal against the full bench's decision to the Supreme Court of Appeal, held that EM had a clear right to future income from a 'living annuity' (as defined in s 1 of the Income Tax Act 58 of 1962, read with General Note 18 of the second schedule thereof) — which was evidently an income stream which could be valued, and so was an asset in his estate. (See [37] – [38].)

PETROPULOS AND ANOTHER v DIAS 2020 (5) SA 63 (SCA)

Land — Lateral support — Duty to maintain lateral support between contiguous pieces of land — Scope of — Extending not only to land in its natural state but also to land with buildings on it.

Nuisance — Neighbour disputes — Duty of lateral support — English law on lateral support, that duty owed only to land in its natural state, not part of our law — In South Africa, duty sourced in neighbour law and owed to land and buildings — Liability for breach of lateral support strict, neither culpa nor dolus required.

When the entire slope on which Mr Dias' property was situated, subsided, the property moved laterally and downwards towards the excavation on Ms Petropulos' property. This resulted in extensive structural damage to Mr Dias' property which he attributed to excavations undertaken by Mrs Petropulos and one Mr Venter on their respective properties; and he instituted a claim for damages against both, based on strict liability, for breach of the duty to provide lateral support. (See [2] – [5].)
The trial proceeded only on separated issues, including whether a common-law duty to provide lateral support to Mr Dias' property was owed by Ms Petropulos and Mr Venter's properties.The trial court held that there was: the duty of lateral support owed not only in respect of land but also buildings constructed on the land, but not where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land'. (See [6] – [7].)
In this appeal to the Supreme Court of Appeal, the issues and the court's findings on them were as follows:

- Whether Mrs Petropulos owed a duty to provide lateral support to Mr Dias' property, inasmuch as the latter's property was no longer in its natural state (see [11]).

Held, that the significance of this court's decision in Anglo Operations† was twofold: First, it affirmed the correct statement of our law on lateral support; and second, it brought the principle of lateral support within the sphere of our neighbour law. The court a quo was accordingly correct in holding that the duty of lateral support was not limited to land in its natural state (as in English law) but extended to buildings on the land. However, the court a quo's qualification of this general principle was untenable. (See [20] and [24].)

- Whether excavations on Mrs Petropulos' property breached the duty to provide lateral support.

Held, that it did. Having carefully considered the totality of the evidence of the two experts, the court a quo could not be faulted for preferring the evidence of Mr Dias'

expert. Given the objective facts in this case, it would defy logic to hold that the Petropulos excavations did not destabilise the Dias property and thus breached the duty to provide lateral support to it. (See [45].)

- Whether the excavation on the first appellant's property was linked sufficiently closely to the harm suffered by the respondent for legal liability to ensue (legal causation).

Held, that the test was whether, having regard, inter alia, to legal policy, reasonableness, fairness and justice, the harm was too remote from the conduct. This question must be answered against Mrs Petropulos. (See [57].)

- Whether Mrs Petropulos should be held liable in the absence of a finding of fault (strict liability).

Held, that neither culpa nor dolus was a requirement for liability for damage caused by the withdrawal of lateral support. Broadly stated, every landowner had a right to lateral support. Where subsidence or other destabilisation occurred as a result of excavations on an adjacent property, the owner of the adjacent property would be liable in an action for damages, irrespective of whether the owner was negligent or not. (See [59].)

HEWETSON v LAW SOCIETY OF THE FREE STATE 2020 (5) SA 86 (SCA)

Attorney — Misconduct — Appropriate order — Misappropriation of trust moneys — Husband and wife partners in firm, with husband misappropriating moneys and wife delaying in reporting his doing so — Appropriate sanction for wife.

Appellant and her husband were attorneys and directors of a company through which they practised (see [1]). Appellant became aware her husband had misappropriated trust-account moneys, and she reported the matter to the Law Society concerned (see [11] and [12]). The Law Society proceeded to investigate and uncovered irregular activities by the husband (see [15]). It then obtained an interdict prohibiting appellant or her husband from operating the firm's trust account, and for the appointment of a curator (see [16]). Thereafter the Law Society applied to strike both appellant and her husband from the attorneys' roll (see [1]). The Law Society was successful in this, and here appellant appealed to the Supreme Court of Appeal (see [1]).

It held, per Nicholls JA, writing for the majority, that the High Court had materially misdirected itself in finding appellant had made certain loans to herself, and that the Supreme Court of Appeal could therefore make the decision whether appellant should be struck from the roll or suspended (see [4] and [7] – [8]).

This involved an enquiry as to whether the facts supported suspension or striking-off, and this turned on appellant's honesty (or dishonesty) in her explanation of when she became aware of her husband's theft (see [29] – [30] and [37]).

Further context was that she had been away from the practice over part of the period during which the misappropriations had occurred (she had been on maternity leave), and that her husband controlled and indeed excluded her from management of the firm's finances (see [11]).

The court's conclusion was that, though appellant had undoutedly failed in the joint duty of directors to keep proper books, there was inadequate evidence to justify striking-off, absent an answer to the question of appellant's first knowledge of the theft (see [10] and [27] – [28]). In this regard the Supreme Court of Appeal expressed sympathy at a spouse delaying reporting a husband's wrongdoing (here,

for a month) when the consequences of doing so extended beyond her professional life (appellant had instituted divorce proceedings at the time of reporting the matter to the Law Society) (see [12] and [35]). But the court qualified this statement by holding that it would be difficult to exonerate her, had she in fact been aware of her husband's conduct over a period of months or years (see [35]).
Given the lack of evidence on appellant's knowledge, and its necessity for the making of the decision to strike off or suspend, it would be in the interests of justice for there to be a further hearing on the issue by the High Court, before it made the decision (see [39]).
Ordered, accordingly, that the appeal be upheld and the High Court's order set aside insofar as it applied to appellant, and that the application for striking-off be referred to the full bench of the High Court for determination afresh, after a hearing on the issue. Appellant suspended pending this determination (see [41]).
The position of the minority of the Supreme Court of Appeal, Leach JA writing, was that appellant ought to be struck from the roll and the appeal dismissed (see [42], [53] and [79]).
In Leach JA's view, appellant was not a young and inexperienced attorney 'who . . . possibly did not fully appreciate . . . her duties in regard to trust funds', and her excuse that she entrusted administration of the funds to her husband 'held no water': it was the duty of each attorney in a partnership to ensure proper administration of the funds (see [54] – [56]).
This alone justified striking-off, but other factors militated for it as well (see [57]):

- Appellant's false statement, on oath, about when she first learned of trust-account irregularities (see [58], [63] and [72]);
- her failure to investigate employee allegations of misuse of trust moneys (see [68]);
- her failure to immediately report the debit balance of the firm's trust account on learning of it (she had taken a month to do so) (see [70]);
- the Law Society's preference for striking-off (see [75]).

MARAIS AND ANOTHER NNO v MAPOSA AND OTHERS 2020 (5) SA 111 (SCA)

Marriage — Proprietary rights — Community of property — Spouse donating asset to third party — Whether non-transacting spouse deemed to have consented thereto — Matrimonial Property Act 88 of 1984, s 15(9)(a).

A husband and his wife were married in community of property. Some time later the husband donated 75% of the major asset of the joint estate, an interest in a corporation, to first, second and third respondents, in 25% portions (see [1], [38] – [39] and [41]).
Shortly before the husband's death, his wife learnt of the transfer, and after his death, applied to set it aside (see [1] – [2] and [18]).
She said her lack of consent to it resulted in its invalidity under s 15 of the Matrimonial Property Act 88 of 1984 (see [2] and [42]).
The High Court, however, found she was deemed to have consented and dismissed this part of the wife's claim but granted her leave to appeal to the Supreme Court of Appeal (see [3]).
It considered, inter alia, s 15(3), which requires a spouse to obtain his or her spouse's consent to donation of an asset to a third party, where, absent consent, the donation is void (see [23] and [26]).

It also examined s 15(9), which pertains to a spouse contracting with a third party contra s 15(3). It deems the non-transacting spouse to have consented where the third party 'does not know and cannot reasonably know . . . the transaction is being entered into contrary to [s 15(3)]' (see [25]). To meet the 'cannot reasonably know' standard, the third party must have made the enquiries a reasonable person would have made, as to whether the transacting spouse was married, by which regime, and whether the non-transacting spouse's consent was required, and given (see [8] and [32]).
Here the third party (third respondent), who attended to the transfer, knew the husband was married but did not enquire as to the regime or consent (see [33], [39] and [44]). Accordingly, the third party did not establish that she could not reasonably have known the wife had not consented (see [44]).
The appeal was upheld and the donation, which was prejudicial to the wife's interests, was set aside, the members' interest reverting to the joint estate (see [44]).

MOTLOUNG AND ANOTHER v SHERIFF, PRETORIA EAST AND OTHERS 2020 (5) SA 123 (SCA)
Practice — Summons — Signature — Absence of registrar's signature on summons may be condoned — Uniform Rules of Court, rules 17(3)(c) and 27(3).

Appellants and a third party were involved in a motor vehicle accident and instructed their attorney to act against the Road Accident Fund. The attorneys duly prepared a summons and conveyed it to the registrar of the High Court, who allocated it a case number, and stamped it with the date, his designation, and name. However, he did not sign it (see [2]).
Appellants' attorneys then sent the summons to respondent, the sheriff, for him to serve, but he refused to do so. His view was that, unsigned, the summons was not court process, was null, and he had no power, or obligation, to serve it (see [3]).
Owing to the non-service, appellants' claim against the Road Accident Fund prescribed, and they instituted an action against the sheriff for their damages: the amount of the award they might have received against the Fund (see [4]).
In response, the sheriff made a special plea, which raised whether absence of his signature rendered the summons null. The High Court found that it did, and dismissed the claim, but granted leave to appeal to the Supreme Court of Appeal (see [5] – [7]).
The Supreme Court of Appeal upheld the appeal, set aside the High Court's order, and replaced it with an order dismissing the special plea (see [32]).
The court held that, though Uniform Rule 17(3)(c)'s requirement of signature by the registrar was peremptory, the requirement's breach was condonable under rule 27(3) (see [12] and [29]). (Rule 17(3)(c) provides that 'the summons shall be signed and issued by the registrar'; and rule 27(3) that 'The court may, on good cause shown, condone any non-compliance with these Rules'.) (See [10] and [13].)
This was on the following grounds:

- Authority was to the effect that even breach of a peremptory rule did not necessarily result in nullity (see [13]);
- breach of a peremptory provision of rule 17(3)(a) had been condoned (see [12] and [15]);
- though authority provided that a registrar's failure to issue a summons nullified it, issue and signature were distinctive acts, and while issue brought the summons into existence, signature was merely evidence of issue (see [23] – [24] and [26]); and

- condonation's requirement of 'good cause' would allow for consideration of prejudice to the other party (see [28]).

TAU v MASHABA AND OTHERS 2020 (5) SA 135 (SCA)

Defamation — Interdict — Interdict on repetition of allegedly defamatory statement.

Appellant, the ex-mayor of Johannesburg, made a public statement about his political rival, respondent, the current mayor of the city (see [1] – [2]). This caused respondent to apply, pending his instituting a damages claim based in defamation, for an order that appellant retract the statement, refrain from repeating it, apologise, and publicise the retraction and apology (see [4]).
The High Court declared the statement defamatory and interdicted its repetition, but deferred adjudication of the other relief sought to the action (see [12]). This, purportedly under rule 33(4) (see [13]). Here, appellant appealed to the Supreme Court of Appeal (see [14]).
The SCA found it unnecessary to determine the validity of the deferral but it did reference authority as to the undesirability of deciding applications piecemeal (see [15]).
The issue it did consider was the validity of the declarator and interdict on repetition. It held that the declarator was invalid: whether there was defamation was not an issue before the court (see [19] – [20]), and the declaration that the statements were defamatory effectively precluded appellant from defending against this in the action. (see [20]).
The interdict, which was interim in character, was also invalid: its requirements had not been met (apprehension of future harm had not been established; and another remedy — damages — was available in the action) (see [18], [21], [26] and [28]). Moreover, there was a dispute as to whether the apprehended acts (future statements similar to the first) were lawful, where authority proscribed interdiction thereof on motion when there was a question around the acts' lawfulness (see [22]).
Appeal upheld. The High Court's order set aside and replaced with an order dismissing respondent's application (see [29]).

CHANGING TIDES 17 (PTY) LTD v MIEKLE AND ANOTHER 2020 (5) SA 146 (KZP)

Mortgage — Foreclosure — Application to declare property specially executable — Compliance with rule 46A of Uniform Rules of Court required — May not be short-circuited by resort to money-judgment procedure under rule 31(1).

The applicant, after service of a summons in an action on a mortgage bond over a residential property, and a confession to judgment by the defendants in terms of rule 31(1) of the Uniform Rules of Court, applied for judgment in terms of rule 31(1) together with an application to declare the immovable property executable in terms of rule 46A.
Held
It was undesirable, impractical and contrary to the interests of justice to combine a judgment by confession in terms of rule 31(3) with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A. This was because service of the application for judgment by confession

would not inform the defendants, as lay persons, how they should go about placing before the judge in chambers any facts or representations regarding the fate of the residential property. (See [16] – [17].)
The court proceeded to grant, in chambers, the money judgment by confession but postponed the declaration of the immovable property as executable sine die pending an application in open court in compliance with the legal requirements for such relief. (See [18].)

ESKOM HOLDINGS SOC LTD v NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND OTHERS 2020 (5) SA 151 (GP)

Electricity — National Energy Regulator — Determination of electricity tariffs — Factors to be taken into account — Affordability and impact on consumer relevant factors — Energy Regulatory Act 4 of 2006, s 15(1).

Electricity — National Energy Regulator — Determination of electricity tariffs — Factors to be taken into account — Effect of government equity injection into electricity supplier — Energy Regulatory Act 4 of 2006, s 15(1).

Electricity — National Energy Regulator — Determination of electricity tariffs — Reasonable judgment that NERSA allowed to exercise not translating into open-ended discretion that insulated it from scrutiny and judicial review — Energy Regulatory Act 4 of 2006, s 15(1).

The applicant, Eskom, sought an urgent interim order pending the finalisation of an application for the review and setting-aside of a decision by the first respondent, NERSA, authorising Eskom to increase its tariffs at a much lower rate than it had requested in its application for tariff increases for the 2019/2020, 2020/2021 and 2021/2022 financial years.
The interim order would direct NERSA to authorise Eskom to increase its standard tariffs for the 2020/2021 financial year by 16,60% over the previous financial year; its standard tariffs for 2021/2022 by 16,72%; and to impose on municipalities the same tariff increases for those two financial years. In issue was the treatment by NERSA of an annual government equity injection of R23 billion in the calculation. The effect of the interim relief would thus be the imposition of an electricity tariff pending the determination of the review application (see [51]).
NERSA had calculated Eskom's total allowable revenue by deducting the annual government cash injections from its allowable revenue (see [28]). Eskom contended that these sums were intended to assist it with its debt repayments and that NERSA had, by using them to offset a high tariff increase, treated them as revenue in the hands of Eskom. An equity injection could not, argued Eskom, have the effect of reducing its costs.
Eskom in addition argued that the affordability and impact of tariffs on consumers and the economy were not relevant in the determination of a tariff since s 15(1) of the Energy Regulatory Act 4 of 2006 (the ERA) provided that a licence condition had to enable a licensee such as Eskom to recover the full cost of its licensed activities, including a reasonable margin or return. It contended that the decision fell to be set aside because it contravened the principle of legality, was ultra vires, irrational, unreasonable, and procedurally unfair.
NERSA's stance was that it was entitled to independently assess and verify the figures and projections presented by Eskom and apply reasonable judgment to its

determination of its allowable annual revenue or any component thereof. It argued that if the cash injection had not been taken into account, it would have caused excess returns to Eskom and that it had sought to balance Eskom's interests with those of the public.
Eskom argued that it required interim relief because it was on the edge of a financial precipice. Its refusal would be catastrophic for itself and the South African economy as a whole since Eskom's ensuing inability to repay its debt to the government could ultimately trigger a sovereign debt default (see [58] – [59]).
Held
To interpret s 15(1) in isolation without regard to the context of the ERA as a whole would have the effect of distorting the objectives of the ERA. In seeking to ensure that a licensee was able to recover the full cost of its activities and a reasonable return, the issues of affordability and impact on the consumer remained relevant and were required to be factored into such a determination. The process of determining tariff increases was not only a matter of calculation but also involved reasonable judgment and a balancing of what could well be conflicting interests — those of licensees against those of end users (see [39]). Moreover, to insulate questions of affordability and impact on the consumer from the decision to be taken would have the effect of undermining s 4(1) and (2) of the Promotion of Administrative Justice Act 3 of 2000, which required the impact of an administrative decision on the public to be taken into account as a relevant consideration. (See [40] – [41].)
The reasonable judgment that NERSA was allowed to exercise could not translate into an open-ended discretion that insulated it from scrutiny and judicial review and it accordingly had to be arguable that NERSA's decision in its treatment of the R23 billion equity injection was open to review and possible attack (see [49]).
As to whether Eskom had met the requirements for interim relief, it appeared that the relief sought in the present case would not only have the effect of restraining the exercise of NERSA's statutory powers, but go beyond that in seeking to have a tariff other than the one determined by NERSA imposed by the court. Such relief, though competent, should only be granted in the clearest of cases and when a strong case had been made out. (See [54].)
While Eskom had shown that it had at least a prima facie right to the relief claimed (see [57]), it could not, however, be said that there was a well-grounded apprehension of irreparable harm if it was not granted (see [64]). Even if it were accepted that Eskom would face dire consequences, it was not clear what the political response to this would be. Ultimately the financial health and survival of Eskom was a matter that fell in the remit of the political sphere of government. A tariff determination for effectively a single year (2020/2021) should not be elevated to determining the survival or the demise of a significant state-owned entity. Nor was it desirable to leave that determination to a court. (See [62] – [63].)
Lastly, the balance of convenience did not favour the granting of the interim relief claimed (see [73]). Whether a tariff increase of about 17% struck a fair balance between users and licensees and its overall impact on the economy were complex matters that were best left to agencies with the necessary expertise (see [70]).
Accordingly the application for an interim interdict fell to be dismissed (see [76]).

HOLLOWAY AND ANOTHER v PADI EMEA LTD 2020 (5) SA 172 (GJ)

Court — High Court — Jurisdiction — Foreign company — Application to compel English company to produce record of disciplinary proceedings conducted in United Kingdom — Uniform Rules of Court, rule 53.

First applicant, a natural person, and second applicant, a corporation, were members of the Professional Association of Diving Instructors (PADI). Respondent, an English company, administered the organisation in South Africa.
An accident occurred on a dive under first applicant's supervision and second applicant's auspices in South Africa (see [9]). An enquiry later took place in the United Kingdom, and a tribunal there terminated first and second applicants' PADI memberships (see [26]).
Here, as a preliminary to review of the tribunal's decision, first and second applicants applied for an order that respondent furnish them with the record of the tribunal's decision. This under rule 53.
The issue was whether the Johannesburg High Court had jurisdiction to do so, which would be the case if there was an adequate connection between the suit and its area of jurisdiction (see [12] and [17]). Adequacy of connection was measured by suitability and convenience (see [12]).
Held, that the court had jurisdiction to make the order (see [28]). This based on the following factors:

- respondent had a business address and traded through an entity in Johannesburg (see [5]);
- respondent employed a manager, based in Randburg, who carried on the South African operations (see [6] and [8]);
- summons was served in this country (see [11]);
- the effects of the tribunal's decision were felt in South Africa (see [15]); and
- respondent had a bank account in South Africa and generated considerable turnover here (see [19]).

Ordered, accordingly, that respondent produce the record (see [29]).

INSTITUTE FOR ACCOUNTABILITY IN SOUTHERN AFRICA v PUBLIC PROTECTOR AND OTHERS 2020 (5) SA 179 (GP)

Costs — Against public official — Punitive costs order sought against Public Protector in failed application by institute acting in public interest — Issues raised not mere political point-scoring but were of momentous public importance — Rationale for costs order sought against deponent to founding affidavit unjustifiably undermined bona fides of applicant.

Evidence — Admissibility — Findings of fact by another court — Such generally admissible in later proceeding — But evidence of conviction in criminal proceedings not admissible in subsequent civil proceedings as proof of guilt — Ambit of Hollington rule discussed.

Public Protector — Fitness to hold office — Removal from office based on prior court judgments — Although findings by other courts amounting to opinions, they were binding on all persons and organs of state to which they applied, particularly as they were not subject to further appeal.

Public Protector — Fitness to hold office — Removal from office — National Assembly mandated to perform this function — Not for court to prescribe to National

Assembly what to conclude in light of findings of fact made by courts — Constitution, s 194.

The applicant applied for an order declaring that the second respondent was no longer a fit and proper person to hold the office of Public Protector as required by s 193(1)(b) of the Constitution, alternatively an order declaring that she had abused her office. It also asked that the costs of the application be paid by the second respondent in her personal capacity on an attorney and client scale. In a counter-application the second respondent, in her personal capacity as well as in her capacity as Public Protector, sought an order declaring that the application was an abuse of court process, and a further order declaring that the applicant was a vexatious litigant, and she sought a punitive costs order against the deponent to its founding affidavit,Mr RP Hoffmann. The applicant based its application on adverse findings, statements and orders made in five cases in the Constitutional Court and High Courts against the second respondent personally, and in her capacity as Public Protector. It contended that those findings were admissible in the present proceedings and were of such a nature that they proved that the second respondent was no longer fit to hold office or alternatively that she had abused that office. The sixth respondent, a political party (the EFF), contended that the findings of the other courts were not admissible evidence in the present proceedings, relying on the rule in Hollington v F Hewthorn & Co Ltd [1943] KB 587 (CA) ([1943] 2 All ER 35). The second respondent contended that under s 194 of the Constitution the issue of her fitness to hold office was a matter for the National Assembly, and that the application was an attempt to usurp its power and therefore breached the principles of the separation of powers.

Held

The rule in Hollington did not apply to the present case. The ratio in Hollington had to be strictly confined to the facts that had to be decided in that case. The admissibility of a criminal conviction in subsequent civil proceedings, and its sphere of application was never extended to the findings of fact dealt with in the present matter. (See [25].) Ultimately, the rationale for the Hollington rule was that the findings of the previous court constituted the opinions of that court and for that reason were irrelevant and inadmissible in subsequent civil proceedings. Nonetheless, they could not be equated with the opinions of ordinary individuals and could not be treated as such as they were binding on all persons and the organs of state to which they applied. In this context it was significant that none of the findings of fact relied upon by the applicant were subject to further appeal. (See [31].)

The very issue the applicant required the court to determine was what the National Assembly was mandated to do in terms of the Constitution. There was merit in the respondents' argument that the declaratory relief sought in the proceedings might force the hand of the National Assembly, which had already commenced the process envisaged in s 194. It was clear that the court would have a duty to see to it that the National Assembly acted in accordance with the Constitution, but the court was not to interfere in the process of the National Assembly unless clearly mandated to do so by the Constitution. It was not for the court to prescribe to the National Assembly what it ought to conclude in the light of the various findings of fact made by the courts regarding the conduct of the second respondent in her role as Public Protector. That function fell outside the scope of the court's constitutional authority and would constitute an unjustified intrusion into the processes of the National

Assembly. (See [42] and [48].) The court would therefore exercise its discretion against the grant of the declaratory relief (see [53]).
The second respondent correctly conceded that no case had been made out for declaring applicant a vexatious litigant. And the allegations that the applicant was the alter ego of Mr Hoffmann and that the application had to be construed as of his own doing, in bad faith, were unsubstantiated. The applicant did not consist only of Mr Hoffmann, and other individuals connected to it, including its trustees, had authorised the bringing of the application. Furthermore, the issues raised could not be characterised as mere political point-scoring but were of momentous public importance. The rationale for the costs order sought against Mr Hoffmann therefore unjustifiably undermined the applicant's bona fides.
Counter-application dismissed and each party ordered to bear its own costs. (See [56] – [60].)

NIEHAUS v HIGH MEADOW GROVE BODY CORPORATE 2020 (5) SA 197 (GJ)

Spoliation — Mandament van spolie — When available — Electricity supply — Body corporate of sectional title scheme reducing supply of electricity to unit of owner who was in arrears with levy payments.

Applicant, an owner of a unit in a sectional title scheme, fell in arrears with her levy payments, and respondent body corporate, in response, reduced her electricity supply, citing a right to do so in the scheme rules and an agreement between it and applicant (see [1], [2], [4] and [6]).
Here, applicant applied urgently for restoring of the electricity supply (see [3]).
The court considered when quasi-possession of a right to electricity is protectable by the mandament van spolie (see [9], [19] – [20] and [24]) and the relevant authorities (see [9] – [14], [17] – [18] and [21] – [24]). It held that applicant's right to electricity was an incident of her possession of the immovable property, and that the mandament therefore availed her (see [9], [19] – [20] and [25]). The court also confirmed that the mandament was available even where (as here) there was only part-deprivation of possession (see [26]).

ROAD ACCIDENT FUND v MANQINA 2020 (5) SA 202 (ECB)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Interim payment — Whether interim payment under rule 34A for future medical treatment and school fees precluded by s 17 of Act — Uniform Rules of Court, rule 34A; Road Accident Fund Act 56 of 1996, s 17(4).

Respondent's child was struck by a motor vehicle and respondent sued appellant fund for damages (see [3] – [4]). Appellant then seemingly conceded liability for damages respondent could prove (see [4] and [11]).
However, before the hearing on quantum, respondent obtained an order under Uniform Rule 34A for appellant to make an interim payment for future medical treatment and school fees (see [5] and [8]). The High Court's view was that this was not precluded by s 17(6) of the Road Accident Fund Act 56 of 1996 (see [15]).
Rule 34A(4) provides:
'If . . . the court is satisfied that —
(a) the defendant . . . has admitted liability for . . . plaintiff's damages; or

(b) . . . plaintiff has obtained judgment . . . for damages to be determined, the court may . . . order . . . respondent to make an interim payment . . .' (see [10]).
Section 17(4) then provides:
'Where a claim for compensation . . .
(a) includes a claim for . . . costs of . . . future . . . treatment . . . the Fund . . . shall be entitled, after furnishing the third party . . . with an undertaking . . . to compensate —
(i) the third party . . . after the costs have been incurred . . . .'
Appellant then appealed to the full bench, and it upheld the appeal, and substituted the High Court's order with one dismissing respondent's application for the interim payment (see [1], [16], [22] and [24]).
It held that the text of s 17(6) was clear, and precluded payment (see [18]); that the High Court's finding went contra the Act's established mechanism for compensating the costs that respondent sought (see [19]); and that a court's changing of that mechanism would contravene the separation of powers (see [20] – [21]).

SA SIGHT MANAGEMENT INITIATIVE NPO v BENADE AND OTHERS 2020 (5) SA 211 (FB)

Competition — Restraint of trade agreement — Enforceability — Restraint in favour of non-profit organisation — Such organisations entitled to enforce restraints of trade.

Non-profit organisation — Restraint of trade agreement — Enforceability — Such organisations entitled to enforce restraints of trade.

The applicant, a registered non-profit organisation established to provide low-cost access to basic eyecare in underserviced areas in South Africa by doing electronic eye screening, applied for an order preventing the respondent, a former employee, from engaging for a period of two years in any way in any business, in a defined area of the southeastern Free State, similar to the applicant's business, in contravention of a contractual restraint. The respondent admitted that he continued business against the provisions of the restraint of trade but contended that the applicant could not restrain charity services by way of contract as it would be against public policy. In issue was whether the applicant, as a charitable organisation that was also a business, was entitled to enforce the restraint.
Held
The mere fact that the applicant was a non-profit organisation did not prevent the generation of profit as long as it was for the benefit of charity. The law of contract was just as applicable to entities for profit as it was to non-profit entities, provided that the contract could not monopolise welfare services in its primary form. The covenant in restraint of trade was not automatically illegal and unenforceable because the applicant was a non-profit organisation. (See [30], [34], [39].)

STANDARD BANK NOMINEES RF (PTY) LTD AND OTHERS v HOSPITALITY PROPERTY FUND LTD 2020 (5) SA 224 (GJ)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Procedure — Whether offer of fair value lapsed 'if it has not been accepted' within 30 business days — Meaning of provision — Offer lapsing even if shareholder had actually dismissed or refused offer — Companies Act 71 of 2008, s 164(12)(b).

The respondent, a JSE-listed company, issued a circular to the holder of its units in which it gave notice of a meeting at which a special resolution would be proposed that — if adopted — would result in the implementation of a scheme of arrangement in terms of s 164 of the Companies Act 71 of 2008. Under this scheme all units would be substituted for no par value B shares. The fourth applicant engaged with the respondent and gave the required notice and demand indicating that it proposed to vote against the resolution. The resolution was duly adopted and the respondent made a written offer in terms of s 164(11) for fair value for the units at R2,90 per share and indicated that the offer would lapse in terms of s 164(1)(b) if it was not accepted within 30 business days. The offer was not accepted and instead the fourth applicant instituted an appraisal application in the High Court under s 164(14). The difficulties that subsequently emerged arose from the fact that the first applicant held the shares as nominee for the second applicant, which was the beneficial owner of the shares, which it held in trust for an investment fund. The fund was, in turn, a portfolio in a collective investment scheme established under a deed between the second applicant (the Trustee) and the third applicant.

Having obtained legal advice, the fourth applicant discovered that it had been incorrectly designated as the applicant in the appraisal application whereas the second applicant should have been designated as the Trustee. It accordingly delivered a supplementary answering affidavit in which it attempted to correct the error, but the respondent attacked the locus standi of both the fourth applicant and the Trustee. The fourth applicant then withdrew the application, tendering costs.

The applicants then brought an order declaring that the first applicant was the holder of the shares in question and was entitled to exercise all rights in and to the shares and was entitled to be paid certain sums arising from dividend declarations made by the respondent in the period February 2016 to date. The basis of the application was that the purported attempt to exercise the appraisal rights in respect of the shares was invalid and had no legal effect on the first applicant's shareholding, and when the substitution was effected, it became the registered shareholder of the substituted shares and therefore was entitled to its share of the dividends distributed by the respondent since inception of the substituted shares.

The respondent contended for a different interpretation of the applicable parts of s 164. It contended that in terms of the legislative scheme, a shareholder's rights were fixed from the moment it made a demand to be paid fair value under ss (7). From that point onwards, under ss (9), the shareholder had no further rights in respect of its shares other than the right to be paid fair value, and accordingly had no right to subsequent dividends. Subsection (10) ameliorates these consequences by providing that if the events contemplated in ss (9) occurred, the shareholder's rights in respect of the shares were reinstated without interruption.

Central to the respondent's interpretation of these provisions was the meaning to be ascribed to ss (12)(b) in providing that an offer of fair value lapsed 'if it has not been accepted' within 30 business days. It contended that that really meant 'rejected'.

Held

The respondent's interpretation was contrary to the ordinary, grammatical meaning of the words. On the plain meaning of the words used in ss (12)(b), an offer was open for acceptance for 30 business days after it had been made. At the end of those 30 days, in the absence of an acceptance by the dissenting shareholder, the offer lapsed, even if the shareholder had actually dismissed or refused the offer. (See [60] – [61].)

Section 164 balanced the interests of the dissenting shareholder to opt out of the scheme of arrangement with the interests of the company to implement the scheme. The default position was that if the shareholder failed to pursue its right of appraisal within the prescripts of s 164, the scheme of arrangement adopted by the majority of shareholders simply followed the normal course. (See [65] – [66].)
The first applicant, regardless of any intention it may have had to exit its shareholding against fair value, was legally required to follow the prescribed process to enforce its right of appraisal under s 164. Since it had not applied within the prescribed 30-day period, it lost its right to approach the court for a determination of fair value. This triggered the default position under ss (10), reinstating the first applicant to its full rights in respect of its shares. (See [70], [75].) Having been ignorant of the invalidity of the steps it had taken under s 164, the first applicant had also lacked the requisite knowledge to waive its rights to the dividends (see [78]). Hence it was entitled to the relief sought (see [80], [96]).

BEADICA 231 CC AND OTHERS v TRUSTEES, OREGON TRUST AND OTHERS 2020 (5) SA 247 (CC)

Constitutional law — Common law — Development — Common-law principles of contract — Enforcement of contractual terms — Proper role of fairness, reasonableness, good faith and ubuntu clarified — Constitution, s 39(2).

Constitutional law — Human rights — Right to equality — Equality in contract — Whether enforcement of contractual terms resulting in failure of black economic empowerment initiative offending substantive equality — Constitution, s 9(2).

Contract — Enforcement — Public policy — Public policy grounds upon which court may refuse to enforce contractual terms — Proper role of fairness, reasonableness, good faith and ubuntu clarified.

The applicants were four close corporations (the franchisees) which owned and operated franchises under a franchise agreement for a 10-year period. Its members were historically disadvantaged former employees of the franchisor. The franchisees obtained the funding to own and operate the franchises by way of loans made by National Empowerment Fund (the Fund) under a cooperation agreement between it and the franchisor, as part of a black economic empowerment initiative.
In terms of the franchise agreements, the franchises had to operated from approved premises, leased from the respondent, the Oregon Trust (of which the franchisor's only member was also a trustee); and the franchisor had an election to terminate the agreements in the event that the franchisees were ejected from the approved locations, or if the lease agreements in respect of the approved locations were terminated.
The lease agreement between the franchisees and the Trust was for a period of five years, with an option to renew the lease agreement for a further five years. When the renewal options were not exercised within the required notice periods — three of the franchisees attempting to do so after the notice period had lapsed — the Trust demanded that they vacate the premises. In response, the franchisees approached the High Court for a declaratory order that the renewal options had been validly exercised, and that the Trust be prohibited from taking steps to evict them.
The High Court, relying on its interpretation of the Constitutional Court's decision in Botha (annotated below) — that it introduced a principle that the sanction for

breach must be proportionate to the consequences of the breach — granted the application on the basis that termination of the leases would result in a disproportionate sanction, because the termination of the franchise agreements would collapse the franchisees' business and lead to the failure of a black empowerment initiative.

In the Trust's appeal, the Supreme Court of Appeal rejected the notion of proportionality, confirming that courts may only decline to enforce contractual terms when doing so would offend public policy and then only in the clearest of cases (ie with 'perceptive restraint'). It then upheld the appeal on the grounds that there were no considerations of public policy that would render the renewal clauses unenforceable.

In the present case the Constitutional Court granted the franchisees' application for leave to appeal because it offered an opportunity to clarify the proper constitutional approach to the judicial enforcement of contractual terms, in particular the public policy grounds upon which a court may refuse to do so.

The franchisees argued that enforcement would be inimical to the values of the Constitution, in particular the right to equality contained in s 9(2) of the Constitution in that it would collapse their businesses and lead to the failure of the black economic empowerment initiative financed by the Fund. The Trust and others (including the franchisor) argued that the Constitutional Court in Barkhuizen (annotated below) imposed an onus on parties seeking to avoid the enforcement of a contractual term on the basis of public policy, to adequately explain their failure to comply with the term, and that since the franchisees had failed to do so, the enforcement of the renewal clause could not be found to be contrary to public policy. The franchisor's explanation for their failure to comply with the term, that they were unsophisticated and did not grasp the implications of their failure to comply, was accepted by the High Court but rejected by the SCA.

Held[*]

Barkhuizen remained the leading authority in our law on the role of equity in contract, as part of public policy considerations. It recognised that good faith was 'not a self-standing rule, but an underlying value that [was] given expression through existing rules of law'. Botha did not revise Barkhuizen, nor did it hold that disproportionality or unfairness were separate, self-standing grounds, upon which a court may generally refuse to enforce contractual provisions. There was agreement between this court and the SCA that abstract values did not provide a freestanding basis upon which a court may interfere in contractual relationships, but instead performed creative, informative and controlling functions (See [38] and [58].)

The impact of the Constitution on the enforcement of contractual terms through the determination of public policy was profound. As was stated in Barkhuizen, it required that courts 'employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives'. Public policy imported values of fairness, reasonableness and justice, and ubuntu, which encompassed these values,was now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informed public policy. Many established doctrines of contract law are themselves the embodiment of these values, such as those concerning fraud, duress, misrepresentation, estoppel, implied terms and rectification. (See [71] – [73.)

While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning was required to ensure certainty of the

law and respect for the doctrine of separation of powers. The scope for the development of new common-law rules in our law of contract was broad: constitutional values had an essential role to play in the development of constitutionally infused common-law doctrines. In developing the common law, courts must develop clear and ascertainable rules and doctrines ensuring that our law of contract was substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This was what the rule of law, a foundational constitutional value, required. (See [76], [78] and [81].)

A court may however not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application was mediated through the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It was only where a contractual term, or its enforcement, was so unfair, unreasonable or unjust that it was contrary to public policy that a court may refuse to enforce it. (See [80].)

Two principles derived from case law need further elucidation: pacta sunt servanda and 'perceptive restraint'. The former was not a relic of our pre-constitutional past. This court has recognised that, in general, public policy required contracting parties to honour obligations that have been freely and voluntarily undertaken. It was crucial to economic development that individuals should be able to trust that all contracting parties would be bound by obligations willingly assumed. Certainty in contractual relations advanced constitutional rights and was essential to the achievement of our constitutional vision. However, there was no basis for privileging pacta sunt servanda over other constitutional rights and values; the requirements of public policy were informed by a wide range of constitutional values. Where a number of constitutional rights and values were implicated, a careful balancing exercise was required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances. As for 'perceptive restraint', while it was a sound approach, courts should not rely on it to shrink from their constitutional duty to infuse public policy with constitutional values, nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Furthermore, the notion that there must be substantial and incontestable harm to the public before a court may decline to enforce a contract on public policy grounds, was alien to our law of contract. (See [83] – [85], [87], [89] – [90].)

In applying this approach to the facts of this case, the question was whether the franchisees discharged the onus of demonstrating that the enforcement of the renewal clauses would be contrary to public policy in the particular circumstances of this case. As was decided in Barkhuizen, a party seeking to avoid the enforcement of a contractual term was required to demonstrate good reason for failing to comply with the term. While the explanation provided was not the only relevant consideration, it was critical in the overall assessment of whether enforcement would be contrary to public policy in all the particular facts and circumstances of a case. In most cases the absence of an explanation would be the end of the enquiry. Here, the only reasons advanced by the franchisees for their failure were that they were not sophisticated businesspeople and not fully apprised of their rights and obligations. Yet, the terms of each lease governing termination and renewal were in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand. The inference was inescapable that there were no circumstances that

prevented the applicants from complying with the terms of the renewal clauses in the leases and that they had simply neglected to comply when it was possible for them to do so. The harsh outcome alone, absent an explanation for their failure to comply with the terms of the renewal clauses, did not constitute a sufficient basis to hold that the enforcement of the clauses would be contrary to public policy. It followed that they did not show that enforcement of the clauses would be contrary to public policy. (See [91] – [98].)
As for the equality argument, to establish the legal principle that enforcement of a contractual term would be inimical to the constitutional value of equality, and therefore contrary to public policy, where enforcement would result in the failure of a black economic empowerment initiative, would deter other parties from electing to contract with beneficiaries of the Fund, or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations. These outcomes would, in effect, undermine the very objects that the Fund and s 9(2) seek to achieve. It followed that the appeal would be dismissed.

SA CRIMINAL LAW REPORTS SEPTEMBER 2020

NOHOUR AND ANOTHER v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2020 (2) SACR 229 (SCA)

Prosecution — Prosecutor — Powers and duties of — Duty of prosecutor to hand over statement by complainant in conflict with her testimony — Claim for damages for breach of such duty — No evidence that compliance with duty would have rendered different decision by trial court — Plaintiffs failing to prove factual causation.

The appellants appealed against the dismissal of their action for damages arising from the alleged negligence of the prosecutor who had conducted their successful prosecution in a regional magistrates' court on charges of kidnapping and rape. They contended that they would have been acquitted if the prosecutor had discharged her common-law obligations by disclosing to the defence the material deviations between the complainant's evidence and the contents of the police docket. They alleged that the docket contained a statement by the complainant that she was a prostitute, something that she had denied in cross-examination during the criminal trial.
Held, that the claim by the appellants that, if the information in the docket had been disclosed they would have used it to ensure their acquittal, went too far. They were in no position to say that their cross-examination would have yielded the result they contended for and the magistrate would still have had a duty to evaluate the complainant's evidence. It was of significance that the magistrate had been made aware that the complainant was alleged to be a prostitute, and had taken this into account in evaluating her evidence. (See [24].)
Held, further, that, even though the prosecutor omitted to disclose to the defence the fact that the complainant had admitted that she was a prostitute, the same prosecutor had informed the court about this. Although it might not have been at an appropriate stage of the trial, there were, however, no facts established by evidence that supported the assertion that they would have been acquitted, but for the omission by the prosecution, and they had accordingly failed the test for factual causation. Furthermore, the wrongful act on the part of the prosecution had not been

proved to be linked sufficiently closely or directly to the loss alleged to have been suffered by the appellants, and the appeal had to fail.

MADYIBI v MINISTER OF POLICE 2020 (2) SACR 243 (ECM)

Damages — Measure of — For unlawful arrest and detention — Plaintiff arrested unjustifiably for alleged unlawful demarcation of land and held overnight in police cells in unsavoury conditions — Award of R40 000 appropriate.

The plaintiff instituted a claim against the defendant for unlawful arrest and detention. His arrest had come about after he had been employed by the community to demarcate certain land. Whilst he was involved in demarcating the land by driving his tractor, he was accosted by the police and told to stop the demarcation, as it was unlawful. He was held overnight in the police cells in unsavoury conditions. Counsel for the defendant contended that the arrest was lawful, in that the plaintiff had committed an offence in the presence of the police, namely a contravention of s 26(2) read with s 58 of the Special Planning and Land Use Management Act 16 of 2013.
Held, that no evidence had been led to prove that an offence in terms of the section relied upon had been committed by the plaintiff. He never used any land, but was merely engaged in his business activities by doing what he was hired for by the community. Furthermore, no evidence had been led as to who the owner of the land in question was. Accordingly, the defendant had failed to establish that the statute relied upon authorised the arrest by the police. Neither was there any evidence forthcoming from the defendant as to why the plaintiff was detained. The arrest and detention were therefore both unlawful. (See [28] – [32].)
Held, further, that the contention by the defendant, that the plaintiff had not proved any damages suffered as a result of the arrest and detention, could not be accepted. Arrest and detention were serious violations of the right to freedom under s 12 of the Constitution. Once that right had been infringed, and it was found that there was no just cause for the arrest and detention, the arrested person would have suffered a measure of damages. In the circumstances of the case an amount of R40 000 would be appropriate. (See [34] and [40].)

MTSHEMLA AND ANOTHER v MINISTER OF POLICE AND OTHERS 2020 (2) SACR 254 (ECM)

Arrest — Legality of — Without warrant — Criminal Procedure Act 51 of 1977 — Plaintiffs arrested by civilian and handed over to police who detained them for two and half days — No proof that arrest by civilian was lawful in terms of s 42 of CPA and police officials who detained plaintiffs not investigating circumstances of arrest before such detention — Arrest and subsequent detention both unlawful.
Damages — Measure of — For unlawful arrest and detention — Plaintiffs arrested by civilian and handed over to police who detained them for two and half days — Both arrest and subsequent detention unlawful — Plaintiffs awarded damages of R90 000 each.

The two appellants instituted action against the respondents in the regional court for damages for unlawful arrest and detention. The magistrate held that the respondents were justified in arresting and detaining them, and dismissed their claims. The third respondent was alleged by the appellants to be one 'Warrant Officer Qotoyi'. They alleged that Qotoyi and another police officer had come to their house where they found a motor vehicle which the appellants admitted was in their possession. Qotoyi and the other police officer told them that they were under arrest and took them to the local police station where they were detained. They spent two and a half days in custody in unpleasant conditions. It was only during the evidence of the second witness for the respondents, a constable who had taken over the matter as the investigating officer and who had had nothing to do with the arrest of the appellants, that it was discovered that 'Warrant Officer Qotoyi' was not in fact a police official, but was actually an employee of 'Netstar Vehicle Tracking Unit'. The respondents, in their plea, had alleged that the police officers who had arrested and detained the appellants had been justified in doing so, and accepted the onus to prove the justification for the arrest, despite the fact that the person who carried out the arrest was a civilian. The respondents argued that the arrest was lawful by virtue of the fact that Qotoyi was entitled to arrest under the provisions of s 42 of the Criminal Procedure Act 51 of 1977 (the Act), which dealt with a civilian arrest.
Held, that it was abundantly clear that a reasonable suspicion had to reside in the mind of the peace officer at the time of the arrest of the person concerned. Qotoyi was not a police officer and therefore not a peace officer. Even if one were to give a vast amount of leeway in this regard and consider whether or not Qotoyi had the right in terms of s 42 to arrest the appellants and that, on this basis, the police officers who detained the appellants were clothed with legality in doing so, the respondents ought to have failed on that score as well. Qotoyi had made no allegation in his statement that the appellants had committed or attempted to commit any offence in his presence, and there was no statement to the effect that he reasonably suspected the appellants of having committed an offence referred to in sch 1 to the Act.
Held, further, that the magistrate therefore ought to have found that the respondents had not established that the arrest itself was lawful and, that being so, the subsequent two and a half days' detention was also unlawful. To simply detain the appellants, apparently on the say-so of a civilian who had arrested them, was not sufficient and there had to be an interrogation of some sort to ensure that the arrest was lawful. (See [19].)
Held, further, that in the circumstances an award of damages of R90 000 for unlawful arrest and detention would be appropriate.

MINISTER OF SAFETY AND SECURITY v LINCOLN 2020 (2) SACR 262 (SCA)

Prosecution — Malicious prosecution — Proof of — Initiating prosecution not equivalent to instigating prosecution.
Prosecution — Malicious prosecution — Proof of — Claim against Minister of Safety and Security for prosecution allegedly instigated by police official — Evidence showing that police official's statements subjected to rigorous scrutiny by senior police officials and numerous members of prosecuting authority — Plaintiff failing to prove that institution of prosecution malicious.

The appellant appealed against a decision of the court a quo in which the majority of the court, sitting as a court of appeal, had upheld the respondent's claim for damages for malicious prosecution. The only issue in the appeal was whether the employees of the appellant had instigated the prosecution of the respondent, a major general in the SAPS, and whether they had had reasonable and probable cause to do so. The evidence before the court was that the respondent had been charged with 47 counts, including multiple counts of fraud. These all related to his activities as a director in the SAPs and his investigation into the activities of an allegedly highly placed member of the Italian Mafia resident in Cape Town, and the suggestion of a mutually beneficial and corrupt relationships between him, a high-ranking officer in the SAPS and a minister in the national Cabinet. A Presidential Investigative Task Unit (the PITU) was appointed, with the respondent as the commander of the unit, and included one Sgt Smith (Smith) who had previous experience of investigations into the Mafia. The Commissioner of SAPS appointed an evaluation team to assess the efficiency of the PITU. This team had interactions with Smith who had had numerous altercations with the respondent. Smith made a number of serious incriminating allegations against the respondent, which resulted in a further investigation by two experienced detectives who worked under the supervision and direction of members of the Attorney-General's staff. Once the dockets in respect of the latter investigation were complete, they were subjected to a thorough review by a state advocate, a Deputy Attorney-General, and the Attorney-General. Subsequent representations by the respondent to the National Director of Public Prosecutions were unsuccessful, and he directed that the prosecution proceed. The respondent was subsequently acquitted on all the counts and instituted the claim for malicious prosecution. The appellant conceded that employees of SAPS had initiated the process against the respondent.
Held, that the appellant's concession did not equate to 'setting the law in motion' or 'instigating' a prosecution. Merely supplying information, however incriminating, to the police on which they eventually decided to prosecute was not the equivalent of launching a prosecution. The facts in the present case indicated that Smith's affidavit was not accepted at face value by the last set of investigators, who vigorously challenged the veracity of his assertions to the extent that Smith had felt threatened.
Held, further, that all the material, both incriminatory and exculpatory, had been placed before the state advocate, and it was his assessment of the material before him in the dockets that had led to the ultimate decision by first the Attorney-General, and then the NDPP, to proceed with the charges. There was no evidence that the investigation team had actively sought to persuade the Attorney-General to institute the prosecution. (See [45].) In the circumstances the respondent had failed to establish the alleged conduct attributed to the members of SAPS, or that they had no honest belief in the credibility of the statements presented and had left the decision to prosecute or not to the Attorney-General. The appeal accordingly had to be upheld.

S v HORN 2020 (2) SACR 280 (ECG)

Prevention of crime — Offences — Contravention of s 4 of Prevention of Organised Crime Act 121 of 1998 — Money-laundering — Proof of — Use of attorney's trust account in operation of pyramid scheme — Purpose of use of trust account simply to clothe scheme with appearance of rectitude and legality and not to launder proceeds thereof — Contravention of section not proved.

The appellant, who at the time of the commission of the offences in question had been an attorney but was subsequently struck off the roll, predominantly because of his role in the commission of the theft that formed the basis of count 73, was convicted of 65 counts, including two counts of racketeering and one count of money-laundering involving the use of his attorney's trust account in the operation of a pyramid scheme together with his brother. He appealed against his conviction and sentence of an effective 10 years' imprisonment. The money-laundering charge (count 3) was a contravention of ss 4, 8 and 1 of the Prevention of Organised Crime Act 121 of 1998 (POCA), relating to the money in his trust account and the misappropriation thereof by him and his brother for purposes other than held out, with the effect of concealing or disguising the source, location, disposition, movement and ownership of the money he knew or ought reasonably to have known was the proceeds of unlawful activities.
The court held that the actus reus required for the commission of the offence was to disguise the movement and ownership of the property or ownership thereof or to assist the offenders to avoid prosecution, or to remove or diminish the proceeds of some criminal activity. On the facts of the matter, however, it was a considerable stretch to conclude that what occurred in the trust account in any way constituted the disguising or concealing of the proceeds of criminal activity, as was required. The purpose of the use of the trust account was simply to clothe the scheme with the appearance of rectitude and legality and not to launder the proceeds thereof. The money was not received into the trust account for the purposes set out in s 4 of POCA and the conviction on the count had to be set aside. (See [55] – [57].)
In respect of the racketeering counts, the court held that racketeering under ss 2(1)(e) and (f), as read with ss 2(2) and (4) of POCA, required the existence of an enterprise, a pattern of racketeering activity and that the accused participated in the conduct of the enterprise's affairs directly or indirectly. Although the appellant had participated in the conduct of the business, the requirement of s 2(1)(f) of 'managing' the operation was not satisfied on the evidence, and the appellant had to be acquitted on one of the two counts. (See [59] – [63].) The convictions on most of the fraud counts were upheld.
As regards sentence, the court took into consideration that the appellant was remorseful and was a suitable candidate for rehabilitation. He was in his 60s with poor health, and an appropriate sentence would be one of an effective six years' imprisonment.

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA AND OTHERS v CPAD FARM HOLDINGS AND OTHERS 2020 (2) SACR 300 (ECP)

Prevention of crime — Forfeiture order in terms of Prevention of Organised Crime Act 121 of 1998 — Beneficiary of — Organ of state — No reason why could not rank as victim of fraudulent activity alongside private individual or entity.
Prevention of crime — Forfeiture order in terms of Prevention of Organised Crime Act 121 of 1998 — Effect of prior judicial attachment of property subject to forfeiture — Forfeiture order could not override or displace such prior judicial attachment.

The applicant (the Land Bank) applied for an order to vary the terms of a forfeiture order in terms of s 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998

(POCA), granted at the instance of the National Director of Public Prosecutions (the NDPP) in terms of which a certain farm was declared forfeited to the state. Paragraph 5 of the order provided that the fifth respondent (the curator to the first respondent, CPAD Farm Holdings) was required to return the farm to the fourth respondent, the Department of Rural Development and Land Reform (the Department), for reallocation, and that this would be regarded as payment to the state. What the applicant sought was a variation to the order to read that the forfeiture was subject to the rights of bondholders, and a declaration that the curator be entitled to proceed with the sale of the property subject to the rights of the bondholders. In April 2007 CPAD had caused a mortgage bond to be registered over the property in favour of the Land Bank, and in 2008 the latter instituted action against CPAD to recover amounts owing to it under a credit facility extended to CPAD in an amount of approximately R5,2 million. Judgment was obtained and an order was made declaring the property executable, and the sheriff subsequently attached the property.

During October 2014 the NDPP had launched an application in terms of s 38 of POCA for a preservation order in respect of the property and as a result of such order the curator was appointed to take control of the property. A copy of the order was served on the Land Bank which proceeded to confirm to the NDPP and its attorney that it held a first mortgage bond over the property, and that it wished to enter an appearance to exclude the Land Bank's interests in the property. The Land Bank received confirmation that its interest as mortgage-holder would be excluded from the forfeiture order, but, despite this, the eventual order was made subject only to 'bonds which rank in both time and efficacy'. The curator entered into negotiations for the sale of the property and, when a deed of sale in an amount of R8 million was concluded, the Department objected to it on the basis that the sale would result in the Land Bank receiving the full proceeds of the sale, but that this would be inequitable since the Department had been the victim of the fraud perpetrated upon it, which related to the preservation order and the subsequent forfeiture order being sought. It was common cause that the Department had given a grant for the purposes of 39 previously disadvantaged individuals to benefit from the acquisition of the farm, but, by means of certain fraudulent misrepresentations, the property had been transferred to, and registered in the name of, CPAD. The Department contended that, as a victim of the criminal conduct, it was entitled to share in the proceeds of the forfeited property. The Land Bank had not entered an appearance in terms of s 39(3) of POCA subsequent to the granting of the preservation order, it having been reassured that it was unnecessary, since the forfeiture of the property automatically would cater for its rights. Neither did the Land Bank receive notice of the application for the forfeiture order which was granted by default. The Department accepted that the forfeiture order ought to be varied to protect the Land Bank as bondholder, but argued that an appropriate order balancing the rights of victims of the fraud ought to be made by ensuring that the proceeds should be divided pro rata according to the capital losses incurred by the Land Bank and the Department.

Held, that POCA sought to protect the interests of innocent third parties who had been the victims of fraudulent activity, and there was no reason in principle why an organ of state could not rank as a victim of such activity alongside a private individual or corporate entity. (See [30].)

Held, further, that it was clear that both the Land Bank and the Department had suffered losses as a result of the fraud perpetrated upon them, and were accordingly both victims of the unlawful activity. However, the Land Bank held security in the

form of a mortgage bond and it had perfected such security by obtaining a judgment against CPAD and an order authorising execution against the property, which included both capital and interest, and there was no reason why the Land Bank's interest in the property should be limited to the capital losses suffered. (See [36] – [37].)
Held, further, that para 5 of the order could not, in the light of para 1, be construed as an exclusion of interest contemplated by s 54(1), but instead it had to be construed as an order to which effect could not be given, and had presumably been granted per incuriam. (See [42].)
Held, further, that the forfeiture order could not, without more, override or displace a prior judicial attachment of the property. Where there were competing claims, those could be adjudicated by interpleader proceedings. (See [45].)
The court accordingly ordered that para 1 had to be amended by the insertion at the end thereof of the phrase 'subject to the rights of the bondholders', and para 5 replaced with an order that the curator was authorised to dispose of the property and pay the proceeds, after deduction of expenses, to the Land Bank in an amount equal to the value of its judgment as at the date of disposal of the property, and to the Department in an amount equal to the value of the grant funding paid to facilitate acquisition of the property.

CORRUPTION WATCH AND ANOTHER v ARMS PROCUREMENT COMMISSION AND OTHERS 2020 (2) SACR 315 (GP)

Review — In what cases — Commission of inquiry — Grounds — Legality — Whether findings reviewable by court of law.

Review — In what cases — Commission of inquiry appointed to investigate and make findings on whether military-arms procurement process of government was marked by fraud and corruption — Failure to enquire fully and comprehensively into issues to be investigated as per terms of reference — Failure to examine evidence material to issues at hand — Failure to rigorously test versions of vital witnesses — Various mistakes of law made — Findings of Commission set aside on basis of failure of Commission to operate according to requirements of legality and rationality.

In 2011 former President Jacob Zuma appointed a commission of inquiry to investigate the military-weapons acquisition programme — labelled the Strategic Defence Procurement Package (SDPP) — undertaken by the South African Government between 1997 and 1999. Its terms of reference included, inter alia, enquiring into, and making findings and recommendations concerning, whether any person — inside the government or outside — had improperly influenced the awarding of any contracts forming part of the SDPP. In December 2015 the Commission delivered its final report, and concluded that all government officials involved in the acquisition process had acted lawfully; all allegations of fraud and corruption against them were dismissed. In the present application instituted in the Pretoria High Court, the applicants sought an order reviewing and setting aside the Commission's findings. They alleged that the Commission, in the way that it had conducted its proceedings and arrived at its findings, failed to carry out its constitutional and statutory function of investigating the allegations of fraud, corruption, impropriety or irregularity in the SDPP in the manner required by law.

Accordingly, they argued, the Commission had acted contrary to the requirements of legality and rationality, and they were therefore entitled to the relief they sought.
The court firstly confirmed that the findings of a judicial commission of inquiry were reviewable by a court on the grounds of legality and rationality (see [15], [50]). As to the powers of the court to review the Commission's findings, the court noted it was granted extensive public powers through the Commissions Act 8 of 1947 to investigate and make recommendations on a matter of major public importance, so as to bring finality to a controversy which had bedevilled South Africa almost from the dawn of democracy (see [51]), as well as restore public confidence in the processes of government (see [15]). The court concluded that the Commission — despite the wide discretion given to it to investigate into, and make findings on, the matters falling within its terms of reference — was obliged to operate within the framework of the principles of legality (see [51]).
The court held that the principle of legality and its underlying source, the rule of law, dictated that there had to be a rational relationship between the exercise of a public power and the objectives for which it was exercised.
In this case the objects were to investigate with an open mind, in order to reveal the truth to the public on a matter of the utmost public importance. (See [68].)
The court held, based on the evidence before it, that the Commission had failed to enquire fully and comprehensively into issues which it was required to investigate on the basis of its terms of reference, as was to be expected of a reasonable commission (see [53] and [69]). This was demonstrated by, inter alia, its failure to examine evidence — incorrectly ruled inadmissible on an incorrect understanding of the law — material to the enquiry in question, pointing as it did to incidents of corruption in the procurement process (see [53], [67], [69]); and a failure to rigorously test the veracity of evidence presented by key witnesses (see [53], [69]) — in particular their denials of corruption in the face of supporting evidence pointing to the contrary (see [54] – [66]).
The court concluded that the requirements of legality dictated that findings of the Commission be set aside (see [70]).

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Democratic Alliance v President of the Republic of South Africa and others (Economic Freedom Fighters as Intervening Party and Commission for Gender Equality as amicus curiae) [2020] 3 All SA 747 (GP)

Constitutional and Administrative Law – National State of Disaster – Financial assistance – Qualification for assistance – Criteria to be applied when funds were distributed to designated targets – Objection to BBBEE status or criteria such as race, gender and disability being used as a basis for a decision as to the recipients of distributions from funds – Court finding criteria to fall foul of basic principles of the rule of law in that the requirement that the exercise of a public power must be certain, even if a discretion to allocate funds was permissible.

Following the invasion of the Covid-19 virus into South Africa, a national State of Disaster was declared in terms of the Disaster Management Act 57 of 2002. The nationwide lockdown which followed the declaration threatened the South African economy. As a result, government sought to dispense funds to small businesses to assist their effort to ensure their survival during the lockdown. The Minister of Small Business Development (the “Minister”) established two funds to provide financial relief

to small, medium and micro enterprises, viz the Debt Finance Scheme ("DFS") and the Business Growth Resilience Fund ("BGRF").

The question for determination in this case concerned the criteria to be applied when such funds were distributed to the designated targets. The applicant contended that BBBEE status or criteria such as race, gender and disability could not be used as a basis for a decision as to the recipients of distributions from the two funds.

Held – The qualifying criteria as claimed to be applied by the Minister were largely procedural or hygiene requirements. By contrast, there was a substantive requirement that employees must be 70% South Africans and it was stated that priority would be given to business owned by women, youth and people with disabilities. There was no guidance given at all as to how the various criteria were to be weighed by a decision-maker. Such a broad phrase without any guidance as to what weight was to be given to the criteria could not pass muster in our constitutional democracy. The ostensible criteria fell foul of basic principles of the rule of law in that the requirement that the exercise of a public power must be certain, even if a discretion to allocate funds was permissible.

The Court set aside the criteria and referred the matter back to the Minister for a redrafting of the regulations in which the Minister would be required to consider the role of race, gender, youth and disability in the formulation of the criteria to be applied.

Director of Public Prosecutions: Limpopo v Molope and another [2020] 3 All SA 633 (SCA)

Criminal law and procedure – Reservation of question of law – Criminal Procedure Act 51 of 1977, section 319 – Requirements – Reserved question must be framed accurately leaving no doubt what the legal point is; the facts upon which the point hinges must be clear; and such facts should be set out fully in the record together with the question of law – Trial court has a duty to set out the relevant facts fully in the record as part of the question of law, and failure to do so meant that section 319 was not complied with.

The respondents were amongst five accused charged with two counts of kidnapping and two counts of murder. At the end of the State's case, the defence applied for all the accused to be discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977. The trial court ordered the discharge of the respondents on the two main charges of kidnapping and murder, and convicted the respondents of the crime of assault with intent to do grievous bodily harm – a competent verdict for murder – after the respondents had closed their case and elected not to testify. The fact that the trial court made certain findings against the respondents and yet discharged them at the end of the State's case on the main counts lay at the heart of the State's contention that it erred in law. The State therefore applied to the trial court to reserve a question of law in terms of section 319 of the Criminal Procedure Act.

The State contended that there was prima facie evidence against the respondents on both counts (kidnapping and murder) at the end of the State's case, and that the

court was not competent to discharge them merely because there were contradictions in its case.

Held – Before a question of law is reserved under section 319, three requisites must be met. First, the question must be framed accurately leaving no doubt what the legal point is; secondly, the facts upon which the point hinges must be clear; and thirdly, these facts should be set out fully in the record together with the question of law. The State failed to comply therewith in this matter. The trial court in this case did not frame a question of law in its judgment in the section 319 application for the consideration of the present Court, nor did it record the factual findings on which the purported point of law was dependent. The trial court had a duty to set out the relevant facts fully in the record as part of the question of law.

The shortcomings in the State's application in terms of section 319 were insurmountable. The appeal was accordingly dismissed.

Freedom Front Plus v President of the Republic of South Africa and others [2020] 3 All SA 762 (GP)

Constitutional and Administrative Law – Disaster Management Act 57 of 2002 – State of National Disaster – Constitutionality of Disaster Management Act – Whether absence of parliamentary oversight in States of National Disaster gives executive the power to impermissibly issue regulations which negatively impact on fundamental rights – Court confirming lawfulness of Act, finding that under States of National Disaster, fundamental rights remain intact in the sense that any limitation is still subject to being tested against section 36 of the Constitution

The applicant was a political party, challenging the legality of the government's response to the Covid-19 crisis.

On 15 March 2020, acting under section 3, read with section 27 of the Disaster Management Act 57 of 2002, the second respondent declared a national State of Disaster. The President announced a strict national lockdown with effect from midnight on 26 March. Regulations were promulgated, putting in place measures to deal with the epidemic. The stringent lockdown measures were eased progressively over time.

Although the applicant sought review and declaratory relief, the Court held that the relief relating to review should be postponed for the filing of the record.

Held – Unlike States of Disaster, the Constitution itself deals with States of Emergency in section 37. The judicial requirements for the declaration of a State of Emergency are prescribed in section 37(1). In challenging the constitutionality of the Disaster Management Act, the applicant referred to the safeguards built into section 37, as regards States of Emergency, which are absent from the Disaster Management Act. In particular, the applicant contended that Parliament exercises crucial oversight over States of Emergency, and yet has no role to play when it comes to national disasters. That means that the executive has free rein in a national disaster even though the regulations and directions issued by the executive may have far-reaching effects on fundamental rights.

The Disaster Management Act does not permit a deviation from the normal constitutional order. It permits the executive to enact regulations or issue directions. It may well be that such regulations will limit fundamental rights. But the fundamental rights remain intact in the sense that any limitation is still subject to being tested against section 36 of the Constitution. For that reason, it is not for the Act to include a specific provision preserving the competence of courts to rule on the validity of regulations. Under States of Disaster, that competence remains intact. It is never removed or suspended to begin with.

Concluding that the applicant's attack on the Disaster Management Act was founded on a misconception and was fundamentally flawed, the Court refused the relief sought.

Hlumisa Investment Holdings (RF) Ltd and another v Kirkinis and others [2020] 3 All SA 650 (SCA)

Civil Procedure – Exception to claim – Rules regarding exceptions – Excipient must satisfy court that the conclusion of law set out in the particulars of claim is unsustainable – Court may uphold the exception only if satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.

Corporate and Commercial – Company law – Misconduct by company directors – Negligence by auditors – Diminution in share value – Claim for damages by shareholders – Reflective loss – Right of action – Section 218(2) of the Companies Act 71 of 2008 states that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention – Due to fact that the person who can sue to recover loss is the one to whom harm was caused, where loss was occasioned to the company, it was the company which had the right of action.

The first appellant ("Hlumisa") and second appellant ("Eyomhlaba") were shareholders in an entity ("ABIL").

The first to tenth respondents were either former or current directors of ABIL. The eleventh respondent ("Deloitte") was the auditor of both ABIL and its subsidiary ("African Bank").

In the court below, the appellants sued the directors and Deloitte for damages allegedly suffered as a result of the diminution in the value of their shares in ABIL, on account of the directors' alleged misconduct in relation to the affairs of both African Bank and ABIL and on account of Deloitte failing to conduct audits in accordance with generally recognised auditing standards. It was alleged that between 2012 and 2014, and in breach of section 76(3) of the Companies Act 71 of 2008, the directors failed to exercise their powers in good faith and in the best interests of ABIL and African Bank, which resulted in the business of ABIL and African Bank being carried on recklessly or with gross negligence in contravention of the provisions of section 22(1) of the Act. That was said to have caused the bank and ABIL to suffer significant losses, which, in turn, caused the ABIL share price to drop. The particulars of claim set out numerous instances of the directors' alleged misconduct.

The directors and Deloitte raised several exceptions to the claims. In short, they averred that the claims by the appellants – which, if proven, enured only to the company – were unsustainable at common law, at the instance of shareholders in their

capacity as such, and could also not be brought in terms of section 218(2) of the Companies Act. Deloitte was adamant that it owed a legal duty to the company but not to the appellants in their capacities as individual shareholders in the company.

As the court below upheld the exceptions by the directors and Deloitte, the appellant brought the present appeal.

Held – In deciding an exception a court must take the facts alleged in the pleading as being correct. The excipient must satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.

The Court restated the rule against a claim by a shareholder that is purely reflective of a loss suffered by a company. The appellants' claims against the directors were quintessentially reflective loss claims. It therefore had to be determined whether section 218(2) assisted the appellants in relation to the claim against the directors. The section states that, "Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention." But the person who can sue to recover loss is the one to whom harm was caused. In the present case, loss was occasioned to the company and the company was the entity with the right of action.

In similar vein, the duty of the auditors was owed primarily to the company. Liability by Deloitte to shareholders in the circumstances of this case was therefore untenable.

The appeal was dismissed with costs.

LM v Chairperson of the Standing Committee for Refugee Affairs and others [2020] 3 All SA 780 (WCC)

Immigration – Asylum seeker – Refusal of application – Review application – Decision to refuse asylum application found to be tainted by lack of rationality and procedural and substantive flaws.

Immigration – Asylum seeker – Refusal of application – Review application – Late filing – In exercising its power under section 9(2) of the Promotion of Administrative Justice Act 3 of 2000 to grant an extension of time beyond the 180-day limit contemplated in section 7(1) the court is enjoined to give consideration to the interests of justice.

The applicant, a national of the Democratic Republic of the Congo ("DRC"), sought to review two decisions which culminated in a refusal to grant her asylum in South Africa and a subsequent order for her deportation.

At the core of the refusal of the application for asylum, lodged in terms of section 22 of the Refugees Act, were alleged material inconsistencies in a number of factual averments made by the applicant over the years regarding her personal history, and her arrival in the country as recorded in various working documents of the Department of Home Affairs. The second respondent (the "RSDO") therefore rejected her application for asylum. In terms of the internal review procedure contemplated under section 25(1) of the Act the first respondent (the "SCRA") upheld the RSDO's decision.

The review application was brought under the Promotion of Administrative Justice Act 3 of 2000. The application for review was out of time and did not comply with the 180 day period prescribed by section 7(1) of the latter Act.

Held – The respondents, although seeking to hold the applicant to the prescribed time limits, had also not adhered to reasonable time limits in processing the applicant's application. In exercising its power under section 9(2) of the Promotion of Administrative Justice Act to grant an extension of time beyond the 180-day limit contemplated in section 7(1) the Court is enjoined to give consideration to the interests of justice. Having regard to the circumstances, the importance of the matter to the applicant and her prospects of success in the review, it would be contrary to the interests of justice to deny the relief sought under section 9(2). The time limit was thus extended.

On the merits, the Court found that the RSDO's decision lacked rationality and was both procedurally and substantively flawed. It was accordingly reviewed and set aside.

Mathekga and another v S [2020] 3 All SA 681 (SCA)

Criminal law and procedure – Appeal against convictions – Factual findings of trial court – A court of appeal is bound by the factual findings of the trial court except where these findings are wrong or not borne out by the record.

Criminal law and procedure – Murder – Attempted murder – Malicious damage to property – Appeal against sentence – Trial court's finding that murder fell within ambit of section 51(1) of the Criminal Law Amendment Act 105 of 1997 instead of section 51(2) constituting misdirection warranting interference on appeal.

The appellants were police officers who, armed with an R5 assault rifle and Z88 9 mm pistol, opened fire on two other police officers clad in civilian clothing. The two officers clad in civilian clothing had been pursuing a suspect on foot for having shot their colleague. One was killed and the other seriously injured by the appellants. A bystander was also injured from a gunshot, and three minibus taxis and two motor vehicles, which were parked at a taxi rank where the incident occurred, were badly damaged by bullets.

As a result of the above, the appellants were convicted of murder, two counts of attempted murder and malicious damage to property. They were each sentenced to an effective term of 15 years' imprisonment. They were granted leave to appeal.

Held – The issues for determination were whether the appellants objectively and/or subjectively believed that their actions were justified by section 49 of the Criminal Procedure Act 51 of 1977; whether they were aware that the deceased was a police officer in order for the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 to apply on sentencing; and whether an effective sentence of 15 years' imprisonment imposed on the appellants was appropriate in the circumstances.

Section 49(2) of the Criminal Procedure Act deals with the use of force in effecting arrest.

The trial court correctly found that there was no evidence to support the version of the appellants. Their evidence created doubt that a warning was given. On the evidence supported by independent witnesses – the civilians at the taxi rank – who were close to them when they started to shoot, the appellants had not issued any warning to their colleagues before they opened fire on them. Furthermore, the appellants were unable to explain why they fired twenty-nine bullets directly at the two men when they had posed no threat.

A court of appeal is bound by the factual findings of the trial court except where these findings are wrong or not borne out by the record. This is especially when the findings are dependent on the credibility of the witnesses who testified. The trial court could not be faulted for having found that the force the appellants used was not reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the purported suspects from fleeing. Excessive force was used, when there was no basis therefor. The appellants therefore acted outside the scope of section 49(2).

Taking all the evidence into account, it was clear that the appellants, who were trained police officers, armed with lethal weapons, made no attempt to arrest the two police officers they thought were suspects.

The trial court erroneously found that the murder fell within the ambit of section 51(1) of the Criminal Law Amendment Act instead of section 51(2). On that basis alone, it misdirected itself materially. That obliged the present Court to reconsider sentence afresh. Having regard to the relevant circumstances, the Court found that a sentence of 13 years' imprisonment on the murder count would be proportionate to the crime, the criminal and the legitimate needs of society.

McLennan-Smith and others v Mannaru and others [2020] 3 All SA 814 (KZD)

Property – Servitudes – Rights of owner of dominant tenement and of beneficiary of a servitude – Whether the common law permits the construction of a gate across a servitude – Beneficiaries must exercise rights civiliter modo, which involves a balancing of the interests of the beneficiaries and owners – As the principle of effective use requires that beneficiaries be enabled to exercise the servitude properly, reasonableness dictated that erection of gate across servitude be permitted.

In terms of an oral agreement concluded between the plaintiffs and the first defendant, the defendant permitted the plaintiffs to erect a gate across a road servitude at their own expense. The servitude formed part of a sectional title scheme known as Kings Avenue No 1 in which the first defendant was the owner of two sections, and it existed in favour of 1B and 1C (owned by the first and second plaintiffs), 1E and 1D (owned by the third and fourth plaintiffs) Kings Avenue.

The plaintiffs were owners of a panhandle property to which they had access via the servitude over the property of the first and second defendants. They erected a temporary gate across the servitude, which limited the defendant's access. About six months later, the plaintiffs tried to get the defendant's consent to replace the temporary gate with a permanent structure, which required municipal approval. The defendant withheld consent, and in October 2017, the plaintiffs launched the present action. They sought an interdict to restrain the first and second defendants from removing, damaging or opening the gate providing access to the plaintiffs' properties; a declarator that they could erect a permanent gate to replace the temporary one; and an order to rectify the defendant's title deeds by registering a Notarial Deed of Servitude in favour of the plaintiffs' properties.

The defendant counterclaimed that the plaintiffs erected a remote access gate across the servitude without her consent and that the gate denied her free access to use and enjoy that portion of the servitude which adjoined the plaintiffs' properties.

Among the questions raised in this case was whether the common law permits the construction of a gate across a servitude. It also had to be determined whether there

was a basis for balancing the competing claims of the plaintiffs to enhance their security and the defendant's right of ownership of the land on which the servitude existed.

Held – Permitting the plaintiffs to erect a security gate across the servitude would be reasonable. What is reasonable use of a servitude is a matter of mutual interest best determined by the users and owners of real rights. Erecting a security gate across the servitude was a reasonable response to remedy the security concerns of the plaintiffs. The question was whether the law permitted the Court to grant an order that would impose burdens on the ownership rights of the defendant.

A servitude is a limited real right that entitles its holder either to use and enjoy another person's property or to insist that the owner of the servient property refrain from exercising certain entitlements over his property that he would have been able to exercise if the servitude did not exist. Under section 25(1) of the Constitution, no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation off property. The law in this case was the common law. Beneficiaries of a servitude hold real rights in things the ownership of which vests in the owner of the servient tenement (jura in re aliena). Beneficiaries may prohibit the owners from exercising any one or more of their rights of ownership. They are entitled to the free use and exercise of their servitude without going beyond what is required for the proper enjoyment of the servitude. Applying the principle of effective use, beneficiaries must be enabled to exercise the servitude properly.

A gate across a servitude is not an ancillary or subsidiary right to use the servitude, but is an interference with real rights. Beneficiaries must exercise their rights civiliter modo, that means, in such a way that the servitude does not become more burdensome on the owner. Applying the civiliter principle involves a balancing of the interests of the beneficiaries and owners.

Under the common law, without consensus, the plaintiffs had no right to burden the defendant's ownership of the servitude land. Erecting a gate was an encroachment and therefore a prohibited burden. However, security was a need for both owners and beneficiaries. The Court therefore considered whether it was appropriate for it to develop the common law. It held that the best outcome for a dispute of mutual interest was one that the parties devised for themselves.

The Court issued an order permitting the plaintiffs to erect and maintain a gate on the road servitude, with the proviso that they gave the first and second defendants and anyone they authorised unsupervised access to use the servitude. That arrangement would remain in force for as long as the first or second defendant was the owner of servitude.

Mkuyana v Road Accident Fund [2020] 3 All SA 834 (ECG)

Legal Practice – Attorney's fees – Reasonableness – Contingency fee agreement – Validity of agreement – In terms of section 2 of the Contingency Fees Act 66 of 1997, the attorney is required at the outset, to make an assessment of the prospects of success of the client's case – Where contingency fee agreement was only concluded a few months before the trial despite the fact that the plaintiff's attorney had been working on the matter on a contingency basis for much longer, section 2 not complied with and agreement was invalid.

Having been injured in a motor vehicle accident, the plaintiff instituted action against the Road Accident Fund for the payment of damages that she suffered as a result of the injuries she sustained in the accident. On the day of the trial, the court was informed that the matter had been settled and a draft order was furnished. In compliance with the provisions of section 4 of the Contingency Fees Act 66 of 1997 (the "Act") the plaintiff's attorney also provided the Court with a contingency fee agreement entered into by the plaintiff and her attorneys. The Court proceeded to make an order in accordance with the terms of the settlement, but raised a question with regard to whether the settlement agreement was compliant with the Act. The query concerned the timing of the fee agreement and the reasonableness of the fees agreed to.

Held – Contingency fee agreements are subject to judicial oversight and intervention. A contingency fee agreement that is not covered by the Act, or which does not comply with the requirements of the Act, is invalid. The starting point to the present enquiry was therefore whether, what was stated in the second agreement as being the attorney's normal fee, complied with the provisions of the Act.

The relationship between a client and his attorney is that of principal and agent based on a contact of mandate. The attorney is entitled to be remunerated for his services. His charges may be agreed in advance or they are the usual or normal fees due for the work actually performed. Irrespective of whether the attorney's fees are agreed, the fee charged must be reasonable. Based on considerations of public policy the court retains the right to decide what a fair and reasonable remuneration would be. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreaching, will be unreasonable and consequently unenforceable. The usual method for determining the reasonableness of a disputed attorney and client fee is taxation. Failing that, a determination of the reasonableness of the attorney's normal fees for purposes of the Act therefore requires an objective assessment of what is appropriate in the circumstances of a particular case.

In terms of section 2 of the Act, the attorney is requited at the outset, to make an assessment of the prospects of success of the client's case. The contingency fee agreement upon which the plaintiff's attorney relied was only concluded a few months before the trial despite the fact that the plaintiff's attorney had been working on the matter on a contingency basis since the firm took over the plaintiff's claim from another firm. It accordingly did not comply with the provisions of sections 2 and 3 of the Act. As non-compliance with the provisions of the Act renders a contingency fee agreement invalid and therefore legally unenforceable, the plaintiff's attorney was entitled to recover from the plaintiff a reasonable fee for the services rendered to her. Those fees were to be on the attorney and own client scale. The reasonableness of the fee would be assessed upon taxation by the Taxing Master.

One South Africa Movement and another v President of the Republic of South Africa and others (Solidarity as amicus curiae) [2020] 3 All SA 856 (GP)

Constitutional and Administrative Law – State of National Disaster – Covid-19 epidemic – Government's response to disaster – Challenge to government's move to less restrictive level of alertness on ground that State was constitutionally obliged to act in a manner that did not place the right to life of the populace under threat –

Decision found not to be an unreasonable or irrational choice, particularly given the range of protective measures that remained in place.

Constitutional and Administrative Law – State of National Disaster – Covid-19 epidemic – Government's response to disaster – Rationality of government's decision to move to less restrictive level of alertness – Section 27(2) of the Disaster Management Act 57 of 2002 giving the Minister for Cooperative Governance and Traditional Affairs the power to make regulations or issue directions concerning a range of things, and such power was exercised in a rational and lawful manner.

Central to the present application was the progression of the Covid-19 epidemic in South Africa and the government's response to it. The applicants accused the government of irrationally, unlawfully and unconstitutionally abandoning measures aimed at effectively combating the Covid-19 epidemic, and replacing them with constitutionally non-compliant measures which are likely to result in the preventable deaths of human beings, especially the poor and vulnerable. They sought a reversion to alert level 4 (from alert level 3) and the setting aside of the regulations made following the movement from level 4 to 3. In addition, they want to prevent government from re-opening public schools until certain conditions are met.

The first applicant ("OSAM") was a registered non-profit organisation, and the second applicant ("Mr Maimane") was a former Member of Parliament currently employed as the convenor of OSAM. He brought the application in his personal capacity, as a citizen and parent of school-going children, and in his representative capacity as convenor of OSAM.

Held – Government's response to the pandemic involved declaring a State of National Disaster and initially putting into place a strict lockdown of limited duration. The strict lockdown was then followed by the easing of the lockdown linked to a system of alert levels. The aim was to restart the economy. The applicants accepted in their founding affidavit that the respondents' Covid-19 responses were done in good faith and with a view to striking a balance between health and safety concerns on the one hand, and economic activity on the other. However, they contended that the right to life should be given paramountcy, and that the State was constitutionally obliged to act in a manner that did not place the right to life of the populace under threat.

The Court recognised the competing constitutional prerogatives involved in the State's decision. The exercise of the executive power in making the decision was unavoidably polycentric, and involved the consideration of a range of policy and legislative choices that might be adopted in order to deal with the Covid-19 crisis in a manner that complied with government's obligations under section 7(2) of the Constitution. The Court could not find that the decision was an unreasonable or irrational choice, particularly given the range of protective measures that remained in place, and the option to revert to a higher alert level where that might be indicated. There was thus no merit in the applicants' challenge to the constitutionality of the decision to move to alert level 3 based on the violation of rights.

On the issue of rationality or legality, the court pointed out that section 27(2) of the Disaster Management Act 57 of 2002 gave the third respondent the power to make regulations or issue directions concerning a range of things. The applicants sought an interpretation which limited the power to make directions on a strictly necessary basis. The Court disagreed with the applicants' interpretation. It also held that Covid-19 presented both a health and economic disaster for the nation. The respondents were

obliged to act in the public interest to address both aspects of the disaster, which is what they sought to do.

Finally, the Court confirmed the lawfulness of the decision to reopen schools. An overview of the readiness plans submitted, indicated that provision had been made and adequate consideration given to the proper implementation of such plans.

The application was accordingly dismissed.

Residents of: Industry House, 5 Davies Street, New Doornfontein, Johannesburg and others v Minister of Police and others (Lawyers for Human Rights and another as amici curiae) [2020] 3 All SA 902 (GJ)

Constitutional and Administrative Law – Right to privacy – Warrantless searches by police – Section 13(7) of the South African Police Service Act 68 of 1995 – Intrusions by police into private spaces – Extent of invasion of personal right to privacy authorised by section 13(7)(c) substantially disproportionate to its public purpose.

Constitutional and Administrative Law – Section 13(7) of the South African Police Service Act 68 of 1995 – Authorisations of searches by police – Rationality of decision to issue authorisation – Decision reviewed as there was no rational relationship between the information provided in the respective applications for section 13(7) authorisations and the decisions granting the authorisations.

Criminal law and procedure – Warrantless searches by police – Section 13(7) of the South African Police Service Act 68 of 1995 – Section 13(7) gives police extended, intrusive powers to restore public order or to ensure the safety of the public in a particular area – The section gives members of police carte blanche to enter any home within that cordoned off area and then to search the entire home including the most private spheres, with no predetermined safeguards to minimise the extent of intrusions – Overbreadth rendering section unconstitutional.

Between June 2017 and May 2018, police officers acting on authorisations granted in terms of section 13(7) of the South Africa Police Services Act 68 of 1995, conducted the warrantless search of the person, homes and properties of about three thousand occupants of eleven buildings in the inner city of Johannesburg. The operation was motivated by the high incidence of serious crime in the inner city. Those who committed the serious and violent crimes, according to police intelligence, used the buildings as refuge and hide-outs.

The applicants were the occupiers of buildings situated within the areas that were cordoned off and searched pursuant to the section 13(7) authorisations that were granted. They sought to have section 13(7) declared constitutionally invalid. They also sought that all the decisions authorising the searches to which they were subjected be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 and that they be compensated for the infringement of their constitutional rights to privacy and dignity which the searches entailed.

Held – Section 13(7) gives the police extended, intrusive powers to restore public order or to ensure the safety of the public in a particular area. It provides that where it is reasonable in particular circumstances, the national or provincial commissioner of the South African Police Services may, in writing, authorise the cordoning off of any area as well as the warrantless search of any person, vehicle and premises in the

cordoned off area and the seizure of any article referred to in section 20 of the Criminal Procedure Act 51 of 1977.

By contrast, section 14 of the Constitution guarantees that everyone has the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed.

The question was whether the statutory limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 13(7)(c) has no predetermined safeguards to minimise the extent of intrusions into a person's private home within the cordoned off area where the nature of the section 13(7) police operations may make an invasion of privacy necessary. But technically it gives members of the police carte blanche to enter any home within that cordoned off area and then to search the entire home including the most private spheres. The court therefore concluded that the extent of the invasion of the personal right to privacy authorised by section 13(7)(c) was substantially disproportionate to its public purpose. Its overbreadth rendered it unconstitutional.

The application for review was also successful, as the decision-makers failed to apply their minds to the evidence before them before issuing the authorisations. There was no rational relationship between the information provided in the respective applications for section 13(7) authorisations and the decisions granting the authorisations.

School Governing Body Grey College, Bloemfontein v Scheepers and another (Federation of Governing Bodies of South African Schools as amicus curiae) [2020] 3 All SA 704 (SCA)

Education – Public school – Role of principal – Powers and functions of school governing body in terms of section 20 of South African Schools Act 84 of 1996 – Source of principal's powers not lying with governing body but is prescribed by South African Schools Act – Withdrawal of principal's functions by school governing body – Distinction exists between governing body's governance/legislative function and managerial/executive function of principal – Governing body lacking statutory authority to restrict the role of the principal to strictly academic functions.

The appellant was the governing body of a public school for boys. The first respondent ("Mr Scheepers") served as principal at the school from January 2013 until May 2018. On 3 May 2018, he was invited by email to attend a special meeting of the SGB, regarding the withdrawal of rights and duties said to have been delegated to him by the SGB. No clarification was offered by the SGB as to what rights and duties were being referred to. At the meeting, Mr Scheepers' request for clarity was met with the SGB's suggestion that he should look at the South African Schools Act 84 of 1996 to appreciate the distinction between his professional duties and those that were within the preserve of the SGB. The SGB urged him to accept that all of the functions and responsibilities that section 20 of the Act assigned to a school governing body were at least tacitly delegated to him by the SGB. He was then presented with a list of complaints to which he was invited to respond. Pursuant to a vote, it was then resolved to withdraw the functions and responsibilities delegated to Mr Scheepers by the SGB.

Contending that the SGB's actions were procedurally flawed, and lacking substantive merit, Mr Scheepers successfully applied to the High Court for the review and setting aside of the decisions taken. That resulted in the SGB bringing the present appeal.

Its stance was that the powers, functions and duties that the principal had exercised before its impugned decision had been delegated to him by the SGB. It was adamant that, as the repository of the original power and functions, it could revoke them at will.

Held – Section 20 of the South African Schools Act sets out the functions of a governing body. Section 16(3) provides that the professional management of a public school must be undertaken by the principal under the authority of the Head of Department.

The SGB ignored the statutory architecture and did not distinguish between the different roles played by the governing body and the principal. It did not appreciate the distinction between its governance/legislative function and the managerial/executive function of the principal. It viewed the principal as having no original authority and adopted the position that all his functions and duties derived from it. The SGB wrongly sought to restrict the role of the principal to strictly academic functions, despite the clear wording of the relevant provisions of the Act.

The conclusion of the court below that the SGB lacked the statutory authority to act in the manner complained of, by effectively preventing the principal from fulfilling his statutory functions and duties, was therefore correct.

The appeal was dismissed with costs.

Van Zyl NO v Getz NO [2020] 3 All SA 730 (SCA)

Family Law and Persons – Parent and child – Legal duty of support – Grandparent's duty of support – Claim against deceased estate of grandparent – Common law rule that a legal duty to support a grandchild is not enforceable against a grandparent's deceased estate – Whether common-law rule offended normative structure of the Constitution; and, if not, whether there were wider interests of justice considerations that required its further development – Court declining to develop common law due to insufficiency of evidence and drastic effect which might implicate various constitutional values.

n the High Court, the appellant, in her capacity as the curatrix ad litem to a psychiatric patient ("B") instituted action for damages on behalf of B against the respondent in his capacity as an executor in the estate of the late B's deceased grandfather.

A claim had been lodged on B's behalf against the deceased estate, but was repudiated on the ground that at common law, there is no obligation in law on a grandparent's estate to maintain a grandchild.

The appellant alleged that B suffered damages as a result of the respondent's and his co-executor's failure to recognise B's claim for maintenance in the estate of her deceased grandparent. The High Court ruled against the appellant, and the present appeal came before the Supreme Court of Appeal.

As the common-law rule set out below stood in the way of B's claim for maintenance against the deceased, the appellant sought an order in terms of section 172(1)(a) of the Constitution declaring that the common-law rule was inconsistent with the Constitution and invalid. The appellant further sought an order in terms of sections 8(2)(a) and 173 of the Constitution declaring that henceforth, the common-law rule was that when parents or their deceased estates are unable to support their children who are in need of support and the grandparents are deceased, there is a duty on the grandparents' deceased estates, if they are able to do so, to support the grandchildren.

Held – Two rules govern the legal duty of support of grandchildren by grandparents. The first is that where a grandchild is in need of support, his grandparent will have a legal duty to maintain him, only if both parents are unable to support the child and the grandparent is able to provide support. The second rule is that a legal duty to support a grandchild is not enforceable against a grandparent's deceased estate. The Court was asked to develop the latter rule so that the common law would recognise a duty of support on the part of a grandparent's deceased estate.

Liability to maintain ex lege is based on three factors: the claimant's inability to support himself; his relationship to the person from whom he claims support; and the latter's ability to provide support.

The question was whether the common-law rule offended the normative structure of the Constitution; and, if not, whether there were wider interests of justice considerations that required its further development. The appellant asked the court to change the common-law rule altogether on the basis of the facts and assumptions contained in the stated case. But the evidence regarding the sufficiency of steps taken by the appellant to trace the whereabouts of B's father and his financial situation was disputed by the respondent. Due to the insufficiency of the evidence upon which to develop the common-law rule, it would be inappropriate for the court to develop the common law. The development sought by the appellant was quite drastic and might implicate various constitutional values.

The appeal was dismissed with no order as to costs.

END-FOR NOW