LEGAL NOTES VOL 1/2021

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TELKOM SA SOC LTD v CAPE TOWN CITY AND ANOTHER 2021 (1) SA 1 (CC)

Telecommunication — Network — Cellphone network — Cellphone mast — Challenge to bylaw requiring rezoning of property in order to erect mast.

Telkom had made an agreement with a Cape Town property owner allowing it to erect a cellphone mast on his property (see [7]). The zoning of the property, however, disallowed erection of masts thereon and Telkom applied to the City of Cape Town for a rezoning which would allow this (see [8]). However, before the application was approved Telkom built the mast and in response the City froze the application and penalised Telkom (see [8]).

This caused Telkom to approach the High Court for a declarator that the cell-mast regulating bylaw and policy of the City were invalid (see [9]). It asserted that the City had no competence to make a bylaw and policy impacting on electronic communications and that the bylaw and policy conflicted with s 22 of the Electronic Communications Act 36 of 2005 (see [9]).
In response, the City applied for a declarator that the masts were built in contravention of the National Building Regulations and Building Standards Act 103 of 1997 (see [10]).

The High Court accepted this contention and dismissed Telkom's application. This brought Telkom to appeal to the Supreme Court of Appeal (SCA) (see [12]). The SCA ruled that the bylaw and policy were both legislatively competent and that there was no conflict between s 22 and the bylaw (see [15] – [16] and [18]).

Telkom then sought leave to appeal the decision from the Constitutional Court (CC). The issue was whether it was in the interests of justice to grant leave to appeal (see

[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 June 2012 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!**

[19]). This could be decided by considering Telkom's prospects of success, which could be gauged by analysing the soundness of the SCA's reasoning (see [21]). *Held*, in this regard, that the SCA had not erred in dismissing the appeal and accordingly that leave to appeal should be refused (see [45]). In coming to this conclusion, the CC considered first the competence point that the City's municipal planning power did not embrace land to be used for telecommunications infrastructure (see [22]). The contention was that such infrastructure crossed multiple municipal boundaries and that it would be unworkable to comply with the bylaws of each (see [22]).

Rejecting these points, the SCA had concluded that they were untenable in excluding the municipality from engaging in the zoning, which was at the core of the municipal planning competence (see [25]). This was because any zoning impacting a national or provincial legislative competence would be invalid (see [25]). There was moreover precedent that cross-municipal projects would not displace the municipality's municipal planning power (see [26]).

Apparently endorsing this reasoning, the CC added that, were each sphere of government permitted to zone land to achieve the aims of their competences, the situation would be both unworkable and disconsonant with the consitutional scheme (see [28]). The SCA was also correct in ruling that licensees were required to comply with municipal bylaws in exercising their rights under s 22 (see [31]).
Insofar as the contention that there was a conflict between the bylaw and s 22 and hence the bylaw's invalidity under s 156(3) of the Constitution (see [33]), the SCA had concluded that there was no such conflict and that Telkom was obliged to comply with the bylaw by s 22(2) (see [35]), reasoning that the CC approved (see [37] – [38]).

The CC also agreed with the SCA that requiring municipal consent for construction of telecommunications infrastructure would not be a thwarting of the aims of the Act (see [39]). The statement relied on for this contention had not been appropriately contextualised (see [42]).

As far as the policy was concerned, the CC was apparently in agreement with the SCA that it dealt with matters within the municipality's competence (see [44]).

COMPCARE WELLNESS MEDICAL SCHEME v REGISTRAR OF MEDICAL SCHEMES AND OTHERS 2021 (1) SA 15 (SCA)

Administrative law — Administrative action — Review — Organ of state seeking, in public interest, to review decision of another organ of state — Whether Promotion of Administrative Justice Act 3 of 2000 or principle of legality appropriate path to review.

Appellant, a medical scheme, sought to change its name and to this end submitted a name-change application to first respondent, the Registrar of Medical Schemes (see [2]).
The Registrar, however, refused to approve the change on the basis that the Medical Schemes Act 131 of 1998 prevented him changing a name to one 'likely to mislead the public' where he was of the view that the proposed name was likely to so mislead (see [2]). (Section 23(1)*(c)* provides in this connection that 'The Registrar shall not . .

. change the name of a medical scheme to a name . . . which is likely to mislead the public.' (See [1].)

Appellant then appealed to second respondent, the Council for Medical Schemes, but it dismissed the appeal. Appellant then appealed further to third respondent, the Appeal Board of the Council for Medical Schemes (see [2]). The Board upheld the appeal, and ordered the Registrar to make the name change, subject to appellant abiding by certain conditions (see [2]).

This prompted the Registrar and Council to apply to the High Court to review the Board's decision. The High Court duly granted the application and set aside the decision, and later granted the Board's application for leave to appeal to the Supreme Court of Appeal (see [11]).

There, the first issue was whether the Board's decision was reviewable under the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality (see [12]). To this end, the Registrar and Council claimed standing, and the court found they had standing to bring the review, in the public interest (see [15] and [17]). This aligned the case with an earlier matter in which a natural person had claimed standing in the public interest to review a decision of an organ of state (see [19]).

There it was held that the natural person, in acting in the public interest, had stepped into the shoes of a member of the public, and had come to bear the rights such member would have borne, had it chosen to litigate (see [19]). Accordingly PAJA was held to be the appropriate means to review the decision in that case (see [19]).

Here, similarly, the Registrar and Council had brought the application in the public interest, and in doing so had stepped into the shoes of a member of the public, so coming to bear that member's right to just administrative action, which they acted to defend (see [20]). PAJA thus applied to the review (see [20]).

The second issue was whether the Registrar and Council had established the ground of review they relied on, that is, that the Board had not been authorised to act as it had by the empowering provision concerned (s 6(2)*(a)*(i) of PAJA).

This in turn raised subquestions. The first was whether the Registrar had a discretion to permit a name change, even despite it being likely to mislead the public (see [27]). If the Medical Schemes Act did indeed confer such a discretion, then the Board would have acted within its powers in making its decision (see [27]).

Held, that s 23(1) conferred no such discretion: when the Registrar had decided that a proposed name fell within ss 23(1)*(a)*, 23(1)*(b)* or 23(1)*(c)*, the Act was clear — the Registrar could not register the name or allow a change to that name (see [28]). In this regard nothing in s 23(1) suggested that a discretionary power to deviate from the section's express terms was intended, necessary for attainment of its purposes, or incidental to the express provisions (see [29]). Indeed such a discretion would create a conflict within the section (see [29]).

The second subquestion was whether, even where a name change was likely to mislead, the Act nonetheless gave the power to attach conditions to an approval, to

prevent this occurring (see [30]). Authority was to the effect that in the absence of an express provision providing so, a power could not be interpreted to embrace the wider power of attaching conditions (see [31]). In this regard, s 23(1) did not expressly empower the Registrar to impose conditions, and there was no basis to imply such a power (see [32]). Indeed had the legislature intended such a power, it would have said so, as it did in s 24(1) (see [32]).

Held, accordingly, that the High Court had been correct to set aside the Board's decision: the Registrar had no power to approve the name change once he had taken the view that the proposed name was likely to mislead the public, nor did the Registrar have the power to approve such change subject to conditions (see [33]). As a result, the Board exceeded its powers in ordering the Registrar to approve a name likely to mislead the public, subject to conditions (see [33]).
Appeal dismissed (see [34]).

INVESTEC BANK LTD v ERF 436 ELANDSPOORT (PTY) LTD AND OTHERS 2021 (1) SA 28 (SCA)

Prescription — Extinctive prescription — Interruption — By acknowledgment of liability — Whether series of payments in reduction of loan constituted acknowledgments of liability interrupting prescription — Prescription Act 68 of 1969, s 14.

The appellant Investec had advanced a loan to the first respondent company Erf 436, secured by the passing of a notarial mortgage bond over a 50-year long notarial lease, in respect of a commercial property, concluded by Erf 436 as lessee and the South African Rail Commuter Corporation (SARCC) as lessor. The further respondents stood as sureties for Erf 436's debt under the loan. It was a term of the loan agreement that Investec had an option to replace Erf 436 as lessee in the event of Erf 436 defaulting on its obligations to SARCC. Erf 436 did default, and so, as it was entitled to, Investec demanded, on 10 September 2002, payment within seven days of the full outstanding amount. The commencement of prescription of the debt was thus 17 September 2002, being the due date of payment.

When payment was not forthcoming, Investec elected to exercise its option and conclude a lease with SARCC. Despite this, *an agreement was reached between Investec and Erf 436* that the latter would continue to manage the property, collect monthly rental from subtenants, and pay those amounts over to Investec to be credited to its loan account. The parties so conducted themselves until around mid-2003, when another agreement was reached between Investec and Erf 436 providing that the former would take over management of the property, itself collect rental from subtenants and credit the Erf 436 account with the amounts collected each month. It was further understood that endeavours would be made to find a purchaser for Investec's rights in the property and the purchase price would be credited to Erf 436's loan. Investec so managed the lease until July 2009, when it sold its rights as lessee to the entity Johnny Prop, and credited Erf 436's loan account with the purchase price, as agreed.

Investec subsequently, in a summons issued in the High Court served on 21 January 2011, claimed the outstanding amount it alleged was owing in terms of the loan agreement — R3 979 184,50 — from Erf 436, as well as the sureties. Erf 436 and the sureties raised a special plea of prescription. Investec, in response, pleaded that, on the basis of the number of payments made to reduce its loan, as well as various statements made in letters on behalf of it, Erf 436 had made a series of acknowledgments of liability, the effect of each acknowledgment being to interrupt prescription against Erf 436, and hence against the sureties too. The High Court, however, upheld the special plea of prescription. Investec appealed to the SCA to press its case.

The court first stressed that, in order to determine whether the various payments and statements amounted to acknowledgments of debt for the purposes of interrupting prescription in terms of s 14 of the Prescription Act 68 of 1969, they had to be viewed holistically and in their broader context. Here in particular, the two agreements referred to above relating to the management of the property. (See [32] and [43].)

The SCA held that the following acts, *given the context in which they took place,* constituted acknowledgments of debt by Erf 436, each of which had the effect of interrupting prescription:

- *During the period in which Erf 436 was responsible for collection of the subtenants' rental*, the multiple payments made by Erf 436 to Investec, the last of which occurred on 30 September 2003. (See [33].)
- Two letters, dated 7 May 2003 and 13 June 2003, respectively written by one of the directors of Erf 436 in which he expressly acknowledged liability on behalf of Erf 436. (See [33].)
- *During the period in which Investec managed the property*, the multiple payments made by Investec to reduce Erf 436's loan account, the last of which occurred on 17 July 2008. (See [38].)
- A payment to Investec on 29 March 2006 made by another entity, for the purpose of, as agreed with Investec, reducing Erf 436's loan. (The court held that such payment could be inferred to have been made on behalf of Erf 436, given the involvement and acquiescence of a director common to both entities.) (See [36].)
- Queries on 21 May 2007 by a director of Erf 436 as to the mechanics of the monthly payments into the Erf 436 account, and relating to how the VAT components of the rentals would be dealt with. (See [37] – [38].)
- The payment of the purchase price of Investec's rights in the property into the Erf 436 account in around July 2009.

The court concluded that, at the time of service of summons, the claim in question had not prescribed, given the series of interruptions of prescription. The court upheld Investec's appeal. (See [47] – [48].)

VALOR IT v PREMIER, NORTH WEST PROVINCE AND OTHERS 2021 (1) SA 42 (SCA)

Government procurement — Contract — Unlawful agreement — Provincial government cancelling its own award of contract but later, in response to proceedings brought by other party, settling matter and making settlement order of court — Settlement recording continuance of agreement, which had been entered without open

procurement process, and purporting to change character of agreement to bring it in accord with regulations — Thereafter provincial government cancelling agreement for second time — Other party proceeding for declarator that termination unlawful as well as for damages — Provincial government counter-applying to review and set aside agreement's award — Effect of delay in bringing proceedings to set award aside — Legality of contractual arrangement — Effect of settlement's attempt to recharacterise agreement — Whether settlement competently made order of court.

In this matter the Department of Sports, Arts and Culture of the North West Province had contracted with Valor IT for the provision by it of electronic content-management services (see [1], [4] and [11]). In the course of the performance of the contract, the Department formed the view that it had been entered without compliance with s 217 of the Constitution, and it cancelled it (see [19]). This caused Valor IT to institute proceedings for damages, and the Department, on the advice of a state law advisor, settled the dispute, the settlement agreement being made an order of court (see [19] – [20]). Under the agreement the termination was agreed to be unlawful and the status quo of before was restored (see [20]). The provincial government also paid a sizeable settlement amount (see [21]).

Then thereafter, on the advice of external lawyers that the agreement was concluded contrary to s 217, the provincial government again cancelled the agreement, and this again caused Valor IT to apply for a declarator of the termination's unlawfulness and damages (see [22]).

This time, the provincial government counterclaimed for setting aside the services agreement as well as rescission of the settlement (see [22]).
The High Court dismissed Valor IT's application but granted the counterclaim, setting aside the services agreement and rescinding the settlement (see [2] and [55]). It later refused leave to appeal and Valor IT obtained that on petition to the Supreme Court of Appeal (see [2]).

The first issue concerned the length of time the provincial government had come to take in bringing the counter-application to set aside its award of the agreement (see [23]). The provincial government, which acted under the principle of legality, was required to bring the review of its decision within a reasonable time, which it had failed to do (see [27] – [28] and [32]). Nonetheless, and even despite the inadequacy of its explanation therefor, its unreasonable delay could be condoned, because its prospects of success on the merits were strong (see [32] – [33] and [38] – [39]).
The second issue concerned the legality of the award of the agreement and certain related agreements, which the provincial government had made before it cancelled those agreements for the first time (see [23] and [44]). These were unlawful in not being preceded by open procurement processes (see [42] and [44]).
The further issues concerned the settlement agreement. The first was the effect therein of renaming the contractual arrangement in an attempt to bring it into compliance with the regulations concerned (see [48]). This failed to alter its essential unlawful character (see [49] – [50]).

The second was whether the settlement agreement met the requirements to be made an order of court (see [51]). It did not, in that it was not lawful — a requirement for the making of a settlement an order (see [52] and [55]).

Appeal accordingly dismissed (see [56]).

VAN MEYEREN v CLOETE 2021 (1) SA 59 (SCA)
Animal — Actio de pauperie — Defences of owner against liability — Negligence of non-custodian third party resulting in injury to person — Whether defence to be recognised.

An intruder or intruders broke the locks on a gate to Mr Van Meyeren's garden, allowing his dogs to escape into the street, where they attacked and badly injured a passerby, Mr Cloete (see [1], [10], [12] and [14].)

Mr Cloete subsequently instituted proceedings against Mr Van Meyeren based in the *actio de pauperie*, alternatively negligence, in pursuit of damages (see [2] and [15]). He was successful in his pauperien action. When Van Meyeren applied for but was refused leave to appeal by the High Court, Van Meyeren obtained such leave from the Supreme Court of Appeal (see [2]).
There, the issue was whether an owner of an animal could be exonerated from liability where a third party who was not a custodian of the animal caused it, by his negligence, to injure a person (see [22] – [25] and [31]).
Held, that the owner should not be so exonerated: there was no clear authority for the defence (see [25], [27] and [31]); it would not accord with the basis of the existing defences (see [37] – [39]); and it was not in the interests of justice to so develop the common law.

MEC, WESTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT v BE OBO JE AND ANOTHER 2021 (1) SA 75 (SCA)

Delict — Liability — Liability of state — Place of care — Place of care in terms of Child Care Act — Child injured when playing on swing in playground — Defective design and construction of swing rendering it dangerous — Whether MEC owing legal duty to children in places of care to take reasonable steps to ensure safety of equipment — Whether MEC liable for damages suffered by injured child — Child Care Act 74 of 1983, s 30(3)*(b)* and reg 30(4).

JE, 5 and a half years old at the time, was playing on a swing in the playground of the nursery she attended, the Babbel & Krabbel Kleuterskool (the School), when the heavy cross-beam to which the swing was attached collapsed on top of her. The beam had become dislodged from the uprights it sat on when the metal fixings broke as a result of undetected metal fatigue that had developed owing to a defect in the swing's design. JE sustained head and brain injuries, leaving her severely disabled. Consequently, in the Western Cape High Court, JE's father, the first respondent, claimed delictual damages from, inter alia, the MEC: Department of Social Development in the Western Cape, the appellant. The basis of the claims was as follows:
Section 30(3)*(b)* of the Child Care Act 74 of 1983 — under which the School had been registered, and which had been of application at the time of JE's sustaining her injuries — provided that the Director-General of the Department of Social Development, before granting an application for the registration of a 'place of care', such as the School in question, had to be satisfied that the proposed place of care complied with all prescribed requirements for registration and that it would be

suitable for the reception, custody and care of children. Further, and most critically, reg 30(4) of the regulations promulgated under the Child Care Act provided that the registration of a place of care shall be reviewed every 24 months by way of quality-assurance assessments undertaken by appropriately trained officials appointed by the DG. What reg 30(4)) gave rise to, the first respondent argued, was a legal duty on the part of the MEC to ensure that the School and its premises, as a place of care in terms of the Child Care Act, provided a safe environment for children; and to take reasonable steps to ensure the safety of children whilst on the School's premises. (See [17] and [21].) The first respondent argued that the MEC had negligently breached this duty when, inter alia, there was a failure by officials in its employ to identify by way of quality-assurance assessments the defect in the swing's design and observe the signs of metal fatigue in the fixtures, and then alert the School, which would have then been required to resolve the issue. (See [19] and [32].)
The first respondent was successful in its claim to the High Court. The MEC appealed to the Supreme Court of Appeal (SCA), where the sole legal question to be answered was whether there was indeed a legal duty on the part of the MEC in its capacity as regulator having oversight of places of care and like institutions in the Western Cape, to prevent or avoid the kind of harm that occurred.

Held, that a claim that a breach of, or non-compliance with, statutory provisions was wrongful and gave rise to delictual liability could rest on either one of two possible bases. The first was where, properly construed, the statutory provision imposed an obligation to pay damages for any loss caused by such breach or non-compliance. The second was where the breach of, or non-compliance with, a statutory provision, when taken together with all other relevant factors, led to the conclusion, in accordance with common-law principles, that it was wrongful, so as to attract delictual liability. (See [11].)
Held, that the correct construction of reg 30(4) appeared from its proper context. That context was that the provision of places of care, as they were formerly known under the Child Care Act, and early childhood development centres, as they were now known under the Children's Act, was largely undertaken by NGOs, private organisations and individuals. The responsibility of the departments of social development in each province *was to facilitate the establishment and registration of such facilities and to exercise general oversight* over their operations by regular visits and inspections by departmental staff, who were primarily social workers or healthcare professionals such as nurses. That the structures in which these facilities operate were properly constructed was a matter over which the local authorities in which they were situated exercised their conventional powers to enforce both the National Building Regulations and Standards and local bylaws governing the construction of buildings. (See [38].) As regards general issues of safety, including the construction and maintenance of playground equipment, the responsibility for this was that of the person or organisation operating the facility and the persons employed in it as teachers, carers, assistants or ground staff. In terms of s 30(3)*(b)* of the Act, the Department's responsibility *at the time of initial registration* was to ensure that these people and organisations were suitable to manage and conduct the place of care so that it would be suitable and safe for the reception, care and custody of children. *When a quality-assurance review was undertaken every two years*, that would again be the focus. The obligation of the DG was to appoint officials to conduct reviews who were appropriately qualified to assess whether the people and organisations operating the place of care were

suitable to manage and conduct it, so that it in turn would be suitable and safe for the reception, care and custody of children. Operational issues such as the proper design and maintenance of play equipment were the responsibility of the place of care and its management and employees. (See [39].)
(The court rejected the argument (see [32]) that reg 30(4) obliged the MEC to ensure that officials appointed to conduct quality-assurance assessments were qualified to identify technical faults in playground equipment. The implication of such an interpretation, given that a person possessing this particular skill would not necessarily be suitably qualified to conduct the other tasks required to be carried out, was that each review would have to be undertaken by several different officials, each having different qualifications. The enormity of the task of undertaking quality-assurance reviews every two years in respect of all these institutions in a single province, let alone every province throughout the country, provided a clear indication that counsel's construction of reg 30(4) could not be correct. It would have the effect of stultifying the legislative objective that provincial departments should facilitate the registration of these institutions.)

Held, further, that policy considerations pointed away from imposing a broader duty on the MEC:

- Firstly, as mentioned above, the role of the MEC and the Department was regulatory and not operational. (See [41].)
- Secondly, the responsibility for other health and safety issues lay explicitly with the local authorities in whose area of jurisdiction childcare facilities were located. (See [42].) There was no specific provision imposing responsibility for safety in places of care on the MEC or Department. Further, imposing liability on the MEC for personal injuries arising in circumstances such as the present case would have a chilling effect on the Department's officials in the performance of their statutory and administrative duties. (See [43].)
- Thirdly, given the very broad ambit of the legal duties pleaded, being entirely general and not specific to the School, the principle that courts should avoid imposing liability in an indeterminate amount for an indeterminate time to an indeterminate class applied. (See [44].)

Held, in conclusion, that there was no legal duty as contended for on the part of the MEC. Appeal upheld. (See [46] and [51].)

AIRPORTS CO SA LTD v SPAIN NO AND OTHERS 2021 (1) SA 97 (KZD)

Company — Business rescue — Business rescue plan — Whether company no longer financially distressed — Court to have regard to actual financial statements of company, not projected income — Companies Act 71 of 2008, s 141(2)*(b)*(ii).

Company — Business rescue — Business rescue plan — Whether plan substantially implemented — Court to adopt sensible interpretation of documents placed before it without attempting to analyse plan in such detail that scrutiny resulting in plan having no practical effect — Companies Act 71 of 2008, s 152(8).

State — Contracts by — Challenge to validity — Organs of state obliged to challenge own irregular acts by way of direct review or counter-application (collateral challenge) — If they fail to do so they cannot complain that they were being held to unlawful agreement.

State — Finance — Procurement — State-owned enterprise cannot complain that it was being held to unlawful agreement when it has not sought to review it.

The applicant, a state-owned entity as intended in the Public Finance Management Act 1 of 1999 (the PFMA), leased premises to the second respondent to carry on business as a restaurant in an airport. Later, following a resolution taken in September 2017 under the Companies Act 71 of 2008 (the Act), the applicant was placed in business rescue. The first respondent was appointed as the business rescue practitioner. The applicant's claim against the second respondent was for more than R5 million.

The background facts were that the applicant and the second respondent had concluded the lease agreement (the original lease) in August 2009. The lease period was from May 2010 to April 2015. The second respondent fell into arrears and the applicant instituted an action which was not finalised. An application for the eviction of the second respondent was also not persisted in. Instead, the applicant continued trading and placed itself in business rescue.

In the present proceedings the applicant sought an order compelling the first respondent to end business rescue under s 141(2)*(b)*(ii) and to give notice that the applicant was no longer financially distressed under s 152(8) of the Act.
The business rescue plan put forward by the first respondent provided for the continued occupation of the business premises by the second respondent despite the institution of eviction proceedings by the applicant. Relying on correspondence between it and the applicant, the second respondent sought to show that the original lease had been extended almost a year after it had expired. The validity of this renewed lease agreement, for which fair tender procedures were not followed, was in issue before the court.

The first respondent argued that security of tenure was necessary for the survival of the business. Being a state-owned entity, the applicant was obliged under the PFMA to follow fair tender procedures before concluding any contract for goods or services. The applicant contended in the light of this that it was being held to an unlawful agreement. For its part the second respondent contended that even if the agreement was unlawful, it remained valid and binding until set aside on review, for which no application had been brought in the present case.

Held
As a state-owned enterprise, the applicant had a constitutional duty to follow a fair process in concluding a lease extension. Its conduct could not simply be ignored and had to be set aside in a direct or an indirect review (see [22]). Since the applicant never sought a review, it could not complain that it was being held to an unlawful agreement (see [25]).
The principal issue before court was whether the applicant made out a case that the second respondent was no longer in financial distress (see [27]). The applicant's case was based on assumptions drawn from the business rescue plan and the financial indications in it, the highwater mark being its allegation that, having regard to the projected cashflow surplus reflected in the business plan, it had to be concluded that the second respondent had generated sufficient cashflow to settle admitted debts as recorded in the business rescue plan. (See [27].) That was hardly

a sufficient basis on which to conclude that the second respondent was no longer in financial distress, which had to be ascertained with reference to cashflow projections in its actual financial statements. The true test of the liquidity of a business could only be assessed by having regard to the 'actuals' in terms of cashflow statements and the ability of the business to meet its day-to-day expenses. (See [28].)

In determining whether the business rescue plan had been substantially implemented as intended in s 152(8), the court had to adopt a sensible interpretation of the documents before it, without attempting to analyse the plan in such detail that the scrutiny under which it was placed resulted in the plan having no practical effect. There was, however, nothing before the court to indicate how far the process had gone and neither was there anything before the court in terms of the negotiations towards the conclusion of a lease between the applicant and the second respondent, as directed in terms of the plan. The applicant accordingly failed to discharge the onus of establishing that the first respondent had achieved substantial implementation of the business rescue plan. (See [31] – [33].) Application accordingly dismissed (see [34]).

BALENI AND OTHERS v REGIONAL MANAGER, EASTERN CAPE DEPARTMENT OF MINERAL RESOURCES AND OTHERS 2021 (1) SA 110 (GP)

Minerals and petroleum — Mining and prospecting rights — Mining rights — Application — Access to application — Community members living and working on land in respect of which mining rights applied for, having right to access information in such applications — Mineral and Petroleum Resources Development Act 28 of 2002, ss 10(1) and 22(4).

The applicants were community members who lived and worked on land in respect of which the fifth respondent (TEM) had applied for mining rights under s 22(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). They sought a declaratory order that they had a right, under ss 10(1) and 22(4) of the MPRDA, to be furnished with a copy of a s 22 application for a mining right on request to the relevant Regional Manager of the Department of Mineral Resources (the Department), subject to the Department redacting financially sensitive aspects of the application (see [6] and [9]).

The Department had earlier referred their request for information regarding the application to TEM, but they refused it — only doing so after the application was launched (see [7] – [8] and [15.8] – [15.15]). The state respondents did not oppose the application but TEM did, on the bases that the relief sought had become moot, and that ss 10 and 22 did not confer the right of access contended for but that the applicants must utilise the procedures of the Promotion of Access to Information Act 2 of 2000 (PAIA) instead (see [10] – [11]).

Held

Interested parties had a right to raise environmental objections as the basis for objecting to an application for a mining licence, and were entitled to be heard before a decision was made. A meaningful consultation process was intended, to advance the objects of the MPRDA. The applicants, unlike the general public, would be affected by the environmental impacts of the mining operations. The information was

requested for the specific purpose of facilitating meaningful consultation, the applicant's inputs intended to inform the outcome of the application. The manner in which the applicants obtain a copy of the mining right should not be restricted to the request processes in terms of PAIA; the Department must deal directly with the issues that will determine the application. The relevant sections (ss 10 and 22(4)), properly interpreted, meant that they were entitled to a copy on request from the Regional Manager. (See [84], [86] and [89] – [91].)

Mootness did not present an absolute bar to adjudication; a court had a discretion to consider whether any order it may make would have a practical effect on the parties or on others. The applicant's case met the requirements for exercising this discretion: they were clearly persons interested in an existing, future or contingent right or obligation; and it was a proper case for doing so. (See [103] – [104] and [107].) The applicants would therefore be entitled to the relief sought.

BWANYA v THE MASTER AND OTHERS 2021 (1) SA 138 (WCC)

Administration of estates — Intestate succession — 'Spouse' — After 'spouse', words 'or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support' to be read in — Intestate Succession Act 81 of 1987, s 1(1).

Applicant, Ms Bwanya, and one Mr Ruch had entered into a relationship during the course of which Mr Ruch died (see [25]). Ruch, who was an only child, had left a will, but it nominated as his heir his mother, who had predeceased him (see [42]). Applicant had later made a claim on Ruch's estate, alleging a universal partnership, but this had been rejected by the second respondent, the executor (see [44]). Bwanya later instituted proceedings, alleging she was the surviving spouse in an opposite-sex life partnership, and challenged the constitutionality of s 1 of the Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Acts 27 of 1990, insofar as they excluded her from inheriting or receiving maintenance (see [46], [48] – [49] and [85] – [86]).

On the day of the hearing, applicant, the executor and the fourth to tenth respondents settled, and those respondents withdrew (see [35] and [37]). However, the hearing continued on the constitutional points, with the third respondent, the Minister of Justice, abiding by the outcome (see [35], [37] and [54]).

Held

- Applicant's failure to proceed within 30 days of notification of the rejection of her claim would be condoned (see [81] and [123]).
- The questions of the partnership's existence and the legislation's constitutionality were not moot (see [131].
- A life partnership with reciprocal duties of support had subsisted (see [141] – [142]).
- Section 1(1) of the Intestate Succession Act treated opposite-sex life partners differently to married men and women and same-sex life partners, and it also indirectly differentiated between the male and female partner (see [169]).

- This differentiation, on the listed grounds of marital status, sexual orientation, and sex and gender, was discriminatory and unfair (see [169], [172], [176], [179] and [182]).
- It was also an unjustifiable limitation of the equality right (see [186]).
- Likewise, the provision unjustifiably infringed the right to dignity (see [182] and [186]).
- Section 1(1) accordingly, in excluding opposite-sex life partners who had undertaken reciprocal duties of support, was unconstitutional and invalid (see [191] – [192]).
- But authority, namely *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) ([2005] ZACC 2), stood in the way of relief in respect of the Maintenance of Surviving Spouses Act (see [200] and [209]).

Application upheld in part, and ordered, inter alia:

- That after the word 'spouse' in s 1(1) of the Intestate Succession Act, there be read in 'or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support' (see [233]).
- That the Master and executor give effect to the order in respect of Bwanya, to the extent of the settlement.

CASSIM NO v MEC, DEPARTMENT OF SOCIAL DEVELOPMENT, FREE STATE AND OTHERS 2021 (1) SA 184 (FB)

Children — Schooling — Right of access to school — School refusing to admit vulnerable child requiring treatment until 'cured' — Condition discriminatory, unlawful and contrary to ministerial policy — Court ordering, inter alia, that child be admitted to appropriate school.

Education — School — Public school — Special-needs school — Admission policy — School refusing to admit vulnerable child requiring treatment until 'cured' — Condition discriminatory, unlawful and contrary to ministerial policy — Court ordering, inter alia, that child be admitted to appropriate school.

The applicant, the *curator ad litem* of a 12-year-old girl, brought an application on a semi-urgent basis to compel a special-needs school that had rejected her to accept her. The participating respondents, the school and its governing body, refused to admit her until they were satisfied that her behavioural impediments and addictions had been 'dealt with'. It appeared that she was a vulnerable child who had been diagnosed with foetal alcohol syndrome and suffered from cognitive impairments, behavioural disorders and epilepsy. She was addicted to snuff and had started consuming alcohol. She had also been exposed to violence at home and been sexually violated. The respondents' counsel took issue with the urgency aspect of the application on the ground that the country was in lockdown, which necessitated the closure of schools, and argued that there was therefore no reason for the court to decide the matter at the present.

Held

The arguments raised in opposition to urgency lacked merit. The court would always come to the aid of the vulnerable where their welfare and life were under threat and were ignored by those tasked with the responsibility to protect them. Although it was true that the country was gripped in uncertainty as a result of the pandemic, it would

be an absurdity to put the matter in abeyance until the lockdown was lifted. (See [10].)

The conditions imposed by the respondents constituted unlawful action as the minor child was effectively being barred from attending school until the respondents were satisfied that she had been 'cured'. This thinking was susceptible to perpetuating exclusivity and was in contravention of the law because every child who was admitted to school had to be allowed to attend school. It was also against the core principles of the Screening, Identification, Assessment and Support policy approved by the Ministry of Basic Education. A plan had to be put in place with other stakeholders to achieve the best interests of the child. The application would accordingly be upheld.

DENBY v EKURHULENI METROPOLITAN MUNICIPALITY 2021 (1) SA 190 (GJ)

Legal practitioner — Attorney — Rights and duties — Authority — Ostensible authority — Consent to judgment — After merits settled and made order of court, parties' legal representatives jointly seeking damages order in absence of agreement thereto by defendant — Previous conduct indicating that defendant's legal representatives had authority to agree to such order — Draft damages order made order of court.

In an action for damages arising from bodily injuries to plaintiff, the parties' legal representatives had, after the issue of merits was settled and made an order of court, agreed upon a joint memorandum seeking the court to make an order for payment in terms of a draft order to which the parties' legal representatives had agreed, but the defendant itself not.

Held
By all accounts, the defendant had left it in the hands of its legal practitioners to deal with the matter. In the absence of something to the contrary, that would include making such admissions and confessions at a pretrial conference as were appropriate, which would include the ultimate consequence of agreeing that an order be granted if that was the outcome of the pretrial engagement. There was no suggestion that what the defendant's legal representatives had agreed to was anything but bona fide, and in the circumstances the court would grant an order on the terms agreed to by the parties' legal representatives.

EQUAL EDUCATION AND OTHERS v MINISTER OF BASIC EDUCATION AND OTHERS 2021 (1) SA 198 (GP)

Education — Right to education — Whether including right to basic nutrition — Constitution, s 29(1)*(a)*.

With the lockdown that began in late-March, schools were closed, and this impacted on the longstanding National School Nutrition Programme, carried on by the state (see [33]). Under the Programme, learners who were not receiving regular meals at home, were provided with at least one meal per day, at their school (see [28]).

With the eventual easing of the lockdown, a return to school was mooted, and to this end, a phased return was planned. That is, grades 7 and 12 would be the first to return, followed by a staggered return of the other grades. Accompanying this, on a decision of the Minister of Basic Education, would be a phased reimplementing of the Programme: grades 7 and 12 to be its first recipients on their return, and other grades, as they progressively returned (see [76] and [78]).

Applicants sought an order that the Programme be rolled out to all learners regardless of whether they had returned to school or not (see [78]).
The court, in granting the application, *held* as follows.

- The right to basic education included, as one of its components, a right to basic nutrition, an understanding reflected in the Department of Basic Education's policies as well as its actions (see [8] and [40] – [42]).
- Given this right, and the state's corresponding duty, the state could only limit the right if there were sufficient justification for doing so (see [48]). In this regard it rejected the proposed justification that the state was not the prime bearer of the duty to provide basic nutrition, recognising that the state, in the absence of parental or family care, bore a supplementary duty (see [49]). The state was also disentitled to confer a benefit and later retract it at will (see [56]).
- The court considered further whether a structural interdict was warranted, and concluded it was (see [8] and [101]). This on account of the state's sluggishness in reinstating the Programme, the vulnerability of the children concerned, and administrative disorder in the provinces (see [88.1] – [88.3] and [91]).

Declared, inter alia, that all learners, whether they had returned to school or not, were entitled to a daily meal under the Programme (see [103.2]); that the Minister was under a duty to fulfil that right (see [103.3]); and that she was in breach of that duty (see [103.4]).
Ordered that she without delay ensure implementation of the Programme (see [103.5]); that she provide a plan for implementation of the duty (see [103.9]); and that she report periodically to the court on the implementing of its order (see [103.10]).

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK v MOONSAMMY t/a SYNKA LIQUORS 2021 (1) SA 225 (GJ)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure to deliver notice prior to commencement of proceedings — Effect — Non-compliance cannot be cured by attaching proof of purported compliance to summons or application — Compliance not elective but compulsory — Contrary precedents not followed — National Credit Act 34 of 2005, ss 129, 129(1)*(a)*, 130, 130(4).

In an application for summary judgment on a credit agreement subject to the provisions of the National Credit Act 34 of 2005 (the NCA), the respondent's defence was that the contract required a prior demand before the debt became payable but no such notice had been given, and if such notice was necessary, it had to be given, and it had to be alleged as having been given, before a default notice could be given under s 129. Counsel for the applicant, relying on High Court authority of that division, contended that there would have been proper compliance with the NCA if the s 129 default notice was attached to the summons. The contract did contain

notice terms that the plaintiff had to comply with before the loan became repayable but those terms were not pleaded.

Held
The plaintiff did not plead a completed cause of action. The cause of action was not verified and the particulars of claim were therefore excipiable. In the circumstances summary judgment would be refused. However, the applicant, having alleged that it had complied with ss 129 and 130, could amend its particulars of claim. Therefore the court had to consider whether there was indeed compliance with those sections. (See [8] – [9].)

Non-compliance with s 129 could not be cured by attaching proof of purported compliance with s 129 to a summons, an application for default judgment or one for summary judgment. Compliance with ss 129 and 130 was not elective but compulsory. The NCA made no provision for the curing of the non-compliance with s 129, other than a stay of proceedings until a court order in terms of s 130(4) was given effect to. Therefore, the application for summary judgment had to be dismissed and the defendant granted leave to defend. The action proceedings would be stayed until 10 business days after the plaintiff, in due compliance with ss 129 and 130 of the NCA, had served a notice as contemplated in s 129(1)*(a)* on the defendant. (See [47] and [49].)

In reaching the above finding the court refused to follow a line of Gauteng cases, originating with *SA Taxi Development Finance (Pty) Ltd v Phalafala* 2013 JDR 688 (GSJ), which held that non-compliance with s 129 could be cured by attaching a s 129 default notice to the summons.

LEGAL AID SOUTH AFRICA v JANSEN 2021 (1) SA 245 (LAC)

Labour law — Dismissal — Fairness — Automatically unfair dismissals — Disability — Depression — Nature of enquiry — Causation must be established — Labour Relations Act 66 of 1995, s 187(1)*(f)*.

Section 187(1)*(f)* of the Labour Relations Act 66 of 1995 provides that a dismissal will be automatically unfair if the reason for the dismissal is that the 'employer unfairly discriminated against an employee, directly or indirectly', inter alia, on grounds of 'disability'.

The Labour Court had found in favour of the respondent, one Mr Jansen, that his dismissal for misconduct — which misconduct that court accepted was caused by his depression — amounted to discrimination against him on the grounds of 'disability'; and that his dismissal was therefore automatically unfair as contemplated in s 187(1)*(f)* of the LRA. In his employer's appeal to the Labour Appeal Court —

Held
An applicant seeking to establish that a dismissal was automatically unfair on any of the grounds listed in s 187(1) of the LRA must show causation. It was incumbent on an employee to produce sufficient evidence raising a credible possibility that the dismissal amounted to differential treatment on the alleged ground. (See [35] and [37].)

In an automatically unfair dismissal claim based on depression, the enquiry was whether the reason for the dismissal was depression, and differential treatment on that basis. Mr Jansen failed to adduce cogent evidence, whether medical or otherwise, showing that his acts of misconduct were caused by his depression and that he was dismissed for being depressed.

MUNYAI v ROAD ACCIDENT FUND AND RELATED MATTERS 2021 (1) SA 258 (GJ)

Practice — Interlocutory proceedings — Trials interlocutory court, Gauteng divisions — Judge President's Directive 2 of 2019, part A, items 19 to 25 — Abuse of process by practitioners (i) submitting affidavits containing unsubstantiated allegations; and (ii) asking court to prematurely compel other party to discover or to appoint experts within specified time — Proper interpretation of items 20 (succinctness) and 25.5 (failure to secure expert timeously).

In eight matters that came before the interlocutory court in terms of the Judge President's Directive 2 of 2019, the court felt itself obliged to comment on (i) the lackadaisical way in which affidavits were being drafted; and (ii) the nature of relief sought, in particular the abuse by practitioners of items 20 (succinctness) and 25.5 (failure to timeously secure expert witness) of the Directive.

Held
The interlocutory court was intended to be an easily approachable court, its purpose being to assist parties to obtain procedural relief against recalcitrant litigants who are delaying matters from becoming trial-ready (see [1], [17]).
While the court would assist litigants by ensuring that their cases were trial ready and by calling to order recalcitrant litigants that were preventing it, legal procedure and protocol had to be followed nevertheless (see [8]).

Practitioners were taking the stance that item 20 allowed them to negate their professional obligations and submit affidavits containing largely unsubstantiated allegations, leaving the judge the unenviable task of making assumptions. This was noticeable in matters where an applicant sought an order to compel the other party to discover. In the applications before the present court no allegations were made that either a rule 35(1) notice had been delivered or that the other party had received notice of the trial date — the court was expected to assume that such a notice had been served. (See [5] – [7].)

Practitioners were also misconstruing item 25.5 of the Directive as giving a licence to applicants to ask the interlcutory court to direct a respondent to appoint experts and to do so within specified time periods. The Directive was never intended to confer any power on the courts to order a litigant to appoint experts but was merely intended to enable an applicant to approach the court for an order to place a respondent on terms to decide how it wished to conduct and/or present its case. Similarly, practitioners had taken to interpreting item 25.5 to mean that the court could compel a defendant to cause a plaintiff to submit to a medical examination. That interpretation was only partially correct. If the defendant had given notice, in terms of rule 36(9)*(a)*, of its intention to call a particular expert, the court could be

approached to compel the defendant to cause the plaintiff to submit to a medical examination in terms of rule 36(1).

RUCKSTUHL AND ANOTHER v WAKENSHAW ESTATE HOME OWNERS ASSOCIATION 2021 (1) SA 269 (KZD)

Land — Transfer — Deeds Office — Powers of registrar — Rectification of faulty entry in deeds registry — Deeds Registries Act 47 of 1937, s 4(1).

Land — Transfer — Deeds Office — Faulty entry in registry — Claim for rectification — Requirements — As contrasted with requirements for common-law rectification — Deeds Registries Act 47 of 1937, s 4(1).

Sectional title — Schedule of conditions under which property held — Rectification — Under Deeds Registries Act 47 of 1937, s 4(1).

In 2004 a property was subdivided into four parts for the purposes of residential development. It was envisaged that the four separate developments would be treated as one for certain purposes and would have one homeowners' association, namely the defendant in this matter. The defendant's objects were to attend to the shared needs of the owners of the individual properties or sectional title units in the gated estate, such as the maintaining of a secure environment within the fenced perimeter; the maintenance of roads and verges, street lighting, and areas of conservation significance; and to ensure that good standards of conduct were upheld by its members and occupiers of the properties on the estate. For these purposes it raised levies and could impose fines and penalties. Clause 5.3 of the defendant's constitution provided that when a member became the registered owner of an erf, he or she became a member of the defendant and ceased to be a member when they ceased to be an owner.

The plaintiffs instituted action against the defendant for an order declaring that they were not members of the defendant or subject to its constitution and were therefore not liable to it for any claims made against them under its constitution. The plaintiffs relied on the fact that the conditions under which they held their sectional titles, unlike the conditions applicable to other owners, did not contain conditions rendering them members of or liable to the defendant. After having investigated this discrepancy, the defendant established that there was an error in its constitution which had the effect of restricting its application to only the first of the four parts of the development, and that the schedule of conditions in terms of s 11(3)*(b)* of the Sectional Titles Act 95 of 1986 had been negligently drawn up by a conveyancer. The defendant delivered a plea to the effect that its constitution and the s 11(3)*(b)* certificates fell to be rectified, and it counterclaimed to the same effect. The plaintiffs contended that as the type of 'error' liable to be rectified by the Registrar of Deeds was not defined in s 4(1) of the Deeds Registries Act 47 of 1937, the common law of rectification of contracts had to apply but the conveyancer responsible for drafting the certificate had not been called to explain the omission, nor was there any evidence of an antecedent common intention on the part of the owners of the affected properties that the conditions of title should include the suggested amendments.

Held
The evidence was overwhelming that all owners of erven in the first part of the development and sectional title owners in the other parts regarded themselves as having become members of the defendant upon acquiring ownership, until the issue was raised between 2012 and 2015, when deficits in the documentation were first noted. It would have been perfectly obvious to any newcomer that a single homeowners' association was necessary in circumstances where there was a single entrance gate serving the entire property; refuse collection was centralised; and there was a single water supply to the entire property. In these circumstances the case for the rectification of the constitution had been well established and that relief would be granted. (See [19] – [20].)

In respect of the rectification of the s 11(3)*(b)* certificate, the requirements for rectification in terms of s 4(1) of the Deeds Registries Act were different from the common-law requirements for rectification, and rectification under the former could take place when it was considered necessary or desirable, and done under statutory authority. The court would hesitate to deny the remedy where the test for its granting was whether the Registrar of Deeds thought rectification desirable or necessary. Therefore, the Registrar of Deeds would be authorised to proceed with the rectification of the certificate on condition that he shared the view that the rectification was desirable or regarded it as necessary.

S v LM AND OTHERS 2021 (1) SA 285 (GJ)

Children — Drug offences by — Use or possession of dagga — Criminalisation unconstitutional — 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 correction of defects in Act, no child to be arrested, prosecuted or diverted for contravening s 4*(b)*.

Children — Diversion from criminal justice system for minor offences — Programme operating outside of strictures of Child Justice Act 75 of 2008 impermissible.

In this case the court considered whether the Constitution countenanced the criminalisation of dagga use or possession by children when it was no longer an offence for adults.
On review before the court were the cases of four children who had tested positive for cannabis at school and were thus deemed guilty of dagga possession, which, being an offence under s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the DDTA), was regarded, under s 41 * of the Child Justice Act 75 of 2008 (the CJA), to be a 'sch 1 offence'. Under s 41 read with s 53(3) of the CJA, prosecutors could 'divert' matters, in which children were alleged to have committed sch 1 offences (which were relatively minor ones compared to the more serious sch 2 and 3 offences), to various options outside the formal criminal justice system, such as cautions, apologies, supervision and good-behaviour orders, and compensation — see [99]. The state eventually conceded that diversion did not permit compulsory residence at youth centres as an option for sch 1 offences — see [117].

When the children in the present matter failed to comply with their diversion orders, the authorities invoked the 'more onerous' option contemplated by s 58(4)*(c)* of the

CJA, and had them committed to compulsory residence at youth centres by order of court. The Johannesburg High Court subsequently ordered their immediate release. The incident triggered a court order for an audit of children committed to youth care facilities for sch 1 offences. By March 2020 it became apparent that magistrates' courts were still diverting children who had allegedly committed sch 1 offences to compulsory residence. The High Court interdicted the centres from receiving any more such children. The audit also revealed that the children in the present matter had been ordered to attend an informal 'drug child programme' run by a senior state prosecutor, a state advocate and a team of volunteers.

Held
Since the decriminalisation of dagga possession by adults, its possession and use by children had, by targeting persons on the basis of their age, become a status offence ripe for abolition. (See [37] and [48].) The criminalisation of the use and possession of cannabis violated children's right to equality because 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. Since the provision contravened the equality provision, it had to be declared unconstitutional for this reason alone. (See [58] – [60].) And since there were less restrictive means available to prevent the harmful use of cannabis by children, the criminalisation of such offences also violated the best interests of the child. (See [66] and [69].)
Therefore, s 4*(b)* of the DDTA would be declared to be inconsistent with the Constitution and invalid to the extent that it criminalised the use or possession of cannabis by children. Pending the completion of the law- reform process to correct the constitutional defects of that legislation, no child could be arrested or prosecuted or diverted for contravening that provision. These orders would be referred to the Constitutional Court under s 172(2) of the Constitution. (See [136].)
Section 53(3) of the CJA did not permit, under any circumstances, children accused of committing sch 1 offences to be diverted to undergo compulsory residence. Nor did s 58(4)*(c)* of the CJA authorise prosecutors or child justice courts to refer children accused of sch 1 offences who failed to adhere to a previous diversion order to undergo any further diversion programme involving a period of compulsory residence. (See [136].)
The 'drug child programme' in question seemed to be operating, impermissibly, outside of the strictures of the CJA. The use of a standardised order for all children was contrary to the 'best interests' standard. Instead of opting for lighter level-one diversions, the prosecutor had thrown the proverbial book at the children, who were obliged to perform undefined community service for an undetermined amount of hours at the discretion of the principal. The court orders were therefore flawed.

SA CRIMINAL LAW REPORTS JANUARY 2021

S v LUNGISA 2021 (1) SACR 1 (SCA)

Assault — With intent to do grievous bodily harm — Sentence — Imprisonment — Municipal councillor hitting fellow councillor on head with glass jug filled with water — Victim sustaining serious injuries — Sentence of three years' imprisonment, of which one year suspended, confirmed on appeal.

The appellant was convicted in a magistrates' court of assault with intent to cause grievous bodily harm and was sentenced to three years' imprisonment, of which one year was suspended for a period of five years. He appealed unsuccessfully to the High Court against both his conviction and sentence and was granted special leave, on petition, to appeal against his sentence.
The offence was committed during a disturbance in the council chamber of the Metro municipality in which the appellant, the leader of the ANC in the council, hit the complainant, a DA councillor, on his head with a glass jug filled with water. The complainant fell to the ground and bled profusely. He became unconscious and was taken to hospital where he received medical treatment. Pieces of glass had to be surgically removed.
It was contended for the appellant on appeal that the trial court had not properly balanced the appellant's personal circumstances with the seriousness of the offence and interests of society and that it had downplayed his achievements. He contended further that the event happened in a moment of madness and was a spur-of-the-moment attack. He contended further that he was being sacrificed on the altar of deterrence and that a higher standard was applied in assessing his blameworthiness because of his high political profile, than would have been applied to an ordinary person. In the circumstances a sentence of correctional supervision would have been an appropriate sentence.
The appellant was 38 years old and was married, with seven children. His parents and siblings were also dependent on him. It appeared that he had the respect of many within his community and had had a good relationship with the complainant prior to the assault. He was a first offender.
Held, that the sentence imposed by the trial court would equally befit even an ordinary member of society if due regard were had to the seriousness of the offence. (See [15].)
Held, further, that the appellant had showed no remorse for his actions and had not accepted responsibility for them. The High Court was correct in its finding that there was no misdirection or improper exercise of the trial court's discretion. All the relevant factors were appropriately balanced, and, that being the case, the appellate court was not at large to interfere with the sentence. The sentence was in keeping with sentences that had been imposed by the courts in similar cases. (See [18] – [19].) The appeal was dismissed.

PANDAY v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2021 (1) SACR 18 (KZP)
Prosecution — National Director of Public Prosecutions — Decision to prosecute — Review of — Legality review — Whether NDPP had taken decision 'after consulting' with DPP — National Prosecuting Authority Act 32 of 1998, s 22(2)*(c)*.
Prosecution — National Director of Public Prosecutions — Decision to prosecute — Review of — Rationality review — Contention that NDPP should have waited for intercepted material he had requested before taking decision to prosecute — Sufficient material before NDPP for him to have taken decision.
Words and phrases — 'After consulting' — Meaning of in s 22(2)*(c)* of National Prosecuting Authority Act 32 of 1998.
The applicant applied for an order setting aside the decision of the National Director of Public Prosecutions (the NDPP) to prosecute him on charges of fraud and corruption relating to the provision of accommodation for members of the South African Police Service (the SAPS) during the World Cup soccer tournament of 2010.

The NDPP's decision to prosecute came after the Director of Public Prosecutions (the DPP) in KwaZulu-Natal (KZN) had declined to prosecute the applicant. The applicant attacked the rationality of the decision and contended furthermore that the NDPP had failed to consult the KZN DPP before taking the decision, as was required by s 22(2)*(c)* of the National Prosecuting Authority Act 32 of 1998 (the Act). He contended further that the decision was irrational, in that after requesting the intercepted communications from the SAPS, the NDPP had not waited for the provision of the material, but had gone ahead and taken the decision to prosecute.
Held, that the words 'after consulting' in s 22(2)*(c)* of the Act had to be construed in context and, in the present context, it meant to give serious regard to the views of the DPP. In circumstances where the DPP had had the opportunity to motivate her decision to decline to prosecute by addressing a memorandum to the NDPP — giving as her reasons those in the report of a subordinate — it could not be said that the DPP did not have the opportunity to explain her reasons to the NDPP, and neither could it be said that he was not aware of her reasons or had made his decision in ignorance of them. (See [19] and [21].)
Held, in respect of the failure by the NDPP to wait for the arrival of the intercepted material, prior to making the decision, the NDPP had before him a record running to some 3790 pages, including thousands of pages of invoices, many statements of witnesses, and a forensic report. That being the case, it could not be said that the NDPP ought to have insisted on receiving the intercepted material prior to making the impugned decision. (See [60].)
Held, accordingly, that, on the basis of the accepted prosecution policy, the NDPP could conclude that the decision to prosecute the applicant was 'well-founded upon evidence reasonably believed to be reliable and admissible'. The attack on the legality of the impugned decision could not succeed.

NATIONAL COMMISSIONER OF POLICE AND ANOTHER v GUN OWNERS OF SOUTH AFRICA 2021 (1) SACR 44 (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.
Trial — Presiding officer — Conduct of — 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 a 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 [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.

RESIDENTS, INDUSTRY HOUSE v MINISTER OF POLICE AND OTHERS 2021 (1) SACR 66 (GJ)

Search and seizure — Search — Without warrant — Validity of — Search conducted in cordoning-off operation authorised under s 13(7) of South African Police Service Act 68 of 1995 — Power given to police officers in terms of ss 13(7)*(c)* constituted violation of right to privacy protected by s 14 of Constitution, was overbroad, and did not pass constitutional muster.
Search and seizure — Search — Without warrant — Validity of — Search conducted in cordoning-off operation authorised under s 13(7) of South African Police Service Act 68 of 1995 — Authorisations granted for ulterior motive and invalid.
Words and phrases — 'Public order' — Meaning of in s 13(7) of South African Police Services Act 68 of 1995.
The South African Police Service (the SAPS) invoked the provisions of s 13(7) of the South African Police Services Act 68 of 1995 (the SAPS Act) to cordon off areas in the inner city of Johannesburg and conduct warrantless searches in 11 buildings occupied by some 3000 people. Each of the 13 applications for authorisation in terms of s 13(7) was supported by a letter from the station commanders concerned, motivating the utilisation of the provision. The authorisations were granted by various provincial commissioners of the SAPS. Officials from the Department of Home Affairs and officers of the Johannesburg Metropolitan Police Department assisted the police officers in the searches, and the search operations resulted in arrests of undocumented foreigners. In the present application, the applicants sought an order declaring s 13(7) constitutionally invalid and the review and setting-aside of all the authorisations in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). They contended that the provision was constitutionally invalid in its entirety since it permitted warrantless searches of a person, a person's home and property, and the seizure of their possessions, thereby infringing the right to privacy entrenched in s 14 of the Constitution. They argued that s 22 of the Criminal Procedure Act 51 of 1977 (the CPA) adequately provided for warrantless searches. The police contended that the limitation of the fundamental right to privacy was reasonable and justifiable within the meaning of s 36 of the Constitution.
Held, that the scope of the relief sought by the applicants, in declaring the whole of s 13(7) constitutionally invalid, on the basis that it infringed the s 14 of the Constitution, was impermissibly broad: neither ss 13(7)*(a)* nor *(b)* infringed right to privacy in s 14 of the Constitution, and the power granted by the section was an important legislative mechanism that enabled the police service to discharge its constitutional mandate effectively. (See [21] – [22].)

Held, that the power given to police officers in terms of s 13(7)*(c)* to search someone's person, home and property, and to seize their possessions, indisputably constituted a violation of the aforesaid right to privacy protected and the court therefore had to assess whether that statutory limitation was reasonable and justifiable in terms of s 36 of the Constitution, in an open and democratic society based on human dignity, equality and freedom. (See [24] – [25].)

Held, that s 13(7) could have achieved its ends through other means less damaging to the right to privacy. Less restrictive measures, such as provided by s 22 of the CPA existed to achieve the purpose of s 13(7)*(c)* of the SAPS Act. The extent of the invasion of the innermost component of the personal right to privacy authorised by the section was substantially disproportionate to its public purpose and was clearly overbroad in its reach, insofar as it also permitted warrantless, extensive and intrusive searches of private homes and the persons inside them. It was furthermore deficient in failing to guide police officers as to the manner in which searches were conducted. Section 13(7)*(c)* was overbroad and did not pass constitutional muster. The declaration of unconstitutionality should be prospective and, in the light of the substantial public-interest considerations at issue, that the declaration of invalidity be suspended for 24 months to allow the legislature an opportunity to cure the constitutional defect. (See [45] – [50].)

Held, further, in respect of the PAJA review, that the authorisations in question, in giving the police blanket permission to carry out warrantless searches in the areas specified in the applications, contravened s 13(7) of the SAPS Act, as that section did not extend to authorising the police to carry out warrantless searches and seizures. The decisions accordingly fell to be set aside in terms of s 6(2)*(f)*(i) of PAJA. (See [63] and [66].)

Held, furthermore, that the decisions to issue the authorisations to the three inner-city police stations were taken for an ulterior purpose or motive, as the raids during which the searches were conducted were intended in large part to achieve objectives other than 'to restore public order or ensure the safety of the public in a particular area'. The ulterior purposes were to enable the Department of Home Affairs to search homes and arrest those suspected of being illegal immigrants, without a warrant. It was impermissible for immigration officials to carry out random searches without a warrant under the guise of s 13(7). The further ulterior purpose was to enable the City to survey the occupants of the buildings occupied by the applicants to deal with 'hijacked buildings' which were described as a major problem in the inner city. (See [68] – [69] and [72].)

Held, further, that, since 'public order' had a broader 'public collective' connotation than simply maintenance of law and order, what had to be demonstrated in each of the applications was that the operations were necessary to restore the normality and security of the community in the areas specified in the applications, but no such motivation appeared in any of the 13 applications which the decision-makers considered. The decision-makers had not applied their minds to the material before them before issuing the written authorisations and had simply rubber-stamped them, and the authorisations had to be reviewed and set aside. (See [84] and [97] – [98].)
Held, further, that the undisputed facts demonstrated an egregious abuse of an infringement of the applicants' constitutional rights to privacy and dignity and they

were entitled to a declaratory order that the searches, seizures, fingerprinting and arrests conducted at their homes unjustifiably infringed their right to dignity and privacy as protected by ss 10 and 14 of the Constitution.

S v LEKEKA 2021 (1) SACR 106 (FB)

Verdict — Competent verdict — Combination of charges to form one count — Judgment to be pronounced on each of counts charged.

Rape — Attempted rape — Sentence — Prescribed minimum sentence — Criminal Law Amendment Act 105 of 1997 — Mere fact, that s 55 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provided that person who attempted to commit sexual offence in terms of Act may be liable to punishment to which person convicted of actually committing offence would be liable, could not be interpreted to mean that prescribed minimum sentences in Act 105 of 1997 applicable in such instance.

The appellant was charged in a regional magistrates' court on two counts, the first being housebreaking with the intent to commit an offence unknown to the state, and, the second, an attempted contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), in that he had attempted to rape the 13-year-old complainant. In its judgment, the court combined the two offences and convicted the appellant of housebreaking with the intention to contravene s 3 of SORMA, and contravention of s 55 of SORMA, the magistrate describing it as 'housebreaking with the intent to rape and attempted rape'. The magistrate sentenced the appellant to life imprisonment.
The court held, however, that there was no basis upon which the court a quo could have 'combined' the two counts to form one new count, and a judgment or verdict needed to be pronounced on each of the counts. The court a quo should have found the appellant guilty on the first count, on the competent verdict of housebreaking with the intent to rape, as well as guilty on the second count, of attempted rape. (See [31] – [32].)
In respect of sentence, the court a quo concluded that life imprisonment was also to be considered the prescribed minimum sentence for a contravention of s 55 of SORMA.
On appeal, the court held that the mere fact, that s 55 of SORMA provided that a person who attempted to commit a sexual offence in terms of the Act may be liable to the punishment to which a person convicted of actually committing that offence would be liable, could not be interpreted to mean that the prescribed minimum sentences in the Criminal Law Amendment Act 105 of 1997 were applicable in such an instance. The court a quo had accordingly misdirected itself in this regard, as well as in having imposed a sentence on only one 'combined' count, which entitled the court to intervene on appeal. (See [39] – [40].)
The court held that, although it was normally not desirable that counts be taken together for purposes of sentence, it could be done in exceptional circumstances, and in the present case it would be appropriate to do so. The appeal against the sentence was upheld and the sentence of life imprisonment was set aside and substituted with a sentence, taking the two counts together, of 10 years' imprisonment.

ALL SA LAW REPORTS JANUARY 2021

Afribusiness NPC v Minister of Finance [2021] 1 All SA 1 (SCA)

Constitutional and Administrative Law – Procurement Regulations – Preferential Procurement Regulations, 2017 – Validity of promulgation – Inclusion of pre-qualification criteria in Regulations – Where pre-qualification criteria stipulated in Regulations did not have as its objective the advancement of the requirements of section 217(1) of the Constitution, Minister's decision to promulgate ultra vires the powers conferred upon him in terms of section 5 of the Preferential Procurement Policy Framework Act 5 of 2000.

In terms of the Preferential Procurement Policy Framework Act 5 of 2000 (the "Act"), the respondent (the "Minister") promulgated the Preferential Procurement Regulations, 2017 (the "2017 Regulations"). The appellant ("Afribusiness") approached the High Court for the review and setting aside the promulgation and adoption of the 2017 Regulations. It contended that the Minister had exceeded his powers under the Act by promulgating Regulations which provided for pre-qualification criteria which Afribusiness contended were inconsistent with section 217 of the Constitution and section 2 of the Act. It argued that the pre-qualification criteria could disqualify a potential tenderer from tendering for State contracts, and that section 2(1)(f) of the Act was clear that contracts must be awarded to tenderers who scored the highest points unless objective criteria justified the award to another tenderer.

The Minister denied that his decision to promulgate the 2017 Regulations constituted administrative action that was reviewable under the Promotion of Administrative Justice Act 3 of 2000, and contended that the application had to be dismissed. On the merits, the Minister contended that the application of pre-qualification criteria in terms of the 2017 Regulations was discretionary and would not apply in every case; that the procedure he followed in promulgating the 2017 Regulations met the requirements of the Promotion of Administrative Justice Act; and that the categories of preference under the 2017 Regulations were based on sound constitutional principles, were not irrational, unreasonable, or unfair. The upholding of those contentions led to the present appeal.

Held – Section 5 of the Act makes it clear that the Minister's powers are not unconstrained. He may only make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act. It was correct that the application of the pre-qualification requirements was largely discretionary. But the regulations did not provide organs of State with a framework which would guide them in the exercise of their discretion should they decide to apply the pre-qualification requirements. The discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constituted a deviation from section 217(1) of the Constitution which enjoins Organs of State when contracting for goods or services, to do so in in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of section 217(1) of the Constitution. Insofar as the pre-qualification criteria stipulated in the 2017 Regulations failed to meet that requirement, the Minister's decision was *ultra vires* the powers conferred upon him in terms of section 5 of the Preferential Procurement Policy Framework Act. The Regulations were declared invalid, with the order being suspended for 12 months to enable remedial action to be taken by the Minister.

Knoop NO and another v Gupta (Tayob as intervening party) [2021] 1 All SA 17 (SCA)

Civil Procedure – Appeals – Suspension of order pending appeal – Application for execution order – Section 18(3) of the Superior Courts Act 10 of 2013 – Requirements – Applicant for execution order must prove exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.

Civil Procedure – Appeals – Suspension of order pending appeal – Section 18(1) of the Superior Courts Act 10 of 2013 provides for automatic suspension of an order pending the outcome of an appeal against it – Where execution order is granted, party wishing to challenge execution order has an automatic urgent right of appeal and execution order is suspended pending such appeal.

The respondent, together with her husband and his two brothers (collectively referred to as the "Guptas"), were shareholders in equal shares of two companies ("Islandsite" and "Confident Concept") which were controlled by a holding company ("Oakbay"). The two companies were placed under supervision and went into voluntary business rescue on 16 February 2018 after major South African banks ceased to offer them banking facilities due to allegations made about the Guptas.

The appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners ("BRPs") of the companies. Disputes between the BRPs and Oakbay's Chief Executive Officer and other employees led to the respondent applying to the High Court for the removal of the BRPs in terms of section 139(2) of the Companies Act 71 of 2008. The granting of the order saw the appellants lodging an application for leave to appeal against the removal order. In turn, the respondent brought an application for leave to execute. The BRPs' application or leave to appeal was granted and an execution order was also granted to the respondent in terms of sections 18(1) and (3) of the Superior Courts Act 10 of 2013. That led to the present urgent appeal by the BRPs.

Pending the hearing of the urgent appeal, the execution order was suspended in terms of section 18(1) of the Superior Courts Act. The Full Court, however, granted an order that the urgent appeal would not suspend the operation of the execution order and new BRPs were appointed. The intervening party in the present appeal ("Mr Tayob") was the new BRP of Islandsite. The actions taken by the new BRPs included withdrawal of the appellants' appeals against the removal order and purported termination of the business rescue.

Held – The first question to be addressed was whether the execution order was appealable. Section 18(1) of the Superior Courts Act provides for automatic suspension of an order pending the outcome of an appeal against it. As a safeguard against irreparable prejudice caused by a court granting an execution order when it should not have done, so the aggrieved party has an automatic urgent right of appeal. An appeal against an execution order is one of right and the party that obtained the execution order cannot object to it. If they wish to sustain the execution order, they must oppose the appeal. Section 18(4)(iv) states that an execution order is suspended pending an urgent appeal by the aggrieved party. The suspension of the original order in terms of section 18(1) of the Superior Courts Act continues until the disposal of the

urgent appeal. The Full Court's order was held to be invalid for flying directly in the face of the provision that pending an urgent appeal under section 18(4) the operation of an execution order is suspended.

The nullity of the Full Court order meant that the execution order was suspended pending the present appeal. No lawful steps could be taken to remove the appellants as BRPs until the urgent appeal had been finalised. Substitute BRPs could not be appointed to take their place, because the order for their removal was not yet effective.

On the merits of the appeal against the execution order, the court stated that an applicant for an execution order must prove three things, namely, exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made. Those requirements were not satisfied by the respondent.

The appeal was accordingly upheld.

Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters [2021] 1 All SA 42 (SCA)

Civil Procedure – Adducing of further evidence on appeal – Section 19(b) of the Superior Courts Act 10 of 2013 empowering court to receive further evidence on appeal, provided evidence is weighty and material.

Civil Procedure – Interim interdict – Preservation of property pendente lite – Doctrine of res litigiosa – Requirements are those for an ordinary interim interdict, plus property which is the subject of the interim interdict must be subject of the action, and the action and the interim application must be between the same parties.

In terms of an interim interdict issued by the High Court, the appellant companies in each appeal were prevented from dealing freely with their property, pending the determination of an action which was instituted by the first to fifth respondents (the "respondents"). The appellants in the first appeal were referred to collectively as "the Pepkor entities". One of those appellants ("Tekkie Town") was a business which was at the centre of the agreements between the parties in both appeals. The appellants in the second appeal were Steinhoff International Holdings NV ("Steinhoff NV") and Town Investments (Pty) Ltd ("Town Investments").

In August 2016, the respondents and Steinhoff NV entered into a written agreement, in terms of which they sold 56,94% of their shares in, and ceded their claims against, Tekkie Town to Steinhoff NV, for a purchase price of R3 257 250 000 (the "sale agreement"). On 17 January 2017, the purchase price was discharged by the issue of consideration shares in Steinhoff NV to each of the respondents, in proportion to its aliquot share as defined in the sale agreement. By March 2018, the respondents claimed that the value of the consideration shares had been overstated and were but a fraction of their value when the sale agreement was concluded. They alleged that the then CEO ("Mr Jooste") of Steinhoff NV had fraudulently misrepresented and concealed Steinhoff NV's true financial position, to induce them to enter into the sale agreement.

In May 2018, the respondents instituted action against Steinhoff NV and Town Investments, alleging fraudulent misrepresentation by Mr Jooste concerning Steinhoff

NV's financial position, which induced the respondents to enter into the sale agreement. They alleged in the particulars of claim that they had resiled from the agreement.

Almost a year after they had instituted the main action, the respondents launched an urgent application for the interim interdict referred to above. The High Court's granting of the relief sought led to the present appeal.

Held – The first question was whether the order was appealable. The court held that it was in the interests of justice that the order granted against the appellants was appealable.

In support of their claim for the interim interdict, the respondents had invoked the doctrine of *res litigiosa*. Their case was that the Tekkie Town shares and business became *res litigiosa*, which entitled them to an interdict pending the final determination of the main action. *Res litigiosa* is property which is the subject of litigation. A plaintiff may in principle apply to preserve *res litigiosa*, *pendente lite*. The requirements are those for an ordinary interim interdict. As a general principle, there are two additional inherent features: the first is that the property which is the subject of the interim interdict is the subject of the action; and the second, that the action and the interim application are between the same parties. The Court found that the doctrine was inapplicable in this case as the latter requirements were not present.

The respondents' allegation that the sales and transfers of the shares in Tekkie Town were simulated transactions and that Steinhoff NV was guilty of fraud was not established on the papers in the interdict application. It was also not true that Steinhoff NV controlled all corporate actions and activities within the Steinhoff group. The High Court erred in finding the contrary.

Finally, the court refused an application by the respondents to adduce further evidence on appeal. Although section 19(b) of the Superior Courts Act 10 of 2013 empowers the present court to receive further evidence on appeal, such evidence must be weighty and material – which was found not to be the case in this matter. The application was thus dismissed.

The two appeals before the Court were upheld.

Premier for the Province of Gauteng and others v Democratic Alliance and others [2021] 1 All SA 60 (SCA)

Civil Procedure – Appeals – General rule is that an order is suspended pending appeal – For execution of order pending appeal, applicant must prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders – Infringement of peremptory provision of Constitution constituting exceptional circumstances warranting granting of execution order.

Local Government – Dissolution of municipal council – Appointment of administrator – Section 159(2) of the Constitution requiring election to be held within 90 days of dissolution of municipal council – Allowing administrator to continue in office beyond 90 days impermissible.

The first respondent (the “DA”) applied for the review and setting aside of a decision of the second appellant (the “Gauteng EC”) to dissolve the Council of the City of Tshwane Metropolitan Municipality (the “Tshwane Council”) and appoint an administrator in terms of section 139(1)(c) of the Constitution to run its affairs. The Full Court found in favour of the DA and set aside the dissolution of the council.

Subsequently, the first appellant (the “Premier”, the “Gauteng EC”, the third appellant (the “MEC”) and the ninth respondent (the “EFF”) launched a conditional application for leave to appeal to the present Court, pending the application for direct access to the Constitutional Court. As a result, the DA launched an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 in the High Court, to implement the Full Court’s decision pending the appeal process. The High Court found that there were exceptional circumstances justifying the grant of the relief sought by the DA; that it would suffer irreparable harm if the order was not granted; and that the Gauteng EC would not suffer irreparable harm.

Held – The issue in the present appeal was whether the DA had satisfied the requirements of section 18 of the Superior Courts Act for interim enforcement of a judgment pending an appeal. The Court emphasised that what was before it was an appeal against the order putting into operation the judgment and orders made by the Full Court, pending an application for direct appeal to the Constitutional Court and the conditional appeal to the present Court.

The default position is that in terms of section 18(1) read with section 18(5), the noting of an appeal suspends the operation and execution of the order pending the decision of the appeal or application for leave to appeal. The judgment or order is also suspended whilst an application for leave to appeal is pending before the present Court or the Constitutional Court. Section 18(3) is an exception to this general rule. Under section 18(1), a court may order otherwise “under exceptional circumstances”. A party who requires the court to order otherwise is in terms of section 18(3) required to prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

The question was whether the High Court, in granting the order to execute, had due regard to the relevant provisions of section 18 and applied them correctly. The High Court rightly held that the circumstances of the case were exceptional, given that they involved the infringement of peremptory provisions of the Constitution; and that the DA had made out a proper case under section 18(3). The running of the City of Tshwane by an unelected administrator ran counter to democratic and accountable government for local communities, enshrined in section 152(1)(a) of the Constitution. The DA contended that allowing an administrator to be in office for longer than the 90-day period stipulated in section 159(2) of the Constitution goes against the constitutional scheme and, as such constituted irreparable harm – referring to an injury that is permanent or irreversible. Finding that the order could not be faulted, the majority of the court dismissed the appeal.

In the minority ruling, it was held that the administrator’s appointment endured beyond the 90-day period, until a newly elected municipal council assumes office.

Tiry and others v S [2021] 1 All SA 80 (SCA)

Criminal law and procedure – Organised crime – Racketeering – Conviction and sentence – Appeal – Duplication of charges – Difference between section 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act 121 of 1998 – Section 2(1)(a) applies to those actively involved in the conduct of the racketeering enterprise, while section 2(1)(f) applies to the person who knows or ought reasonably to have known that the enterprise was being conducted through a pattern of racketeering activity – Charging and convicting someone of both offences may well involve an impermissible splitting of charges.

Criminal law and procedure – Search and seizure warrant – Validity – Whether evidence obtained through warrant which was issued irregularly fell to be excluded in terms of section 35(5) of the Constitution, which provides that evidence obtained in a manner that violates any right in the Bill of Rights must be detrimental to the administration of justice – The exclusion of such evidence is not an absolute prescript and may be accepted by court.

The first and second appellants operated two unlawful tank farms for the receipt and storage of stolen petroleum products and the sale of the stolen product to the retail market and end users. They were both charged on count 1 with managing an enterprise conducted through a pattern of racketeering activities in terms of section 2(1)(f) of the Prevention of Organised Crime Act 121 of 1998. Together with the remaining appellants they were charged on count 2 with conducting or participating in an enterprise conducted through a pattern of racketeering activities in terms of section 2(1)(e). In addition, they were charged with 43 separate counts of theft of petroleum products arising from their acquisition of the petroleum products. The remaining appellants were charged with theft in respect of those transactions with which they were involved.

The first appellant received an effective sentence of 30 years' imprisonment; the second appellant an effective sentence of 18 years' imprisonment; and each of the remaining appellants an effective sentence of 15 years' imprisonment.

They appealed against their convictions and sentences. In respect of convictions, the appellants complained that their right to a fair trial had been infringed in several respects.

Held – The grounds of appeal relating to cross-examination and hearsay evidence were found to be unsustainable.

A third ground related to the trial judge's conduct. It was found that while the judge was, on a few occasions, impatient and overbearing towards the appellants' Counsel, it could not be said that the appellants' trial was rendered unfair.

Finally, the Court had to consider the validity of the search and seizure warrant issued in respect of one of the locations where the appellant's operated their tank farm. It was common cause that the warrant was issued irregularly.

The question was whether, notwithstanding the irregularities, the evidence secured pursuant to the search fell to be excluded in terms of section 35(5) of the Constitution, which provides that evidence obtained in a manner that violates any right in the Bill of Rights must be detrimental to the administration of justice. That is not an absolute exclusionary provision for evidence obtained in violation of an accused's constitutional

rights. The next enquiry is whether the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. The court found that despite the irregularity in issuing the warrant, the evidence obtained pursuant to its execution was correctly accepted.

In the individual appeals against convictions, the court highlighted the difference between section 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act. The former provision applies to those actively involved in the conduct of the racketeering enterprise, while the latter applies to the person who knows or ought reasonably to have known that the enterprise was being conducted through a pattern of racketeering activity. Charging and convicting someone of both offences may well involve an impermissible splitting of charges. On that basis a number of the appellants' convictions were set aside.

The Court also upheld some of the appeals against sentence to a limited extent. The first appellant was sentenced to an effective 20 years' imprisonment, the second appellant to an effective 15 years' imprisonment; and the remaining appellants' were sentenced to an effective 7 years' imprisonment.

Vrystaatse Munisipale Pensioenfonds v Minister of Finance and others [2021] 1 All SA 116 (SCA)

Employee Benefits and Retirement – Pensions – Pension fund surplus – Apportionment of in terms of section 15B(1) of Pension Funds Act 24 of 1956 – Power to apply surplus apportionment lies with board of fund in terms of section 15B(4) of Pension Funds Act – Promulgation by Minister of Finance of Regulation obliging pension fund board to place calculable enhancements due to former members who cannot be traced in a contingency reserve fund from which it could not be released, except as payment to such members or as a result of crediting the Guardian's Fund or some other fund – Minister arrogating power to deal with surplus and to establish contingency reserve funds, in conflict with provisions of Pension Funds Act.

The concept of an actuarial surplus was at the centre of the present appeal. A surplus arises in a pension fund when an actuary determines that the pension fund's assets exceed its liabilities. The Pension Funds Second Amendment Act 39 of 2001, which came into effect on 7 December 2001, was enacted to regulate the distribution of a surplus by pension funds. The appeal turned on the interpretation and application of relevant provisions of the surplus legislation, located within the Pension Funds Act 24 of 1956.

The appellant was a closed pension fund, whose members were full-time employees and former employees of local authorities in the Free State. In November 2013, it deposited a copy of a statutory actuarial valuation report reflecting the valuation of the fund as at 30 June 2011, with the Registrar of Pension Funds, as required by section 16(1) of the Pension Funds Act. The Registrar rejected the actuarial valuation report, on the ground that contrary to regulation 35(4) of the Pension Fund regulations, the fund was releasing the surplus allocated to former members.

Regulation 35(4) obliges a pension fund to place in a contingency reserve account, the total amount (liability) owing, of enhancements due to quantifiable but untraced members, where it is to stay until claimed or transferred to a fund identified in the regulation.

The fund challenged regulation 35(4) in the High Court, contending that regulation 35(4) impermissibly placed a number of fetters on the wide discretion of the board of a fund to decide how an actuarial surplus is to be applied.

In opposing the application, the Minister took the stance that there was nothing in the provisions of the Pension Funds Act that prevented the Minister from directing or requiring a pension fund to create contingency reserve accounts.

The Court dismissed the fund's application, leading to the present appeal.

Held – Section 15B(1) deals with the apportionment of an existing surplus and provides that the board of every fund that commenced prior to March 2002, must submit to the Registrar a proposed apportionment of an actuarial surplus. Section 15B(4) of the Pension Funds Act makes the board of a pension fund the determinant of which categories of persons shall participate in the surplus apportionment. The board is obliged to include for participation those who departed the fund in the period 1 January 1980 up to the surplus apportionment date, including untraced members. It may exclude unquantifiable members. Section 15B(4)(b) does, however, provide the option of establishing a contingency reserve account in order to satisfy the potential claims of unquantifiable members in terms of the proviso in section 15B(5)(e). It is a board's prerogative to determine how to apply a surplus apportionment for the benefit of former members, including those who have not yet been traced.

Regulation 35 purports to deal with contingency reserve funds. Regulation 35(4) provides that where a board is able to determine the enhancement due in respect of a particular former member in terms of section 15B(5)(b) or (c) of the Act, but is unable to trace that former member in order to make payment, the board shall put the corresponding enhancement into a contingency reserve account specific for the purpose. The requirement that the board "shall" put funds into a contingency reserve account conflicts with the recognition that the power to create contingency funds vests in a board.

The Minister thus arrogated the power to deal with a surplus and to establish contingency reserve funds, to the exclusion of the board. As stated above, those aspects are within a board's prerogative. In promulgating regulation 35(4) the Minister acted beyond the regulation making powers set by the Pension Funds Act.

The appeal was upheld.

AK v JK [2021] 1 All SA 139 (WCC)

Civil Procedure – Contempt of court – Failure to comply with maintenance order – Whether applicant for order of contempt established that respondent's failure to pay maintenance was wilful and mala fide – Reasons advanced by respondent for failure to comply with order found to be unsatisfactory and court finding conduct to be both wilful and mala fide.

In terms of their divorce order issued in 2013, the respondent undertook to maintain the applicant until her death, or remarriage or until she co-habited with a third party for a period in excess of 6 months. The maintenance was initially fixed at R52 000 per month and was subject to escalation in accordance with an agreed formula. By the beginning of 2018, the monthly sum payable by the respondent had escalated to R63 417,45 and it presently stands at R69 384,48. From February 2018, the

respondent unilaterally reduced the maintenance until by May 2020, he was paying R10 000 per month. It was common cause that at the end of October 2020, he was in arrears in the sum of R1 539 158,96. He claimed that he could not afford the agreed maintenance.

The applicant sought an order that the respondent be held to be in contempt of the divorce order and that he be sentenced to an appropriate term of imprisonment which should be suspended on terms which included the repayment of the arrears and future compliance with the order.

Held – The issue in dispute on the aspect of contempt of court was whether the applicant had established that the respondent's failure to pay maintenance was wilful and *mala fide*. The Court took into account the assets of the respondent, and his financial situation. His allegation that he lacked funds to meet his maintenance obligations to the applicant was not borne out by the facts. Both wilfulness and *mala fides* were clear in this conduct. He was found to be in contempt of the divorce order.

The respondent was directed to pay to the applicant the amount of R1 539 158,96 in respect of his non-compliance with the maintenance order, plus interest *a tempore morae* which was to run from 1 February 2018 until date of payment and was to be calculated on each unpaid maintenance instalment during the said period. He was also declared to be in contempt of the order and was committed to imprisonment for a period of 60 days. The period of imprisonment was suspended for a period of two years on stipulated conditions.

Bennett and another v S; *In re*: S v Porritt and another [2021] 1 All SA 165 (GJ)

Civil Procedure – Recusal application – Delay in bringing application – Delay suggesting that applicant did not consider there to be a risk of bias – Interests of justice requiring that trial proceed to finality.

Civil Procedure – Recusal application – Test for recusal – Question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge had not or would not bring an impartial mind to bear on the adjudication of the case, ie a mind open to persuasion by the evidence and the submissions of Counsel – Party alleging bias or an apprehension of bias bears the onus of proving it and an apprehension of bias can only arise based on correct facts.

An application was brought for the recusal of the judge in this matter, by two accused facing over 3000 counts involving white collar crime. The offences ranged from common law fraud and tax-related offences to exchange control contraventions, market manipulation, stock exchange listing contraventions, money laundering and racketeering.

The bias of which the judge was accused was said to have occurred in August 2016. A delay of over three years occurred before the recusal application was brought. The delay would be a ground for refusing the application unless some new incident was alleged to have arisen which independently supported the application.

The first applicant ("Bennett") filed an application for a special entry under section 317 of the Criminal Procedure Act 51 of 1977 on 18 September 2019, requiring the judge to consider *mero motu* whether he should recuse himself. Bennett contended that it was a material irregularity for the court not to have disclosed or explained to the accused the circumstances under which the judge's name appeared on a 2002 list of

income tax defaulters issued by SARS. On being provided with proof of the incorrectness of the allegations made against the judge, Bennett withdrew the section 317 application and brought the present application a month later.

Held – The question was whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge had not or would not bring an impartial mind to bear on the adjudication of the case, ie a mind open to persuasion by the evidence and the submissions of Counsel. An apprehension of bias can only arise if it is founded on the correct facts. The test is objective and the party alleging bias or an apprehension of bias bears the onus of proving it.

On the issue of delay, the Court held that the first consideration was whether the failure to bring an application within a reasonable time constitutes evidence that the accused themselves did not consider there to be a risk of bias, perceived or real. The other consideration was the interests of justice. It was concluded that the accused's conduct was not that of a person who is concerned about the possibility of bias on the part of the presiding judge. Because of the length of time already taken in hearing witnesses and various other factors, the court was satisfied that the interests of justice required that the trial proceed to finality unless there was some more recent event which, standing on its own, raised an apprehension of bias or demonstrated actual bias. The two issues relied on by the applicants as new events were found to be of no assistance to them.

The request for recusal was thus refused.

Ma-Afrika Hotels (Pty) Ltd and another v Santam Limited (a division of which is Hospitality and Leisure Insurance) [2021] 1 All SA 195 (WCC)

Insurance – Business interruption indemnity – Extension to losses caused by notifiable disease – Interpretation of indemnity clauses – Words used to be given ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract – Purposive approach to interpretation is required, in a manner that provides an interpretive outcome that is fair, sensible and business-like.

Insurance – Causation – Covid-19 pandemic and government response leading to business interruption and losses found to be inseparable part of the same insured peril – Had it not been for Covid-19 and the government's response, the applicants' business would not have been interrupted and they would not have suffered their loss.

On 11 March 2020, the World Health Organisation declared Covid-19 a global pandemic. On 15 March 2020, the President of South Africa announced a national lockdown which commenced on 27 March 2020. The economic impact of the pandemic was unprecedented in its scale and effect, and had devastating consequences on businesses across the globe. The various mechanisms put in place to contain and limit the spread of Covid-19 including mandatory quarantines, social distancing measures and lockdowns to fight the rapid and dramatic spread of the virus, caused business disruptions and closures on a massive and unprecedented scale. That led to a surge in business interruption insurance claims and lawsuits. The insurance industry globally denied cover for business interruption losses that resulted from Covid-19 and the lockdown, and refused to indemnify business for losses sustained. Lawsuits such as the present one, sought to determine whether any cover

had been triggered by the pandemic, and if so, what the ambit and scope of such cover provided for was by the wording in particular and policies in general.

The applicants operated businesses which were each covered by an insurance policy with the respondent ("Santam") which policies provided for business interruption insurance cover. The applicants sought two declaratory orders, to the effect that Santam was liable to indemnify them in terms of the business interruption section of the relevant insurance policies, for losses " . . . occasioned by the occurrence of a notifiable disease in the form of Covid-19 occurring within a radius of 40km of the insured premises". They further sought an order that the indemnity period for the loss incurred by each establishment was 18 months.

The applicants contended that the insured peril, or insurable event that was the proximate cause of the applicants' loss of revenue occurred on 11 March 2020, when a notifiable disease in the form of Covid-19 occurred within a radius of 40km of each of the establishments insured under the policies. On 11 March 2020, it was widely reported in the media that a patient living in Cape Town, who had returned from Europe two days before, had been diagnosed with Covid-19. After the announcement of that first confirmed case of Covid-19, the applicants experienced an increase in cancellations of reservations in their establishments.

Responding to the claims for loss of revenue, Santam rejected four of the fine claims on the basis that none of them were caused by a notifiable disease occurring within the 40km radius of the business premises, and that the loss the applicants had suffered was because of the lockdown and/or the general concern or fear of the public.

Held – At the heart of the matter was the interpretation of the infectious disease clause in the policies, which clause extended business interruption coverage losses "due to" amongst other things, a "Notifiable Disease occurring within a radius of 40km of the premises". The interpretation of contracts has evolved towards a practical, common sense approach, giving the words used their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. The words are considered by having regard to their context in relation to the contract as a whole, taking into account the nature and purpose of the contract. The purposive approach to interpretation is required, in a manner that provides an interpretive outcome that is fair, sensible and business-like. The court held that a notifiable disease and government response was inextricably linked due to the public health risk imperatives. It was thus a logical conclusion that the only textual-and purposeful interpretation of the clause was that the insured peril covered Covid-19 and the government's response to Covid-19.

Santam contended that the applicant failed to prove factual causation, satisfying the "*but for*" test, and legal causation establishing the insured peril was the proximate cause of the loss.

Following the approach in an English case dealing with similar insurance clauses, the court found that the Covid-19 and government response to Covid-19 were an inseparable part of the same insured peril. The breakout of a notifiable disease, whether reported to a local or national authority always comes with the risk of a government response, and makes the government response part of the insured peril of notifiable diseases. Both factual and legal causation were therefore established in respect of the trigger event referred to in the policy. It was concluded that the national

response to the Covid-19 disease that had a local occurrence was sufficient to satisfy the policy. Had it not been for Covid-19 and the government's response, the applicants' business would not have been interrupted and they would not have suffered their loss. The applicants' losses were exactly what they had insured themselves against.

Trends clauses in a business interruption policy are used to quantify the loss that the insured has suffered due to business interruption. Santam contended that even on assumption that the local occurrence was the proximate cause of the loss, an application of the trends clause would deny the applicants cover. Rejecting Santam's interpretation of the trends clause, the court ruled that the applicants had to be put in the position that they would have been in had the insured peril not occurred, taking into account the correct counterfactual scenario.

Finally, the applicants sought a declaration that the indemnity period under their policies was eighteen months and not three months as maintained by Santam. Finding an ambiguity in the relevant provisions in the policy, the court held that the *contra proferentum* principle should be invoked and the ambiguity resolved against Santam.

The Court issued a declaration that the applicants had an existing contractual right to indemnity under the infectious diseases clause to the policies, and to an indemnity period of eighteen months.

In a concurring judgment, the same conclusion was reached, for different reasons.

Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and others [2021] 1 All SA 237 (LCC)

Land – Land restitution claim – Notice in terms of section 11(1), Restitution of Land Rights Act 22 of 1994 – Description of land – Order sought directed at compelling Regional Land Claims Commissioner to publish a section 11(1) notice which would provide a correct description of the land claimed by the applicant – Whether claim form sufficiently identified the land claimed – What is required is that the form describe the land as best as a bona fide claimant can.

The applicant was a traditional authority seeking to compel the Regional Land Claims Commissioner (the "RLCC") to refer to the court, within a specified time, their dispute with another traditional authority regarding an overlapping land claim, in terms of section 14(1)(b) of the Restitution of Land Rights Act 22 of 1994.

In June 2011, an order was made pursuant to an agreement the parties had reached. There were however a number of other orders sought in the present application which required determination. They were directed at compelling the RLCC to publish a section 11(1) notice which would provide a correct description of the land claimed by the applicant. In the alternative, the applicant sought an order declaring that it made a mistake in naming the area identified in its land claim form, that it was entitled to have the error condoned, have its claim form amended to correctly reflect the land in issue and have a fresh section 11 notice published.

Held – It had to be determined whether the claim form sufficiently identified the land claimed and if not, what effect that might have if any. A necessary prerequisite was to determine if there was an error and if so how it arose. The principal question related to how one characterised the legal question which arises when the land described on

the land claim form lodged under section 10 of the Act is not identified with specific reference to the cadastral system of deeds registration.

Section 10 of the Act sets out the requirements for lodging a valid land claim. In terms of section 11 the RLCC is obliged to cause a notice to be published if satisfied that the claim has been lodged in the prescribed manner; the claim is not precluded by the provisions of section 2; and the claim is not frivolous or vexatious.

What is required is that the form describe the land as best as a *bona fide* claimant can. The Act requires the RLCC to effectively inform itself of the land which the claimant is in fact describing in the claim form.

The Court granted the relief sought by the applicants.

Road Accident Fund and others v Mabunda Incorporated and others and related matters (Law Society of South Africa and others as Intervening Parties) [2021] 1 All SA 255 (GP)

Appeal – Suspension of decision pending appeal – Section 18(3) of the Superior Courts Act, 2013 – Implementation of order pending appeal – Test involves establishing whether exceptional circumstances exist; proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant if order is put into operation and executed; and absence of irreparable harm to respondent seeking leave to appeal.

Until the end of May 2020, the three respondents in the present appeal, together with 41 other applicants in one of the applications, served on a panel of attorneys contracted by the Road Accident Fund ("RAF") by virtue of service level agreements ("SLAs") entered into between the panel attorneys and the RAF. Having operated at a deficit for a number of years, the RAF decided to take measures to curb expenditure. It identified fees paid to panel attorneys as a major expense. It consequently decided not to renew the services of its panel attorneys. Its request for the attorneys to hand over files in cases which remained not finalised sparked litigation. The respondent attorneys obtained an order that the notices of handover were invalid and fell to be set aside.

In June 2020, two of the respondent firms (*Fouriefismer* and *Maponya*) *and the Pretoria Attorneys' Association* launched an application in terms of section 18(3) of the Superior Courts Act, 2013 for leave to carry the orders into execution pending the appeals process. The present appeal was against the granting of the order.

Held – Section 18, dealing with the suspension of a decision pending appeal, brought about more stringent and onerous measures for the implementation of orders pending appeal. The test involves establishing whether exceptional circumstances exist; and proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant to put into operation and execute the order, and the absence of irreparable harm to the respondent seeking leave to appeal.

Addressing the question of whether the prospects of success on appeal should be considered in a section 18(4) appeal, the court held that in appropriate cases, and without being definitive on the prospects of success or otherwise on appeal, the court may have regard to those prospects and the stronger the prospects of success the less likely the prospect of the granting of exceptional relief. Having regard to all the considerations relied upon by the court *a quo*, the court was not satisfied that

considered either individually or cumulatively, they constituted exceptional circumstances. The appeal therefore had to succeed on that basis alone.

The Court nevertheless considered the issue of irreparable harm, and found that the appellants would suffer irreparable harm if the orders were put into operation.

The appeal was upheld, and the order of the court below was set aside.

TM v Road Accident Fund and a related matter [2021] 1 All SA 285 (GJ)

Personal Injury/Delict – Motor vehicle accidents – Road Accident Fund – Settlement agreements – Need for judicial oversight to ensure that Road Accident Fund, as a public body, acts with proper regard for disbursement of public funds – Where settlement agreements purported to validate inflated claims, court setting such agreements aside.

Two actions against the Road Accident Fund ("RAF") came before court so that agreements of settlement entered into between the plaintiffs and the fund could be made an order of court. The fund was not represented in court, and the attorneys for the plaintiffs made it clear that the court's approval of the settlement agreements was not being sought.

Dissatisfied with the stance taken by the attorneys, the court insisted on being addressed on the validity of the settlements and the legality of the RAF's position in the matter.

Held – The RAF is a critical organ of State which provides compulsory social insurance cover to all users of South African roads. The main source of income received by the Road Accident Fund is a levy that is based on fuel sales, which is, in effect, a compulsory contribution by the public to social security benefits. A central power of the RAF is the investigation and settling, subject to the Act, of claims arising from loss or damage caused by the driving of a motor vehicle. Thus, if there is no loss or damage, the RAF does not have the power to settle a claim and if it purports to do so, this would be *ultra vires*. The fund has been beset by maladministration and financial problems. The court stated that one of the main bulwarks against venality and incompetence in public bodies is judicial oversight.

Recent steps taken to put in place controls and to enhance scrutiny by the judiciary were chronicled in the judgment. Included in the directives issued by the Judge President is the need for courts to interrogate settlement agreements where public funds are involved.

The scheme of the Act requires that certain criteria are met before compensation may be awarded. As the relevant enquiry is not always clear cut, experts are often used in such matters. The Court explained the role of such experts, with particular reference to actuaries. The expert witnesses are enjoined by court directive and general procedure to meet and see if they can find common ground on salient aspects of the matter. They are expected to prepare and sign what is known as a joint minute.

In both cases addressed by the court, the claims of the plaintiffs were inflated and their loss exaggerated. Those fallacious assumptions were used by the actuary to calculate a loss of earning capacity which yielded significantly inflated figures because

of the exponential nature of the calculation. The RAF was not represented and overwhelmed by the sheer volume of cases, its officials placed undue reliance on the representations of the plaintiff's attorneys as to the loss.

The Court decided that the RAF officials did not act lawfully to conclude the settlements and for that reason they were void *ab initio*.

Concerned about the manner in which the legal representatives of the plaintiffs and the RAF officials had comported themselves, the court referred their conduct to their respective professional bodies.

END-FOR NOW