LEGAL NOTES VOL 11/2020

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BIG G RESTAURANTS (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (6) SA 1 (CC)

Revenue — Income tax — Deductions — Allowance in respect of future expenditure on contracts — Income not accruing in terms of contract; and expenditure not incurred in performance of taxpayer's obligations under such contract — Allowance not applicable — Income Tax Act 58 of 1962, s 24C(2).

The taxpayer, a franchisee, claimed an allowance in terms of s 24C(2) of the ITA * in relation to future expenditure to be incurred under a contractual obligation to upgrade and refurbish its franchise restaurants at intervals determined by the franchisor. The Commissioner refused the allowance; the taxpayer successfully appealed to the Tax Court; and the Commissioner's appeal to the Supreme Court of Appeal was upheld (see [3] – [7]).

In this case, the taxpayer's application for leave to appeal to the Constitutional Court, the majority granted leave to appeal. This on the grounds that the matter raised 'an arguable point of law of general public importance' as contemplated in s 167(3)*(b)*(ii) of the Constitution (see [11] – [14]). This was whether the franchise agreements and the contracts of sale of food were so interlinked that the sale-of-food income may be held to be income that accrued in terms of each franchise contract, each being the contract imposing the obligation to revamp in future, thus creating the future expenditure.

Held

The taxpayer could not place the contracts in terms of which it earned an income from its customers within the ambit of the income-earning contract envisaged in s 24C. The obligations that taxpayer had to perform were imposed, not by the sale-of-food contracts, but by the franchise agreements. This lack of correlation between the

[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!**

income-earning contracts and obligation-imposing contracts plainly made s 24C inapplicable. (See [31].)
Thus the two issues raised in the stated case before the Tax Court (see [4]) would be answered in favour of the Commissoner — income received by the taxpayer operating the franchise businesses did not accrue under the franchise agreements as envisaged in s 24C, nor was the expenditure required to refurbish or upgrade incurred by the taxpayer 'in the performance of the taxpayer's obligations under such contract' as envisaged in s 24C.

CHISUSE AND OTHERS v DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS AND ANOTHER 2020 (6) SA 14 (CC)

Immigration — Citizenship — Citizen by birth — Person who is child of South African citizen — No regard to be had to when or where person born — South African Citizenship Act 88 of 1995, s 2(1)*(b).*

Applicants approached a High Court alleging that the amended South African Citizenship Act 88 of 1995 deprived two classes of individuals of citizenship: citizens by descent (those born outside South Africa who had a South African parent and whose birth was registered) and persons with a 'vested right to citizenship by descent' (those born outside the Republic, of a South African parent, but whose birth was not registered) (see [3], [6], [21] – [22] and [44]). Applicants, barring one, fell into the latter category (see [6]).
The High Court declared the offending amended s 2(1) invalid and ordered a reading-in (see [2]). Here, applicants applied for confirmation by the Constitutional Court of the High Court's order (see [2]).
Held, that the declaration should not be confirmed because the section could be interpreted in a constitutional manner (see [23] and [82]) by reading s 2(1)*(b)*'s 'any person who is born' to apply to persons born before commencement of the amendment (see [69] – [70]). So read, s 2(1)*(b)* would embrace both classes described above, now considered citizens by birth (see [79] and [81]).
Thus '(a)ny person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth' (s 2(1)*(b)*), includes a child of a citizen, regardless of when the child was born, or where (see [60] and [78]).
The interpretation was justifiable, being grammatically sound, aligned with s 39(2), acceptably retrospective, and free of the negative consequences of purely prospective application of the subsection (see [70] and [74]).
The declaration of the High Court not confirmed, the qualifying applicants declared South African citizens, and the Director-General of the Department of Home Affairs directed further in this regard (see [92]).

FIRSTRAND BANK LTD v MCLACHLAN AND OTHERS 2020 (6) SA 46 (SCA)
Credit agreement — Consumer credit agreement — Debt review — Powers of court — May 'rearrange' or 'restructure' consumer's obligations but not alter or amend them — National Credit Act 34 of 2005, ss 3*(d)*, *(g)*, *(i)*, 86(7)*(c)*(ii).

The appellant appealed against a decision in the High Court that set aside a magistrate's order rescinding a debt-review order on the basis that it was null and

void. (The effect of the High Court's decision was therefore to revive the debt-review order — see [21].)
The debt-review order, ostensibly made under s 86(7)*(c)*(ii) of the National Credit Act 34 of 2005 (the NCA), * was granted at the behest of the second and third respondents, who had fallen into arrears with their repayments on a loan by the appellant secured by a mortgage bond. The debt-review order reduced the monthly instalment from R20 000 per month to R8000 per month and extended the repayment period to 261 months. The envisaged repayment did not even cover the monthly interest accruing on the balance, with the consequences that (i) the outstanding debt grew from R2,1 million to over R3 million; and (ii) a substantial amount would still be due at the conclusion of the repayment term.
Held
The debt-review court was empowered to 'rearrange' or 'restructure' the consumer's obligations under the credit agreement but was not empowered to alter or amend them. The court had to defer to the legislative purpose articulated in s 3 of the NCA, in particular the principle of eventual satisfaction by the consumers of all responsible financial obligations assumed by them under credit agreements (s 3*(d)*, 3*(g)* and 3*(i)*). Section 86(7)*(c)*(ii)*(aa)* envisaged a reduction in the monthly instalment with a concomitant extension of the repayment period so that all obligations assumed under the credit agreement would be satisfied at the conclusion of the extended period. Therefore, an order which did not result in the satisfaction of all responsible obligations incurred by the consumer did not meet the purposes of the NCA. (See [12] – [15], [17].)
Since the debt-review court had reduced the monthly instalment to the extent that it did not even remotely cover the monthly interest due, its order did not serve to protect the interests of the consumer, who would at the end of the period be left with an unpayable debt. Hence the debt-review order was ultra vires the NCA and void ab origine. (See [18].) Since rescission was therefore correctly granted, the High Court erred in setting it aside. The rescission was in any event interlocutory and not appealable: it was still open to the respondents to approach the magistrates' court for a determination of a new debt-review order. (See [20] – [22].) Appeal upheld and the order of the High Court set aside.

M AND ANOTHER v MURRAY NO AND OTHERS 2020 (6) SA 55 (SCA)

Insolvency — Insolvent — Property — Pension fund benefits- — Protection against attachment by trustee of insolvent estate — Whether applicable if benefit paid before sequestration — Pension Fund Act 24 of 1956, s 37B.

Pension — Pension fund — Members — Benefits — Protection against attachment by trustee of insolvent estate — Whether applicable if benefit paid before sequestration — Pension Fund Act 24 of 1956, s 37B.

The respondents, trustees of an insolvent estate, successfully applied in the High Court to set aside certain dispositions made to the appellants (on the basis that these were 'collusive dealing before sequestration' as contemplated in s 31 of the Insolvency Act 26 of 1934).
The source of these dispositions was the insolvent's pre-sequestration pension payout. Section 37B of the Pension Fund Act 24 of 1956 protects 'the estate of anyone entitled to a pension benefit payable' against attachment by a trustee of an insolvent estate, by deeming such benefit not to be part of the insolvent's estate

(subject to certain exceptions). The principal issue in this appeal against the High Court's order was whether a pension payout made before sequestration was protected by s 37B of the Pensions Fund Act. The Supreme Court Appeal —
Held
Section 37B established an exception to the provisions of s 20(1)*(a)* of the Insolvency Act — one which only entailed that, while in the hands of a pension fund, the insolvent's pension interest could not be attached by his or her trustee on the basis that it formed part of the insolvent's assets. It protected only the pension benefit of a person whose estate was already sequestrated when they received a pension payout. Once the benefit was paid, the beneficiary ceased to be a 'member' of the pension fund, and the money ceased to be a 'benefit' as defined. And when payment of a benefit was made before sequestration, there was no insolvent estate or trustees to speak of.
Section 37B therefore cannot find application; it did not extend protection beyond payment of the pension benefit. A benefit paid out to an insolvent before their estate was sequestrated therefore did not enjoy the protection provided in s 37B.

NATIONAL COMMISSIONER OF POLICE AND ANOTHER v GUN OWNERS SOUTH AFRICA 2020 (6) SA 69 (SCA)

Arms and ammunition — Licensing — Renewal of licence — Interim interdict preventing South African Police Service from applying, implementing and enforcing various provisions of Firearms Control Act 60 of 2000, pending final relief — Set aside on appeal — Requirements for interim interdict not met — Impermissible restraint on exercise of statutory power, violating principle of separation of powers — Firearms Control Act 60 of 2000, ss 24, 27 and 28.

Judge — Duties and functions — Role of judge as neutral arbiter — Judge, of own accord and with applicant's approval, amending final relief sought — Amounting to descending into arena, was inappropriate and rendered court susceptible to allegation of bias.

Gun Owners of South Africa (GOSA) sought and obtained an urgent interim interdict against the Commissioner of the South African Police Services and the Minister of Police (together, SAPS), prohibiting 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 time frames prescribed by the Firearms Control Act 60 of 2000 (the FCA).
The basis for the relief was the alleged infringement of clear prima facie right to administrative justice: a legitimate expectation that the authorities would have disposed of a system imposing limits which they had conceded on other occasions had no justification and could not be administered. SAPS contended that the relief sought amounted to amending or overriding those parts of the Act GOSA found objectionable, without declaring them inconsistent with the Constitution and invalid — a clear breach of the separation of powers. (See [4] – [5].)
During oral argument, and of his own accord, the presiding judge proposed to GOSA's counsel that certain amendments be made to the final relief it had sought, and subsequently an amended notice of motion was delivered. The effect was that the initial alternative final relief (also amended) became the main final relief — that the periods as referred to in ss 24, 27 and 28 of the FCA be extended in order for people who hold expired licences to apply for the renewal thereof on good cause

shown. Initially, before the proposed amendment, this relief was for an extension — across the board — for the holders of expired licences to apply for their renewal, ie without the limitation of good cause shown. The initial main final relief, that it be declared that firearm licences were valid for the lifetime of the holder, was abandoned after the judge indicated that it was not competent, as was GOSA's motion for a structural interdict. (See [6] and [22] – [24].)

The court a quo concluded that GOSA had shown 'a prima facie arguable case' for the grant of a declaratory order envisaged in the main relief as amended. It based this conclusion, inter alia, on an annexure to regulations under the FCA (Form 518), which provides for the renewal of expired licences; and on assertions concerning the need for an interdict in GOSA's founding affidavit. (See [40].)

In the SAPS appeal to the Supreme Court of Appeal:

Held

The relief sought in the amended notion of motion was fundamentally different from the final relief initially sought by GOSA. It went beyond its founding affidavit and resulted in a new case for GOSA being put up at the instance of the court itself. This was inappropriate because there was a real risk that judicial intervention of this kind may render the court susceptible to an accusation of bias; and because it was a core principle of our adversarial system that the judge remain neutral and aloof from the fray. The initial main relief was inconsistent with the express provisions of the Act. This meant that the application had no reasonable prospect of success, and it ought to have been dismissed on that basis.

GOSA's alleged legitimate expectation was neither reasonable nor legitimate. A concession by the relevant authorities or the SAPS, of incapacity to administer the Act, could not be regarded as a clear and unambiguous representation that firearm licences (valid only for a limited period under the Act) would be extended to the lifetime of their holders; or that expired firearm licences would be extended contrary (in both instances) to the express provisions of the Act. The so-called legitimate expectation was not one that was lawful or competent for an authorised functionary to make. When a firearm licence terminated as contemplated in s 24(1) of the Act, it came to an end by the operation of law; it was no longer valid and thus could not be extended. A statutory proscription could not found a legitimate expectation. (See paras [39] – [40].)

On the facts, GOSA did not establish a prima facie right either. The founding affidavit contained bald and generalised assertions which were simply conclusions, with no factual or evidential basis. The purported renewal of expired licences in Form 518 was at odds with the express provisions and purpose of the FCA. It was a settled principle of statutory construction that regulations made under a statute could not be used to interpret the governing statute. Accordingly, the main relief sought (as amended) had no reasonable prospect of success.

There was no merit in GOSA's claims that it would suffer irreparable harm if the interim interdict was not granted; that it had no alternative remedy; and the balance of convenience favoured the grant of the interim interdict. The interdict cut across the powers vested in the appellants by the FCA, preventing them from implementing and enforcing its provisions, and thus disrupting executive functions conferred by law. It followed that the requirements for interim relief had not been met. The interim interdict granted against the appellants was constitutionally inappropriate. It violated the principle of separation of powers and guaranteed the unlawful possession of firearms. It would therefore be set aside.

QUAD AFRICA ENERGY (PTY) LTD v THE SUGARLESS CO (PTY) LTD AND ANOTHER 2020 (6) SA 90 (SCA)

Competition — Unlawful competition — Passing-off — Similarity in packaging of confectionery — Similar use of colour black and fruit devices not on their own sufficient to show intention to confuse or deceive public — Dissimilarities sufficient for finding that there was no reasonable likelihood of confusion — Passing-off not established.

Counterfeit goods — Counterfeiting — What amounts to — More required than for breach of copyright or trademark infringement.

Intellectual property — Copyright — Infringement — Adaptation — Use of 'senior' work to create 'junior' work not necessarily indicative of making of adaptation — Actual creative composition having to be similar, not just idea.

Intellectual property — Trademark — Infringement — Deceptive use of mark — Composite mark — Distinction between 'sugarless' and 'sugarlean' — Trade Marks Act 194 of 1993, s 34(1)*(a)*.

Intellectual property — Trademark — Registration — Disclaimer — Term 'sugarless' inherently incapable of distinguishing and disclaimer ordered to be endorsed on trademark registration — Trade Marks Act 194 of 1993, s 9.

The first respondent (TSC), an Australian company, was the proprietor of a trademark for a range of goods, including confectionery, consisting of a logo with a large letter 'S' in concentric circles suspended over the word 'Sugarless'. TSC in 2015 appointed the appellant (Quad) as its exclusive distributor in South Africa. In 2018 TSC gave notice of its intention to terminate the agreement. However, before termination, TSC discovered that Quad was making its own competing brand in identical packaging, except that Quad's logo was replaced with a 'Sugarless' logo with an inverted 'S' above it (the first packaging). Eventually Quad introduced new packaging which differed markedly from the first packaging but retained the Sugarless logo, which caused TSC to demand the cessation of its distribution. When Quad refused to accede to these demands, TSC approached the High Court for urgent relief, claiming infringement of its trademark and copyright, passing-off and counterfeiting. It sought a range of declaratory orders and relief, including delivery-up and destruction in terms of the Trade Marks Act 194 of 1993, the Copyright Act 98 of 1978 and the Counterfeit Goods Act 37 of 1997.
Quad responded that it had subsequently abandoned its first logo and introduced a new one using the word 'Sugarlean' in addition to the new packaging, but that there were still some product lines using the first Sugarless logo. In a counter-application, Quad sought an order for a disclaimer to be endorsed on TSC's trademark registration to the effect that 'Registration of this trademark shall give no right to the exclusive use of the word sugarless, separately and apart from the mark'. The High Court dismissed the counter-application and granted the relief sought by TSC. In its application for leave to appeal against the High Court's decision, Quad sought relief only in respect of certain parts of the court's order. Leave was granted for it to appeal against the dismissal of the counter-application; against the declaration that the new packaging and future packaging constituted copyright infringement; that the future packaging constituted passing-off; interdicting the use of the trademarks SUGARLESS and SUGARLESS CONFECTIONERY; and against the relief granted under the Counterfeit Goods Act in respect of the new and future packaging. Crucial

to the success of the appeal as a whole was the issue of the disclaimer sought by Quad, which turned on the import of the word 'sugarless'.

Held

***The disclaimer**:* The issue was whether the matter contained in the trademark lacked the capability of distinguishing within the meaning of s 9 of the Trade Marks Act. The term 'sugarless' was inherently incapable of distinguishing one person's confectionery goods from another's. No amount of use of a purely descriptive term could make it distinctive. There was accordingly no basis for the counter-application to have failed before the High Court, and it followed from this conclusion that the interdicts against the use of the marks could not stand. A disclaimer of exclusive rights to the word 'sugarless' would therefore issue.

***Copyright infringement**:* The issue hinged on whether Quad's artwork on the new packaging was an adaptation of TSC's work, ie a transformation of the work such that the original or substantive features thereof remained recognisable (see [22], [25]). TSC's contention, that the use of a 'senior' work to create a 'junior' work constituted making an adaptation of the senior work, was incorrect: the mere fact that prior work had been used did not mean that the subsequent work was to be considered an adaptation, and thus an infringement. The actual creative composition had to be similar, not just the idea. As there was not a substantial degree of correspondence between the packaging, it could not be said that Quad availed itself of a great deal of the skills and industry that had gone into TSC's packaging. Accordingly, there could be no objective similarity and the decision of the court a quo on this issue was incorrect. (See [26] – [28] and [33].)

***Passing-off**:* Quad's packaging was not calculated to deceive. The main similarity between the get-ups was the colour black and the presence of fruit or other devices. But there was nothing wrong with that, given the plethora of confectionery products in the market which utilised that colour and the obviously non-distinctive nature of the devices (see [38]). There were sufficient dissimilarities between the various packagings — which would be apparent and obvious to any customer — to hold that there was no reasonable likelihood of confusion between the two. As with the copyright appeal, the appeal on this leg had to succeed (see [39]).

***Trademark infringement**:* The argument, that the only distinguishing feature between the SUGARLESS and SUGARLEAN marks was the last two letters, could not be upheld. That was not the way the average consumer would perceive things. The marks were visually, phonetically and aurally different. What distinguished the two marks was that 'sugarless' was a closed compound, whereas 'sugarlean' was merely two words that had been forced together in the formation of a proper noun that was almost never joined or used in succession in common parlance. Therefore TSC's cross-appeal in respect of the trademark infringement had to fail. (See [45], [47].)

***Counterfeiting**:* The High Court had granted relief under this head without considering at all the requirements for counterfeiting, which were more extensive than those for copyright or trademark infringement. Since neither the claim of breach of copyright nor that of trademark infringement was made out, there had been no countefeiting. Therefore the appeal in respect of the order in this regard also had to succeed.

ROAD ACCIDENT FUND v MBELE 2020 (6) SA 118 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Definition of 'motor vehicle' — Test to be applied — Designed or adapted for road use

— 'Reach stacker' used for manoeuvring containers around harbour qualifying as 'motor vehicle' for purposes of s 1 of Road Accident Fund Act 56 of 1996.

The appellant's husband, a stevedore, was knocked over at his workplace, Cape Town Harbour, by a 'reach stacker'. He later succumbed to his injuries. Stackers are large engine-driven machines designed to lift, manoeuvre and stack ship containers. This one was 12 metres long, 4 metres wide, and weighed over 70 tonnes.
The appellant sued for loss of support under the Road Accident Fund Act 56 of 1996, but the Fund disputed liability on the ground that the stacker was not a 'motor vehicle' as defined in s 1 of the Act, thus excluding the claim from its ambit. Section 1 defines 'motor vehicle' as a 'vehicle designed for propulsion . . . on a *road*'.
It appeared that while the stacker had a normal Cape Town registration number, its weight and size prevented it from operating on public roads without appropriate escort. In its day-to-day operations it did duty on both public and non-statutory roads within Cape Town Harbour. A single judge of the Cape Town High Court concluded that the stacker was not a motor vehicle as defined in s 1. In an appeal a full bench reversed this finding, ruling that the stacker was indeed a motor vehicle for the purposes of the RAF Act.
In a further appeal, the Supreme Court of Appeal — after restating the *Chauke* test that, if a reasonable person would conclude that driving the vehicle on a public road would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected, then it was not a 'motor vehicle' for the purposes of the RAF Act —
Held
The test whether a vehicle is designed for use on a road was objective, the question being whether a reasonable person would conclude that, when used on a road, it would create a danger to other road users. In this regard, design features such as lights, indicators, field of vision, hooter, maximum speed and engine output were considerations in deciding whether there was compliance with the definition. (See [12].) Given its additional features over the ones above, the stacker had been designed and was suitable for travelling on a road inside the port. It could, moreover, not be said that driving it on a road used by pedestrians and other vehicles would be extraordinarily difficult or dangerous. (See [24] – [26].) Therefore, the stacker was a motor vehicle as defined (see [25]). Appeal dismissed

SOUTH AFRICAN HISTORY ARCHIVE TRUST v SOUTH AFRICAN RESERVE BANK AND ANOTHER 2020 (6) SA 127 (SCA)

Access to information — Access to information held by public body — Request for record relating to third party — Whether reasonable steps taken to inform third party of request — Whether grounds for refusal of access — Promotion of Access to Information Act 2 of 2000, ss 34(1), 36(1)*(b)*, 37(1)*(b)*, 42(1), 45*(b)*, 46, 47(1) and 49(2).

In this matter appellant had requested access to records of the first respondent (the SARB) that it had generated in the course of investigations into certain third persons (see [2]). The SARB said it could not locate records in respect of certain of the third persons and refused access to records pertaining to three (see [3]).

This was on the basis, apparently, that the records fell within ss 34(1), 36(1)*(b)*, 37(1)*(b)*, 42(1) and 45*(b)* of the Promotion of Access to Information Act 2 of 2000, and where it was against the public interest (s 46) to disclose them (see [37] – [39] and [44] – [46]).
Appellant had then approached a High Court for, inter alia, a declarator that the referral was unlawful and for an order setting it aside (see [4]). The application was dismissed and the appellant appealed to the Supreme Court of Appeal (see [4]).
The SCA upheld the appeal and substituted the order of the High Court with a declarator that the refusal was indeed unlawful and should be reviewed and set aside (see [49]).
The SCA reached this decision on the basis that the SARB had failed to take reasonable steps to inform the third parties of the records related to the request (s 47(1)), and accordingly this requisite for a decision to be made on the request (s 49(2)) had not been met (see [8], [19], [21] and [27]). Moreover, the SARB had not established that any of the records fell within the categories of record where refusal of access was permitted or required

BILL v WATERFALL ESTATE HOMEOWNERS ASSOCIATION NPC AND ANOTHER 2020 (6) SA 145 (GJ)

Spoliation — Mandament van spolie — When available — Deactivation of biometric access to residential estate.

Applicant took cession of the rights in a 99-year lease of a property on a residential estate, and in so doing, and becoming a party to the agreement, automatically became a member of first respondent, the estate's homeowners' association, and subject to its memorandum of incorporation, as well as the estate's rules (see [2] – [3] and [10] – [12]).
Under those rules applicant was required to start building on the property within a certain period and, when he failed to, he became liable for certain monetary penalties levied on him (see [15], [18] and [21]). These he disputed (see [19]).
Ultimately, and apparently in an attempt to induce applicant to pay the penalties, first respondent deactivated applicant's biometric access to the estate, but not, however, to the property thereon, and also disallowed his builders access, again to the estate (see [24], [38] and [131]).
This caused applicant to apply under the *mandament van spolie* for the restoration of his biometric access to the estate, and that of his builders (see [1], [30] – [31], [36] and [133]).
The court *held* that applicant's biometric access to the estate, and his contractors' access, were entitlements incidental to applicant's possession of the property (see [52], [87], [90] and [130]); that applicant's peaceful and undisturbed quasi-possession of these rights of access had been disturbed (see [13], [95] and [97]); and that this was unlawful (see [129]).
It accordingly granted the application

CAPE BAR v MINISTER OF JUSTICE AND OTHERS 2020 (6) SA 165 (WCC)

Legal practitioner — Legal profession — Regulation — Composition of provincial councils of Legal Practice Council — Constitutionality of race and gender requirements

— Court finding that impugned rules and regulations constitutional and binding — Legal Practice Act 28 of 2014, s 23.

Constitutional law — Human rights — Right to equality — Right not to be unfairly discriminated against — Affirmative action — Statutory transformation and restructuring of legal profession — Constitutionality of race and gender requirements in electoral process proposed in rules and regulations under Legal Practice Act 28 of 2014 — Court finding that impugned rules and regulations constitutional and binding — Constitution, s 9(2); Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 14(1) and s 14(2).

The Cape Bar challenged, simultaneously in the Western Cape Division and Equality Court, the constitutionality of regulatory provisions made under the Legal Practice Act 28 of 2014 in respect of the composition of the provincial councils of the Legal Practice Council (the third respondent). The challenge came after a provincial council election in which black male advocate, Mr P, was elected over Ms M, a black female advocate who had received more votes. This was the result of the application of the challenged provisions, which required (i) a 50/50 male/female split; and (ii) that the four seats reserved for advocates be filled, respectively, by a white man, a white woman, a black man and a black woman (the scheme).

The Cape Bar launched an Equality Court challenge to the scheme, arguing that it was discriminatory and inimical to its alleged purpose of transforming of the legal profession. The challenge was brought under the Equality Act 4 of 2000.*

The Cape Bar at the same time instituted review proceedings in the High Court under the Promotion of Administrative Justice Act 3 of 2000, alternatively a legality review. It argued that if PAJA was inapplicable, then the scheme ought to be scrapped because it imposed inflexible race- and gender-based quotas. The Cape Bar reasoned that while the scheme on the face of it guaranteed black and female representation, it actually capped it, while — ironically — protecting positions for white men. So, by restricting black women to one seat, Ms M was denied a benefit or opportunity based on race or gender in violation of the Constitution and the Equality Act.

The Cape Bar also argued that the scheme failed to meet the requirements of the *Van Heerden* test for fair discrimination under s 9(2) of the Constitution. *Van Heerden*† stated that a measure was protected under s 9(2) if it *(a)* targeted persons or categories of persons who were disadvantaged by unfair discrimination; *(b)* was designed to protect or advance such persons; and *(c)* promoted the achievement of equality. The respondents denied discrimination, arguing that everyone was treated equally.

Questions for the court were whether prohibited discrimination under the Equality Act was established; whether the decisions to promulgate the regulations and issue the rules were reviewable as administrative action or the exercise of a public power; whether the first respondent minister acted ultra vires in promulgating the regulations; and the legality of the electoral process and the issuance of the rules and regulations.

Held

Unfair discrimination*:* Occupying a seat in a body seized with the administration of the legal profession was not necessarily a 'benefit'; it could be viewed instead as an opportunity to serve the profession. Nor did the appointment of a council member give rise to a contract of employment or access to work, briefs or instructions. (See [52] – [53].) The scheme satisfied all three *Van Heerden* requirements: it was aimed,

at least in the main, at a disadvantaged group; it was designed to ensure the representation of black people and women; and it promoted the achievement of equality (see [63], [66]). While it did at the same time guarantee a seat for a white man, there was no naked intention to prefer them (see [78], [80]). Quotas were not prohibited in all circumstances, and the present case could be distinguished from the precedents on the constitutionality of quotas because the scheme was not concerned with the distribution of work or briefs but the reformation of the governing structures of the legal profession (See [84] – [86].)

Administrative action or the exercise of a public power*:* While PAJA might not be applicable, the Minister's exercise of public power was, however, reviewable under s 2 of the Constitution (see [91]). He had acted within the confines of the Legal Practice Act and executed his powers intra vires (see [95]). There was also no arbitrariness in the sense of an absence of reasons for the action taken: both the Minister and the Legal Practice Council gave ample reasons to justify the implementation of the scheme. Nor was there unequal treatment of similarly placed persons or a naked preference for white men (see [97], [99]). A rational link between the issuance and application of the rules and regulations, and the objective sought to be achieved — a transformed profession through a hard-wired 75% representation of black men and women in the provincial councils — was also amply demonstrated (see [104] – [106]). For the same reasons, the attack based on reasonableness had to fail (see [107]).

Both applications would therefore be dismissed.

CENTRE FOR CHILD LAW v DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS AND OTHERS 2020 (6) SA 199 (ECG)

Constitutional law — Legislation — Validity — Births and Deaths Registration Act 51 of 1992, s 10 — Invalid to extent unmarried father not allowed to register birth of his child in absence of child's mother — Appropriate remedy.

Births and deaths — Birth — Registration — Births and Deaths Registration Act 51 of 1992, s 10 — Invalid to extent unmarried father not allowed to register birth of his child in absence of child's mother — Appropriate remedy.

Section 9(1) of the Births and Deaths Registration Act 51 of 1992 (the BDRA) provides for the notification of the birth of any child 'born alive'; and s 9(2) that this notification is '(s)ubject to the provisions of section 10'. Section 10 deals with the notification of the birth of a child born out of wedlock, and makes the exercise by an unmarried father of his right under s 9(1) contingent on either the mother's presence (s 10(1)*(b)*) or her consent (s 10(2)).

In its present form s 10 implicitly bars an unmarried father of a child born out of wedlock from giving notice of the child's birth under his surname if the mother is absent. This is discriminatory on the basis of the marital status of the father of a child born out of wedlock, directly violating his right to equality in s 9(3) of the Constitution, and tantamount to unlawfully discriminating against him. By extension, it also has the effect of denying children, with a legitimate claim to a nationality from birth, a birth certificate, and in this manner discriminates against children born out of wedlock on grounds that were arbitrary. A law that engenders discrimination with potentially enormous consequences cannot be said to be in the best interests of a child. Section 10 of the BDRA is accordingly declared inconsistent with the Constitution and invalid

to the extent that it does not allow an unmarried father to register the birth of his child in the absence of the child's mother. (See [5] and [20].)
The appropriate remedy is a reading-in or substitution of wording — expunging the bar presented by s 10 and providing a mechanism for a child born out of wedlock to be notified in the surname of his or her father where the mother is absent.

INVESTEC BANK LTD v FRASER NO AND OTHERS 2020 (6) SA 211 (GJ)

Mortgage — Foreclosure — Judicial execution — Judicial oversight — When triggered — Order declaring immovable property specially executable — Property owned by trust which was judgment debtor — Rule 46A of Uniform Rules of Court not applicable even though property was primary residence of first respondent, a natural person.

Execution — Sale in execution — Mortgaged immovable property — Sale of residential property for recovery of outstanding bond repayments — Judicial oversight — When triggered — Property owned by trust which was judgment debtor — Provisions of rule 46A of Uniform Rules of Court not applicable even though property was primary residence of first respondent, a natural person.

The first respondent opposed an application by the applicant for an order declaring the immovable property which was her primary residence to be specially executable as a precursor to satisfying a money judgment granted against a trust which owned the property and which was being held liable as a surety and co-principal debtor in an amount of R13,24 million. She based her opposition mainly on the fact that she resided on the property with her two adult children and that, since the applicant had failed to comply with rule 46A of the Uniform Rules of Court, the application was fatally defective.

Held

Upon an analysis of the rules and case law, it was clear that all the constitutional considerations required to be taken into account for the protection of judgment debtors, applied to individuals and natural persons only. The provisions of rule 46A were not applicable to the trust as owner of the property and the applicant was correct to proceed in terms of rule 46 to obtain execution against its immovable property.

WHIP FIRE PROJECTS (PTY) LTD v COMPETITION COMMISSION AND ANOTHER 2020 (6) SA 228 (WCC)

Competition — Competition Commission — Search and seizure — Ex parte order — Reconsideration application — Application for reconsideration of order authorising Competition Commission to conduct raid — When ex parte application permissible.

Competition — Competition Commission — Search and seizure — Ex parte order — Reconsideration application — Application for reconsideration of order authorising Competition Commission to conduct raid — Requirements for search and seizure warrant — Commission not obliged to attach CC1 form — Competition Act 89 of 1998, s 49B(1).

Competition — Competition Commission — Search and seizure — Ex parte order — Reconsideration application — Application for reconsideration of order authorising

Competition Commission to conduct raid — Whether reasonable grounds existed for issue of warrant.

In an application for the reconsideration of an ex parte search and seizure warrant issued by the court at the instance of the first respondent (the Commission), the applicant (Whip Fire) contended, inter alia, that the court should not have granted the relief on an ex parte basis; that the Commission ought to have initiated a complaint by filing a CC1 form and that its failure to do so was fatal to the validity of the warrant; and that there were insufficient grounds for believing that a prohibited practice had taken place or was likely to take place on the premises of Whip Fire.

In the founding affidavit the manager of the Cartel Division of the Commission (the deponent) alleged that there were long-standing collusive arrangements among fire-control and protection-system companies, which engaged in price-fixing and collusive tendering in contravention of s 4(1)*(b)* of the Competition Act 89 of 1998 (the Act). He alleged that a company called Automatic Sprinkler Inspection Bureau (Pty) Ltd (ASIB) — which had been formed by a group of short-term insurers (the respondents) to conduct inspections of fixed automatic fire installations, to test alarm apparatus, and to issue certificates — refused to provide clearance to any installations that had not been carried out by its listed members, regardless of the quality of the installations and the qualifications of the personnel that designed and installed them, thus rendering the standards developed by the South African Bureau of Standards nugatory. Whip Fire was one of ASIB's members.
The deponent stated that there were secret activities within ASIB which required investigation by the Commission, which in turn underscored the necessity of the search and seizure warrant in respect of Whip Fire. The deponent further averred that the facts showed that there was a reasonable suspicion that any attempt to confront the respondents or surreptitiously obtain information regarding their conduct would arouse suspicion, compromising the investigation of the matter.
Held
If the Commission suspected that the outcome of its investigations could be compromised if it attempted to confront Whip Fire or notify it that it was being investigated for its role in the alleged cartel, then the Commission was entitled to apply for relief on an ex parte basis notwithstanding the inroads that such relief made on the rights of Whip Fire. (See [44].) The applicant's argument that the Commission was obliged to attach a copy of a CC1 form to its ex parte application lacked merit. The complaint in the present matter had been initiated by the Commission in terms of s 49B(1) of the Act, and accordingly no formal or substantive prerequisites for the valid initiation of a complaint were required. All that was required was that the complaint had to contain sufficient particularity in respect of the conduct it concerned. (See [48] – [50].)
The reservation of the inspection market by ASIB for itself was the direct result of a horizontal market, and the information on oath clearly showed that there were reasonable grounds to believe that a prohibited practice had taken place or was likely to take place on the premises of Whip Fire, which could, by virtue of its membership of ASIB, be guilty of anticompetitive practice because it had not distanced itself from, and could be deemed to have knowingly consented to, the conduct of ASIB. (See [62] – [63].) Application dismissed.

NEW NATION MOVEMENT NPC AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2020 (6) SA 257 (CC)

Constitutional law — Legislation — Validity — Electoral Act 73 of 1998 — Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections — Amounting to infringement of individual's rights to freedom of association, dignity, to stand for public office and freedom of conscience — Electoral Act declared invalid prospectively, and suspended to afford Parliament opportunity to remedy defect — Constitution, ss 10, 15(1), 18 and 19(3)*(b)*; Electoral Act 73 of 1998.

Constitutional law — Human rights — Right to stand for public office — Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections amounting to infringement of individual's rights to stand for public office — Electoral Act declared invalid prospectively, and suspended to afford Parliament opportunity to remedy defect — Constitution, s 19(3)*(b)*; Electoral Act 73 of 1998.

Constitutional law — Human rights — Freedom of association — Scope of — Negative right not to be compelled to associate also protected — Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections amounting to infringement of individual's rights to freedom and association — Electoral Act declared invalid prospectively, and suspended to afford Parliament opportunity to remedy defect — Constitution, s 18.

Election law — Parliamentary election — Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections — Amounting to infringement of individual's rights to freedom of association, dignity, to stand for public office and to freedom of conscience — Electoral Act declared invalid prospectively, and suspended to afford Parliament opportunity to remedy defect — Constitution, ss 10, 15(1), 18 and 19(3)*(b)*; Electoral Act 73 of 1998.

Section 19(3)*(b)* of the Constitution provides that '(e)very citizen is free to make political choices'; and that '(e)very adult citizen has the right to stand for public office and, if elected, to hold office'.
At issue in this application for leave to appeal (to the Constitutional Court against a High Court order) was whether — in making access to political office possible only through membership of political parties — the Electoral Act unjustifiably limited the constitutional rights to freedom of association (s 18); and to 'stand for public office and, if elected, to hold office' (s 19(3)*(b)*).
The main majority decision's approach was that, at best, s 19(3)*(b)* was neutral — it did not say that when an adult citizen wanted to exercise the right they had to do so through a political party. The relevance of the right to freedom of association in determining the content of s 19(3)*(b)* was in the principle of harmonious interpretation; it must be interpreted to avoid conflict with the right of freedom of association. The question was therefore whether such conflict would arise if s 19(3)*(b)* entailed that an adult citizen desirous of standing for and holding political office may not be able to do so without forming or joining a political party. (See [19] – [21] and [56].)
Held (main majority judgment)
If it was an individual's fundamental right to be free to associate with whomsoever they wished, it must equally be their fundamental right to be free not to associate

with anybody whatsoever. It was axiomatic then that state compulsion of an individual to associate when they did not want to, limited the right to freedom of association. An individual's choice not to associate at all — a negative right not to be compelled to associate — was therefore also protected by s 18.
Conflict *would* therefore arise if s 19(3)*(b)* were read to restrict standing for and holding political office by requiring the forming or joining of a political party — ie a denial of the right to freedom of association. Such a reading would also be in conflict with the constitutional rights of freedom of conscience (s 15(1)) and to dignity (s 10). This called for a reading of s 19(3)*(b)* that was consonant with s 18 and related rights. (See [48], [52] and [58] – [60].)
A reading of s 19(3)*(b)* that did not lead to a denial of the right to freedom of association was also consonant with other constitutional provisions referring to a party-proportional representation —

- items 6(3)*(a)* and 11(1)*(a)* of sch 6 to the Constitution applied only up to a specified point now past (see [65] – [69]);
- the founding values in s 1*(d)* said nothing about the exclusivity of multi-party representation (see [70] – [72]);
- the legislation that ss 46(1)*(a)* and 105*(a)* prescribed (the Electoral Act) was itself subject to constitutional curbs (see [74] – [76]);
- ss 47(3)*(c)* and 106(3)*(c)* said nothing about loss of members who were not sponsored by parties, nor was it in any way indicative of their exclusion from membership (see [77]);
- ss 46(1)*(d)* and 105(1)*(d)* made no reference to party proportional representation, let alone exclusive party proportional representation;
- ss 57(2), 178(1)*(h)*, 193(5) and 236 focused (understandably) on political parties, and did not negate the possibility of the participation of independents in the National Assembly and Provincial Legislatures (see [81] – [87]); and
- s 157(2)*(a)* was tailor-made for municipal elections and did not contradict s 19(3)*(b)* (see [88] – [99]).

In none of these was it obligatory not to afford independent candidates an opportunity to stand for and, if elected, to hold office. (See [100].)
Therefore — insofar as it made it impossible for candidates to stand for political office without being members of a political party — the Electoral Act limited the s 19(3)*(b)* right (see [112]). And the state respondents, on whom the onus rested, failed to proffer justification for the limitation as envisaged in s 36(1) of the Constitution (see [113] – [119]).
A declaration of invalidity would follow, with effect from the date of this judgment so as not to invalidate previous elections; and suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality.

SA CRIMINAL LAW REPORTS NOVEMBER 2020

S v LIVANJE 2020 (2) SACR 451 (SCA)

Housebreaking — Housebreaking with intent to commit offence unknown to state — Sentence — Trial court erring in applying provisions of Criminal Law Amendment Act 105 of 1997 in circumstances where appellant not warned of such and neither state or defence having addressed court on issue — Minimum sentence of 10 years' imprisonment replaced on appeal with sentence of five years' imprisonment.

The appellant was charged in a regional court with housebreaking with intent to commit a crime unknown to the state, read with the provisions of s 262(2) of the Criminal Procedure Act 51 of 1977. The court found that the appellant had had the intention to commit robbery and accordingly convicted him of housebreaking with intent to rob. It also found that there were no substantial and compelling circumstances warranting a sentence less than the minimum sentence of 10 years' imprisonment prescribed by the Criminal Law Amendment Act 105 of 1997. He was accordingly sentenced to the prescribed minimum. His appeal against the conviction and sentence failed and he obtained leave to appeal to the Supreme Court of Appeal (the SCA). The SCA held that, on a conspectus of the evidence, there was an additional intent of committing another offence besides the housebreaking, but the regional court had misdirected itself in concluding that that intention was to commit the offence of robbery. It was not the only inference that could be drawn from the circumstances of the case, there being no circumstantial or direct evidence to support that conclusion, and the conviction on the second part of the offence accordingly had to be set aside and replaced with a conviction of the crime with which he had originally been charged, namely housebreaking with intent to commit a crime unknown to the state. (See [19].) As to sentence,
Held, that, in the circumstances where the charge had not made reference to the application of the provisions of Act 105 of 1997, where no address had been made to the court either by the prosecutor or defence in this regard, and where the appellant had not been warned about the application of the Act, this was a material misdirection on the part of the trial court, which called for a fresh consideration of the appellant's sentence. A sentence of five years' imprisonment would be appropriate.

KHOSA AND OTHERS v MINISTER OF DEFENCE AND MILITARY VETERANS AND OTHERS 2020 (2) SACR 461 (GP)

Fundamental rights — Enforcement of — Declarator — Rights of public — Disaster management — Covid-19 — Lockdown — 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 the 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

S v LM AND OTHERS 2020 (2) SACR 509 (GJ)

Child — Child and youth care centre — Diversion to in terms of s 41 of Child Justice Act 75 of 2008 — Provisions of s 53(2) read with s 53(3) not permitting child, accused of committing sch 1 offence, to undergo diversion programme involving period of temporary residence.
Child — Child and youth care centre — Diversion to in terms of s 41 of Child Justice Act 75 of 2008 — Provisions of s 58(4)*(c)* not authorising prosecutor or child justice court to refer child, accused of committing sch 1 offence, and who failed to adhere to previous diversion order, to any further diversion programme involving period of temporary residence.
Child — Offences by — Drug offences — Section 4*(b)* of Drugs and Drug Trafficking Act 140 of 1992 inconsistent with Constitution and invalid to extent that it criminalised use or possession of cannabis by child — Pending completion of law-reform process to correct constitutional defects of that legislation, no child to be arrested, prosecuted or diverted for contravening provision.
Child — Diversion of — From criminal justice system — Programme operating outside of strictures of Child Justice Act 75 of 2008 impermissible.

An urgent review concerning four children came before the court in respect of cases where magistrates had ordered diversions in terms of s 41 of the Child Justice Act 75

of 2008 (the Act). The children were alleged to have committed offences referred to in sch 1 to the Act, in that they had all tested positive for cannabis in tests performed at school. The diversion agreements presented to them and their parents were made orders of court. The children had allegedly not complied with the diversion agreements and the prosecutor sought to invoke more onerous diversion programmes as contemplated in terms of s 58(4)*(c)* of the Act. The children were referred to the Department of Social Development where probation officers consulted with them and their parents. In all four matters the recommendations were for compulsory residence at one of two youth care centres. After agreement by the parents and children, the children were then referred to the centres for an unspecified period and the matters were remanded for six months.
The court held on 5 February 2019 that s 41 of the Act, in cases where the offences fell within the ambit of sch 1, did not permit compulsory residence as an option and that s 58(2) had not been complied with. The orders referring the children to the youth care centres were set aside. Because of concerns by the acting senior magistrate, Krugersdorp, that there may be other children in youth care centres affected by that decision, the court granted a further order that the youth care facilities conduct an audit of children referred to them in terms of s 41. That rule was extended a number of times, and, as a result, some particularly egregious cases emerged where children had been referred, for compulsory residence for minor offences in the institutions. The audit also revealed that each of the four matters under review, the child had been ordered to attend a 'Drug Child Programme' for a period of three months. This was a programme run by a senior state prosecutor, a state advocate and a team of volunteers.
The court noted that since the decriminalisation of the possession of cannabis by adults, the possession and use of cannabis in respect of children became a status offence in that it targeted persons on the basis of their age. At the level of international and regional law, it was clear that status offences had to be abolished and the court was obliged to view the offences through the prism of abolition when evaluating their constitutionality. (See [37] and [48].)

The court held that the criminalisation of the use and possession of cannabis violated a child's right to equality; there was no underlying purpose for singling out children; it amounted to discrimination on a prohibited ground; and did not meet the limitations test set out in s 36(1) of the Constitution. The provision accordingly fell foul of the equality provision and for this reason alone had to be declared unconstitutional. (See [58] – [60].) The criminalisation of such offences violated the best interests of the child and there were less restrictive means available to prevent children from using cannabis to the extent that it was harmful to them. Both the Prevention of and Treatment for Substance Abuse Act 70 of 2008 and the Children's Act 38 of 2005 provided for prevention, early intervention, treatment and rehabilitation processes and mechanisms to deal with children who were in need of treatment for addiction to a dependence producing substance in appropriate circumstances. (See [66] and [69].)

As a result, the court declared s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 inconsistent with the Constitution and invalid to the extent that it criminalised the use and/or possession of cannabis by a child, and, pending the completion of the law reform process to correct the constitutional defects of that legislation, no child could be arrested or prosecuted and/or diverted for contravening that provision.

The court also declared that s 53(2) read with s 53(3) of the Act did not permit under any circumstances whatsoever, for a child accused of committing a sch 1 offence, to undergo any diversion programme involving a period of temporary residence, and that s 58(4)*(c)* of the Act did not authorise or empower a prosecutor or child justice court to refer a child accused of committing a sch 1 offence, and who failed to adhere to a previous diversion order, to undergo any further diversion programme involving a period of temporary residence.
The court noted furthermore that the 'Drug Child Programme' in question seemed to operate outside of the strictures of the Child Justice Act, which was impermissible. The use of a standardised order for all children fell foul of the 'best interests' standard. The prosecutor, rather than selecting one level 1 diversion option available, imposed every option available. The proverbial book was thrown at the children who had to perform, inter alia, undefined community service for an undetermined amount of hours at the discretion and whim of the principal; ensure an increase in their school marks by at least 10%; and take part in some form of sports cultural event regularly. The court orders were consequently flawed.

S v KHAUTA 2020 (2) SACR 547 (FB)

Evidence — Certificate in terms of s 212(8) of Criminal Procedure Act 51 of 1977 — Proof of — Requirements — No evidence led as to identity of persons from whom DNA samples taken; under which numbers those samples were sealed; and how the sealed bags ended up in hands of DNA analyst — Convictions for robbery with aggravating circumstances, attempted murder and rape set aside as result.

The appellant was convicted in a regional magistrates' court of robbery with aggravating circumstances, attempted murder and rape. He was sentenced to life imprisonment. The complainant and her friend were attacked by two unknown men whom they were unable to identify because of the darkness at the place where the attack occurred. The appellant was arrested almost 12 months later on the basis of DNA evidence purporting to link the appellant to the DNA found on the vaginal swabs taken from the complainant. The DNA evidence formed the basis of the conviction of the appellant, but the only evidence thereof was an affidavit, in terms of s 212 of the Criminal Procedure Act 51 of 1977, giving the results of the DNA analysis. That affidavit was handed in by consent, but there were no further admissions by the defence relating to the DNA sample or analysis.
Held, that, in the absence of any further admissions by the defence in the court a quo, it was evident that there were no indications whatsoever as to the identity of the persons from whom the forensic samples were obtained; under which numbers those respective samples were sealed; and how the sealed bags with the samples ended up in the hands of the DNA analyst. In the circumstances the magistrate's finding, that the DNA evidence placed the appellant at the scene of the crime, was clearly wrong. It was not even known whether the one sample came from the complainant and the other sample from the appellant. The appeal was upheld, and the convictions and sentence set aside.

NYANYA v MINISTER OF POLICE 2020 (2) SACR 550 (ECG)

Damages — Measure of — For unlawful arrest and detention — Tailor with no criminal history arrested by anti-crime group in front of family and handed to police

— Held for three and half days without necessary medication for diabetes or family visits — Damages of R160 000 awarded.

The plaintiff claimed damages of R300 000 in respect of his unlawful arrest and detention. He was a tailor by profession and had no previous convictions or issues which lowered his status in the community. He was detained at home at 21h00 in front of his family and taken to the local police station by a group of people, a so-called crime group, but who were not part of the police. When handed over he was arrested and detained and held in the police cells for some three and a half days. He was severely embarrassed and humiliated by his arrest and the prosecution was not proceeded with. The plaintiff was a diabetic and whilst incarcerated was denied both medication and family visits.
Held, after an examination of comparable cases, that an award of R160 000 would be appropriate.

S v JD 2020 (2) SACR 555 (WCC)

Trial — Mental state of accused — Enquiry in terms of s 77 of Criminal Procedure Act 51 of 1977 — Regional court ordering that accused be admitted as state patient after receiving report that he was certifiable in terms of Mental Health Care Act 17 of 2002 and not fit to stand trial, and evidence indicating that he had committed offence in question — Magistrate thereafter referring matter to court in terms of s 47 of latter Act for 'final determination' — No application for discharge of patient and no legal basis for sending matter on automatic review — Matter erroneously referred.

The accused stood trial in a regional magistrates' court on a charge of murder for having shot and killed the deceased. After observation at a mental-health institution, the court received a unanimous report from three practitioners indicating that he suffered from an intellectual disability and was certifiable in terms of the Mental Health Care Act 17 of 2002 (the Act), and was not fit to stand trial. The court heard and accepted evidence indicating that the accused had in fact committed the offence and the court ordered that he be admitted as a state patient to the mental-health facility. The regional magistrate referred the matter to the court in terms of s 47 of the Act 'for final determination'.
There was no application for the discharge of the patient and the court held that the present proceedings were not a review, but it was nonetheless satisfied that the proceedings were substantially in accordance with justice. It held that the trial court had erroneously referred the matter to the court for 'final determination' in terms of s 47, which dealt with an application for discharge of a state patient. It held furthermore that there was no legal basis for sending a matter on automatic review when an accused person had been declared a state patient in terms of the Act. However, there might be specific reasons for sending the matter on review, in which case those reasons were to be indicated and the matter sent on review. If the trial court was satisfied that its decision was in accordance with justice, the matter should not have been referred for review.

ALL SA LAW REPORTS NOVEMBER 2020

Breetzke and others NNO v Alexander and others [2020] 4 All SA 319 (SCA)

Trusts – Fiduciary duty of trustee – Breach of duty – Trustee nominating company owned by him to acquire property being sold by trust in which he was trustee, and company subsequently selling property at significant profit – Whether separate and independent case, properly grounded in delict, was established in particulars of claim, allowing trust to succeed against nominated company – A person who knows that a person owing fiduciary duties to others is acting in breach of those duties and facilitates the execution of the breach of trust, acts wrongfully and attracts liability under the Aquilian action – Exception to particulars of claim on basis of lack of cause of action against company rejected on appeal.

As owner of a number of commercially lettable properties, a trust (the "Sleepy Hollow Trust") in which the first respondent ("Mr Alexander") was trustee, decided to sell its properties. Mr Alexander submitted an offer to purchase, and in May 2013, the trust concluded a sale agreement with the second respondent ("Ziningi"), a company nominated by Mr Alexander and owned and controlled by him. In determining the purchase price, it was alleged that some R90 million related to one of the properties (the "SARS property").

After payment was made the properties were transferred to Ziningi. On 6 November 2013, Ziningi sold the SARS property to an entity ("Delta") for R110 million. Based on the figure included in the gross price of all the properties sold by the trust to Ziningi, that represented a gross profit of over R19 million in the space of six months. That profit gave rise to the present claim, brought by another trust (the "SF Trust") which was one of the beneficiaries of the Sleepy Hollow Trust. The appellants were trustees in the SF Trust.

Underlying the claims against Mr Alexander and Ziningi was the fact that Delta had expressed interest in acquiring the properties when purchasers were first sought. Its offer to purchase was rejected by the trust as being too low. Another entity's offer was then received, and negotiations were far advanced when Mr Alexander opposed the sale and offered to purchase the property portfolio himself through Ziningi. The appellants alleged that he was aware at that stage that Delta remained eager to purchase the SARS property. They contended that he was under a fiduciary duty to disclose that fact to his fellow trustees (the first and second appellants and the third respondent) and to obtain their informed consent to his proceeding with the sale agreement to Ziningi at the prices offered for the properties. In failing to make that disclosure, Mr Alexander was alleged to have breached his fiduciary duty to the trust and its beneficiaries, more particularly the SF Trust, by not acting with the utmost good faith towards them and putting his own interests first. The claim against Ziningi was founded upon the allegation that Ziningi was a company owned and controlled by Mr Alexander and in which he had a financial interest. It was alleged that Ziningi knowingly participated in the alleged breach of trust by Mr Alexander.

Mr Alexander and Ziningi raised an exception to the SF Trust's particulars of claim, and the High Court agreed that the appellants failed to make out a separate and independent case, properly grounded in delict, allowing it so succeed against Ziningi. It struck out the claim against Ziningi and granted leave to amend. The appeal was with the court's leave.

Held – A breach of fiduciary duty in relation to a trust may give rise to two different actions, one on behalf of the trust to which the duty is owed, such as the Trust in the present case, the other by a beneficiary of the trust claiming in their own right. Accepting that the SF Trust had a direct claim as a beneficiary against Mr Alexander, the question was on what basis a separate claim for the same amount could be advanced against Ziningi. The crisp issue posed by the exception was whether Ziningi's knowing participation in the alleged breach of trust by Mr Alexander gave rise to a cause of action against it at the instance of the SF Trust as a beneficiary of the Sleepy Hollow Trust.

The Court confirmed that a person who knows that a person owing fiduciary duties to others is acting in breach of those duties and facilitates the execution of the breach of trust, acts wrongfully and attracts liability under the Aquilian action. The appellants' pleading alleging knowledge of and participation in a breach of fiduciary duty by Ziningi was a sufficient allegation of wrongfulness and disclosed a cause of action to recover loss flowing from that breach.

As the exception should not have been upheld, the appeal succeeded.

Milestone Beverage CC and others v Scotch Whisky Association and others [2020] 4 All SA 335 (SCA)

Competition – Unlawful competition – Character and nature of product – Whether goods were being marketed in a way that was likely to lead a significant section of the public to think that the goods had some attributes which they did not possess, thereby giving rise to confusion, or likelihood of confusion, in minds of the public – Get-up of product such that first impression on customer was likely to be that product was a whisky, and acting on first impression, average customer would be unlikely to scrutinise the product closely.

Competition – Unlawful competition – It is a form of unlawful competition to trade in contravention of a statutory provision – False representation – Section 11(2)(d) of the Liquor Products Act 60 of 1989 prohibits the use, in connection with the sale of a liquor product, of a class designation or any word or expression that so resembles a class designation that it would be likely to deceive, unless the product complies with the relevant designation – Misrepresentation of nature of product falling foul of section 11(2)(d).

The appellants manufactured and distributed two alcoholic beverages, one in a range called "Royal Douglas" and the other in a range called "King Arthur". The get-up and labelling of the products used the words "Whisky Flavoured" and other descriptors used in connection with whisky.

The first respondent, the Scotch Whisky Association ("SWA") was established to protect and promote the interests of the Scotch whisky trade generally and to prosecute, defend and enter into legal proceedings in any territory of the world in defence of the interests of the Scotch whisky trade.

The respondents averred that the appellants projected a Scottish provenance for their products, misrepresenting them as Scotch whisky, or whisky. Attempts to get the appellants to remove the offending products from the market, and to change the get-up were unsatisfactory, and the respondents instituted application proceedings in the

High Court, accusing the appellants of attempting to "unlawfully pass liquor products off as whisky when they are not and further to take advantage of the well-known Scottish reputation in relation to whisky products". The respondents' case rested on misrepresentation by the appellants as to the particular attributes, character, composition and origin of the Royal Douglas and King Arthur products, and trade in such products in contravention of the Liquor Products Act 60 of 1989.

Finding for the respondents, the Court granted interdictory and ancillary relief. Leave to appeal was granted to the appellants.

Held – In South Africa unlawful competition is recognised as an actionable wrong, distinct from that of passing off, with the remedy lying within the *Lex Aquilia*.

The question was whether the goods were being marketed in a way that was likely to lead a significant section of the public to think that the goods had some attributes which they did not possess, thereby giving rise to confusion, or the likelihood of confusion, in the minds of the public.

The distinctiveness of whisky and Scotch whisky was not in dispute. It was common cause that the product sold by the appellants was not whisky and had no connection to Scotland, or any part of the United Kingdom. However, the get-up of the appellants' products was such as to create a strong association with Scotland and medieval Britain. Adopting a common-sense approach to the labels and the visual impressions created thereby, the Court found that the first impression on a customer passing through a liquor store was likely to be that each product was a whisky, and acting on that first impression, the average customer was unlikely to scrutinise the product closely. The court *a quo* was correct in holding that there was the likelihood of confusion created by the initial (and replacement) get-up of the appellants' products.

Turning to the statutory cause of action, the Court pointed out that it is a form of unlawful competition to trade in contravention of a statutory provision. The Liquor Products Act proscribes the sale of any liquor product in a container, unless the "prescribed particulars of such liquor product are indicated in the prescribed manner on the label of such container and on the package of such container". Section 11(2)(d) prohibits the use, in connection with the sale of a liquor product, of a class designation or any word or expression that so resembles a class designation that it would be likely to deceive, unless the product complies with the relevant designation. The appellants' product offended sections 11 and 12 of the Act for being represented as a whisky or Scotch whisky or a whisky with a Scottish connection, being whisky-flavoured and having an alcohol content of 43% or 43,5% when, in fact, it had an alcohol strength of 34,98%.

The respondents were entitled to the interdictory relief sought by them, and the appeal was thus dismissed.

Van Meyeren v Cloete [2020] 4 All SA 358 (SCA)[2]

Personal Injury/Delict – Attack by dogs – Actio de pauperie – Strict liability imposed on owner of an animal, with exception provided in respect of negligent conduct of a

[2] appeal *Cloete Van Meyeren* reported at [2019] 1 All SA 662 (ECP)

third party – Alleged negligence of third party of no assistance where third party would not have had any responsibility to owner of animals in relation to said animals.

In February 2017, the respondent was pulling his refuse-collecting trolley down a public street, when he was attacked by three dogs owned by the appellant. The injuries sustained by the respondent in the attack were serious, and his left arm was amputated as a result.

In terms of the *actio de pauperie*, the respondent sued the appellant for damages. The issue of liability was separated from *quantum* and the trial was heard in the High Court, which found in favour of the respondent.

The appellant and his wife testified that the gate through which the dogs escaped was customarily kept closed and locked with two padlocks. They suggested that the gate must have been interfered with by an unknown intruder. However, photographs taken on the day of the incident showed that the one half of the gate was open. None of the photographs showed any padlocks or other fastenings for the gates.

Held – The appellant and his wife were not impressive witnesses, and several allegations made by them were contradicted by the evidence. On appeal, the Court explained the proper approach to speculative or improbable evidence. It stated that there is no obligation on a court to accept an improbable explanation of events merely because no other positive explanation is proffered. There were at least two possibilities in this case. The one was that the gates were insufficiently secured to keep the dogs inside the property. The other was the appellant's explanation that there must have been an intruder. The fact that the High Court did not feel able to reject their evidence did not mean that it was obliged to accept it. The issue was whether on a balance of probabilities the appellant's was the only explanation for the dogs escaping. Unless that conclusion could be reached, the appellant did not discharge the onus of proof and the defence should have failed.

In South Africa, strict liability is imposed on the owner of an animal. A recognised exception to the strict liability of the owner of a domestic animal in case law relies on negligent conduct of a third party (in this case, the alleged intruder, who did not exercise control over the dogs, but left the gate open). While not disputing that the requirements of *pauperien* liability were satisfied, the appellant sought to escape liability on the basis that what occurred was not his fault. However, absence of fault has never been a basis for avoiding *pauperien* liability. Thus, even if there was an intruder who left the gate open, such intruder would not have had responsibility to the appellant in relation to his dogs. Based on the principle of strict liability, the appellant remained responsible for injury caused by his dogs.

The appeal was dismissed.

Baleni and others v Regional Manager: Eastern Cape Department of Mineral Resources and others (Centre for Applied Legal Studies as *amicus curiae*) [2020] 4 All SA 374 (GP)

Civil Procedure – Declaratory relief – Court's discretion in granting declaratory relief – Court must be satisfied that applicant is a person interested in an existing, future or contingent right or obligation, and that the case is a proper one for the exercise of the court's discretion

Mining, Minerals and Energy – Application for mining rights on land – Rights of persons living and working on land – Access to mining right application, with confidential portions redacted – Section 10 of Mineral and Petroleum Resources Development Act 28 of 2002 providing for consultation with interested or affected parties – Consultation not adequate without information contained in mining rights application, and failure to consult after provision of application not meaningful.

The first applicant was the head of the Umgungundlovu community council, and the remaining applicants were members of the community. When minerals (titanium) were discovered on the land upon which the applicants lived and worked, the fifth respondent ("TEM") applied for a mining right in respect of the minerals. The applicants were interested and affected persons as contemplated in the Mineral and Petroleum Resources Development Act 28 of 2002. On that basis, they sought to be furnished with a copy of TEM's application for a mining right in terms of section 22 of the Act, acknowledging that financially sensitive aspects of the application could be redacted. In that regard, they sought a declaratory order confirming that interested and affected parties as contemplated in the Act are entitled by sections 10(1) and 22(4) of, on request to the relevant Regional Manager of the Department of Mineral Resources (the "Department") to be furnished with a copy of an application for a mining right subject to the right of redaction.

After the application was filed and served, TEM provided the applicant with the copy of the mining right application, excluding confidential information. However, it opposed the declaratory relief sought. It contended that even though it had voluntarily provided the documents, the applicants were not entitled to them as of right because sections 10 and 22 of the Act did not confer such rights to an objector or interested and affected persons. Instead, the applicants were said to be constrained to utilising the procedures provided by the Promotion of Access to Information Act 2 of 2000, which governed the right to access information.

Held – Section 10 of the Mineral and Petroleum Resources Development Act provided for consultation with interested or affected parties and section 22 set out the procedure for applications for mining rights. The applicants contended that on a proper interpretation, the two sections meant that interested and affected parties or persons should obtain a copy of a mining right application automatically upon request from the Regional Manager to enable them to have meaningful consultations with TEM. Against the imperative that statutes be interpreted so as to give effect to the spirit of the Constitution, the applicants' interpretation of the sections was endorsed by the court. The notice and consultation requirements set out in the two sections implicated the constitutional right to just administrative action. The purpose of consultation is to provide sufficient details to the landowners or occupiers to enable them to make informed decisions. Without access to some of the documents requested, the applicants were unable to meaningfully interact with the mining company that wanted mining rights in the property on which they lived and worked. While TEM had consulted with the community before providing a copy of the application, it refused to do so after. The Court confirmed that for the consultation to be meaningful, the documents had to be provided before consultation.

TEM, again relying on its having already furnished the mining rights application, argued that the matter had become moot, and therefore that there was no need for the declaratory order. However, the Court pointed out that a copy of the application had been furnished only after a lengthy struggle by the applicants.

Regarding the relief sought, the Court referred to section 21(1)(c) of the Superior Courts Act 10 of 2013 which deals with the powers of a court to issue a declaratory order. The exercise of the court's jurisdiction in terms of section 21(1)(c) follows a two-legged enquiry. The first requires the court to be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation. The second leg focuses on whether the case is a proper one for the exercise of the court's discretion. The Court was satisfied that the applicants had satisfied both legs of the enquiry, and the declaratory relief was accordingly granted.

Blue Mountain Products CC and another v Minister of Police [2020] 4 All SA 401 (WCC)

Personal Injury/Delict – Claim for damages against Minister of Police arising from damage to property during violent protest action – Allegation that police were negligent in failing to prevent harm and to protect public – Causation – Factual causation involves a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant, and legal causation involves the question of whether there is a sufficiently close relationship between a factual cause and the loss – Plaintiffs failing to establish that damages suffered by them followed directly from the conduct or omission by any member of the police.

Personal Injury/Delict –Claim for damages against Minister of Police arising from damage to property during violent protest action – Allegation that police were negligent in failing to prevent harm and to protect public – Wrongfulness – Determination of unlawfulness of a negligent omission occurs only in circumstances where the law regards it as sufficient to give rise to a legal duty to avoid negligently causing harm – No wrongfulness where police found to have acted reasonably.

Protest action which took place in the Witzenberg Valley area in November 2012 turned violent, resulting in damage and destruction to the movable and immovable property of the plaintiffs.

Instituting action against the defendant (the "Minister"), on the basis of vicarious liability for unlawful actions of the police, the plaintiffs submitted that the police bear a legal duty to maintain law and order, prevent crime, protect the public and prevent damage to property. It was contended that the police had unlawfully and negligently failed to protect the constitutional rights of the plaintiffs' members and employees in that no measures were timeously introduced to barricade certain areas so as to prevent and limit the threats to the plaintiffs' members and employees and damage to their properties; that an inadequate number of police were deployed to protect the plaintiffs' properties and monitor the protestors so as to prevent damage during the violent protests; and that the police failed to take all steps necessary to protect the plaintiffs' properties.

Pleading to the claim, the Minister denied that in the circumstances of this case the police owed to the plaintiffs a legal duty of care. It was further denied that the police acted unlawfully or negligently. Further, alternatively, in the event that it was found that the police had in fact acted negligently, then it was pleaded that the police were not causally negligent.

Held – It was common cause that the protest action was unlawful. It was also unprecedented in nature and extent. The opportunity to put any measures in place and to plan beforehand was very limited.

On the issue of negligence, the elements at issue in this case were those of wrongfulness and causation. The enquiry was whether the alleged harm caused to the plaintiffs demanded the imposition of liability in the particular circumstances of this case.

Where positive conduct harms the person or property of another, such conduct is *prima facie* wrongful. As there is no general right not to be caused pure economic loss, the negligent causation of pure economic loss is not regarded as *prima facie* wrongful. In considering whether there was a legal duty on the defendant, on the facts of this case, public and legal policy considerations consistent with our constitutional norms had to be considered. It was not the reasonableness of the conduct of the police which required scrutiny, but rather the reasonableness of imposing liability on the defendant, on the facts and circumstances of this matter, which had to be determined. The Court also had to consider the issue of causation, both factual and legal, the latter being relevant to the remoteness of the loss. Even where negligent conduct resulting in pure economic loss, is for reasons of policy, found to be wrongful, it may, for other reasons of policy, be found to be too remote. Factual causation involves a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. Legal causation in turn involves the question of whether there is a sufficiently close relationship between a factual cause and the loss.

The element of wrongfulness is more contentious when dealing with liability for negligent omissions and for negligently caused pure economic loss. The plaintiffs' claims against the defendant were based on alleged negligent omissions on the part of the police. The determination of the unlawfulness of a negligent omission occurs only in circumstances where the law regards it as sufficient to give rise to a legal duty to avoid negligently causing harm. Having regard to all the relevant circumstances, the Court found that the police did not act wrongfully, taking into account the undue demands that were placed upon them in the circumstances. In any event, the plaintiffs failed to establish that the damages suffered by them followed directly from the conduct or omission by any member of the defendant.

The plaintiffs' claims were thus dismissed.

Cart Blanche Marketing CC and others v Commissioner for the South African Revenue Services [2020] 4 All SA 434 (GJ)

Tax – Income Tax – Audit – Selection of taxpayers for audit – Tax Administration Act 28 of 2011 giving Commissioner of SARS the right to select a tax payer for an audit "on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis" – Selection of person for audit results in no more than an investigative process being set in motion, and does not constitute a decision which is capable of review.

In August 2014, the respondent ("SARS") selected the applicants for an audit to allegedly verify their compliance with the Income Tax Act 58 of 1962 and the Value Added Tax Act 89 of 1991.

The applicants sought the review and setting aside of the decision on the basis that it was unlawful as it was alleged to have been taken for an ulterior purpose and for a reason not authorised by the empowering legislation (the "Tax Administration Act 28 of 2011"). It was also averred that the decision was irrational, and taken in bad faith.

Opposing the application, SARS contended that a decision in terms of section 40 of the Tax Administration Act does not constitute reviewable administrative action but even if a selection in terms of section 40 is reviewable, the decision was lawful and should not be set aside.

Held – The matter was to be treated as a legality-based review.

The first question for determination was what powers the empowering provision (section 40) gave the Commissioner of SARS.

The purpose of the Tax Administration Act is to ensure the effective and efficient collection of tax. The Commissioner is not only empowered to use available mechanisms to collect all taxes payable to the fiscus, but is legally enjoined to do so. One of the powers of the Commissioner, in terms of the Tax Administration Act, is the right to select a tax payer for an audit "on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis".

As the applicants insisted that they were fully tax compliant, all they had to do in response to the section 40 notice was to provide the auditors with the relevant documentation to prove such compliance. The documents called for in the audit notifications were those that a compliant taxpayer would have.

The selecting of a person for an audit results in no more than an investigative process being set in motion. The initiation of an investigation does not constitute a decision which is capable of review as it is not yet ripe for review. A further obstacle for the applicants was their non-compliance with the principle of subsidiarity. The Court found that the impugned decision was not capable of forming the subject of a legality review within the factual matrix of this case. In any event, the Court was not satisfied that the decision was unlawful.

The application was dismissed with costs.

Financial Sector Conduct Authority v JP Markets SA (Proprietary) Limited [2020] 4 All SA 457 (GJ)

Financial Services Regulation – Financial services providers – Over-the-counter derivative provider – Requirement of authorisation by regulatory authority – Failure to obtain authorisation – Operating as over-the-counter derivative provider without authorisation constituting contravention of section 111(1) of the Financial Sector Regulation Act 9 of 2017 – Financial Sector Conduct Authority entitled to apply to court for liquidation of erring financial services provider to protect the interests of its clients.

The applicant was the regulatory authority for the financial sector. In terms of section 38B of the Financial Advisory and Intermediary Services Act 37 of 2002 and section 96 of the Financial Markets Act 19 of 2012, it sought the winding up of the respondent.

Held – The issues that arose related both to the interpretation of the two sections and the application of those sections to the facts.

The respondent was authorised as a financial services provider ("FSP") under the Financial Advisory and Intermediary Services Act, holding a Category 1 licence authorising the provision of advice and the rendering of non-discretionary intermediary services in respect of derivative instruments and deposits. It also acted as an "OTC derivative provider" ("ODP"), and was required to be authorised by the applicant in that

regard. It was common cause that it was not so authorised, and it disputed that such authorisation was required.

As OTCs are high-risk financial products, the need for regulation was uncontested. The requirement for ODPs to be authorised is to ensure that they are prudentially sound and meet sound governance and risk management requirements. The aim is to protect the public against ODPs who may not be able to honour contracts-for-difference ("CFDs") if the market turns against them.

The respondent failed to timeously apply for authorisation as required by the Regulations promulgated under the Financial Markets Act. In its arguments, it unsuccessfully attempted to describe its services such as to place itself outside the regulatory framework of the Act and instead to create the impression that at most the services that it rendered constituted some or other form of intermediary services that it was entitled to perform as a licensed financial services provider.

After conducting an investigation, the applicant was entitled, in terms of the legislative provisions referred to above, to apply to court for the liquidation of a financial services provider to protect the interests of its clients. The Court rejected the submission that the inspection must be concluded before the applicant could apply for winding-up. It also could not be found that the applicant was required to demonstrate that there was no alternative remedy available to it before being entitled to seek the liquidation of the respondent.

The respondent's operating as an ODP without authorisation was in contravention of section 111(1) of the Financial Sector Regulation Act 9 of 2017.

The applicant contended that a consequence of the respondent having conducted unlicensed business as an ODP was that the CFDs concluded by it as the opposite party to its clients were rendered void. There were many hundreds of thousands of CFDs transactions. The invalidity of those transactions would affect the respondent's solvency due to its obligations to make restoration to its affected clients.

Concluding that the liquidation of the respondent was reasonably necessary to protect the interests of clients and to maintain stability in the financial services sector, the court placed the respondent under final winding-up.

Olive Marketing CC v Eden Crescent Share Block Limited and another (Shepstone and Wylie and others as third parties) [2020] 4 All SA 498 (KZD)

Civil Procedure – Declaratory relief – In order to obtain a declaratory order in respect of a servitude, relevant party required to prove an actual, existing or future right or obligation with regard to property; an existing and real dispute about such right or obligation; and a convincing reason why court should exercise discretion to settle dispute by granting a declaratory order setting out parties' respective rights and obligations.

Property – Praedial servitudes – Nature of – Praedial servitudes are perpetual, and once properly and legally established they become immutable between the parties unless the parties agree to alter their effect.

Property – Servitudes – Owner of dominant tenement may claim damages from party that has interfered with its rights under servitude if it can satisfy normal requirements for action in delict – Where wrongfulness, fault, causation and harm found to be

present, conduct complained of qualifying as a delict and defendant held liable for loss of diminished rental claimed by plaintiff.

Having approved the development of an ice rink the second defendant's city council sought to alleviate the problem of limited parking in proximity to the ice rink complex. When leasing property adjoining the development, the council included a condition in the leasehold agreement, that the lessee would make 250 parking bays on the leased property available for the exclusive use of patrons of the ice rink. When the adjoining property was sold, the condition was carried forward. A material term of the sale agreement was that 250 parking bays would remain available to the ice rink development, and a parking servitude would be registered by the purchaser to secure in perpetuity the benefit of the 250 parking bays for the owner and developer of the ice rink. The main issue for determination in the present matter was the validity of the parking servitude.

The plaintiff ("Olive Marketing") purchased the property from the second defendant, the eThekwini Municipality in September 2008. The sale agreement recorded that the property had the benefit of a parking servitude over the property owned by the first defendant ("ECS"). ECS' property was thus the servient tenement in respect of the servitude.

From about 2004, ECS refused to comply with Olive Marketing's attempts to enforce the servitude. In 2005, ECS disputed the validity of the deed of servitude, leading to the present litigation.

Olive Marketing sought an order declaring the parking servitude over ECS' property valid and enforceable; directing ECS to make available parking facilities for at least 250 motor vehicles on its property for the exclusive use of Olive Marketing's property; and, to pay damages calculated from March 2010 in the sum R6 680 000 plus interest.

An alternative claim was brought against the municipality in the event of a finding that there was no valid parking servitude over ECS' property. Such a finding would trigger a breach of the contract between Olive Marketing and the municipality – hence the claim for damages.

ECS denied that the deed of servitude established a servitude, and/or that the deed was validly registered. It also denied that the deed of servitude conveyed any rights with respect to its property. It further pleaded prescription of all damages allegedly sustained more than three years prior to 17 April 2013, when the cause of action for the damages claim was introduced.

Apart from defending the action on the merits, the municipality raised two special pleas. The first was that the claim against it had been extinguished by prescription in terms of the provisions of Chapter 111 of the Prescription Act 68 of 1969. In the alternative, it pleaded that the sale agreement contained a "*voetstoots*" clause, which excused the municipality from any liability to Olive Marketing by reason of all defects in the property.

Held – The servitude in dispute was a praedial servitude in land. As stated in the authorities, praedial servitudes are constituted in favour of a particular *praedium* and are by nature perpetual, and once they are properly and legally established they become immutable between the parties unless the parties agree to alter their effect. They are limited real rights in the property of another person and must have some

utility for the holder. The owner of the servient land may exercise all powers of ownership not inconsistent with the servitude – while the holder of the servitude may not increase the burden on the servient land beyond the express or implied terms of the servitude. As praedial servitudes are interests in land and constitute a subtraction from the *dominium* in land, the Alienation of Land Act 68 of 1981 requires that any agreement granting such a right must be in writing and signed by both parties to be valid. In addition to the formal written requirement, the servitude has to be registered.

To succeed obtaining a declaratory order in respect of a servitude, Olive Marketing had to prove an actual, existing or future right or obligation with regard to property; an existing and real dispute about that right or obligation; and a convincing reason why the Court should exercise its discretion in the circumstances to settle the dispute by granting a declaratory order that sets out the parties' respective rights and obligations.

The defences raised by ECS in challenging the validity of the servitude related to absence of a servitude diagram; conflict with the Town Planning Scheme and the Housing Development Schemes for Retired Persons Act 65 of 1988; absence of a special resolution of ECS' shareholders said to be required by the Share Blocks Control Act 59 of 1980; and an allegation that the terms in the deed were vague and inadequate to describe the rights and obligations created under the deed. The Court found no merit in those contentions. It found on the other hand that Olive Marketing had established the requirements for the declaratory relief sought.

In respect of the damages claim against ECS, the Court stated that an owner of the dominant tenement may claim damages from the party that has interfered with its rights under the servitude if it can satisfy the normal requirements for an action in delict. Olive marketing's claim was one of pure economic loss. All five elements, ie an act, wrongfulness, fault, causation and harm must be present before the conduct complained of may be classified as a delict. The Court was of the view that ECS deliberately refused to permit Olive Marketing access to parking on its property while utilising the parking for its residents, and for generating an income for its own benefit. It therefore had the necessary intent to act wrongfully. Even if that were not true, ECS' conduct met the test for negligence. Finally, the Court was satisfied that on a balance of probabilities, Olive Marketing had established factual causation *viz* that it suffered economic loss through diminished rentals because of the withheld access to parking. ECS was therefore held liable in delict for the loss of diminished rental claimed by Olive Marketing.

Olive Marketing did not seek damages from ECS until it delivered a notice of amendment to its declaration, which was served on ECS on 17 April 2013. However, it sought damages calculated from March 2010. The Court upheld ECS' plea of prescription of all damages sustained more than three years prior to 17 April 2013, when the cause of action for the damages claim was introduced.

Panday v National Director of Public Prosecutions [2020] 4 All SA 544 (KZP)

Constitutional and Administrative law – National Director of Public Prosecutions – Decision to prosecute – Review application – A decision to prosecute may be reviewed only if it offends the principle of legality – Principle of legality requiring that decision-maker must act within the law and in a manner consistent with the Constitution and that decision be rationally related to the purpose for which the power was conferred – In absence of unlawfulness and irrationality, review cannot succeed.

In January 2018, the then National Director of Public Prosecutions ("NDPP") made a decision to prosecute the applicant ("Mr Panday") for fraud and corruption. Mr Panday sought the review and setting aside of that decision.

The decision to prosecute was based on allegations that Mr Panday had acted with two members of the South African Police Service (the "SAPS") to defraud the SAPS in the supply of temporary accommodation to members of the SAPS during the FIFA World Cup.

Held – A decision to prosecute is not susceptible of review under the Promotion of Administrative Justice Act 3 of 2000, and may be reviewed only if it offends the principle of legality. The latter principle embodies the rule that the exercise of all public power must comply with the Constitution. As the impugned decision involved the exercise of public power, the principle of legality applied to it. A decision based on the principle of legality has two features. The decision-maker must act within the law and in a manner consistent with the Constitution – and the decision must be rationally related to the purpose for which the power was conferred.

Prosecutorial independence is a hallmark of the separation of powers. A decision to prosecute or not is specifically allotted to the prosecuting authority by section 179(2) of the Constitution. Courts will seldom intrude on such a decision.

The first ground of attack on the legality of the impugned decision was that the NDPP had failed to consult the Director of Public Prosecutions (the "DPP") KwaZulu-Natal before reviewing her decision not to prosecute Mr Panday. Section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 provides that the power to review a decision arises only after the DPP has been consulted. The Court considered what is meant by "after consulting" in that section. Prior to the impugned decision being made, an exchange of correspondence between the NDPP and the DPP took place, with the DPP providing reasons for her decision not to prosecute. The Court found that there had been adequate consultation and the first ground of review was dismissed.

The second ground related to rationality of the decision. Mr Panday contended that unauthorised interceptions of his communications with his attorney breached attorney-client privilege, and because his defences were thereby disclosed, any subsequent trial would result in a failure of justice. Applying the test for rationality, Mr Panday failed to show that the NDPP did not use means appropriate to the end of reviewing the decision of the DPP. No case was made out that the impugned decision lacked rationality.

Selota Attorneys and another v Ramolotja and others [2020] 4 All SA 569 (GJ)

Civil Procedure – Rescission application – Uniform Rule 42(1)(a) – A court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby – An order is not erroneously granted or sought where the plaintiff was procedurally entitled to the order and no mistake occurred in the proceedings.

The first respondent was injured in a motor vehicle accident. The applicants were attorneys, who were instructed to institute a claim on first respondent's behalf, against the Road Accident Fund. The litigation culminated in an order in favour of the first respondent, who was awarded R963,309. The amount was paid into the applicants' trust account. After deducting a contingency fee, the applicant transferred the balance

of R722, 482 to a bank account. The first respondent therefore had no access to the money. Six months after receiving the payment, the applicants began setting up a trust, ostensibly for the benefit of the first respondent, and when the trust was registered, the applicants arranged for the money to be paid into the trust's bank account.

According to the first respondent, the applicants had no mandate to set up the trust or to deal with the money as they had. He obtained an order in the applicants' absence, for payment of the money awarded to him. The present application was for rescission of that order. The applicants relied on Uniform Rule 42(1)(a), which provides that a court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

Held – Based on the common cause or acceptable facts, the applicants were unable to establish a *bona fide* defence to the claim. The next question was whether a court retains a discretion to refuse a rescission of judgment under rule 42(1)(a), notwithstanding that the requirements thereof have been satisfied, where it appears from the papers before the Court that there is no *bona fide* defence.

An order is not erroneously granted or sought where the plaintiff was procedurally entitled to the order. There must be a mistake in the proceedings. None of the decisions considered by the Court suggested that an order can be rescinded under rule 42(1)(a) where the Court that granted the order if apprised of the facts would nonetheless still have granted the order. If the Court would have granted the order even if it had knowledge of the facts that the applicant contended demonstrates that the plaintiff was not procedurally entitled to the order, then to rescind that order would transgress on what is the domain of an appeal and not of a rescission.

Upon a consideration of the facts, the Court held that the applicants were not entitled to rescission in this case.

#UniteBehind v Minister of Transport and others [2020] 4 All SA 593 (WCC)

Constitutional and Administrative Law – Public entity – Passenger Rail Association of South Africa – Appointment by Minister of Transport of administrator of entity – Lawfulness of decision – Legal Succession to the South African Transport Services Act 9 of 1989, not empowering Minister to place entity under administration and appoint an administrator and Public Finance Management Act 1 of 1999 not vesting Minister with power to designate a functionary in a public entity as the accounting authority – Court reviewing decisions and ordering Minister to appoint Board of Control as required by legislation.

The fourth respondent ("PRASA") was a public entity wholly owned by the State and "a National Government Business Enterprise" listed under Part B of Schedule 3 of the Public Finance Management Act 1 of 1999. It was tasked with the provision of rail commuter services, and played a major role in South Africa's public transport.

It was common cause that PRASA had been beset by chronic governance and management failures. There was a decline in public services and various financial and procurement irregularities were unveiled. From 1 August 2014, when a Board was appointed for a three-year term, there was constant instability. In April 2018, the applicant submitted nominations to the then Minister for members of a new permanent board. An interim board was appointed, but the woes of the organisation continued.

The first respondent was appointed as Minister of Transport on 30 May 2019. On 15 November 2019, he offered the third respondent ("Mr Mpondo") a contract appointment as a special advisor. On 26 November 2019, the Minister served on the individual members of the board, notices of his intention to terminate their membership as members of the interim board. After hearing submissions from the board members, the Minister dissolved the board, and terminated Mr Mpondo's employment contract as special advisor and offered him a contract appointment as project manager and secondment to PRASA. The offer was accepted. A contract was entered into in terms of which Mr Mpondo was appointed as administrator of PRASA.

Expressing concern that the actions taken by the Minister were not lawful, the applicant requested clarity on the legal basis for appointing an administrator and whether the Minister intended to involve National Treasury or Parliament as contemplated in law.

In the present application, the applicant sought the review of, *inter alia*, the Minister's failure to appoint a Board of Control for PRASA and his decision to appoint Mr Mpondo as the administrator of PRASA.

Held – The parties were in dispute about the interpretation of certain sections of various pieces of legislation relevant to the matter. The Court held that a fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so will result in an absurdity. Linked to that rule is that statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and all statutes must be construed consistently with the Constitution.

In terms of the Legal Succession to the South African Transport Services Act 9 of 1989, the Minister had no power to place the entity under "administration" and appoint an "administrator". The appointment of Mr Mpondo as special advisor in November 2019 and his subsequent secondment was also unlawful as he was not an existing employee capable of secondment. The provisions of section 15 of the Public Service Act, 1994 were not complied with.

The Minister also argued that he was entitled to apply section 49 of the Public Finance Management Act in order to appoint the third respondent as the accounting authority. However, section 49(2)(b) applied by operation of law only to public entities that did not have as a matter of law a board or a controlling body and it did not vest the Minister with the power to designate a functionary in a public entity as the accounting authority.

The Court confirmed that the Minister had a duty to appoint a Board of Control. The Minister was given 60 days to complete that process.

The relief sought by the applicant was accordingly granted.

END-FOR NOW