LEGAL NOTES VOL 10/2020

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AB AND ANOTHER v PRIDWIN PREPARATORY SCHOOL AND OTHERS 2020 (5) SA 327 (CC)

Education — School — Independent school — Contract between school and parents — Validity of school's cancellation of agreement without hearing parents or children — Impact of right to basic education and best interests of child — Constitution, 1996, ss 28(2) and 29(1).

Applicants AB and CB were the parents of children D and E, who attended Pridwin Preparatory School, an independent school. At a point, and owing to the behaviour of AB, the school cancelled the schooling agreement between it and the parents, and D and E went elsewhere (see [109]).

AB and CB later challenged the cancellations, but having been unsuccessful in both the High Court and the Supreme Court of Appeal, they here applied for leave to appeal to the Constitutional Court.

The majority, per Theron J, granted leave to appeal, upheld the appeal, and set aside the Supreme Court of Appeal's order. They declared the cancelling of the schooling contract invalid, and set it aside (see [212]).

They held as follows:

- It was in the interest of justice to hear the matter, albeit that it had become moot, owing to the boys' departure from the school (see [108], [110] and [117]). It raised important questions about the constitutional rights of learners and the duties of independent schools (see [112]); the relief claimed would have broad practical effect (see [112]); the judgments of the High Court and Supreme Court of Appeal had broad implications (see [114]); extensive argument had been presented (see [115]); and it was a first, and rare opportunity, for the court to consider the rights of learners at independent schools (see [116]).

[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!**

- Direct horizontal application of the Bill of Rights was justified given the growing significance of the independent school sector (see [127] and [131]).
- The context to be examined in considering the school's decision was the parents' conduct, the right of children that their best interests be of paramount importance in matters concerning them, and the right of everyone to a basic education (see [132]).
- As to the parents' conduct, it was relevant that AB's misbehaviour was on multiple occasions observed by other parents and children (see [134]); that Pridwin's principal had sought a hearing on AB's conduct, which was superseded by an agreement with AB and CB on AB's prospective behaviour (see [134]); that AB had breached the agreement, been confronted by the principal on this, and that the principal had thereafter dispatched the school-contract cancelling letter (see [134] and [135]). Relevant also was that the school had later extended the notice period of cancellation, and that the principal had drafted a letter supporting the boys' move to another school (see [135]).
- Concerning the child's right that its best interests be of paramount importance, the right afforded a right to make representations whenever the interests of the child were at stake (see [137], [141] and [151]). This entitlement might, or might not entail an oral hearing (see [151] and [153]). Thus here, when Pridwin decided to cancel the schooling agreement, it was required to give AB and CB an opportunity to make representations on the boys' best interests (see [148] and [188]). It had however failed to do so (see [153] and [189]).
- As to the right to a basic education, the term 'basic education' described the content of the right, and on this approach, children at independent schools were receiving a basic education from these schools (see [164]). This entailed a negative obligation on these schools (including Pridwin) to not interfere with the right (see [174] and [181]).
- There was no justification for cancelling the schooling agreement and so limiting the boys' right to a basic education (see [196] and [198]). This owed to the failure to afford a fair process (see [201]); the availability of lesser measures (see [202]); the uncertainty that places would be available for the boys in public schools (see [203]); and the breaching of the boys' bonds with their teachers and friends (see [204]).
- The cancellation of the agreement was accordingly unconstitutional owing to the failure to afford a hearing on the boys' interests; for self-evidently being against their best interests absent such hearing; and in violation of the negative obligation to not interfere with the right to a basic education (see [209]).

Nicholls AJ in a separate judgment would have withheld leave to appeal on the issue of the validity of the principal's cancellation of the schooling agreement (see [59]). This owing to the issue's mootness: the boys had left the school, and AB and CB did not seek their reinstatement there (see [48] – [49]).

However, she would have granted leave to appeal in respect of the constitutionality of the schooling agreement's cancellation clause, which permitted cancellation, without the following of any fair procedure (see [57]); and she would have declared that the clause was indeed unconstitutional, contrary to public policy, and unenforceable, to the extent it allowed Pridwin to cancel the schooling agreement, without such fair procedure (see [96]).

She would, moreover, have declared that a child's basic education could not be terminated, absent an appropriate, substantively fair procedure (see [96]).

In coming to these conclusions, she considered that:

- While authority was for the applying of public policy to test the constitutionality of a contractual clause, that authority did not disallow the direct application of constitutional rights to such a clause (see [67]).
- The issue accordingly was whether, and which rights applied to exercise of the cancellation clause (see [68]).
- The rights so applying were the best-interests and basic-education rights of children (the latter obliging an independent school, as a provider of basic education, not to interfere with the right) (see [72] and [88]).
- Enforcement of contracts involving children's interests and basic education was subject to these rights (see [91]).
- This entailed, with respect to exercise of cancellation clauses, that the parents be informed of the proposed cancellation, that the school give reasons therefor, as well as a fair hearing (see [93]).

Khampepe J, in her separate judgment, emphasised the aspect of the best-interests standard that the child be given an opportunity to be heard on matters affecting it, a position supported in international law as well as the Children's Act 38 of 2005 (see [226], [232], [241] and [243]).

Applied to this case, this entailed that D and E be given an opportunity by Pridwin to express their views on their potential exclusion and that Pridwin consider what they had to say (see [226], [234], [243] and [248]).

As far as the best interests of other learners were concerned, a school would be generally speaking obliged to hear them, although, depending on the facts, their views might be expressed through a representative (see [247]).

Cameron J, and Froneman J, in their joint judgment, were in agreement that independent schools which provided basic education were subject to the negative obligation not to interfere with the attending children's right to a basic education (see [215]).

The right could though be limited, and in that context, both procedural and substantive fairness were necessary before a child could be required to leave. Such limitation was most appropriately approached in terms of s 36 of the Constitution (see [217]).

As for mootness, the only basis on which to grant leave to appeal was the enforceability of the schooling agreement's cancellation clause (see [218]).

LIBERTY GROUP LTD v ILLMAN 2020 (5) SA 397 (SCA)

Suretyship — Surety and co-principal debtor — Meaning of concepts.

Suretyship — Prescription — Whether interrupting prescription against surety A will interrupt prescription against debtor — Whether interrupting prescription against surety A will interrupt it against surety B — Prescription Act 68 of 1969, s 11.

Company E contracted with company L to procure third parties to contract with L for L's financial products. Under E and L's agreement, E would receive commission from L on premiums the contracting third parties paid to L on those products (see [2]).

L advanced commissions to E in respect of premiums which had not yet been paid to it by the third-party contractants, and some of those contracts were cancelled on account of non-payment of premiums, leaving E owing moneys to L (see [4] and [5]).

In this respect, respondent, one September, and several other individuals, had bound themselves to L as sureties and co-principal debtors in solidum, for any moneys E might come to owe L (see [3]).

Ultimately, L cancelled its agreement with E, ceded its claims to the moneys to appellant, and appellant issued summons against all the sureties for repayment of the amount owed. However appellant apparently only served summons on Mr September, who it came to receive default judgment against (see [6]).
Then, about five years after its issue, respondent's summons was served on respondent, who raised a plea of prescription (see [7]). In replication, appellant asserted that the effect of respondent and September and the other sureties denoting themselves as sureties and co-principal debtors in solidum, was to make them co-debtors, and accordingly, as with the position under our law, interruption of prescription against one co-debtor had interrupted prescription against the other co-debtors, including respondent (see [8] and [21]).
The High Court however rejected the contention and upheld the plea but granted leave to appellant to appeal to the Supreme Court of Appeal (see [1]).
It likewise rejected appellant's contention, holding that the effect of a surety binding himself as a co-principal debtor, was merely to renounce the surety's benefits as against the creditor (excussion etc), but not to change the nature of the surety's obligation from that of a surety to that of a co-debtor (contra to certain academic opinion) (see [13] – [14], [16], [18] and [20]).
Appellant raised a further argument. It was based on the Roman-Dutch position that a creditor's interruption of prescription against a debtor also interrupted prescription against the debtor's surety (see [21]). Applicant proposed extending this to the converse situation, such that interrupting prescription against the surety should interrupt it against the debtor and then, further, that interrupting prescription against one surety should interrupt it against any other sureties (service on Mr September accordingly interrupting prescription against respondent) (see [22]).
The Supreme Court of Appeal rejected this argument, noting that the Roman-Dutch writers were ad idem that the converse position should not apply (see [23]). It accordingly dismissed the appeal (see [24]).

SA EXPRESS LTD v BAGPORT (PTY) LTD 2020 (5) SA 404 (SCA)

Appeal — Late noting of — Condonation — When granted — Attorney breaching court rules in flagrant and continual fashion — Failing to seek qualified assistance — Negligence inexcusable — No condonation — Matter struck from roll.

State — Finance — Procurement — State-owned enterprise relying on PFMA to escape settlement agreement in which it undertook to pay service provider — Not what PFMA is for — Not applying to acknowledgement of already existing indebtedness — Public Finance Management Act 1 of 1999.

The respondent sued the appellant out of the Johannesburg High Court for R4,7 million for the provision of baggage wrapping services at various airports. In response to an application for summary judgment, and without opposing it, the appellant proposed a settlement of the dispute in which it undertook to pay the amount to the respondent. The agreement was forwarded to the respondent by the appellant's chief procurement officer before being signed on behalf of the appellant by its payroll/human resources manager, and on behalf of the appellant by its CEO. It was clear that, apart from the appellant's CEO, its chief procurement officer and its chief financial officer were also aware of the agreement, and the chief procurement officer co-signed an expense authorisation form together with the CEO, and the chief financial officer wrote to the respondent undertaking to pay in terms of the settlement

agreement. When the appellant nevertheless failed to pay, the respondent applied for the agreement to be made an order of court. The court duly made it an order as sought for by the respondent, directing the appellant to pay the amount together with interest and costs on an attorney and client scale. More than two months later the appellant applied for leave to appeal after the respondent had attached one of its aircraft. The court granted leave to appeal. There were two issues for decision on appeal: (i) whether, given that the appellant's appeal had lapsed, condonation ought to be granted to it for its delay in prosecuting the appeal, so that it could be reinstated; and (ii) whether the appellant had established that the settlement agreement was unenforceable.

The prosecution of the appeal was beset by numerous delays which the appellant's attorney attempted to lay the blame for at the door of his correspondent. The court was of the view that the attorney had himself appointed the correspondent and could not escape the consequences of his agent's negligence. The primary obligation to produce a proper record and file it timeously lay with him. It must furthermore have been clear to him from an early stage that his correspondent was as out of his depth as he was, yet he continued to rely on the correspondent's advice. The attorney's negligence lay in the fact that he did not acquaint himself with the rules of the court; did not have even the most rudimentary understanding of what had to be done; had relied on the correspondent who also proved himself to be unqualified to do the work; and steadfastly failed or refused, until it was too late, to engage the services of people who knew what to do and could do the job.

The conclusion was inescapable that the attorney was grossly negligent throughout. The attorney's explanation was not reasonable and all that it did was to establish his negligence. The present case was the type of case in which condonation should be refused irrespective of the prospects of success and irrespective of the fact that the blame lay solely with the attorney: the breaches of the rules had been flagrant and continual. The court nonetheless decided to deal with the prospects of success. (See [39], [43] – [44].)

In respect of the merits, the appellant alleged that the settlement agreement was invalid for two reasons: firstly, that its CEO at the time had shown a 'flagrant disregard for internal processes as envisaged in both the Contract Compliance and expense authorisation forms'; and, secondly, that s 38(2) and s 68 of the Public Finance Management Act 1 of 1999 (the PFMA) was not complied with. The court held, however, that there had been no attempt to impugn the settlement agreement before, and nowhere in the papers was it even remotely suggested that the settlement agreement was induced by misrepresentation, fraud, duress, undue influence, mistake or anything similar. Furthermore, the argument lacked a factual foundation, and on the basis of the *Plascon-Evans* rule, the respondent's version had to prevail. (See [47].)

As to the applicability of the PFMA: if the Act applied at all, it applied to the conclusion of the baggage wrapping service and not to an 'acknowledgement of an already existing indebtedness'. It was not suggested that when the respondent concluded the settlement agreement it was not dealing in good faith with the appellant and there had likewise been no suggestion that it knew or ought reasonably to have known that two forms had not been completed. In these circumstances s 20(7) of the Companies Act applied to prevent the appellant from relying on its failure to comply with its own internal procedures. (See [49], [54].)

Application for condonation and for the reinstatement of the appeal accordingly dismissed, and the matter struck from the roll (see [57]).

HLUMISA INVESTMENT HOLDINGS RF LTD AND ANOTHER v KIRKINIS AND OTHERS 2020 (5) SA 419 (SCA)

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action against directors and auditors for compensation for share value loss due to alleged mismanagement of company — Company proper plaintiff in both claims — Claim against directors contrary to (entrenched) 'no reflective loss' rule — Not saved by exception to rule — Claim against auditors not meeting wrongfulness requirement — Exceptions correctly upheld in court a quo — Companies Act 71 of 2008, s 218(2).

Accountant — Auditor — Claim by shareholders against company's auditors for share value loss — Auditors not accountable to individual shareholders for negligent misstatements concerning company's financial statements — Duty owed to company — Claim one for pure economic loss — In absence of element of wrongfulness, no claim established — Auditing Profession Act 26 of 2005, s 46, not founding claim where none existed before

When company A with subsidiary B suffered a dramatic collapse in its share price, minority shareholders (the appellants) sued A and B's directors (the first to tenth respondents) and B's auditors (the eleventh respondent) for damages, alleging (i) mismanagement of both companies by their directors; and (ii) failure by the auditors to adhere to auditing standards in their presentation of B's 2012 and 2013 annual financial statements, which hid losses. The appellants sought R721 million from the directors and R1,3 billion from auditors Deloitte.
The principal issue was whether s 218(2) of the Companies Act 71 of 2008 permitted the shareholders' claim, in their capacity as individual shareholders in A, against the directors for their contravention of various other sections of the Companies Act. This in turn raised the applicability of the rule against recovery of reflective loss (the 'reflective loss rule'), which prevents shareholders from bringing claims where their loss merely reflects that of the company, the 'proper plaintiff' in such cases (see [21]). † With the auditors the issue was whether they owed the shareholders, individually, legal duties not to have made misrepresentation in B's financial statements and to have qualified the audit (see [23]).
The Pretoria High Court ruled shareholders' claims excipiable for their contravention of the 'no reflective loss' and 'proper plaintiff' rules, which were not abrogated by s 218(2). The judge pointed out that while shareholders benefited from limited liability, they were excluded from the benefit of claims accruing to the company, and that if s 218(2) had the breadth ascribed to it by the shareholders, it would be a radical departure from the reflective loss rule, a core principle of company law, and that there was no indication that the legislature intended to alter it via s 281(2). The court held that B, not the shareholders, was the proper plaintiff in a claim against Deloitte.
On appeal to the Supreme Court of Appeal the appellants argued that s 218(2), which provided that '(a)ny 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', provided a general remedy to anyone, enabling their claim against the directors. They also argued that they were entitled to rely on s 218(2), read with s 30(2)*(a)* of the Companies Act, to found liability on the part of the auditors.
Held

The rule against claims for reflective damages was an established one, having been recognised by our courts both before and after the promulgation of the 2008 Companies Act (see [37]). Here the basis of the shareholders' claim was the wrong done to A, and while A itself had a common-law claim against the directors, that same claim precluded a personal claim by the shareholders (see [38]). There was no independent cause of action, as argued by the shareholders, nor did it fall into one of the recognised exceptions to the rule. The shareholders gave no reason why it would be unjust to deny their claim or why allowing it would not do violence to the sound policy reasons for the retention of the rule, including a multiplicity of claims by aggrieved shareholders (see [39]).
Section 218(2) of the Companies Act did not save the day for the shareholders. The Act defined a company as a distinct juristic person, and property vesting in it did not vest in its members, which was the basis for the rule against the claim for reflective loss (see [42]). The legislature must be taken to have been aware of the need to retain these common-law principles, which were applied under preceding legislation and were consonant with constitutional values and international company law (see [43]). Also relevant was the presumption that statutes did not intend to alter the common law unless they did so expressly or by necessary implication (see [44]).
The duties owed by directors were owed to the company, not individual shareholders, and under s 77(2)*(b)* they were liable 'in accordance with the principles of the common law' (see [48]). The legislature had preserved common-law principles, which made for a harmonious blend (see [50]). It was therefore clear that the rule against claims for reflective loss were not expressly or by necessary implication abolished by s 218(2) (see 52]).
It followed that the essential findings of the High Court could not be faulted, and that the exceptions were correctly upheld (see [54]).
The shareholders' claim against Deloitte was based on a cascade of reflective losses. The primary loss was B's, A's was in the second degree, and that of the shareholders in the third (see [56]). Besides, their claim was one for the recovery of pure economic loss, which the law was reluctant to entertain (see [58]). When auditors made negligent misstatements about companies' financial statements, individual shareholders did not have claims against the auditors because auditors were accountable to shareholders collectively, as a body, ie as the company (see [67]). Moreover, imposing a legal duty on auditors in a case such as the present raised the spectre of indeterminate liability, which disqualified the shareholders' claim (see [68] – [69]). And their reliance on s 46(3) of the Auditing Profession Act 26 of 2005 — 'liability to third parties' — did not found a claim where none existed before (see [72]). The duty of the auditors was owed primarily to the company and in the circumstances liability by Deloitte to shareholders was untenable.

NATIVA (PTY) LTD v AUSTELL LABORATORIES (PTY) LTD 2020 (5) SA 452 (SCA)

Competition — Unlawful competition — Injurious falsehood — Publication concerning competitor — Application for interim interdict to supress publication of injurious falsehood concerning safety of applicant's product — No fault required — Prompt relief against unlawful competition of this sort warranted — Interim interdict pending claim for damages granted.

The appellant marketed a brand of joint-care supplements, OsteoEze, among them OsteoEze Gold. They all contained glucosamine and chondroitin. The appellant sought an interim interdict in the High Court to restrain the respondent from utilising or broadcasting an advertisement which warned that said ingredients posed a health risk to persons with high blood pressure, diabetes and asthma, and to restrain it from competing unlawfully with the appellant by making false and defamatory statements regarding its products or the ingredients, pending the outcome of an action to be instituted against the respondent for unlawful competition.

The advertisement in question promoted the respondent's own joint supplement, Piascledine, which did not contain glucosamine and chondroitin, and stated that its product was the 'only clinically proven osteoarthritis treatment . . . safe to use with other medicine'. The advertisement showed the OsteoEze Gold product, but after complaint by the appellant, it blurred out the picture of the OsteoEze products so that they were less distinct (the altered ad). Save for the blurring, the two ads were the same, the altered ad repeating the warning that the OsteoEze ingredients were a health risk to persons with high blood pressure, diabetes and asthma.

The High Court dismissed the application, ruling that the appellant had failed to show that it had a prima facie right worthy of protection. The court found that a comparison of the two advertisements revealed that the appellant's product was 'not clearly and readily identifiable'; that no direct or indirect reference to the appellant's product could be deduced from the altered advertisement; that the expert opinion on the disadvantages of using products containing glucosamine and chondroitin by patients suffering from high blood pressure, diabetes or asthma was inconclusive; and that it was not possible on the papers to attribute any disparaging comments to the respondent regarding the appellant's product.

In an appeal to the SCA the only issue was whether the appellant had made out a case for an interim interdict based on unlawful competition.

Held
Taken together, the thrust of the advertisements — that the OsteoEze ingredients were harmful — was false, as showed by the evidence. The evidence also showed that the respondent had succeeded in influencing members of the public to buy Piascledine instead of OsteoEze. It was obvious that the respondent withdrew the initial advertisement because it realised that it was competing unlawfully. Its claim that it had acted 'without admission of wrongdoing' rang hollow. It was, moreover, extremely unlikely that reasonable viewers would have noticed the difference between the two advertisements, it being more probable that they would associate both advertisements with the appellant's product. (See [21] – [23].)
Apart from failing to produce any countervailing medical evidence, the statement in the answering affidavit — that glucosamine and chondroitin could affect blood pressure, diabetes and asthma — was 'true and capable of being substantiated' — was insupportable on the facts. (See [32].)

Fault was not a requirement for an interdict based on injurious falsehood: it was sufficient if the representation was false. The requirements for the grant of an interim interdict had been satisfied and the appellant had already suffered harm in that both advertisements, containing false, misleading and disparaging remarks concerning its

product, had already been broadcast, and the flighting of the altered advertisement was likely to continue. The envisaged claim for damages was likely to take some time before it was finalised, and the balance of convenience accordingly favoured the appellant, whereas an interim interdict would not hinder the respondent in the pursuit of its business interests. (See [33] – [34].) The appeal would accordingly be upheld.

FOURIEFISMER INC AND OTHERS v ROAD ACCIDENT FUND AND RELATED MATTERS 2020 (5) SA 465 (GP)

Motor vehicle accident — Road Accident Fund — Decision to cancel tender with its panel of attorneys — Decision unlawful and irrational — Set aside on review — Court freezing status quo for six months to protect public's constitutional rights — RAF ordered to fulfil its obligations to current panel — Constitution, s 172(1)*(b)*, s 217.

Government procurement — Procurement process — Cancellation of tender — Decision of Road Accident Fund to cancel tender with its panel of attorneys ruled unlawful and irrational — Set aside on review — Court freezing status quo for six months to protect public's constitutional rights — RAF ordered to fulfil its obligations to current panel — Constitution, s 172(1)*(b)*, s 217.

The applicants were attorneys' firms appointed in terms of a tender procurement process to a panel that was to provide specialist litigation services to the Road Accident Fund (RAF). The service level agreement (SLA) provided that the appointment would run for five years, until 29 November 2019. At the end of 2018 the RAF published a new tender with a closing date of 28 February 2019. While it was still busy adjudicating the tender, two addendums were made to the SLA, resulting in an extension of the existing contracts to the end of May 2020. The reason for this was that the RAF was considering entirely doing away with panel attorneys. On 25 February 2020 the bid adjudication committee recommended the cancellation of the tender.
Bidders were notified of the cancellation by notifications dated 26 February and 28 February. The existing panel members were directed to comply with the provisions of the amended SLA by handing over their files, together with a status report, opinions on merits and quantum, and their recommendations.
The applicants then launched three separate urgent applications seeking (i) the review and setting-aside of the decisions calling on them to hand over their files; (ii) the setting-aside of the decision to cancel the new tender; (iii)) the setting-aside of the RAF's decision to dispense with the services of the panel attorneys; and (iv) an order directing that they continue to serve the RAF until 30 June 2020 or until it had appointed a panel of attorneys in terms of the new tender or a fresh tender process. They submitted that the impugned decisions were unconstitutional. The matters were argued together, although they were not consolidated.

Held
The panel attorneys were standing in for the RAF in performing a social duty for the state. It was therefore expected of the RAF to perform its obligations in a fair and lawful manner. The extension of the procurement of services, like the initial procurement, had to be in line with s 217 of the Constitution. It was evident that the panel attorneys had had no say whatsoever on the period of time of the extension,

and that the RAF abused its public position and authority over them by threatening to recall its files if they did not agree to the second addendum, which they had not been consulted about before. Neither had the RAF been transparent when it added the second addendum, which had been imposed on the panel attorneys in contravention of s 217 of the Constitution and which was therefore invalid and unlawful. (See [33] – [38].)
Since the RAF's Board had not been consulted on the issuing of the notices before they were issued, nor been aware of it, the dissemination of the notices to the panel attorneys was unauthorised and invalid. (See [51].)
The stated reason for the RAF's cancellation of the panel attorneys' mandate, namely to save legal costs, was contradicted by its concession that it would have to replace them with other attorneys, also funded by it, to perform the same function. Therefore the RAF had failed to demonstrate the rationality of its decisions. (See [74] – [82].)
The present case was an exceptional one. A constitutional crisis that would have a grave effect on claimants loomed. The court was obliged to intervene to protect the public against the implicit threat to their constitutional rights. The status quo had to prevail to allow all parties to reach an amicable, just and equitable solution. It was therefore necessary to retain the status quo for at least six months, which would enable the RAF to reconsider its position and retain the social net that currently protected the public. (See [84] – [86].)

KHOSA AND OTHERS v MINISTER OF DEFENCE AND MILITARY VETERANS AND OTHERS 2020 (5) SA 490 (GP)

State — Duties — Disaster management — Covid-19 lockdown — Enforcement — Declarator — Rights of public — Defence force and police to respect rights, use minimum force, and adhere to prohibition on torture — Code of conduct and operational procedures to be published — Mechanism for reporting torture to be established.

Applicants in this case were, respectively, the mother, life partner and brother-in- law of Mr Collins Khosa (see [34] – [35]). In the course of the lockdown announced in late March 2020, members of the defence force, who were employed to assist the police and municipal police in enforcing the lockdown, entered upon the property where Mr Khosa resided, accused him of violating the lockdown regulations, and ordered him outside (see [24], [28] – [29] and [34]). There they proceeded to assault him. He later died of his injuries (see [34]).
Here applicants sought and were granted a declarator under ss 38 and 172(1)*(b)* of the Constitution, read with s 21(1)*(c)* of the Superior Courts Act 10 of 2013, for inter alia the following (see [67], [74], [76], [79], [80] – [82] and [146])):

- All persons were entitled to the rights to dignity, to life, and not to be tortured or treated in a cruel, inhuman or degrading way.
- The defence force, police and metropolitan police were required to act in accordance with the law, and to respect, protect, promote and fulfil the rights in the Bill of Rights.
- Their members were required to use minimum force by the South African Police Service Act 68 of 1995 read with the Defence Act 42 of 2002, and were bound by the Torture Convention and Prevention and Combating of Torture of Persons Act 13 of 2013.

- The Minister of Defence and Military Veterans, the Secretary for Defence, the Chief of the Defence Force and the Minister of Police were required to suspend the members of the defence force who were at Mr Khosa's place of residence on the night he was assaulted; to command members of their forces to adhere to the prohibition on torture and to apply the minimum force reasonable to enforce the law; and to warn their forces that any failure to report or prevent torture or cruel and inhuman treatment would expose them to individual criminal, civil or disciplinary sanctions.
- The Minister of Defence and Minister of Police were required to publish a code of conduct and operational procedures regulating the conduct of their forces in giving effect to the state of disaster, and to publish in newspapers and other media certain guidelines (on enforcement of the lockdown regulations, social distancing, restriction of movement, when force could be used, when persons could be arrested) and information (where the public could lodge complaints against members of the Ministers' forces).
- The Minister of Defence, the Secretary for Defence, the Chief of the Defence Force, the Minister of Police, the National Commissioner of Police and the Acting Chief of the Johannesburg Metropolitan Police Department were to establish a mechanism for civilians to report allegations of torture or cruel and inhuman treatment by members of their forces during the state of disaster; and were to publicise the existence of the mechanism.
- The Minister of Defence and Minister of Police were to ensure that internal investigations into the treatment of Mr Khosa and other persons whose rights had been infringed were completed, and reports furnished to the court.

The context for the declarator was as follows (see [22]):

- Statements made by the Minister of Defence before Mr Khosa's death concerning the use of force by defence force members on the public (see [37]), and statements after Mr Khosa's death warning the public not to provoke soldiers (see [44] and [46]);
- statements, again before the death of Mr Khosa, by the Minister of Police, about use of force by the police against the public (see [39]), and statements after his death regarding the destruction of property connected with the illegal sale of liquor (see [42]);
- the Torture Convention and the Prevention and Combating of Torture of Persons Act, which obligates the state to inter alia, promote awareness of the prohibition on torture (see [55]);
- provisions of the South African Police Service Act and Criminal Procedure Act 51 of 1977 limiting the use of force by the police and metropolitan police, which the Defence Act applied to members of the Defence Force (see [58] – [59] and [63]);
- provisions of the Defence Act requiring the drafting of a code of conduct and operational procedures for instances when defence force members are employed in co-operation with the police (see [63]), and further provisions requiring such members to be appropriately trained before such employment (see [63]).

Respondents had also objected to certain parts of the declarator that was granted, but these were justified as follows:

- The order that the Minister of Defence, Secretary for Defence, Chief of the Defence Force and Minister of Police command all members of the defence force, police and metropolitan police to adhere to the prohibition on torture and to apply minimum force, and that they warn members that a failure by members, inter alia, to prevent torture would expose them to various sanctions. These orders were

supportable in light of the directive to the soldiers involved in Mr Khosa's death, which was oriented toward military combat (see [88]); and in view of the Minister of Defence and Minister of Police's statements described above (see [88], [92] – [93] and [97]).

- The order that the Minister of Defence and Minister of Police publish a code of conduct and operational procedures regulating members giving effect to the state of disaster. The Defence Act obligated the Minister of Defence to publish such a code, yet she had failed to (see [107] and [116]).
- The order that the Minister of Police and Minister of Defence publish guidelines on the enforcing of the lockdown regulations (see [125] – [126]). This order was justified, given that the existing directives were deficient in respect of police and soldiers' use of force (see [120] – [123] and [125]).
- The order that the Minister of Defence, Secretary for Defence, Chief of the Defence Force, Minister of Police and Acting Chief of the Johannesburg Metropolitan Police Department establish a mechanism for civilians to report torture by members of the Defence Force, police and metropolitan police during the state of disaster. This was appropriate, given the absence of a mechanism capable of effectively investigating lockdown brutality (the Office of the Military Ombud was not independent of the defence ministry, and the Independent Police Investigative Directorate was inadequately funded and staffed) (see [138] – [139] and [141]); in light of the state's obligation under the Torture Convention to promptly and impartially investigate suspected acts of torture (see [131]); and ss 7(2) and 12(1) of the Constitution (see [127] – [128]).

MAKESHIFT 1190 (PTY) LTD v CILLIERS 2020 (5) SA 538 (WCC)

Spoliation — Mandament van spolie — When available — Electricity supply — Owner of farm granting individuals right to occupy building on farm and to use electricity on condition that they paid for it — Contract for supply of electricity to farm between owner and Eskom — Owner cancelling supply of electricity to farm in attempt to force occupiers from building.

Under an agreement, respondent and her family occupied a building on a farm owned by appellant (see [4] and [43]). Further under that agreement, respondent was entitled to use electricity supplied to the farm by Eskom so long as her husband paid the monthly bills (see [8] and [44]). Appellant was the contractant with Eskom for the supply of electricity (see [8]).

Later, and in an attempt to force respondent and her family off the farm, appellant cancelled the electricity contract with Eskom (see [9]). This caused respondent to bring spoliation proceedings in the magistrates' court and to ultimately obtain a final order that appellant restore the electricity supply to the building (see [10] – [11] and [13]).

Here appellant appealed that order (see [1]).
The issue was whether the alleged right to the supply was purely personal, and so not susceptible to spoliatory protection, or an incident of the possession or occupation of the property, and so qualifying for such protection (see [23] – [24], [32], [35] and [38]).

Held, that cases in the first category were where the occupier had separate contracts with a provider of the right of occupation (such as a landlord) and a provider of the service in question (perhaps the power utility) (see [33]); while those in the second category were where the grantor of the right of occupation and the grantor of the right to the service were one and the same (a landlord, for instance) (see [34]). In such a case the landlord's interference with the right to the electrical supply would be an interference with the cluster of rights making up the right of occupation or possession of the premises concerned (see [34] and [38]).

Thus here the matter fell in the second category, in that appellant was the provider of possession of the premises and its adjunct, the right to the electricity supply, with interruption of the supply disturbing possession of the property (see [48] and [50]). Appeal accordingly dismissed (see [63]).

MOHAMED AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2020 (5) SA 553 (GP)

State — Duties — Disaster management — Covid-19 lockdown — Regulations prohibiting 'gatherings', issued under Disaster Management Act in response to Covid-19 pandemic — Validity of state's refusal to craft exemption for Muslim communal prayers at mosque — In spirit of ubuntu, every citizen called upon to make sacrifices to their fundamental constitutional rights — Reasonable and justifiable limitation of rights in context of response to pandemic — Constitution, s 36; Disaster Management Act 57 of 2002, s 27.

On 15 March 2020 a state of disaster was declared in terms of the Disaster Management Act 57 of 2002 in relation to the coronavirus pandemic. This was followed by the promulgation of regulations (the Regulations) enacting a range of measures designed to slow the spread of the virus and 'flatten the curve' (see [36]). Under these, all gatherings (except funerals) were prohibited.

Here the applicants argued that the state's refusal to craft an exemption for Muslim communal prayers at mosque constituted a limitation of their constitutional rights to freedom to practise their religion (s 15(1)) and to do so in communal association with others (s 31). At issue was whether such limitation was reasonable and justifiable (as contemplated in s 36 of the Constitution).

Held

This pandemic posed a serious threat to South Africans and their right to life, dignity, freedom of movement, right to access healthcare and their right to a clean, safe and healthy environment. Having regard to the context in which the Regulations have been imposed, it was important that the value and ideals of ubuntu be considered. For the sake of the greater good — the spirit of ubuntu — every citizen was being called upon to make sacrifices to their fundamental rights entrenched in the Constitution, and in ways impacting on their livelihood, their way of life, their economic security and freedom. Every citizen of this country needed to play their part in stemming the tide of an insidious and relentless pandemic. (See [62] – [63].) If regard was had to the sacrifices that have had to be made, the applicants could not ask for exceptions of the nature sought. There were over 850 mosques in South Africa — the risk of exposure rises with each attendance at mosque; it would be tantamount to opening the floodgates. The restrictions imposed were therefore

neither unreasonable nor unjustifiable — thus the application would fail. (See [65] and [75].)

ONE SOUTH AFRICA MOVEMENT AND ANOTHER v PRESIDENT OF THE RSA AND OTHERS 2020 (5) SA 576 (GP)

State — Duties — Disaster management — Covid-19 lockdown — Government's decision to move from alert level 4 to alert level 3 — Not unconstitutional, unreasonable or irrational — Application to review decision dismissed — Constitution, s 7(2), s 11; Disaster Management Act 57 of 2002, s 27(2), s 27(3).

Education — Covid-19 schools closure — Phased reopening of schools — Government's decision to selectively reopen schools — Decision giving effect to right to basic education — Government having taken proper account of safety and health of children and of interests of broader school community — Risk moderated by extensive mitigating measures — Decision passing constitutional muster — Application for review dismissed.

These applications — made against the backdrop of the Covid-19 pandemic, the declaration of a national state of disaster on 15 March 2020 and the subsequent imposition of a countrywide lockdown — involved challenges to aspects of the government's response. The applicants alleged that they violated or imperilled fundamental rights, contrary to the government's obligation under s 7(2) of the Constitution to instead 'respect, protect, promote and fulfil' them.
Specifically, the applicants accused the government, as represented by the four respondents, † of not doing enough to protect lives when it eased the lockdown restrictions from alert level 4 to alert level 3 (the 'broad challenge'). The applicants argued that the government's conduct was irrational, unlawful and unconstitutional, and sought a reversion to level 4 and the setting-aside of regulations made following the movement from level 4 to level 3 (see [50] and [66] for an explanation of the various levels).

In what was labelled the 'narrow challenge', the applicants wanted to prevent the government from reopening public schools for grades 7 and 12 from 1 June 2020 until certain conditions were met, and sought a structural interdict in this regard. The applicants argued that measures contained in the proposed structural interdict were necessary to offset the risks to learners' human rights.

The applicants argued that government's decisions were unconstitutional because they violated or threatened fundamental rights (principally the right to life in s 11 of the Constitution) and were contrary to the principle of legality or else irrational (the legality/rationality challenge). The latter challenge hinged on s 27 of the Disaster Management Act 57 of 2002 (DMA) — 'Declaration of a national state of disaster', which in s 27(3) sets out the purposes for which disaster-management regulations and directions issued under s 27(2) may be made. The applicants argued that the infringement on constitutional rights could never be justified under s 36 of the Constitution because the right to life and dignity could not be superseded by the government's desire to reopen the economy.

Finally, the applicants argued that the government's decision to open schools in a staggered fashion was irrational and would result in racial or social inequality. Schools should therefore open simultaneously.

Held

As to the 'broad challenge' (the move to level 3): The pandemic implicated several competing fundamental rights of equal value: the right of access to health services for all; the right to freedom of movement; the right to dignity; the right to free choice of one's occupation; and the right to property (see [90]). Therefore, the applicants had to do more than to state simply that the decision to move from level 4 to level 3 breached the right to life. They had to show why, when measured against other implicated and equally compelling fundamental rights, the government's Covid-19 response in moving to level 3 violated its constitutional obligations under the Bill of Rights. It was untenable for the applicants to rely instead on a generalised statement to this effect (see [92]).

It was obvious from the government's response to the crisis that it was alive to the complex choices that had to be made, and the rights implicated (see [93]). It was implicit in measures adopted by the government that it took into account not only the health and lives of those threatened by the virus but also their impact on other fundamental rights such as the right to dignity and the right to earn a living (see [97]). The easing to level 3 was necessary to safeguard against a potential economic catastrophe. To label this move as putting profit before lives, as the applicants did, was to ignore the complexities of the issues involved (see [98]). The applicants failed to show that the government's decision to move to level 3 violated its constitutional duty to protect the lives and health of the populace (see [101]).

Another reason why the applicants should fail was that the government's decision to ease the lockdown was a polycentric and policy-laden one (see [87], [102]). There was a range of options open to the government to balance the need to safeguard life and health with the need to protect the economy, and its decision to go to level 3 was not unreasonable or irrational, particularly given the range of protective measures that remained in place and the option to revert to a higher level if required (see [105]).

The need to reopen the economy was an important government purpose and the limitation on the right to life attendant on the move to level 3 was mitigated by the measures taken to ensure that the threat to life was no more than what was required by the need to open the economy. (See [106], [109].)

There was therefore no merit in the applicants' challenge to the constitutionality of the decision to move to level 3 based on the violation of rights issue (see [111]). And since the reopening of the economy was necessary to achieve the purposes listed under s 27(3) of the DMA, there was no merit in the applicants' legality/rationality challenge based on s 27 of the DMA (see [118] – [120]).

As to the 'narrow challenge' (the reopening of the schools): The government's plans for the reopening were detailed and well considered, and took into account the safety and health of the broader school community (see [148]). The applicants' assumption that because the children and other members of the broader community

would be exposed to the virus by returning to school, the reopening contravened the protection requirement of s 27(3)*(a)* of the DMA, failed to take into account that returning served a range of needs and thus protected and assisted their interests (see 153]). The evidence compellingly showed that the right to life served as a departure point for the decision to reopen (see [163]). In addition, the court was not persuaded that the government (through the fourth respondent) was required to devise additional implementation plans in order to fulfil its duties under s 7(2) of the Constitution, and the implementation issue did not provide a basis for finding that the fourth respondent failed in said duties. (See [171], [173].)

While the right to life was implicated in the reopening of the schools, the evidence indicated that the risk to children was low and that even if infected, children seldom contracted serious illness, while the risk to other members of the school community was inevitable, regardless of measures adopted by the government (see [177]). The decision to reopen schools also gave effect to the right to basic education, besides others like the right to dignity (see [178]). The risk involved was, moreover, substantially moderated by the extensive set of mitigatory plans and measures devised by the government. There was therefore a clear connection between the limitation and its purpose (see [179]).

The government had a stark choice: open schools or accept that most learners would not be educated for as long as they remained shut. The reopening of schools could not be avoided. The extensive mitigating measures put in place showed that the least restrictive means to achieve this were used. The limitation was therefore reasonable and justifiable. (See [180] – [181].)

The contention that the fourth respondent had acted in breach of s 7(2) and that her decision would result in the infringement of the fundamental rights of children, was not sustainable, which meant that the declaratory relief would be refused (see [182]). The requested supervisory relief would also be refused, since (i) granting it would undermine the principle of separation of powers and (ii) it appeared from the government's plans that adequate provision was made for their implementation (see [194] – [195]).

As to simultaneous reopening: There was no evidence to support the applicants' argument that affluent schools would invariably be ready to reopen earlier than poorer schools, with the result that the basis for the relief was, at the very least, questionable. Since the government's objective was to link the reopening to the readiness of each school, staggered reopening was not irrational. Requiring simultaneous reopening would only achieve parity of exclusion and unnecessarily delay the fulfilment of the right to education. (See [198], [200].)

RAND WEST CITY LOCAL MUNICIPALITY v QUILL ASSOCIATES (PTY) LTD AND OTHERS 2020 (5) SA 626 (GP)

Revenue — Value-added tax — Supply — What constitutes — Surrender of contractual rights when replaced by court order — Constituting supply where order obtained in course of furthering vendor's enterprise or normal business activities — Value-added Tax Act 89 of 1991, s 1 sv 'supply', and s 7(1)*(a)*.

The first respondent (Quill) had successfully sued the applicant (the Municipality) for outstanding royalties, the court ordering payment of the outstanding amounts together with, inter alia, value-added tax (VAT) 'if aplicable'. The municipality effected payment but Quill had a writ of execution issued in respect of VAT and other amounts it claimed were owing. This attachment triggered the present application, to have the writ and the notice of attachment set aside.
One of the issues was whether VAT was payable on the amount the court awarded.

Held
The starting point in determining liability for VAT was whether it qualified as 'a supply of goods or services' against which VAT could be levied, as charged by s 7(1)*(a)* of the Value-added Tax Act 89 of 1991. In *Stellenbosch Farmers' Winery Ltd* the Supreme Court of Appeal confirmed that the surrender of a contractual right constituted the supply of services in the course of an enterprise by the taxpayer. There was no reason to confine liability for VAT to instances where a contractual right was surrendered for an amount agreed upon by way of compromise, and not to extend such liability to instances where the amount was determined by way of a judgment or by way of an award by an arbitrator.
Quill's contractual rights were surrendered and replaced by the award, which occurred in the course of the furtherance of its enterprise or normal business activities. Quill would therefore be liable for VAT, and VAT would be payable by the Municipality on the amount that was awarded by the court. (See [39] – [40] and [50].)

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DIRECTOR OF PUBLIC PROSECUTIONS, LIMPOPO v MOLOPE AND ANOTHER 2020 (2) SACR 343 (SCA)

Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Requirements for — Factual basis to be set out in record — Trial court not framing question of law in judgment and state not setting out facts in application but merely summarising evidence without analysing it — Requirements of s 319 not complied with.
Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Provisions of s 319 peremptory.

The two respondents were arraigned in the High Court on two counts of kidnapping and two counts of murder arising from a series of incidents in which certain members of a community believed that the two deceased had been responsible for a spate of robberies. The state relied on the respondents having acted with others in furtherance of a common purpose in respect of the charges of murder. The trial court found material contradictions in the state's case and discharged the respondents on the two main charges of kidnapping and murder, despite having found that there was 'sufficient evidence upon which a court may convict on the alternative verdict of assault with intent to do grievous bodily harm against both respondents'. It then convicted the respondents of assault with intent to do grievous bodily harm after the respondents closed their case and elected not to testify. When sentencing the respondents, the trial judge stated that the deceased had been subjected to the assaults 'for a very long time' and that the respondents had initiated the mob justice

that culminated in the two deceased losing their lives. The state applied to the trial court to reserve a question of law which was stated to be: 'At the close of the state case, did the evidence of [the two witnesses] constitute a prima facie case against the respondents on all counts?' The judge was satisfied that the question posed raised a question of law as envisaged in s 319 of the Criminal Procedure Act 51 of 1977 (the Act) and granted leave to proceed to the Supreme Court of Appeal.
Held, per Saldulker JA, Dlodlo JA concurring, that the provisions of s 319 of the Act were peremptory and required strict compliance as their purpose was to limit appeals by the state. (See [39].)

Held, further, that it was clear that none of the requirements of s 319 had been complied with by both the state and the trial court. The trial court had not framed a question of law in its judgment for the consideration of the Supreme Court of Appeal, nor had it recorded the factual findings on which the purported point of law was dependent. There had to be certainty, not only on the factual issues on which the point of law was based, but also regarding the point of law that was at issue in the trial. Regrettably, the point of law was not readily apparent from the record and therefore it could not be said to have arisen 'on the trial' of a person. (See [44.)

Held, further, that there were serious shortcomings in the state's application which were insurmountable. An examination of the application pertinently illustrated that the facts upon which the point of law was said to hinge were not set out in its application and the state had merely summarised the evidence of the witnesses without analysing the facts. (See [45].) In the circumstances the appeal had to fail.
Held, per Cachalia JA dissenting, that the state had formulated its question inelegantly, but the judge did understand that it was properly raising a point of law and not merely a factual issue disguised as a point of law. There was also no doubt that the question raised by the state required an inquiry into whether the proven facts fell within the ambit of the two main offences which, quintessentially, raised a point of law. The reservation of the point of law should accordingly have been upheld and the order of the trial court discharging the respondents set aside, and the matter remitted to the High Court for retrial on the murder and kidnapping charges. (See [36].)

HANS v DISTRICT COURT MAGISTRATE, CAPE TOWN AND OTHERS 2020 (2) SACR 362 (WCC)

Bail — Application for — Prosecution — Conduct of — Prosecutor obstructing attempts to requisition accused from prison for bail application necessitating application to High Court — Such obstruction amounting to abuse of authority — Warranting costs order against Director of Public Prosecutions.
Bail — Application for — Presiding officer — Conduct of — Postponement of application for period longer than that prescribed by s 50(6)*(d)* of Criminal Procedure Act 51 of 1977 — Mere fact that legal representative had agreed to lengthier postponement not entitling magistrate to postpone matter for longer period.

The applicant was arrested and made his first appearance before the magistrate of Cape Town on Monday 7 October 2019, when the prosecutor submitted that he was charged with an offence under sch 6 to the Criminal Procedure Act 51 of 1977 (the Act) and that the state was opposed to his being granted bail. By agreement

between the prosecutor and his legal representative, the matter was postponed for a formal bail application to 12 November 2019.

When the applicant changed lawyers, he was made aware that the postponement was in contravention of s 50(6)*(d)* of the Act. His present lawyers then approached the senior magistrate responsible for the criminal court on 23 October 2019, when it was agreed that they should have the accused requisitioned for a new date to be determined for the bail hearing. On the following day, the lawyers made attempts to requisition the applicant for a court appearance the next day, but the prosecutors refused to requisition him. The applicant's lawyers then made a written request to the prosecutors to requisition the applicant for 28 October so that a new bail application could be set for hearing within that week. In the request they indicated that, should the requisition not be confirmed, they would bring an urgent application to the High Court, which they did when no confirmation was forthcoming. They applied for a rule nisi calling on the respondents (including the Minister for Justice and Constitutional Development and the Director of Public Prosecutions) to show cause on 1 November why the magistrate's decision to postpone the bail application to 12 November should not be reviewed and set aside, and why the respondents should not be directed to take necessary steps to ensure that the bail application was heard before the return date of the rule nisi, failing which the applicant should be released from custody and warned to appear on 12 November. The application also sought costs against the respondents. The applicant was requisitioned for 31 October but no arrangements were made for the docket or the investigating officer to be at court on that day. The prosecutor was not ready to present the state's case and the matter was postponed to 6 November. In the meantime, on 1 November the court directed the respondents to ensure that the bail application was heard on 4 November and the rule nisi was extended to 5 November. On 4 November the investigating officer was only available at 10h00, at which time it appeared that the applicant had not been brought to court from prison. He was eventually brought to court at 13h00. The matter, however, could only be attended to at 15h00 and was rolled over to the following day for argument, and to 6 November for judgment. The bail application was finalised on that day. On the extended return day, the only issue that remained was that of liability for costs.

Held, that it was not proper for the magistrate to postpone the initial bail application merely because of the agreement between the parties. The statutory prerequisite for postponement proceedings was the magistrate's opinion that she had insufficient information or evidence to reach a decision on the bail application. It was not possible to conclude that the magistrate acted mala fide or for an ulterior motive, but the period of postponement remained shockingly inappropriate. (See [14].)
Held, further, that the refusal of the prosecutors to assist the applicant's lawyers to get him back to court and the matter enrolled for a bail application was unlawful. The applicant was denied an opportunity to bring his bail application within the time limits prescribed by law, to which, but for their conduct, he was entitled. (See [16] – [17].)
Held, further, that the matter was a classic demonstration of the abuse of authority by officers of the court, which happened within the court building. The conduct of the prosecutors adversely affected those who were vulnerable and who depended on the very officers and those courts to protect, defend and advance their rights. The peculiar circumstances of the case warranted a costs order against the Director of Public Prosecutions. (See [24] and [27].)

S v VAN DER WALT 2020 (2) SACR 371 (CC)
Culpable homicide — Sentence — Medical practitioner convicted of culpable homicide arising from medical negligence — Practitioners not entitled to receive special treatment by virtue of their profession.
Evidence — Admissibility — When issue of admissibility to be determined — Magistrate only deciding on issue in judgment — Accused ambushed by late pronouncement and may have affected decision whether to close case without tendering evidence — Irregularity vitiating trial in constitutionally impermissible manner.
Evidence — Expert evidence — Reliance on textbook evidence — Magistrate relying on textbook evidence not produced in evidence during trial — Irregularity vitiating trial in constitutionally impermissible manner.

The applicant, an obstetrician and gynaecologist, was convicted in a regional court of culpable homicide, in that he had acted negligently in the care of a patient after she had given birth, and that this negligence caused her death. He was sentenced to five years' imprisonment. He unsuccessfully appealed to the High Court against his conviction and sentence, and the Supreme Court of Appeal refused special leave to appeal.

In the present application, the applicant sought leave to appeal against the conviction and sentence on the basis that the regional court had handled the trial in a manner that had infringed his fair-trial rights and that the sentence was shockingly inappropriate and an infringement of s 12(1)*(a)* of the Constitution. He contended that the magistrate had decided the admissibility of various pieces of evidence for the first time in her judgment on conviction, which meant that, when he elected not to testify, he had done so without knowing the full ambit of the case against him. The state's evidence at the trial comprised the evidence of three witnesses and a number of exhibits. The applicant assumed that each exhibit, with the exception of those whose admissibility he contested, was admitted in evidence as it was handed up, but in her judgment the regional magistrate admitted some exhibits, but not others. The crux of the applicant's complaint was that the non-admission of some of the exhibits meant that the evidence elicited through cross-examination of them was also rejected. He contended further that the regional magistrate had conducted her own research and had relied on medical textbooks not referred to in testimony. He had thereby been denied an opportunity to challenge the textbooks and produce contributing evidence. In respect of the sentence imposed on him, he contended that doctors convicted of culpable homicide arising from professional negligence were not to be treated in the same way, for example, as a driver whose negligent driving resulted in someone's death, because doctors played a special role of providing access to healthcare services.

Held, that the court would not ordinarily entertain an appeal on sentence merely because there was an irregularity; there also had to be a failure of justice.
The contention that doctors had to receive special penal treatment, lest s 12(1) of the Constitution be infringed, was without basis. The leave to appeal against sentence accordingly had to fail. (See [18] – [20]).

Held, further, that there was no question that the applicant had been ambushed by the late pronouncement on the admissibility of the exhibits. The admission and rejection of evidence at the right time may influence the decision whether to close one's case without tendering evidence. The applicant's fair-trial right was violated by the pronouncement on the admissibility of exhibits at the stage of deciding his guilt and this constituted an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner. (See [27] – [30].)

Held, further, in respect of the reliance on unproved medical literature, the applicant had been denied the opportunity of challenging the textbook evidence and, if so minded, to adduce controverting evidence. The right to challenge evidence required that the accused had to know what evidence was properly before the court. In the applicant's case, the medical literature relied upon was never adduced at all and this went to the heart of a fair trial and also constituted an irregularity that vitiated the trial in a constitutionally impermissible manner. (See [33] – [34].) The appeal had to be upheld and the conviction and sentence accordingly had to be set aside.

S v MTHOMBENI 2020 (2) SACR 384 (KZP)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Multiple rape as contemplated in item *(a)*(i) of part I of sch 2 to Act — Immaterial, for purposes of sentencing one of persons who raped victim, whether co-perpetrator had been convicted, and such not jurisdictional prerequisite for imposition of sentence of life imprisonment.

The appellant pleaded guilty in a regional magistrates' court to robbery with aggravating circumstances and rape. He was sentenced to 15 years' imprisonment in respect of the robbery conviction and to life imprisonment in respect of the rape conviction. He appealed against the sentence imposed. He was convicted on the basis of a statement in terms of s 112 of the Criminal Procedure Act 51 of 1977, and, after questioning by the court on the rape of the complainant by his companion, he stated that his companion had raped the complainant after him. He was sentenced on the basis that the minimum-sentence legislation applied to both counts, the rape charge falling within part I of sch 2 to the Criminal Law Amendment Act 105 of 1997 (the Act). This after the magistrate found that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentence. His counsel contended that the court was bound by the decision of the Supreme Court of Appeal in *Mahlase* and that the court was obliged to reduce the sentence of life imprisonment on the rape conviction to one of 15 years' imprisonment.

Held, that in respect of a multiple rape as contemplated in item *(a)*(i) of part I of sch 2 to the Act, it was immaterial, for the purposes of sentencing one of the persons who raped the victim, whether a co-perpetrator had been convicted, and this was not a jurisdictional prerequisite for the imposition of the sentence of life imprisonment. Since the victim in the present matter had admittedly been raped by more than one person, including the appellant, the offence of rape of which he was convicted fell within the ambit of item *(a)*(i) of part I of sch 2, and the court a quo was not precluded from imposing a sentence of life imprisonment. Although the present

matter was not concerned with a common-purpose situation as was the case in *Mahlase*, the interpretation of the minimum-sentence legislation in *Mahlase* was not consistent with the rights contained in the Bill of Rights and the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms. (See [38].) The appeal was accordingly dismissed.

S v KHANYE 2020 (2) SACR 399 (GJ)

Rape — Sentence — Life imprisonment — Criminal Law Amendment Act 105 of 1997 — Victim raped repeatedly over period of five hours by appellant and two other men who were not before court and had not been convicted of offence — Section 51(1) read with part I of sch 2, properly construed, did not mean that more than one person had to be convicted to trigger provisions thereof — Sentence of life imprisonment confirmed.

The appellant was convicted in a regional magistrates' court on counts of kidnapping, assault with intent to do grievous bodily harm, and rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The count of rape alleged that the appellant and two other men (not before the court and who had not already been convicted) had raped the complainant repeatedly over a period of approximately five hours. The appellant was sentenced to terms of imprisonment on the first two counts and to life imprisonment on the third count. Although the original appeal was against sentence only, the parties ultimately argued the appeal on both conviction and sentence. The court dismissed the appeal against the conviction and proceeded to consider the proper approach of the court to the imposition of sentence on the rape count, given the provisions of s 51 read with part 1 of sch 2 to the Criminal Law Amendment Act 105 of 1997 (applicable to rape committed in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or by more than one person where such persons acted in execution of a common purpose or conspiracy). The appellant contended that the court had misdirected itself in imposing the life sentence, on the grounds that the co-perpetrators were not before the court and had not yet been convicted of rape.

Held, that, properly construed, s 51(1) read with part 1 of sch 2 did not mean that more than one person had to be convicted to trigger its provisions. Further, the circumstances of the commission of the rape in the instant case were so ghastly that they would in any event justify a life sentence. The appeal against the sentence for rape accordingly had to be dismissed. (See [30] and [34].)

S v MAKHETHA 2020 (2) SACR 410 (FB)

Sentence — Suspended sentence — Conditions of suspension — Framing of — Sentence suspended on condition that accused not again convicted of contravening same Act rather than specific offence of which convicted — Condition too wide and failing requirements of precision and reasonableness.

In a matter that came before the court on special review the accused pleaded guilty to and was convicted of a contravention of s 49(1)*(a)* of the Immigration Act 13 of

2002. He was sentenced to a fine with the alternative of imprisonment, half of which was suspended on condition he was not again convicted of contravening the Immigration Act.
Held, that the condition of suspension was too wide and failed to meet the requirements of precision and reasonableness. In the circumstances the condition of suspension had to be changed to provide that the accused was not to be convicted again of contravening the same provision, namely s 49(1)*(a)* of the Immigration Act, committed during the three-year period of suspension. (See [6] – [8].)

S v JN 2020 (2) SACR 412 (FB)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Rape of minor — Accused 71 years of age and first offender displaying remorse by pleading guilty — Sentence of life imprisonment set aside on appeal and replaced with 10 years' imprisonment.

The appellant was convicted in a regional court of having raped a 9-year-old girl and was sentenced to life imprisonment. The evidence was that he had come home drunk and had seen the complainant playing with other kids in the street. He lured her to his house by sending her to the shop to buy a box of matches. On her way back he grabbed her and raped her. He contended that the court a quo had erred in not taking into consideration the fact that he was, at the time of sentencing, a 71-year-old first offender who had pleaded guilty.

Held, that the offence committed by the appellant was undoubtedly a serious one and he was like a family member to the complainant. However, he was a first offender of advanced years and the sole breadwinner of his family. He had committed the offence while under the influence of alcohol and had displayed remorse by pleading guilty. The chances of him becoming a recidivist were slim. There were accordingly substantial and compelling circumstances justifying a sentence less than the sentence of life imprisonment, which was set aside and replaced with a sentence of 10 years' imprisonment.

S v MLANGA 2020 (2) SACR 416 (ECG)

Traffic offences — Culpable homicide — Sentence — Accused grossly negligent in running over pedestrian at pedestrian crossing — Sentence of three years' imprisonment imposed — First offender showing true remorse — Correctional supervision not considered — For many years accepted, though not as inflexible rule, that in absence of recklessness or high degree of negligence, unsuspended sentence of imprisonment, without option of fine, should not be imposed on first offender — Matter remitted to magistrate for reconsideration of sentence.

The appellant appealed against his sentence of three years' imprisonment imposed on him in a regional court for culpable homicide arising from the death of a pedestrian whom he had knocked over at a pedestrian crossing. The appellant had driven at a speed of approximately 50 kilometres per hour, ignored the residential area in which he was travelling, and without slowing or having regard to the

deceased — at least in the vicinity of the crossing and being a person who might well, and then in fact did, cross the pedestrian crossing — collided with him. The appellant was 29 years of age, unmarried and had no children. He held a code 10 driver's licence and was employed in the transport business. At the scene of the collision he had attended to the deceased and arranged to have him taken to the hospital for treatment, assisted in the transfer of the deceased to hospital in Port Elizabeth, and contributed to the financial expenses of the funeral. He had no previous convictions. He submitted on appeal that the magistrate had erred in failing to consider imposing correctional supervision, or a fine with a wholly suspended sentence in terms of s 276(1) of the Criminal Procedure Act 51 of 1977 (the CPA). *Held*, that there was certainly no mention of any other sentencing options such as correctional supervision in the magistrate's judgment, and there was no report, obtained from a correctional-supervision officer or expert, and no pre-sentencing report of any kind. Notwithstanding the absence of such reports, the magistrate ought nevertheless to have raised and considered all possible and appropriate sentence alternatives and, if appropriate, should have called for reports and considered a possible sentence in terms of s 276(1)*(i)* of the CPA.

Held, further, that for many years it had been accepted, though not as an inflexible rule, that, in the absence of recklessness or some other high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on a first offender in respect of punishing drivers who were negligent or reckless. (See [25].)

Held, further, that the magistrate had been correct in categorising the appellant's conduct as, at least, grossly negligent. On the other hand, the appellant was clearly a first offender and a useful member of society. He was also clearly truly remorseful. (See [34] – [35].)

Held, further, that a final decision as to sentence should be taken by the magistrate after consideration of a correctional-supervision report as to the appropriate sentence to be imposed. The matter accordingly had to be remitted to the magistrate after the sentence was set aside.

MAKAPHELA AND OTHERS v ACTING REGIONAL COURT MAGISTRATE AND OTHERS 2020 (2) SACR 427 (ECB)

Court — Judicial officer — Conduct of — Application for costs de bonis propriis in review application of criminal proceedings in which magistrate refused to recuse himself — Magistrate not employee of state — No indication that magistrate's decision actuated by malice — Application refused.

The four applicants, together with seven other accused, stood trial in a regional court before the first respondent on charges of fraud, corruption and money-laundering. They all pleaded not guilty to the charges, but, at a stage when the state was still leading its first witness, the erstwhile accused No 7 decided to change her plea of not guilty to one of guilty. The first respondent proceeded with the case and accepted her plea explanation in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, in which she implicated her co-accused in the commission of the offences with which they were charged. That accused was allocated a new case number, to

be tried separately from her co-accused. On the same day, the first respondent convicted accused No 7 and sentenced her accordingly. A separation of trials was granted, but, on the day when the matter was to continue, the first respondent wanted to continue to preside in the trial as if nothing had happened. Defence counsel for one of the accused applied for his recusal, supported by all the defence counsel and the prosecutor. The first respondent nevertheless dismissed the application to recuse himself, whereupon the parties applied for the matter to be adjourned for them to take his decision on review. The matter was then adjourned. At the hearing of the review, all parties were ad idem that the magistrate ought to have recused himself and that the review application should accordingly succeed. The court upheld the application, but postponed argument on the application by defence counsel for costs against the state and costs *de bonis propriis* against the first respondent, who contended that he had immunity against actions for damages when he was performing his official duties, unless malice could be shown. He claimed that he had not acted maliciously, as he had no direct or indirect interest in the matter.

Held, that it was evident that the first respondent had adopted an intransigent attitude in his refusal to recuse himself, and in his answering affidavit did not take the opportunity to explain why he had refused to do so. It was possible that there had been a genuine mistake in the interpretation of the law and, although his conduct might be regarded as reprehensible, especially in the light of the fact that all the parties were ad idem that he should recuse himself, malice had not been shown. Nor was this a case where the magistrate ought to be mulcted in costs *de bonis propriis*. (See [8] and [19].)

Held, further, that, as this was a criminal matter in which an accused was not usually saddled with costs, there was no justification for an order of costs against the state. (See [20] – [22].)

Held, further, that the applicants' argument that magistrates were employees of the Minister of Justice was incorrect: they were not employees, but were judicial officers subject only to the Constitution and the law.

S v ZONDI 2020 (2) SACR 436 (GJ)

Bail — Pending appeal — Accused granted leave to appeal by Supreme Court of Appeal — Accused convicted and sentenced to life imprisonment for sch 6 offence — Accused having to show exceptional circumstances — Prospect of success not in itself amounting to exceptional circumstance — Case of state not so hopeless that on balance of probabilities conviction would be set aside — Appeal against refusal of bail dismissed.

The appellant appealed against the dismissal by the High Court of his application for bail pending appeal from his conviction of murder, for which he was sentenced to life imprisonment. The Supreme Court of Appeal granted him leave to appeal. He contended that he had faithfully attended at court on each occasion to which the case had been postponed and that, by virtue of two judges of the Supreme Court of Appeal having granted him leave to appeal, he therefore had reasonable prospects of success on appeal against his conviction.

Held, that, taking into consideration that the appellant had been convicted of murder, that fell within sch 6 to the Criminal Procedure Act 51 of 1977, he had to establish 'exceptional circumstances' in order to be granted bail. The prospect of success did not in itself amount to exceptional circumstances. On a consideration of the evidence in the matter, it could not be concluded that the case of the state was so hopeless that on a balance of probabilities the conviction would be set aside, the appellant having been identified by three witnesses who saw him firing the shots. In the circumstances there was nothing more than a reasonable prospect of success on appeal, and the court a quo had not erred in refusing the appellant bail.

S v BADER 2020 (2) SACR 444 (GP)

Bail — Appeal against refusal of — Pending imposition of sentence — Provisions of s 58 of Criminal Procedure Act 51 of 1977 not applicable — Appellant evincing intention during trial to continue committing offences — Refusal of bail upheld on appeal.

The appellant appealed against his refusal of bail after conviction in a regional magistrates' court, but before sentence was passed. He was convicted of two counts of pointing a firearm; assault with intent to do grievous bodily harm; and reckless endangerment to persons or property in terms of s 123*(b)* of the Firearms Control Act 60 of 2000. The appellant contended that the magistrate had failed to consider the provisions of s 58 of the Criminal Procedure Act 51 of 1977 (the Act).
Held, that the appellant's reliance on s 58 was misplaced. The section dealt with the results and effect of bail that had already been granted. In terms of the section, his release from custody would last until a verdict was pronounced. It was clear that the bail granted would be revoked at conviction. Should the sentence not immediately follow upon conviction, the court retained a discretion whether to extend bail until sentence was passed. (See [9].)

Held, further, that it was important to note that, when the state opposed bail in the court a quo, the reasons advanced were that the appellant had, during trial proceedings, testified that he would carry a firearm and use it anytime he felt like doing so; he would never approach the police for assistance because he did not trust the police officials; and he did not consider pointing a firearm at a person as an offence. (See [15].)

Held, accordingly, that there were no grounds to satisfy the court that the decision of the magistrate was wrong. (See [26].)

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Bam v S [2020] 4 All SA 21 (WCC)

Criminal law and procedure – Housebreaking with intent to rob – Nature of offence – Housebreaking is not regarded as a crime on its own – Where an offender commits a housebreaking in accordance with the requisite elements and thereafter proceeds to

engage in further criminal conduct which was facilitated by it, and which was the object of it, he commits a further, and separate offence.

Criminal law and procedure – Housebreaking with intent to rob and robbery – Sentencing – The fact that separate offences are involved does not mean that they must be punished separately – A double sentence would amount to a duplication of convictions and punishments, for what essentially amounts to a single criminal course of conduct.

The State alleged that on 25 January 2016, the appellant broke into the home of the complainant and robbed him of a television set, a cell phone and an amount of cash. The appellant pleaded not guilty to the charge and elected not to provide any plea explanation. At the end of the trial, he was convicted as charged. The trial court imposed a sentence of 7 years' imprisonment in respect of the housebreaking, and 15 years in respect of the robbery. The latter sentence was the prescribed minimum sentence applicable to a first offender who is convicted of robbery with aggravating circumstances, unless there are substantial and compelling circumstances present.

In order to ameliorate the cumulative effect of the sentences, the magistrate directed that the sentence which was imposed in respect of the housebreaking was to run concurrently with that which was imposed in respect of the robbery. Effectively therefore the appellant was sentenced to 15 years' imprisonment.

Held – The appellant's explanation of events surrounding his conviction was correctly rejected by the trial court. In the absence of any credible explanation as to how he came to be dealing with the television set a day after the robbery, the obvious and only reasonable inference to be drawn was that the appellant was one of the persons who had robbed the complainant of it.

In our law housebreaking, per se, is not a crime on its own unless it is accompanied by an intention to commit an offence. Where an offender commits a housebreaking in accordance with the requisite elements and thereafter proceeds to engage in further criminal conduct which was facilitated by it, and which was the object of it, he commits a further, and separate offence. The consequences of an accused being indicted in one rolled-up ie composite charge of housebreaking with intent to commit an offence and the offence itself may in certain instances appear to be anomalous, or may at times result in what appears to be counter-intuitive or inconsistent decisions. But on analysis, those can best be understood if the underlying purpose of the practice in relation to the charging of housebreaking offences viz the avoidance of a duplication of convictions and punishments is borne in mind.

The trial court correctly pointed out that housebreaking with intent to rob and robbery were two separate offences which, for practical reasons are usually combined. However, the Court erred in going on to state that as they were separate offences they should be punished separately, because the appellant was only convicted on a single, composite charge. In doing so the magistrate improperly split the charge in two, which effectively resulted in a duplication of convictions and punishments, for what essentially amounted to a single criminal course of conduct. The double sentence imposed constituted a material misdirection, warranting interference on appeal. The sentence was replaced with a sentence of 12 years' imprisonment, antedated to 21 June 2017.

Café Chameleon CC v Guardrisk Insurance Company Ltd [2020] 4 All SA 41 (WCC)

Corporate and Commercial – Insurance – Loss to business – Provision in insurance policy for indemnification against business interruption – Covid-19 lockdown regulations – Properly interpreted, as the indemnity was conditioned upon a ‘‘human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them”; Covid-19 was covered by the indemnity in the policy.

Corporate and Commercial – Insurance – Interpretation of insurance policy – An insurance policy has to be interpreted so that its provisions receive fair and sensible application and a restrictive consideration of words without regard to context has to be avoided.

Corporate and Commercial – Insurance – Claim under insurance policy – Claimant must prove not only the peril and the loss or occurrence as described in and covered by the contract, but also a causal nexus or link between the two.

The applicant, which conducted the business of a restaurant, sought a declaratory order that the respondent insurance company was obliged to indemnify it as policyholder, in terms of a “Business Interruption” section of the policy, for the loss suffered as a result of the interruption caused by the Covid-19 pandemic and the resultant promulgation and· enforcement of the Regulations (“Lockdown Regulations”) made by the Minister of Cooperative and Traditional Affairs (the “Minister”) under the Disaster Management Act 57 of 2002.

In seeking the relief in question, the applicant explained how the regulatory regime put in place to counter the pandemic impacted on its business.

Held – An insurance policy has to be interpreted so that its provisions receive fair and sensible application and a restrictive consideration of words without regard to context has to be avoided. The policy under consideration could not be interpreted with reference to other policies or on the basis of generalised concerns about the impact of Covid-19 on the insurance industry at large, of which the applicant had no knowledge. The policy instead had to be considered on the contractual terms to which both parties had assented, in a sensible manner which underpinned sound commercial sense, and not have an unbusinesslike result.

The main points taken by the respondent were that the applicant’s loss, if any, was not insured under the Infectious Diseases Extension clause in the policy; and that there was no causal link between the lockdown Regulations and the Infectious Diseases Extension. Properly interpreted, insofar as the indemnity was conditioned upon a “human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them”; Covid-19 fell substantially within the ambit of the Notifiable Disease Extension.

The Court then turned to the issue of causation. A claim in terms of an insurance contract requires a claimant to prove not only of the peril and of the loss or occurrence as described in and covered by the contract, but also of a causal nexus or link between the two. The question was whether the applicant had established that the regulatory regime that was imposed on its business from 27 March 2020 was directly caused by

the Covid-19 outbreak within the permitted radius of its premises and as a result it suffered a loss. The Court accepted that there was a clear nexus between the Covid-19 outbreak and the regulatory regime that caused the interruption of the applicant's business. Factual causation was thus established by the applicant. In determining the presence of legal causation, the question was whether, having regard to the considerations alluded to, the harm was too remote from the conduct or whether, it was fair, reasonable and just that the respondent be burdened with liability. That question was answered against the respondent.

The respondent was therefore liable to indemnify the applicant in terms of the Business Interruption section of the policy.

Cape Concentrate (Pty) Ltd (in liquidation) and others v Pagdens Incorporated and others [2020] 4 All SA 61 (ECP)

Civil Procedure – Pleadings – Particulars of claim – Exceptions – Insufficient particularity – When a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the court that the declaration as it stands, does not state the nature, extent, and, and grounds of the cause of action – The excipient must make out a case of embarrassment by reference to the pleadings alone, and the pleading must be embarrassing in that it cannot be gathered from it what ground is relied on by the pleader.

In an application in terms of Rule 23(1) of the Uniform Rules of Court, the defendants in the main action sought an order that the plaintiffs' particulars of claim be struck out and the plaintiffs be offered an opportunity to, within the prescribed period, deliver amended particulars of claim failing which the claim be dismissed with costs. The plaintiffs had claimed payment in the sum of R23 000 000. The defendants raised various grounds of exception claiming that the particulars of claim were vague and embarrassing and lacking in averments necessary to sustain a claim against them.

Held – Case law makes it clear that when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the court that the declaration as it stands, does not state the nature, extent, and, and grounds of the cause of action. The excipient must make out a case of embarrassment by reference to the pleadings alone. The pleading must be embarrassing in that it cannot be gathered from it what ground is relied on by the pleader. A pleader's initial duty is to allege the facts upon which he relies on and his second duty is to set out the conclusions of law which, according to him or her follow from the pleaded facts.

The first exception averred that the particulars of claim lacked the averments necessary to sustain a cause of action against the second to seventh defendants. The joint and several liability of the second to seventh defendants was premised on the basis that the second to seventh defendants were attorneys and directors of the first defendant (a private company). The Attorneys Act 53 of 1979 was applicable at the time the payments of the amount claimed were allegedly paid into the trust account of the first defendant. Section 23(1)(a) of the Act was peremptory and stipulated that the directors of a private company are only held jointly and severally with the company for the debts and liabilities of the company which were contracted during their periods of office. In the instant matter, there were no allegations or averments made by the plaintiff as to whether the second to seventh defendants were directors of the first defendant at the time the money was deposited.

The next three exceptions, dealing with lack of particularity around the impugned payments were also sustained. The Court held that relevant information should have been pleaded to enable the defendants to know which case they had to plead to.

The final exception was that the plaintiff's did not plead any basis, arising from fact or law, creating an entitlement to *mora* interest. The payment date replied on by the plaintiffs was found not to be proven. The exception was accordingly upheld.

The particulars of claim were struck out and the plaintiff was given an opportunity to deliver amended particulars of claim within 15 days, failing which the claims were dismissed with costs.

Centre for Child Law v Director-General: Department of Home Affairs and others [2020] 4 All SA 76 (ECG)

Family Law and Persons – Birth registrations – Notice of birth of a child born out of wedlock – Section 10 of the Births and Death Registration Act 51 of 1992 – Constitutionality – Notification process for child born out of wedlock, as set out in section 10, in having a dominant preference for surname of mother, presenting a bar in notifying birth of unmarried father's child under his surname in the mother's absence – Court declaring section 10 unconstitutional and invalid, and curing defect by adopting reading-in remedy.

The appellant was a Law Clinic based in the Law Faculty of the University of Pretoria and its involvement in the present matter stemmed from acting in the public interest in accordance with the Constitution of the Republic of South Africa. It had sought leave to intervene in an application in the court *a quo*, in proceedings launched by the third and fourth respondents (as first and second applicants) in which they sought an order reviewing and setting aside the first respondent's refusal to register the birth of their minor child.

The appeal concerned a legal issue that arose from the interpretation and implementation of section 10 of the Births and Deaths Registration Act 51 of 1992. Section 10 deals with notice of the birth of a child born out of wedlock.

Held – Registration of the birth of a child commences with the act of giving notice of the child's birth. The process culminates in the issuing of a birth certificate reflecting the child's legal name containing a forename and surname, the date of birth and place of birth. Children without birth certificates are at risk of being excluded from the education system and from accessing social assistance and healthcare. They are effectively denied support and assistance considered necessary for their positive growth and development.

The appellant's case demonstrated that section 10 poses a bar that is discriminatory on the basis of the marital status of the father of a child born out of wedlock. That directly violates the affected father's right to equality in section 9(3) of the Constitution and is tantamount to unlawfully discriminating against him. By extension, the bar has the effect of denying children, with a legitimate claim to a nationality from birth, a birth certificate; and in this manner it discriminates against children born to unmarried fathers on grounds that are arbitrary.

Section 10 makes provision for the notification of the birth of a child born out of wedlock, and the notification process for a child born out of wedlock has a dominant preference for the surname of the mother. In effect, despite an unmarried father being

permitted to give notice of his child's birth in terms of section 9, section 10 presents a bar when it comes to notifying the birth of his child under his surname in the mother's absence. To that extent the section was inconsistent with the Constitution and invalid. The Court accepted the reading-in proposed remedy proposed by the appellant to cure the defect.

Changing Tides 17 (Pty) Ltd NO v Frasenburg [2020] 4 All SA 87 (WCC)

Civil Procedure – Execution against immovable property – Application in terms of rule 46A to have mortgaged property declared specially executable – Rule 46A deals with all instances of execution against residential immovable property – A mortgagee obtaining a money judgment, and then wishing to levy ordinary execution against the mortgaged property, must bring an application in terms of rule 46A.

Civil Procedure – Money judgment – Pledge – Cession in securitatem debiti – Court recommending to debtor, possibility of offering an investment to the plaintiff as security for the repayment of his loan indebtedness.

The plaintiff sued the defendant in November 2019, claiming payment of R264 114,26 plus interest. Together with an application for default judgment, it then delivered application in terms of rule 46A to have the defendant's mortgaged property declared specially executable.

The defendant's answering affidavit did not disclose a defence on the merits. The focus of attention was whether, on what terms, the mortgaged property should be declared specially executable. The mortgaged property was the defendant's primary residence.

Held – The defendant had not considered offering an investment he had to the plaintiff as security for the repayment of his loan indebtedness. As he was unrepresented, the Court explained to him the workings of a pledge (ie a cession *in securitatem debiti*). That option would allow him to own his house free of a mortgage bond. While not abandoning the application for special executability, the plaintiff submitted in the alternative that the Court should grant judgment for the money debt, which would allow the plaintiff to attach the defendant's investment. The Court was of the view that the appropriate form of attachment for the plaintiff to pursue, if it were granted the money judgment, would be by way of a garnishee order in terms of rule 45(12).

Rule 46A is not concerned with special executability *per se* but with all instances of execution against residential immovable property, whether specially in terms of rule 46(1)(a)(ii) or ordinarily in terms of rule 46(1)(a)(i). If a mortgagee of residential immovable property were simply to ask for and get a money judgment, and then wished, after excussing movables, to levy ordinary execution against the mortgaged property, rule 46A would require the mortgagee to bring an application in terms of rule 46A. Such a mortgagee would not be seeking an order of special executability, but rule 46A would still apply.

The Court rejected the notion that it may not grant a money judgment without granting an order of executability (special or otherwise) against the mortgaged property. It did accept, though, that where a bank in fact seeks an order of special executability as contemplated in rule 46(1)(a)(ii), it is desirable that such claim and the money claim should be considered together.

The facts in this case were clear. Apart from ordinary household goods, the defendant's only assets were his house and the investment. Any income which he was

able to earn was too sporadic and uncertain to be a source from which he could ever meet his obligations to the plaintiff. By granting the money judgment, the court was not placing the defendant's home in any real peril, because all indications were that the investment would yield more than enough to satisfy the plaintiff's claim.

Judgment was granted in plaintiff's favour on the above basis.

Equal Education and others v Minister of Basic Education and others (Children's Institute as amicus curiae) [2020] 4 All SA 102 (GP)

Education – Provision of meals to learners – Suspension of National School Nutrition Programme ("NSNP") – Lawfulness – Whether Minister of Basic Education and MEC's of Education of eight provinces were in breach of their constitutional and statutory duty to ensure that the NSNP provided a daily meal to all qualifying learners whether they were attending school or studying away from school as a result of the Covid-19 pandemic – Where the State, through the Department and the NSNP, had for many years exercised it supplementary role to provide basic nutrition, the failure to roll out the NSNP during the Covid-19 crisis was in breach of their constitutional and statutory duties.

Declaratory orders were sought against the Minister of Basic Education and the MEC's of Education of eight provinces of South Africa declaring that they were in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme ("NSNP") provided a daily meal to all qualifying learners whether they were attending school or studying away from school as a result of the Covid-19 pandemic.

Held – The first question was whether there was a factual basis for the application, as there had never been a refusal by the Minister and MEC's to roll out the NSNP. In the replying affidavit, the applicants sought to establish a new factual foundation, that not all qualifying learners were yet receiving daily meals. The Court described the change on tack as impermissible litigation by ambush. The purpose of pleadings, or in applications the affidavits, is for the opposition to know what case they are to meet.

The Court acknowledged the importance of the feeding programme. The Covid-19 pandemic had the devastating effect of denying 9 million school-going children at least one nutritious meal a day, leaving many, many children hungry and unfed while attempting to learn. For many years the Department of Education had taken on the duty to educate children and addressed the right to basic nutrition through the NSNP. It was thus evident that the State, through the Department and the NSNP, had exercised it supplementary role to provide basic nutrition. In failing to roll out the NSNP from June 2020, the Minister and MEC's had not complied with their constitutional and statutory duties.

The Court granted the declaratory relief sought, as well as a supervisory interdict.

FirstRand Bank Ltd v Mostert and another and related matters [2020] 4 All SA 126 (ML)

Consumer – Litigation involving the National Credit Act 34 of 2005 – Jurisdiction – Rights of consumer – Access to courts – Many citizens being deprived of equal access to the courts by credit providers instituting legal proceedings in matters based on the

National Credit Act in the country's High Courts as court of first instance and not in the lower courts as was the intention of the legislator when it drafted the Act – Court ruling that such matters should be issued, and tried in the Magistrates' Court.

In several cases before the court, the question to be considered was whether the matters should have been instituted by the plaintiffs in the present Court, or in the relevant Magistrates' Courts that had jurisdiction over the persons of the respective defendants/respondents in the matters.

Held – Many defendants who are sued by credit providers and financial institutions out of the present Court lived in the countryside towns and on farms surrounding the seat of the court (Middelburg – Mpumalanga) as well as the main seat in Mbombela. When the financial institutions decide to take to the courts to enforce its rights in terms of the agreements, the defendants are normally in arrears with their obligations for some reason. Some defendants were indigent people, and often very poor.

The Court stated that everybody should have access to the courts and the protection it offers through the capable judicial officers manning it applying the law and upholding the Constitution. However, many citizens were being deprived of equal access to the courts by credit providers instructing its attorneys to institute legal proceedings in matters based on the National Credit Act 34 of 2005 in the country's High Courts as court of first instance and not in the lower courts as was the intention of the legislator when it drafted the Act. When sitting as unopposed, the present Court was inundated with cases, issued by the Registrar, falling within the monetary jurisdiction of the Magistrates' Courts, most of which had its cause of action to be found in the Act. In some of the matters the *quantum* involved was far below R50 000 – matters that could more cost effectively have been dealt with by the Magistrates' Courts.

The Court stated that the National Credit Act and the Magistrates' Courts Act 32 of 1944, with reference to jurisdiction, had in mind that, in as far as matters involving the National Credit Act are concerned, such matters should be issued, and tried in the Magistrates' Courts. The Court highlighted the difficulties posed for consumers, particularly indigent persons, in expecting them to access the High Court instead.

Minerals Council South Africa v Minister of Mineral Resources and another [2020] 4 All SA 150 (GP)

Civil Procedure – Non-joinder – Direct and substantial interest – Any party which has a direct and substantial interest in a particular matter should be joined in the matter – A court should not make an order that may prejudice the rights of parties not before it – A party that stands to be prejudiced by an order has a legal right to be joined to the proceedings so that it can protect its interests, and it must be specifically identified, and the papers properly served upon it.

Aggrieved by various clauses in a Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (the "2018 Charter") published by the first respondent (the "Minister"), the applicant sought to review and set aside the clauses with which it took issue. Some of the clauses displayed similarities to ones contained in the 2017 Charter, and had already been challenged by the applicant in previous litigation.

In the answering affidavit, the respondents contended that the applicant had failed to join important, necessary and relevant parties to the matter, and that until those

parties had been joined, the merits of the applicant's complaint should not be adjudicated at all, alternatively it should be delayed until those parties (comprising affected communities) were properly joined to the proceedings. In an attempt to address the objection, the applicant relied on its having issued a notice in terms of rule 16A of the Uniform Rules of Court drawing the public's attention to the application.

Held – A judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and the court should not make an order that may prejudice the rights of parties not before it. Any party which has a direct and substantial interest in a particular matter should be joined in the matter. The direct and substantial interest, in other words, has to be one that gives rise to a legal right. It would therefore have to be a legal interest.

The 2018 Charter conferred certain rights on community organisations. Those rights would be destroyed if the order sought by the applicant was granted, thus endowing them with a legal interest in the matter. The Court also referred to rights held by trade union parties, which would be affected by the order.

The rule 16A notice published by the applicant was not a substitute for joining a necessary party to the proceedings. A party that stands to be prejudiced by an order has a legal right to be joined to the proceedings so that it can protect its interests. It must be specifically identified, and the papers must be properly served upon it.

The Court ordered that the relevant parties be joined in the application.

Molaza v S [2020] 4 All SA 167 (GJ)

Criminal law and procedure – Rape – Whether appellant should have been convicted on three separate counts of rape due to several sexual acts, committed without consent, being perpetrated within short intervals – Charging of accused – Where a person is accused of raping the victim more than once in a single encounter, the preferred way to charge the accused is with a single count of rape with clear indications in the charge sheet that reliance will be placed on item (a)(i) of Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that separate acts of rape will be sought to be proved.

The appellant was convicted on charges of kidnapping, assault and three charges of rape. He was sentenced to an effective term of life imprisonment. The present appeal was against conviction and sentence.

Held – The onus rests on the State to prove beyond a reasonable doubt that the accused committed the crime accused of. An accused should be acquitted if his exculpatory testimony can be reasonably possibly true. The evidence implicating the accused and evidence exculpating the accused should not be considered in a compartmentalised manner. The court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence. Examining the evidence, the Court was satisfied beyond a reasonable doubt that the complainant was kidnapped, assaulted and raped by the appellant. It was also satisfied that the exculpatory version of the appellant could not be reasonably possibly true.

The question on which the Court was not unanimous was whether the appellant should have been convicted on three separate counts of rape due to several sexual acts, committed without consent, being perpetrated within short intervals. The complainant testified that she had been raped 3 times. The facts underpinning those

conclusions were, however, not placed on record with sufficient particularity. She was not lead on those events adequately. The complainant was never questioned about the interlude or time period between each act of rape. According to the majority judgment, practically, it does not matter whether an accused is charged with one count of rape or three. In either event, the charge should contain reference to section 51(1) of the Criminal Law Amendment Act 105 of 1997and item (a)(i) of Part I of Schedule 2 so as to inform the accused of "all the elements of the form of the scheduled offence" that the State intends to prove; and warn the accused of the punishment he faces if convicted. Thus, where a person is accused of raping the victim more than once in a single encounter, the preferred way to charge the accused is with a single count of rape with clear indications in the charge sheet that reliance will be placed on item (a)(i) of Part 1 of Schedule 2 of the 1997 Act being that separate acts of rape will be sought to be proved.

Where a person is accused of raping the victim more than once and the two acts are separated by a significant period of time, perhaps a week or few months, separate counts are preferable. It is permissible to convict an accused person on more than one count of rape where the facts support separate acts of rape. The preferred way would be to convict of 1 count with a finding of the separate acts should the acts have occurred in a single encounter. The appeal was upheld in respect of the convictions on the charge of assault, the second and third counts of rape, and the sentences imposed in respect of such counts. The accused was convicted of one count of rape with a finding that two acts of rape, as contemplated in item (a)(i) of Part I of Schedule 2 were committed – and was sentenced to life imprisonment.

Moropa and others v Chemical Industries National Provident Fund and others [2020] 4 All SA 197 (GJ)

Constitutional and Administrative Law – Pension fund – Decision of fund to replace provider of administrative services – Review application – Impugned decision not constituting administrative action, as fund was acting in terms of a contractual right and not exercising public power – Allegations of impropriety lacking substance and rejected by court.

Civil Procedure – Locus standi – Commercial standing – To establish standing on the basis of commercial own interests when challenging a decision of a private body, a litigant must show that the challenged decision affects his or her own rights or potential rights or interests.

Civil Procedure – Alleged dispute of fact – Application to refer for oral evidence – Requirements – An application to refer a matter to oral evidence must be clear in its intent and focused on a real dispute of fact, and a matter should not be referred to oral evidence if no facts are to be elicited.

The first eight applicants in this matter were members of the first respondent, a provident fund. The ninth and tenth applicants (referred to as "NBC") were private companies. The cases of NBC and the member applicants were identical in almost every respect.

The second to twenty-sixth respondents were trustees of the fund, and were referred to as the "board".

NBC was contracted to the fund to provide it with administrative and other services. On 21 and 22 November 2019, the board resolved by unanimous vote to terminate the

suite of contracts (the "contracts") the fund had concluded with NBC. On 13 December 2019, the board appointed the twenty-seventh respondent ("Akani") to provide administration services. The twenty-eighth and twenty-ninth respondents ("Novare" and "Moruba") were appointed to provide the rest of the services previously provided by NBC.

Aggrieved by those decisions, NBC and the member applicants applied to court to have the decisions set aside.

In the course of proceedings, NBC brought a motion for referral of an issue to oral evidence.

Held – There was no dispute of fact on the papers. An application to refer a matter to oral evidence must be clear in its intent and focused on a real dispute of fact. A matter should not be referred to oral evidence if no facts are to be elicited. The evidence to be presented must be clearly, concisely and unambiguously identified. To avoid entering the realms of trial, it should not be open-ended or overly wide. The application for referral in this case was refused.

The first issue was whether NBC had *locus standi* to challenge, by review proceedings on public law grounds, the decision of the fund to terminate the contracts with it; appoint Akani, Novare and Moruba to replace the services it provided; and apply for the removal of the principal officer and trustees and replace them with other persons. The sole interest relied on by NBC to establish its standing was commercial. To establish standing on the basis of commercial own interests when challenging a decision of a private body, a litigant must show that the challenged decision affects his or her own rights or potential rights or interests. NBC was unable to do that, and was thus non-suited.

The Court then turned to the member applicants' case. It rejected the purported reliance, for the review application, on the Promotion of Administration Justice Act 3 of 2000 as the decision to terminate the contracts and to appoint Akani did not constitute administrative action. The fund was acting in terms of a contractual right and not exercising public power.

The member applicants' case lay in three contentions, *viz* there was a failure to consult Regional Advisory Committees ("RACs"), decisions were marred by corruption and/or a conflict of interests on the part of three board members. Those allegations were however not found to have any merit.

After setting out the principles applicable to costs, the court ruled that as a result of NBC's conduct, it should pay Akani's costs on an attorney and client scale.

National Commissioner of Police and another v Gun Owners of South Africa (Gun Free South Africa as amicus curiae) [2020] 4 All SA 1 (SCA)

Civil Procedure – Relief – Amendment of relief sought at suggestion of court – Amendments made by court to relief sought constituting an inappropriate intervention resulting in new case for applicant, and inviting allegations of bias.

Civil Procedure – Interim interdict – Whether appealable – Traditional requirements rendering an order appealable, namely that it is final in effect or dispositive of a

substantial part of the case, now subsumed under the broader constitutional "interests of justice" standard.

Civil Procedure – Interim interdict – Requirements – Applicant must establish a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy.

As a voluntary association formed to protect the rights of lawful owners of firearms in South Africa, the respondent ("GOSA") aimed to protect, represent and advance the interests of lawful firearm owners in the country and to promote firearm ownership. Part of its mandate was to ensure reasonable licensing requirements in respect of firearms.

In July 2018, GOSA launched an urgent application in the High Court against the first appellant (the "Commissioner") and the second appellant, the Minister of Police, for an interim interdict, pending the determination of the main application in which it sought final relief. Essentially, GOSA sought to prevent the South African Police Service (the "SAPS") from accepting any firearms for which the license expired at its police stations or at any other place, for the sole reason that the licence for the firearm expired, and to prohibit the SAPS from demanding that such firearms be handed over to it for the sole reason that the licence for such firearm had expired. In Part A of the main application, GOSA sought to have the period of validity of all licences for firearms issued in terms of the Firearms Control Act 60 of 2000, extended to the lifetime of the owner. It also sought to have the time periods for licence renewal applications under section 24 of the Act extended to allow licence holders with expired licences to apply for renewal.

During oral argument, and of his own accord, the High Court judge proposed that certain amendments be made to the final relief sought by GOSA. An amended notice of motion was delivered, fundamentally different from the final relief initially sought by GOSA, and an interim order was issued, essentially disabling the scheme of renewal and termination of firearm licences under the Act, by prohibiting the SAPS from demanding or accepting the surrender of firearms by licence-holders whose firearm licences expired, because they failed to renew their licences within the timeframe prescribed by the Act. That led to the present appeal.

Held – The first issue was whether the interim interdict was appealable. The traditional requirements rendering an order appealable, namely that it is final in effect or dispositive of a substantial part of the case, have now been subsumed under the broader constitutional "interests of justice" standard. Finding that the doctrine of the separation of powers was implicated in this case, and that the interim interdict had a nation-wide effect, and constituted an impermissible intrusion by a court upon executive authority, the Court held that the interim order was appealable.

The amendments made by the High Court to the relief sought constituted an inappropriate intervention and effectively resulted in a new case for GOSA, advanced by the Court itself. The initial relief sought was incompetent and inconsistent with the express provisions of the Act, and the amendment of the relief had a direct impact on the decision to grant the interim interdict. The court's intervention also opened it to allegations of bias.

The core premise of the gun control regime is that gun ownership is not a fundamental right under the Bill of Rights, but a privilege regulated by law under the Act. The possession of a firearm is prohibited under the Act, unless the holder has a licence, permit or authorisation issued in terms thereof. Once a licence is terminated for whatever reason, including the holder's failure to renew it timeously before it lapsed, the holder is then in unlawful possession of a firearm, which is a criminal offence. The holder must dispose of the firearm in accordance with the provisions of the Act.

The requirements for the grant of an interim interdict are a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy. GOSA asserted that it had a clear or prima facie right to just administrative action, in the form of a legitimate expectation that the authorities would have disposed of a system which they, including the SAPS, conceded they did not have capacity to administer. However, for an expectation to be created, it must be legitimate in an objective sense. The court found GOSA's expectation to be neither reasonable nor legitimate, and that it had failed to establish a prima facie right. The founding affidavit contained bald and generalised assertions concerning the need for an interdict and the conduct of members of the SAPS, with no factual or evidential basis.

GOSA was found to have failed to meet the requirements for an interim interdict, and the High Court's finding to the contrary was wrong.

The appeal was upheld with costs.

Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom and others and a related matter [2020] 4 All SA 226 (KZP)

Civil Procedure – Leave to intervene – Requirements – Rule 12 of the Uniform Rules of Court allows any person entitled to join as a plaintiff or liable to be joined as a defendant in any action, on notice to all parties, at any stage of the proceedings to apply for leave to intervene as a plaintiff or a defendant – Whether applicant for leave to intervene had a direct and substantial interest in the right that was the subject matter of the application – A direct and substantial interest under the common law involves a "legal interest" in the litigation which may be prejudicially affected by the judgment of the court, and not merely a financial interest as in the present matter.

The applicant ("Peermont") conducted a casino business. In the present interlocutory application in litigation involving casino operators and bingo operators, it sought leave to intervene as a co-applicant in the main application. The main application was for the review of various decisions taken by the Kwa-Zulu-Natal Gaming and Betting Board (the "Board"), the effect of which was to permit the third to fifteenth respondents (the "bingo respondents") to operate certain electronic bingo terminals ("EBTs") and to offer them for play in their bingo halls.

Peermont held a casino license, and contended that the EBTs at issue in this matter were materially indistinguishable from casino-style slot machines, did not constitute

"bingo", could not lawfully be made available in bingo halls, and could be offered only in licensed casinos.

Held – Rule 12 of the Uniform Rules of Court governs applications for intervention. In terms of the rule, any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The Court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet. The bingo respondents objected to Peermont's intervention on the ground that it lacked a direct and substantial interest in the right that was the subject matter of the application. A direct and substantial interest under the common law involves a "legal interest" in the litigation which may be prejudicially affected by the judgment of the court, and not merely a financial interest (which is only an indirect interest in the litigation), or another form of interest or derivative interest. The court found that Peermont did not satisfy the common law test for a direct and substantial interest insofar as the relief sought by the applicant in the main application was concerned. Peermont at best, had a financial interest, or thus an indirect or derivative interest.

Peermont contended that, in addition to relying on own-interest standing, it also acted in the public interest. The Court found no merit in that submission.

Save in respect of two respondents, the application against the other respondents was dismissed. The intervention in respect of the two respondents referred to above was made subject to conditions set out by the Court.

S v LM and others (Centre for Child Law as amicus curiae) [2020] 4 All SA 249 (GJ)

Criminal law and procedure – Children involved in drug offences – Decriminalising use and possession of cannabis by children – Criminalisation of use and possession of cannabis by children infringing right to equality and violating best interests of the child – Moratorium declared, preventing any child from being arrested and/or prosecuted and/or diverted for contravening the impugned provision.

Constitutional and Administrative Law – Rights of children – Section 28(1)(g) of the Constitution guarantees the right of every child not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age.

The present matter arose from an urgent review concerning four children, which came before magistrates for diversions in terms of section 41 of the Child Justice Act 75 of 2008. The children were alleged to have committed offences referred to in Schedule 1 of the Child Justice Act. They had all tested positive for cannabis, which tests had been performed at school. They were accordingly alleged to have been in possession of cannabis which constitutes an offence in terms of Schedule 1 of the Child Justice Act. The children and their parents appeared before the magistrates who were all, individually and separately, handed draft court orders in terms of section 42(1) of the Child Justice Act, and agreements in terms of which the children and their parents agreed, amongst other things, to undergo diversion programmes. As the children had

allegedly not complied with the diversion agreements, the prosecutor sought to invoke more onerous diversion programmes as contemplated in terms of section 58(4)(c) of the Child Justice Act. It was then ordered that the children undergo compulsory residence at youth centres. Those orders were subsequently set aside by the court.

The two issues which arise were whether it is still a criminal offence for children to use or be found in possession of cannabis, and whether it is permissible for a child to be referred to the criminal justice system after failing a drug test administered by his school.

Held – The case was not about the legalisation of cannabis for children, but about decriminalising its use and/or possession so that other, more appropriate assistance may be rendered to children.

An offence that criminalises actions for only certain groups of people, most commonly because of their religion, sexuality or age, is referred to as a "status offence". Status offences (and in this regard, the criminalisation of cannabis-related offences specifically) violate the constitutional rights of children in the South African context. Children are the individual bearers of rights and enjoy the right to have their best interests considered of paramount importance. Several children's rights are directly violated by the criminalisation of cannabis-related offences on account of the (alleged) offender's age. The criminalisation of the relevant offences infringed the right to equality and violated the best interests of the child.

Section 28(1)(g) of the Constitution guarantees the right of every child not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner, and kept in conditions, that take account of the child's age.

It being established that the criminalisation of cannabis-related offences *viz-a-vis* children limited the rights of children, the next question was whether such a limitation was justifiable.

The court issued a declaration that section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992, was inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child. A moratorium was declared, preventing any child from being arrested and/or prosecuted and/or diverted for contravening the impugned provision. It was also declared that section 53(2) read with section 53(3) of the Child Justice Act does not permit, under any circumstances whatsoever, for a child accused of committing a Schedule 1 offence to undergo any diversion programme involving a period of temporary residence.

Skole-Ondersteuningsentrum NPC and others v Minister of Social Development and others [2020] 4 All SA 285 (GP)

Education – Regulations under Disaster Management Act 57 of 2002 – Private schools – Provisions for re-opening during national lockdown referring only to a "school" as defined in the South African Schools Act 84 of 1996 – No rational and justifiable ground for omitting to make provision for private preschool institutions which were not affiliated with schools and which offered Early Childhood Development ("ECD") education to children in Grade R and lower – Court declaring that all private pre-school institutions

offering Early Childhood Development services (Grade R and lower) were entitled to re-open immediately.

The applicants sought a declaration that in terms of the amendment to the Regulations issued by the second respondent in terms of section 27(2) of the Disaster Management Act 57 of 2002 and published in the *Government Gazette* on 28 May 2020 (the "Alert Level 3 Regulations"), all private pre-school institutions offering Early Childhood Development services (Grade R and lower) were entitled to re-open immediately.

Held – The application concerned the rights and interest of private preschool institutions which were not affiliated with schools and which offered Early Childhood Development ("ECD") education to children in Grade R and lower. By way of the *Government Gazette* number 43372 dated 29 May 2020 and Notice 302 of 2020, the third respondent gave directions to provide for arrangements for a phased return of educators, officials and learners to school and offices. That however only applied to a "school" as defined in the South African Schools Act 84 of 1996.

The Court found no rational and justifiable ground, when interpreting the Regulations, upon which it was envisaged that schools offering ECD programmes including Grade R and lower which formed part of schools as defined in the Schools Act (which include both public and independent schools), were permitted to re-open from 6 July 2020 in terms of the directions, but that other private preschools offering ECD education for children, in Grade R or lower were not permitted to open or simply left in a vacuum.

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. The question whether a decision is rationally related to its purpose is an objective one. The court held that the actions of the third respondent (and by implication the first respondent, who was following her lead) lacked legal certainty and caused trauma and distress to children, parents, teachers, employees, principals, and owners of educational and childcare facilities.

The Court granted the relief sought by the applicants and ordered the first respondent to pay the costs of applicants and the *amicus* on an attorney and client scale.

END-FOR NOW