LEGAL NOTES VOL 12/2020

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ECONOMIC FREEDOM FIGHTERS v GORDHAN AND OTHERS 2020 (6) SA 325 (CC)

Public Protector — Interdicts — Whether stricter test for grant of interim interdict against Public Protector.

This judgment concerned two cases, in both of which the Public Protector had issued a report containing adverse findings against first respondent, Mr Gordhan, and which had directed the President to take remedial action against him (see [7] – [8] and [13] – [14]). In both instances Mr Gordhan interdicted the actions pending reviews of the reports (see [9], [12], [15] and [24]).

Here, the Economic Freedom Fighters (EFF), in respect of the first case, and the Protector, in respect of the second, sought leave to appeal directly to the Constitutional Court against the interdicts (see [3] and [26]).

It *held* that both applications engaged its jurisdiction by raising constitutional issues (see [34] and [43] – [44]). These were in the first application whether interim interdicts directed at the Public Protector were an improper interference with her powers, and whether such interdicts ought to be subject to a stricter test (see [34]); and in the second, whether the interdict comported with the Constitution, and was well grounded, in Mr Gordhan having prospects of success in the review (see [40] – [41] and [43]).

However, it was not in the interests of justice to grant leave to appeal the interim orders (see [75]). This because:

- Neither application had prospects of success: the EFF argued for a stricter test for interim interdicts against the Protector (extraordinary circumstances), but the rationale therefor, that 'routine' interim interdicts eroded the Protector's accessibility and effectiveness, was baseless (see [52] – [53] and [61] – [62]). Indeed the ordinary test for grant of an interdict against the executive could take account of the

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2020 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

Protector's role and protect its powers (see [48], [53] – [54] and [57]); and the High Court had taken account of and accommodated these considerations (see [57]).

- The lower court had not usurped the role of the review court (see [64]); and nor had it misdirected itself on the facts (see [65]).
- Sustaining the interdict would cause no irreparable harm to the Protector, but not doing so would cause Mr Gordhan irreparable harm (see [66] – [67]).
- There was insufficient basis to deviate from the usual appeal channel of the full court or Supreme Court of Appeal (see [70] and [74]).

Apropos costs, the High Court had in the first matter ordered the EFF, in addition to the Protector, to pay the state respondents' costs (see [76]). This was a misdirection arising from a mischaracterising of the matter as unconstitutional (see [78] and [82]). The ordinary principle that a litigant need not pay the state's costs in constitutional litigation accordingly applied (see [76] and [83]).
In the second matter, the order of costs against the Protector personally was also a misdirection: there were no facts to support such an order (see [86] – [87] and [93] – [94]).
Accordingly, in the first matter, leave to appeal the merits denied, but to appeal costs, granted, and the costs order set aside and replaced (see [102]).
In the second matter, likewise, leave on the merits denied, but on costs, granted, with the costs order set aside and substituted (see [102]).
In a concurrence, Jafta J added, as a reason to refuse leave on the merits, that there were no prospects of success for an appeal against another facet of the High Court's order, namely the suspension of the remedial action (see [103] – [104], [112] – [113] and [117]).

BREETZKE AND OTHERS NNO v ALEXANDER AND OTHERS 2020 (6) SA 360 (SCA)

Delict — Specific forms — Pure economic loss — Third party facilitating trustee's breach of fiduciary duty to trust — Claim against third party for loss resulting from breach — Whether allegation of knowing participation in trustee's breach of duty was allegation of wrongfulness.

In this case a trust sold property for R90 million to a company owned by one of the trustees. Shortly thereafter the company sold on the property for R110 million to a third party (see [1] – [2]). A beneficiary of the trust later instituted proceedings against the company and trustee (see [2]).
The allegation was that at the time of the sale by the trust to the company, the trustee was aware of the third party's desire to buy, and in breach of his fiduciary duties had failed to disclose this to the other trustees, and to obtain their consent to the sale to the company (see [5] – [6]). The beneficiary sought from the trustee its share of the profit in the sale to the third party (see [6]). The beneficiary's alternative claim against the company, which again was for the beneficiary's share in the profit, was that the company had knowingly participated in the breach of trust and had benefited thereby (see [7] – [8]). To the latter claim the company and trustee took an exception which succeeded and resulted in the claim's striking out (see [3]). Here, with leave of the High Court, the beneficiary appealed to the Supreme Court of Appeal (see [3]).
The issue was whether the High Court was correct to find that this was a delictual claim for pure economic loss but that the beneficiary had failed to allege

wrongfulness (see [9], [14] and [16]). Put otherwise, the issue was whether the allegation of 'knowing participation' by the company could be regarded as an allegation of wrongfulness and so establishing the delictual cause of action (see [9], [13], [35], [39] and [42]).
Held, that it could be: the legal convictions of the community required that a third party who was a knowing participant in a fiduciary's breach of duty share in the fiduciary's liability, and accordingly an allegation of knowing participation in the breach of duty would be a sufficient allegation of wrongfulness to constitute a cause of action (see [37] and [42]).

KHAN v SHAIK 2020 (6) SA 375 (SCA)

Partnership — Universal partnership — Between unmarried cohabitants — Nature of partners' rights — Claim for division of fruits — Nature and prescription — Prescription Act 68 of 1969, s 11*(d)*.

Partnership — Universal partnership — Between unmarried cohabitants — Termination of — When occurring.

In an appeal against a High Court order, that appellant's claim for division of the fruits of an alleged universal partnership (between unmarried cohabitants) had prescribed, the Supreme Court of Appeal ruled on the following issues:

- **The nature of partners' rights in a universal partnership**

Held, that upon termination of a universal partnership there was an accounting to one another; the poorer partner becoming the richer partner's creditor. Accordingly, it was contract that was the foundation of a universal partnership — not mere consortium and wealth contribution.

- **Whether a claim to divide the fruits of a universal partnership was based on a real or a personal right**

Held, a claim based on contract was plainly a personal, not a real, right. Accordingly, a partner in a universal partnership did not have a direct claim to an asset owned by the other partner. A universal partnership, unlike a marriage in community of property, did not cause the partners to be joint owners of assets. (See 10] – [11] and [31].)

- **Whether the share claimed in a universal partnership was a debt as contemplated by the Prescription Act; and if so, when prescription commenced**

Held, that a claim founded on contract — of which a universal partnership was an example — was such a 'debt'; and in terms of s 11*(d)* of the Prescription Act it prescribed after three years from the termination of the universal partnership. (See [16].)

- **When did a universal partnership terminate**

Held, that the termination of the consortium was often simultaneous with the termination of the universal partnership, but whether or not this was so, in each case, was a question of fact. (See [16], [28] and [31].)
Applying these findings to the present case, the SCA concluded that here the universal partnership terminated at the same time as the consortium, and that since more than three years had elapsed before a claim for division was instituted, it had prescribed. The appeal was accordingly dismissed

MOODLIAR AND OTHERS v RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC AND OTHERS 2020 (6) SA 386 (SCA)

Company — Winding-up — Liquidator — Remuneration — Retention of estimated remuneration where provisional liquidation order discharged — Not permitted.

Shortly before a successful appeal against liquidation orders granted against two related companies, the joint liquidators of the companies deducted their estimated fees from the funds under their control, and paid it over to a firm of attorneys to be held as security for the payment of their fees upon taxation.
The companies objected and obtained a High Court order that the retained moneys, approximately R16,8 million, be returned to them. In the joint liquidators' appeal, the Supreme Court of Appeal, confirming the High Court's order —
Held
Liquidators may reflect their fees in their account, but upon discharge of the order, all assets, including funds which would cover their fees, must be returned to the companies. The provisions of the Companies Act 61 of 1973 and the regulations did not permit the liquidators to retain the disputed funds. These were assets of the companies. The liquidators were not permitted to draw their remuneration until the estate account had been taxed and confirmed.

SIGNATURE REAL ESTATE (PTY) LTD v CHARLES EDWARDS PROPERTIES AND OTHERS 2020 (6) SA 397 (SCA)

Estate agent — Commission — Entitlement — Estate agent misdescribed in fidelity fund certificate — Misdescription result of fault committed by Estate Agents Board — Whether agent precluded from claiming commission — Whether purpose of governing Act served — Estate Agents Affairs Act 112 of 1976, s 34A.

Estate agent — Fidelity fund certificate — Commission — Estate agent misdescribed in certificate — Misdescription result of fault committed by Estate Agents Board — Whether agent precluded from claiming commission — Whether purpose of governing Act served — Estate Agents Affairs Act 112 of 1976, s 34A.

No estate agent may be remunerated for any act unless it had a valid fidelity fund certificate when it performed that act: s 34A of the Estate Agents Affairs Act 112 of 1976.
The Estate Agency Affairs Board by oversight — subsequently corrected — issued the appellant a fidelity fund certificate under its former name (that of a close corporation which subsequently converted into the appellant company). Arguing that this invalidated the certificate, the third respondent refused to pay the appellant its share of a commission. The appellant lost a Cape Town High Court application for its payment. The Cape High Court, which relied on s 34 and the Supreme Court of Appeal's decision in *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* 2017 (4) SA 610 (SCA) ([2016] ZASCA 175), was unaware of a Johannesburg High Court decision which ruled in similar circumstances that the estate agent *was* entitled to claim commission. The appellant was given leave to appeal to the Supreme Court of Appeal, which —
Held
Brodsky was distinguishable on the basis that, in that case, (i) the converted close corporation had never applied for a certificate; (ii) the Board was not informed of the

conversion; and (iii) it was the close corporation's fault that the certificates were issued in the name of a non-existent entity. Hence the Cape High Court's reliance on it was misconceived (see [14]). In the present case the purpose of the Act — to protect the public — was served, since the Board would have been hard-pressed to argue that a claim against the fidelity fund should fail because a certificate had not physically been issued to the wrongdoer at the time of the conclusion of the agreement: such an outcome would be contrary to the purpose of the legislation (see [23]). This did not mean, however, that estate agents should adopt a supine attitude in the face of errors by the Board (see [22]). Appeal upheld and the third respondent ordered to pay the appellant the commission that was due to it (see [25] – [26]).

MKUYANA v ROAD ACCIDENT FUND 2020 (6) SA 405 (ECG)

Attorney — Fees — Contingency fees — Contingency fee agreement — To be concluded at sufficiently early stage of proceedings to reasonably enable compliance with Act — Invalid where, as in present case, entered into after summons issued and few months before trial.

Attorney — Fees — Contingency fees — Statutory limitation — Normal fee — Factors in determining reasonableness of — Validity of normal fees when stated as calculated at hourly rate — Contingency Fees Act 66 of 1997, s 1 sv 'normal fees' and s 2(1)*(b)*.

Section 2(1)*(b)* of the Contingency Fees Act 66 of 1997 (the CFA) provides that a legal practitioner shall be entitled to fees . . . higher than his or her normal fees, set out in [the contingency fee agreement] . . . if such client is successful in such proceedings to the extent set out in such agreement'; s 1 defines 'normal fees' as 'the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement; . . .'.
On a reading of s 2 and the definition of 'normal fees' in s 1, it is clear that the agreed base fee must be a fee that is reasonable for the services of the legal practitioner. Unlike in a case of an express or implied agreement in respect of fees — where the starting point of the court's analysis is the agreed fee — the starting point in the determination of the practitioner's normal fee in terms of the CFA is an independent valuation of a reasonable fee. What is contemplated in the definition of 'normal fees' in s 1 is an objective assessment of the reasonableness of the normal fee, based on three factors: the nature of the work to be performed (such work); by the legal practitioner in question (such practitioner); and the norms and principles that find application in the taxation or assessment of costs on an attorney and own client scale, in the absence of a fee agreement. This last factor means that the reasonableness of the base fee is guided by the court tariff that serves as a standard against which the reasonableness of the practitioner's normal fee was measured. A determination of the reasonableness of the attorney's normal fees for purposes of the Act therefore requires an objective assessment of what is appropriate in the circumstances of a particular case. (See [31], [34] – [36].)
(So held in deciding that an agreed normal fee calculated at an hourly rate of R4500 was invalid for being unreasonable, the departure from the court tariff not having been justified: see [2] – [5]; [37] – [44].)
A contingency fee agreement must be concluded at a sufficiently early stage of proceedings to reasonably enable compliance with the CFA. Whether or not the agreement was concluded at a sufficiently early stage was a question of fact,

dependent largely on the nature of the particular proceedings, and whether compliance with the requirements of the CFA was reasonably possible at that stage (see [47] – [50]).
(So held in deciding that a second contingency fee agreement, entered into after issuing of summons and a few months before trial, and intended to replace a prior contingency agreement, was invalid.

4 AFRICA EXCHANGE (PTY) LTD v FINANCIAL SECTOR CONDUCT AUTHORITY AND OTHERS 2020 (6) SA 428 (GJ)

Stock exchange — Exchange licence — Award — Validity — Application to review Registrar's decision to award exchange licence — No merit in any of review grounds raised by applicant — Application for administrative review dismissed — Financial Markets Act 19 of 2012, s 7(4), s 8(1), s 9(1) and s 17.

On 31 August 2016 the then Registrar of Securities Services * (the Registrar), in order to open up the market for securities exchanges in South Africa, granted licences to two 'alternative' exchanges that would compete with the Johannesburg Stock Exchange (JSE): the applicant (4AX) and the second respondent (ZARX). Crucially, ZARX was twice granted a licence: a (subsequently renounced) conditional licence on 8 March 2016 and then the one of 31 August 2016. The latter involved amended exchange rules for ZARX. The Registrar saw this as a single licensing process lasting from March 2015, when ZARX submitted its first application, to 31 August 2016.
The JSE and 4AX appealed internally to the Financial Services Appeal Board against the award of ZARX's licence. In February 2017 the Appeal Board dismissed the appeal, ruling that ZARX and the Financial Services Board had complied fully with the Financial Markets Act 19 of 2013 (the FMA — all references to statutory provisions below are to sections of the FMA).
4AX then made the present application to set aside the Registrar's decision to award the ZARX licence and the Appeal Board's ancillary dismissal of the internal appeal. †
4AX also brought an interlocutory application under rule 6(5)*(g)* of the Uniform Rules for the referral to oral evidence of certain disputes of fact. But the court, having found that these disputes were not relevant to the pleaded case (see [46]) and that 4AX's allegations in this regard were speculative (see [50]), refused it (see [52], [63]). In this part of the judgment the court also refused to draw an inference of dishonesty, bad faith or impropriety on the part of ZARX (see [52]).
The main review application hinged on five grounds: (1) that the Registrar had already committed himself to grant ZARX the second licence and failed to consider that application in good faith; (2) that by not then publishing a fresh s 7(4), the Registrar had deprived 4AX of the opportunity to object to ZARX's amended rules, and had also overlooked 4AX's objection to the first application, contrary to s 9(1); (3) that the Registrar was already functus officio when he granted the second licence because his earlier decision to award the conditional licence was, despite the renunciation, not set aside by a court; (4) that ZARX's new exchange rules did not comply with s 17 because they permitted it to evade its basic regulatory duties and functions; and (5) that the Registrar failed to properly satisfy himself that ZARX met the financial adequacy requirements of s 8(1)*(a)* and acted irrationally in finding that

they were met. The court pointed out that the issues raised were not particularly complex but were made to seem so by 4AX's convoluted pleadings (see [74.1]).
The court dismissed each of these grounds. It found:
1. The first review ground was based on allegations of impropriety and bad faith against Mr C, the Deputy Registrar, who did not make the decision to award ZARX's licence. That decision was in fact made by the Registrar, Mr T. (See [93].)
2. There was no indication that the Registrar contravened s 7(4) by failing to publish ZARX's amended rules (see [98]). The complaint regarding the breach of s 9(1) similarly lacked a factual foundation: 4AX's objections were considered by the Registrar, and no irregularity occurred. (See [103].)
3. An official's decision may be revoked with the consent of the person who benefited from it. This happened here and it followed that the Registrar was not functus officio when he considered ZARX's application afresh and decided to grant the second licence. (See [109].)
4. Upon analysis, the various rules complained of (i) did not allow ZARX to relieve anyone from complying with the FMA (see [121]); were not irreconcilable with the functions and duties of an exchange under s 10 (see [123]); (ii) did not shift responsibility for surveillance or compliance-monitoring from ZARX to market participants (see [127.3]); (iii) did not unlawfully permit direct market access, which was not a practice that was prohibited under the FMA (see [130]); (iii) were rationally connected to a legitimate purpose, being consistent with s 17(2)*(h)*; and (iv) could be read down to comply with the FMA (see [140]).
5. Given its conduct, 4AX must be taken to have accepted the Registrar's point that he had considered ZARX's financial adequacy and concluded that it was solvent and had sufficient resources to operate as an exchange (see [146] – [148).
Since 4AX therefore failed to establish any grounds for review, the application would be dismissed (see [154] – [155]).

CARTE BLANCHE MARKETING CC AND OTHERS v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (6) SA 463 (GJ)

Revenue — Tax administration — Audit — Selection for — Whether legality review of decision to select taxpayers for audits competent — Ripeness and principle of subsidiarity posing obstacles to such review — Tax Administration Act 28 of 2011, s 40.

Section 40 of the Tax Administration Act 28 of 2011 (the Act) provides that the South African Revenue Service (Sars) 'may select a person for . . . audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis', and s 42 regulatory procedures iro such audits.
Here, in an attempted legality review of a decision to select them for audit, the taxpayers asserted that s 40 afforded them a 'right' not to be selected for audit where the object of the audit was s*omething other than the proper administration of a tax Act*. They claimed that this was so in their cases because the decision to audit them was arbitrary, irrational, done for ulterior motives and in bad faith.
Sars opposed the application, arguing that by selecting a person for an audit an investigative process was set in motion, nothing more, which did not constitute a decision which was capable of review.
The taxpayers were selected for audit after Sars expanded the scope of investigation to the taxpayers' non-compliance with customs and excise legislation, to include a

risk assessment on the taxpayers' compliance with Value-Added Tax (VAT) and Income Tax Acts. The taxpayers elected not to participate in the audit, insisting that their tax affairs were in order and that the decision to audit them was unlawful.
Held
As a matter of law a decision to conduct an audit was reviewable because it would be vitiated by a finding that a step was not taken for purposes of the administration of a tax Act. (See [82].)
The essential flaw in this application was timing (ripeness). All the applicants had an opportunity to participate in the s 42 procedure but they elected not to do so, and before the process envisaged in s 42 of the TAA had played out intimated that they would approach the court to review the decision. Once that procedure was exhausted, the decision would potentially have reached the required degree of ripeness capable of forming the subject-matter of a review. And once assessments were raised, the Tax Court had jurisdiction to entertain legality issues such as those raised by the applicants in this review. The decision was not capable of forming the subject of a legality review within the factual matrix of this case. (See [67], [73] – [74], [76] and [85].)
Furthermore, the principle of subsidiarity required that a party rely on the lower norm regulating the subject-matter in issue. In this application the lower norm was the s 42 procedure; the taxpayers breached the subsidiarity principle by approaching this court directly.

CG v AG AND ANOTHER 2020 (6) SA 487 (ECP)
Marriage — Divorce — Proprietary rights — Community of property — Division of common property — Actio communi dividundo — Applicant seeking termination of joint ownership of immovable property — Interpretation of settlement agreement made order of court — Exercise of discretion arbitrio boni viri in respect of sale of immovable property — Appropriate order.

The parties, formally married in community of property and the parents of L, were granted a divorce order in 2014 (the order), which incorporated the parties' settlement agreement. In dealing with their house, clause 11.2 of the settlement provided that it would stay in the name of both parties until they decided to sell, in which case ('if the property is sold') the profit would be shared equally.
After the divorce, the former wife and L stayed on in the house and refused to agree to its sale, mainly on the basis that the settlement was an order of court and that grating the husband's application for partition — made under the *actio communi dividundo* — would be in conflict with the existing divorce order. The wife argued that the husband should have applied instead for a variation of the order.
The husband's position was that, as co-owner, he was legally entitled to demand the division of the common property at any time. Clause 11.2, he said, did not change the position so as to force him to remain in perpetual co-ownership against his will. He also argued that his former wife failed to exercise her discretion to determine when she would sell the house in good faith — ie by exercising *arbitrio boni viri*.
Held
The order had to be interpreted in accordance with the underlying contractual arrangement. The wife's construction of clause 11.2 that the house could never be sold was not a sensible interpretation and in conflict with a co-owner's right under the *actio communi dividundo* to demand partition at any time. Clause 11.2 did not

mean that she could withhold her agreement to sell in perpetuity, an interpretation that would lead to the absurd result that the wife could stay on indefinitely while the husband was unable to exercise any rights of co-ownership, including the right to utilise the action. Accordingly, clause 11.2 did not take away his right to invoke the actio. While clumsily worded, clause 11.2 envisaged that the house would be sold and the proceeds divided equally. (See [22].)
Whether the wife had exercised *arbitrio boni viri* required a determination whether it was exercised both reasonably and honestly, and her effective failure or refusal to decide to sell was unreasonable, given she had the benefit of residing in the house since the divorce and seemed to want to maintain this arrangement indefinitely. This attitude clashed with clause 11.2 and was not fair to her husband, who was effectively deprived of his rights flowing from co-ownership. He was entitled to challenge this exercise of her discretion, and in so doing to seek to enforce the terms of the court order which she failed to honour.
It followed that the husband was entitled to claim partition of the property (see [31]). So ordered (see [33] for details of the order).

ECLIPSE SYSTEMS AND ANOTHER v HE & SHE INVESTMENTS (PTY) LTD AND A RELATED MATTER 2020 (6) SA 497 (WCC)

Practice — Judgments and orders — Summary judgment — Defendant's duties of disclosure and to set out bona fide defence — Determinative question being whether defendant's version so inherently and seriously unconvincing that it can be rejected out of hand — Sufficient particularity — Plaintiff's particulars disclosing prima facie availability for defendant of defence of prescription — Matter referred to trial.

Company — Directors and officers — Attribution of knowledge to company — Claim against directors by company for compensation for loss caused by illegal conduct of directors — English decision, that attribution of directors' or agents' guilty acts or knowledge to company inappropriate in certain circumstances, approved.

The respondent company obtained summary judgment in the Western Cape High Court (the court a quo) against a series of defendants which included its own members, two other companies, and some of their members. The respondent argued these defendants — the appellants in the present appeals against the summary judgments — were parties to an illegal scheme which caused it financial loss. Its claims were formulated on the basis of theft, not fraud. One of the persons against whom the respondent sought summary judgment was its own former director, one G. It was common cause that, in order to succeed in its claims, the respondent had to establish that the appellants had the intention to steal from it. The appellants argued in their defence that they had no such intention since they acted bona fide on the instructions of the respondent as conveyed to them by G, and that they had believed G's assertion that they were assisting the respondent. The respondent argued that the appellants' version was highly improbable and implausible.
The court a quo ruled that the opposing affidavits filed by the defendants lacked sufficient particularity for a valid defence and that the defence was in any event not bona fide or legally sound. It also found that the appellants' versions were 'conveniently' bald and scant. The court a quo's stance on the absence of a bona fide defence was underpinned by its view that a fraud had been perpetrated on the respondent. It also dismissed a defence based on prescription on the ground that the

respondent had prosecuted its claims well within the requisite three-year period of becoming aware of the identity of the defendant debtors. Leave to appeal to a full bench (the instant court) was granted.

Held

The court a quo had misdirected itself in a number of material respects. As for prescription, the respondent never stated when it became aware of the identity of the appellants or the facts giving rise to the claim, so the finding that it had prosecuted its claims 'well within' three years of so becoming aware was not based on any factual underpinning (see [40]). While it appeared that many of the claims had indeed prescribed because more than three years had passed since the transactions were concluded, the respondent would be able to argue at trial that it only later became aware of the identity of the appellants or the underlying facts (see [43] – [47]).

Whether this would be possible depended on whether the knowledge of the respondent's erstwhile director, G, could be attributed to the respondent. In *Jetivia SA and Another v Bilta (UK) Ltd and Others* [2015] 2 All ER 1083 the UK Supreme Court ruled that it would be inappropriate, where a company sued its own agents or directors for loss caused by their conduct such as fraud or a breach of fiduciary duty, for them to avoid liability on the basis that their own culpable knowledge and acts should be attributed to the company. While this principle seemed applicable in the present case, the obscure nature of the transactions in the present case meant that the court a quo was not in a position to decide finally whether the acts and knowledge of G should be attributed to the respondent (see [49], [54]).

There were also other reasons why summary judgment should not have been granted. It was not possible to conclude, on the affidavits, that what had occurred constituted theft of the respondent's moneys, or if it did, that the appellants had no principal defence thereto which might succeed at trial (see [60]).

In the light of the circumstances, including the appellants', at least prima facie, defence based on prescription, this was eminently a matter in which justice and fairness required that the court should have refused to grant summary judgment and directed that the matter proceed to trial in order that the issues could be ventilated irrespective of any consideration of the appellants' principal defence (see [59]). In addition, the court a quo mistakenly referred to a fraud perpetrated by the appellants, which was not the claim pleaded before it (see [60]).

In weighing up a defendant's version in a summary judgment application, the court does not determine the probabilities, for doing so would effectively determine the merits of the defence. While there was reason to be sceptical about the appellants' version, the simple question at this stage was whether it was so inherently and seriously unconvincing that it could be rejected out of hand. The answer to this question depended on, and could only be determined by, evidence at the trial. As implausible as the appellants' version might seem, it could not be rejected out of hand at this stage (see [63]). The appellants might have accepted at face value G's representation that the transactions would benefit the respondent and that everything was in order if the directors approved the arrangement, which belief, if genuine, would rule out dolus (see [65]).

Insofar as the court a quo held that the appellants' versions were conveniently bald and scant, a perusal of their response showed that they provided the material particulars required for their defence, whether good or not (see [66]).

Appeal upheld, summary judgments set aside and appellants granted leave to defend (see [67]).

FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION v PRESIDENT, RSA AND ANOTHER 2020 (6) SA 513 (GP)

State — Duties — Disaster management — Covid-19 lockdown — Ban on sale of tobacco products — Validity of regulations challenged — Rationality — Test — Whether link existed between purpose (checking spread of disease) and ban — Whether public consultation process required — Whether tobacco products 'essential goods' in terms of regulations — Disaster Management Act 57 of 2002, s 27.

These applications — made against the backdrop of the Covid-19 pandemic, the declaration of a national state of disaster on 15 March 2020 and the subsequent imposition, at various levels, of a countrywide lockdown — involved a challenge to the government's ban on the sale of tobacco products. The responsible Minister was the second respondent, the Minister of Cooperative Governance and Traditional Affairs (the Minister).

Specifically, the applicant sought an order declaring that the exclusion of tobacco sales from the 'essential services' that were allowed to continue during the level 5 lockdown * was unlawful. It also contended that reg 27 of the level 4 regulations † and reg 45 of the level 3 regulations ‡ were invalid to the extent that they banned the sale of tobacco products.

The applicant challenged the rationality of the ban. It contended that the health hazards relied on by the Minister did not justify a total ban. It argued that proportionality and the resulting harm to the economy, employment, livelihoods and the health and safety of individuals were not properly considered. The applicant also cited tobacco users' resort to illicit and potentially hazardous non-regulated products. It furthermore argued that since the prohibition of tobacco sales was — unlike alcohol sales — not specifically authorised by s 27 of the Disaster Management Act 57 of 2002 (the Act), the power to regulate the supply of tobacco had to be taken to have been excluded: *expressio unius exclusio alterius est*.

Held

The question was whether the ban on tobacco sales was irrational as a means to combat the spread of Covid-19. For rationality, the means chosen did not have to be the best suited to achieve the intended purpose. Hence the Minister's choice to ban smoking was not susceptible to review on the ground of irrationality unless there was no rational link between the means and the purpose for which the Minister's power was conferred. The only thing the court needed to determine was whether a rational connection existed between the legitimate governmental purpose to contain the spread of Covid-19 and the means chosen, viz the ban on the sale of tobacco products.

The exercise that the applicant wanted the court to undertake entailed evaluating each side's evidence and then expressing an opinion as to which was more cogent and persuasive, in particular as to whether there was a conclusive link between smoking and the spread of the virus. That was not countenanced by the principle of legality. (See [40] – [41].)

Though the link between smoking and the spread of the virus among smokers was not conclusively established by the materials before the Minister, her decision was a properly considered and rational one, intended to assist the state in protecting lives and curbing the spread of the virus. (See [43].)

The argument that there may have been less restrictive measures available to the Minister was misplaced, given that under a rationality review the question was not

whether better, or less restrictive, means could have been adopted, but whether the means that were adopted forged a rational connection with the intended end. The measures adopted by the Minister indeed had a rational connection with the intended end. (See [50].)
The argument that the Minister did not allow proper public consultation was also ill-conceived: all that was required was that the process leading up to the promulgation of the regulations was rationally related to achieving the purpose sought to be achieved, as had been demonstrated. (See [60].)
The argument that the means chosen by the Minister led to the use of illicit products would suffer the same fate as the others: all the Minister had to show was that the means were reasonably capable of achieving the ends, not that they were the most effective or best suited. Ultimately the question remained whether there was a rational connection between the ban and the saving of lives through curbing infections and preventing a strain on the country's healthcare facilities. This the Minister had demonstrated. (See [68] – [70].)
As to the *expressio unius exclusio alterius est* argument, the Minister was permitted to make regulations in terms of s 27(2)*(f)* concerning the movement of persons and goods to or within a disaster-stricken area and in terms of s 27(2)*(n)* she could make regulations concerning 'other steps that may be necessary to prevent an escalation of the disease, or to alleviate, contain and minimise the effects of the disaster'. To apply the *expressio unius exclusio alterius est* maxim in the context of s 27(2) of the Act would not be a 'valuable servant' but a 'dangerous master'. The section was sufficiently wide to serve as a source for the measures taken by the Minister. (See [78] – [83].)
Cigarettes and tobacco products were not 'essential goods' as intended in reg 11A. Tobacco products were not food, cleaning and hygiene products, fuel or medical products. The listed essential goods shared the common quality of being life-sustaining or necessary for survival, whereas tobacco products by their nature did not. Applying the *eiusdem generis* principle, they could not be deemed to be 'essential goods'. (See [95] – [96].) Application dismissed.

FIRSTRAND BANK LTD AND OTHERS v MOSTERT AND OTHERS 2020 (6) SA 543 (ML)

Credit agreement — Consumer credit agreement — Litigation — Jurisdiction — Concurrent jurisdiction of High Court and magistrates' courts — Whether plaintiff/applicant litigant may elect where to proceed — To promote access to justice, matters arising within ambit of NCA should be instituted in magistrates' court having jurisdiction — National Credit Act 34 of 2005, s 172(2), read with Magistrates' Courts Act 32 of 1944, s 29(1)(*e*); Constitution, ss 9 and 34.

It was a practice in the Middelburg High Court, as it was elsewhere in the country, that litigants often instituted proceedings in the High Court as court of first instance despite their claims falling within the jurisdiction of the magistrates' courts. Many of these matters constituted claims based on the National Credit Act 34 of 2005 brought by credit providers against consumers, over which matters the magistrates' courts had been granted jurisdiction by s 172(2) of the National Credit Act 34 of 2005 (NCA), read with s 29(1)*(e)* of the Magistrates' Courts Act 32 of 1944. The respondents in such matters often were indigent and lived in outlying towns a far

distance away from the High Court, and would therefore incur significant transport costs to attend their matters. With this in mind, the court in the present proceedings by way of a directive, asked the litigants before it to address the court on whether, inter alia —

- the practice of bringing NCA-based claims, over which the magistrates' courts had jurisdiction, before the High Court as court of first instance, failed to give proper effect to the rights of access to court and to equality protected in the Constitution in ss 9 and 34, respectively; and
- the NCA, when interpreted through the prism of the Constitution, necessarily demanded that, save in extraordinary circumstances, the magistrates' court be the court of first adjudication in all NCA matters (this, despite there being no express ouster in the NCA of the High Court's jurisdiction to hear such matters as court of first instance). (See [3].)

Held

The Magistrates' Courts Act and the NCA had to be read in the context of the legislature's decision to equip magistrates' courts with unlimited jurisdiction in NCA matters. This was a clear indication of the legislature's intention to bring justice and the courts closer to the people by ensuring access to justice, generally, and more so to financially stricken people and the previously disadvantaged. (See [51].) Further, the legislation had to be interpreted in light of the Constitution's enjoinder to courts to interpret legislation in accordance with the spirit, purport and objects of the Bill of Rights as per s 39(2) of the Constitution. (See [51].) NCA matters (and also matters that belong in magistrates' courts) being brought in the High Court defeated the s 34 right of access to justice and the s 9 equality right. (See [52].)

The Magistrates' Courts Act and the NCA, interpreted purposively, in its proper context, and in order to give proper effect to the s 34 right of access to justice and the s 9 equality right, demanded that civil actions or applications arising within the ambit of the NCA (and thus falling within the magistrates' court's jurisdiction) should be instituted in the magistrates' court having jurisdiction. (See [51] – [53], [55], [65], [68].)

FOURIE v GEYER 2020 (6) SA 569 (NWM)

Credit agreement — Consumer credit agreement — Whether agreement subject to NCA — Acknowledgment of debt — Friends of long standing — Prior loans — Some business dealings — Formal document — National Credit Act 34 of 2005, ss 4(2)(*b*) and 8(4)(*f*).

Applicant sued respondent on an acknowledgment of debt for repayment (see [1]). Respondent's defence was that the acknowledgment was a consumer credit agreement and that applicant was not registered as a credit provider, and that therefore the acknowledgment was unlawful (see [3]).

Further facts were that the acknowledgment comprised three amounts representing R461 000 in rental, R100 000 in commission and R270 000 paid to a third party on applicant's behalf (see [1]); payment was deferred for 60 days (see [4]); interest ran on the total amount at 18% per annum (see [4]); and provision was made for attorneys' fees, expenses and disbursements (see [12]).

Moreover, applicant and respondent had been friends for 18 years (see [18]); applicant had made prior loans to respondent (see [6]); and the parties had engaged

in business dealings: specifically, respondent was renting applicant's property and applicant was seemingly involved, to the extent he was entitled to commission, in the sale of respondent's immovable property (see [18]).

Held

- The acknowledgment was not excluded from the National Credit Act 34 of 2005's application as a non-arm's-length transaction (s 4(2)*(b)*): it had the formality of an arm's length document, the component transactions were of a business nature, and it was greatly advantageous to applicant (see [17], [20] – [21] and [30]).
- The acknowledgment attracted the Act's application as an agreement under which payment was deferred and charges, fees or interest levied (see [19] – [20] and [30]).
- The principal debt exceeded the prescribed amount (s 40(1)) (see [23] and [30]).

Given the above, applicant was required to be registered as a credit provider at the time the acknowledgment was entered into (s 40(1)), and the effect of his not being so registered was to render the acknowledgment unlawful (s 89(2)*(d)*) (see [29] – [31]).

Applicant's claim accordingly dismissed.

MFWETHU INVESTMENTS CC v CITIQ METER SOLUTIONS (PTY) LTD 2020 (6) SA 578 (WCC)

Court — High Court — Jurisdiction — Companies — Whether 2008 Companies Act abolishing possibility of residence at both principal place of business and registered office — Companies Act 71 of 2008, s 23(3)(*b*).

Applicant close corporation was a supplier of prepaid electricity meters, as was respondent company, which had a place of business in Cape Town, and in Midrand, which was its registered office under s 23(3)*(b)* of the Companies Act 71 of 2008 (see [2] and [7]).

Applicant applied for a final interdict, alleging respondent had unlawfully linked itself to certain of applicant's meters (see [2] and [4]). Respondent's contention was that the Western Cape Division of the High Court had no jurisdiction in the matter, in that the alleged acts were not perpetrated in its jurisdiction (see [8]).

This raised the issue whether the court nonetheless had jurisdiction on the basis of respondent's residence in its jurisdiction (see [10]). (This where, in delictual matters, a court will have jurisdiction if the defendant resides in its jurisdiction, notwithstanding the delict having been perpetrated outside of it (see [12]).)

In this regard, under the common law predating the 2008 Companies Act, a company could reside for jurisdictional purposes at both its registered office and its principal place of business in South Africa (if indeed it had a principal place of business which was separately located to its registered office) (see [13]).

The 2008 Act had, however, brought the requirement that companies with more than one office register their 'principal office' (s 23(3)*(b)*), which, *held* the court, meant its 'principal place of business' (the place where its general administration was centred) (see [18]).

Post-Act authority, which had considered the implications of this on residence for jurisdictional purposes, had concluded that in matters governed entirely by the 2008 Act, a company could only have one residence, its registered office (see [22]).

Considering this authority, the court *held* it to be correct (see [23]).

Thus here, where respondent's registered office in Midrand was outside the jurisdiction of the court, respondent did not reside in the court's jurisdiction, and it accordingly had no jurisdiction in the matter (see [6] and [34]).
And even if the post-Act authority were incorrect, such that a company might reside at both its registered office and principal place of business in South Africa, applicant had not shown that respondent's Cape Town office was its principal place of business (see [27] and [31]).
The application accordingly dismissed (see [35]).

MINISTER OF POLICE AND OTHERS v SILVERMOON INVESTMENTS 145 CC AND OTHERS 2020 (6) SA 586 (KZD)
Defamation — Who may sue or be sued — Government departments — Whether departments of national government may interdict prospective defamation.

First respondent corporation was the owner of a property on which two buildings were located. These it had leased to the Department of Public Works and they were occupied by the police and Statistics South Africa (see [3]). A rental dispute developed, and in the course thereof the corporation and second respondent, a natural person, erected on the property a billboard stating: 'SA government's first land grab in the new South Africa!!! This property has been hijacked by the Department of Public Works for the SAPS.' (See [3] – [4].)
This caused the applicants (the Minister of Police, Statistics South Africa, the Minister of Public Works and the Government of the Republic of South Africa) to apply urgently for an order that the billboard be removed and that first and second respondents be interdicted from making defamatory statements about them (see [1]).
The court ordered removal of the billboard and interdicted the making of such statements (see [2]).
Here, on the return day, the issue was whether the interdict should be confirmed (see [2]). Respondents raised two points in limine.
The first was that the applicants were neither owners of the property nor ratepayers and so lacked standing to seek removal of the billboard, which had been erected without the municipality's permission (see [15], [24] and [26] – [27]).
The court upheld this point (see [28]).
The second was that organs of state had no right to sue for defamation, and consequently that the applicants lacked standing to interdict the respondents making such statements (see [24]).
The court likewise upheld this point (see [48]). This on the bases that the state's reputation was not a thing capable of being defamed, and that giving the state a right to sue for defamation would impact citizens' freedom of speech (see [35] – [36]). This where courts were in any event reluctant to interdict prospective defamation, preferring to leave claimants to proceedings for damages (see [44]).
Rule nisi accordingly discharged, and the application for the interdict dismissed (see [54]).

MSIZA v MOTAU SC (NO) AND ANOTHER 2020 (6) SA 604 (GP)
Administrative law — Administrative function — Principles of natural justice — Audi alteram partem rule — When applicable — Adverse finding against individual by investigator exercising public power, without giving individual investigated opportunity to be heard — Whether audi alteram partem rule to be observed by investigator at investigation stage.

The first respondent, Mr Motau SC, was appointed by the second respondent, The Prudential Authority of the SA Reserve Bank, in terms of the Financial Sector Regulation Act 9 of 2017 (FSR Act) to investigate the looting of deposits at VBS Bank (VBS). His report made a number of adverse findings, remarks and conclusions against the applicant, Mr Msiza; inter alia that he was a 'kingpin' who 'facilitated bribes to municipal officials' in a VBS scheme to attract deposits from municipalities.
Aggrieved that these findings, remarks and conclusions were made without affording him the opportunity to be heard, he sought in this review application to have it expunged from the report. The main issue was whether the findings, remarks and conclusions complained of were reviewable on the basis that he had a right to be heard during the investigation.
Held
The exercise of public power, reviewable both as an administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and under the Constitution, entailed a requirement of fair procedure encompassing a right to be heard. It was in the interests of justice to extend the rule of law and rules of natural justice even to those individuals who were suspected, like in this instance, of wrongdoing by an investigator — it being the individual's right to be heard before adverse findings, remarks and conclusions were made in investigations such as the one envisaged in the FSR Act. (See [50], [53] and [54].)
Where an investigator knew, or was expected to foresee that their findings, remarks and conclusions would have consequences for the party on whose behalf an investigation was conducted and for the party against whom findings would be made, they were obliged to listen to both sides. And the party who was likely to be affected by adverse findings was entitled to demand the right to be heard before an adverse remark or finding, conclusion or decision was made against them. (See [55].)

TUMILENG TRADING CC v NATIONAL SECURITY AND FIRE (PTY) LTD 2020 (6) SA 624 (WCC)

Practice — Judgments and orders — Summary judgment — Applications — Effect of amended rule 32 — Opposing affidavit — Must deal with argumentative matters raised in founding affidavit with sufficient particularity to enable court to determine whether bona fide defence established — Uniform Rule 32(3).

Before its amendment (effective 1 July 2019) rule 32 of the Uniform Rules provided that a plaintiff could apply for summary judgment upon delivery of a notice of intention to defend; after its amendment a plaintiff may only apply for summary judgment after delivery of the plea.
This case concerned two summary judgment applications, brought and opposed under the amended rule in two actions by different plaintiffs against the same defendant, both based on a liquidated claim for agreed commission upon termination of an agency contract. In each matter, in the defendant's plea and in the opposing affidavit in the summary judgment application, it was alleged that the agency contracts had been terminated in terms of a provision which entitled the defendant to summarily cancel the contract if the agent brought it into disrepute (here allegedly

caused by defective workmanship) and which freed it from any obligation to pay ongoing commissions.

Held

Rule 32(3), which regulated what was required of a defendant in its opposing affidavit, was left substantively unamended in the overhauled procedure. That meant that the test remained what it always was: whether the defendant disclosed a bona fide (ie an apparently genuinely advanced, as distinct from sham) defence. There was no indication in the amended rule that the method of determining that had changed: a defendant was not required to show that its defence was likely to prevail; only a legally cognisable defence on the face of it, that was genuine or bona fide. (See [13].)

The effect of the amended requirements for a supporting affidavit was, however, to require the defendant to deal with the argumentative material in its opposing affidavit. Defendants who failed to do that, did so at their peril. Here, the triable defence most obviously evident in the pleas was the allegation that the defendant had cancelled the contract in circumstances in which it had been relieved of the obligation to pay ongoing commissions. However, the fact that the bones of a triable defence had been made out in the plea, did not mean that summary judgment must be refused. The issue was whether the ostensible defence pleaded was bona fide or not. (See [39] – [41].)

The affidavit provided no particulars of the 'reputational harm' or of 'the inadequate workmanship'. It fell far short of what was required of it in terms of rule 32(3)*(b)* if it were to avoid summary judgment. If a defendant failed to put up the facts that it obviously should have been able to do, were it advancing a genuine defence, it could not complain if the court was left unable to find a reasonable basis to doubt that it did not have a bona fide defence. (See [44] – [45] and [48].) Summary judgment would accordingly be granted in both applications (see [55] and [56]).

SOUTH AFRICAN CRIMINAL LAW REPORTS DECEMBER 2020

S v MATHEKGA AND ANOTHER 2020 (2) SACR 559 (SCA)

Murder — Sentence — Life imprisonment — Killing by policemen of fellow police official in plain clothes — Appellants having no reason to believe that deceased had committed offence and not entitled to protection of s 49(2) of Criminal Procedure Act 51 of 1977 — Not aware, however, that was law-enforcement officer — In such circumstances s 51(1) of Act 105 of 1997, read with part I of sch 2, not applicable to appellants, but falling within ambit of s 51(2), read with part II of sch 2, in terms whereof prescribed minimum sentence was 15 years' imprisonment — Compelling and substantial circumstances justifying lesser sentence of 13 years' imprisonment.

The two appellants were constables in the South African Police Service who were convicted in the High Court of murder, two counts of attempted murder, and malicious damage to property. They were each sentenced to 15 years' imprisonment on the murder charge and, on the attempted murder of one of the bystanders, to five years' imprisonment. The first appellant was also sentenced to seven years' imprisonment in respect of the second count of attempted murder. The incident had its origin in a backup call made to the police station, where the appellants were stationed, by another constable reporting that he had been shot while on duty. The suspect had reportedly fled the scene and was being pursued on foot by two of his

plain-clothes colleagues. Responding to the call, the appellants drove to a taxi rank in the city centre and, as they approached the taxi rank, they saw two men holding firearms in their hands walking at a rapid pace. The two men disappeared behind a line of taxis and the appellants started shooting in their direction. The bullets went through the windows of the minibus taxis and motor vehicles parked alongside the pavement. All the taxi commuters and the two plain-clothes police officers attempted to hide to avoid being shot. The first appellant used an R5 assault rifle and the second appellant a Z88 9-mm pistol. One of the plain-clothes police officers was fatally wounded, having sustained gunshot wounds to the head, neck, chest and back, whilst the other sustained wounds to his leg and both hands. By the time the shooting stopped, the appellants had fired 29 bullets directly at the two victims.
The trial court found that the appellants had not attempted to arrest the suspect; they had no reasonable suspicion that the two men whom they had shot had committed any offence relating to the shooting of the policeman reported to have been shot; it could not have been clear to the two police victims that there had been an attempt to arrest them; there was no attempt to resist or to flee by the two; there was no threat of serious violence to the arrestor or any other person; and they had not been trying to overcome any resistance from the two men. It accordingly found that the two appellants were not protected by s 49(2) of the Criminal Procedure Act 51 of 1977 (the Act). (See [5].)
On appeal, the court was required to determine whether the appellants objectively and/or subjectively believed that their actions were justified by s 49 of the Act; whether the appellants were aware that the deceased was a police officer, in order for the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) to apply to sentencing; and whether an effective sentence of 15 years' imprisonment was appropriate in the circumstances.

Held, per Mocumie JA (Cachalia JA, Mokgohloa JA and Dlodlo JA concurring), that, on a conspectus of all the evidence, objectively and subjectively, the appellants had acted outside the scope of s 49(2) of the Act and that there was no merit in the contention that they were justified in their conduct. There was consequently no basis to interfere with the findings of the trial court in this regard. Furthermore, there was no merit in the submission that, at worst, they should have been convicted of culpable homicide. (See [17] – [18].)

Held, further, in respect of the question of sentence, that it was clear that the trial court had convicted and sentenced the appellants on the basis of s 51(1) of the CLAA, read with part I of sch 2, on the basis that the victim was a law-enforcement officer performing his functions. Where the offender was not aware that the person was a law-enforcement officer, the offender could not reasonably be expected to know that the victim was such a person, and the provisions of s 51(1) did not apply. On the facts, the murder was one other than those referred to in part I. It fell within the ambit of s 51(2), read with part II of sch 2, in terms whereof the prescribed minimum sentence was 15 years' imprisonment. The court a quo had accordingly erred in finding that the murder fell within the ambit of s 51(1). (See [22] – [23].)
Held, further, that, where both appellants were first offenders, were relatively young and gainfully employed in the police service with no track record of ill discipline or misconduct; had spent 10 months incarcerated prior to being released on bail; had families and young children of schoolgoing age who depended on them; and where the circumstances in which the murder had been committed were unusual, there

were compelling and substantial circumstances justifying a deviation from the prescribed sentence of 15 years' imprisonment. A sentence of 13 years' imprisonment would be appropriate. (See [27] and [29].)

Held, per Makgoka JA, dissenting, that this was a regrettable and most unfortunate case and the irony of it was that the appellants were to serve long prison terms, alongside the very criminals whose activities they had dedicated their lives to fighting. In the circumstances a sentence of correctional supervision for each of the appellants was a suitable one, as recommended in the probation officers' reports, but were the court to impose a prison term, it would be for no more than eight years' imprisonment, half of which would be suspended. (See [71].)

S v BAM 2020 (2) SACR 584 (WCC)

Housebreaking — Housebreaking with intent to rob and robbery with aggravating circumstances — Sentence — Criminal Law Amendment Act 105 of 1997 — Composite offences — Where one or both offences attract prescribed minimum sentence.
Housebreaking — Housebreaking with intent to rob and robbery with aggravating circumstances — Sentence — Sentence not to be imposed as if separate offences.

The appellant was convicted in a regional magistrates' court of housebreaking with intent to rob and robbery with aggravating circumstances, and was sentenced to seven years' imprisonment in respect of the housebreaking, and to a further 15 years' imprisonment in respect of the robbery with aggravating circumstances. The sentences were ordered to run concurrently. On appeal the court held that the court a quo had erred in punishing the two offences separately because the appellant was only convicted on a single, composite charge. (See [55].)
The question then arose as to what sentence the court should impose on a single, composite charge where one or both of the charges that made up said composite charge attracted a prescribed minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997. The court held that it would not be appropriate to seek to circumvent long-established practice in regard to the way housebreaking charges were formulated, by separating them into two separate charges simply in order to allow for different discretionary minimum sentences to be imposed in terms of Act 105 of 1997. In most instances doing so would effectively result in a duplication of convictions and punishments which would be liable to be set aside on appeal. Where a housebreaking facilitated an offence, which might attract a minimum sentence in terms of Act 105 of 1997 and sch 2 to that Act, there would in most instances also not be a clash or dilemma as to which minimum sentence might be applicable. Where there was the possibility of a conflict, the minimum sentence which should apply was that which was determined by the offence which the housebreaking facilitated, as it was the principal offence at which the housebreaking was directed. (See [80] and [86].)
In the present case, where there were substantial and compelling circumstances which would make the imposition of a sentence of 15 years' imprisonment disproportionate, the sentences imposed by the regional magistrate had to be set aside and replaced with a sentence of 12 years' imprisonment. (See [95].)

S v RAMABELE AND OTHERS 2020 (2) SACR 604 (CC)

Trial — Delay — Unreasonable delay — Application of provisions of s 342A(3)(*d*) of Criminal Procedure Act 51 of 1977 — Requirements for.

The applicants were tried in the High Court for contraventions of the Prevention of Organised Crime Act 121 of 1998 (POCA), sections of the Mining Rights Act 20 of 1967, as well as s 4 of the Precious Metals Act 37 of 2005. These charges related to procuring, refining and disposing of unwrought gold for the benefit of the criminal enterprise and its associates, and laundering the benefits by purchasing motor vehicles, luxury items and immovable property. The charges also included offences such as theft. The trial was beset by numerous delays and spanned a period of six years, from 2008 – 2014. Some of the delays were caused by the applicants' legal-representation requirements and the withdrawal of their first legal representative, and the termination of their second legal representative's services while he was cross-examining the last witness for the state. The applicants stated that they wanted to re-engage the services of their former legal representative and needed a postponement for the process of raising funds for that purpose. The court granted another postponement, but when the applicants again appeared, unrepresented, the court allowed evidence to be led and the state closed its case on 25 June 2014. The accused did not cross-examine the last state witness after their legal representative's services were terminated, and refused to testify in their defence. Instead, they sought a postponement for eight months to allow them to raise funds to obtain a legal representative of their choice, but this was refused. On 28 July 2014 the state requested the court to invoke s 342A(3)*(d)* of the Criminal Procedure Act 51 of 1977 (the CPA) and close the accused's case on their behalf. The court refused that application, but postponed the trial for two weeks to allow the accused to consider their position. On 11 August 2014, when the accused persisted with their former application for a postponement, the court held that the unreasonable delays constituted exceptional circumstances as required by s 342A(3)*(d)* and issued an order that the accused's cases were deemed closed. In an application for leave to appeal,

Held, that, while the court had pronounced on the importance of unreasonable delays in criminal proceedings in terms of s 25(3)*(a)* of the interim Constitution and s 35(3)*(d)* of the Constitution, it had yet to properly engage with s 342A of the CPA. It was therefore in the interests of justice to grant leave to appeal. (See [35] – [36].)

Held, further, in determining whether a particular lapse of time was reasonable, the approach was that courts ought to consider an array of factors, including: *(a)* the nature of the prejudice suffered by the accused; *(b)* the nature of the case; and *(c)* systemic delay. Courts had developed further factors such as the nature of the offence, as well as the interests of the family and/or the victims of the alleged crime. A proper consideration of these factors required a value judgment with reasonableness as the qualifier. It was, furthermore, a fact-specific inquiry. (See [59].)

Held, further, the fact of a delay could not automatically constitute an infringement of the right to a fair trial. A proper reading of s 342A as a whole revealed that the section required an investigation into the reasonableness of the delay. Where the delay was caused by the conduct of the accused, the delay could not per se serve as a basis for the court to decide that the subsequent behaviour was unfair. (See [60] – [61] and [66].)

Held, further, having regard to what transpired, the state had notified the applicants of its intention to invoke the provisions of s 342A and the trial judge had properly explained the said provision and the consequences thereof to the applicants, who were unrepresented at the time. The court had followed the correct procedure and there were exceptional circumstances for it to apply the provisions of s 342A(3)*(d).* In the circumstances the appeal had to be dismissed. (See [69] – [70].)

S v LOTTERING 2020 (2) SACR 629 (WCC)

Appeal — Application for hearing of further evidence — Application made to trial court — Requirements for — Interests of finality in litigation weighty consideration — Criminal Procedure Act 51 of 1977, s 309B(5)*(b)*.

In an appeal by the appellant, a policeman, against his conviction for armed robbery, the defence had applied after sentence for leave to appeal and for leave in terms of s 309B(5) of the Criminal Procedure Act 51 of 1977 (the Act) to adduce evidence from the appellant's wife who had not been called as a witness during the trial. The prosecution had made her available to the defence before the commencement of the trial, but the appellant's attorney had chosen not to call her. The mandate of the trial attorney was terminated after conviction.
Held, that the provisions of s 309B(5) were intended to avoid as far as possible the disruption of appeal proceedings that sometimes occurred when appellants made application to the appellate court for the admission of new evidence. In many such cases where the application was granted, the appellate court would set aside the conviction and sentence, and remit the matter to the trial court for the hearing of additional evidence. The provision allowed for the short-cutting of that laborious process. The interests of finality in litigation were a weighty consideration and it was therefore important that magistrates faced with applications in terms of the section were mindful that the applications were brought at what might properly be termed 'the appeal stage', notwithstanding that they were brought to the trial court. Courts should adjudicate them in accordance with the principles dealing with applications to adduce additional evidence on appeal. Such applications should therefore not be granted if there has been only token compliance with the requirements of s 309B(5)*(b).* (See [26] and [30].)
Held, further, the application had not made out a proper case for further evidence to be laid at the appeal stage of the case. It did not adequately explain why the evidence had not been led in the trial. It gave no corroborating detail concerning the circumstances in which the decision was made not to call the appellant's wife as a witness, in circumstances in which the importance of it would have been abundantly apparent, even to a layman, and certainly to a policeman of 16 years' experience. There was, furthermore, no confirmatory affidavit by the appellant's trial attorney or any evidence as to the circumstances in which that attorney's mandate had been terminated. (See [32] and [34].)
Held, however, on the evidence, that the odds against the appellant's innocence were just too overwhelming and there was no doubt that he had been correctly convicted and sentenced. (See [53].) The appeal was dismissed.

S v ROCHE-KELLY 2020 (2) SACR 649 (WCC)

Extradition — Application for — Requirements — Certificate in terms of s 10(2) of Extradition Act 67 of 1962 — No format for certificate prescribed — Deposition in terms of s 9(3) may be by way of hearsay.
Extradition — Application for — Requirements — Certificate in terms of s 10(2) of Extradition Act 67 of 1962 — No format for certificate prescribed — Statement of offences required by art 12.2(*b*) of European Convention on Extradition admissible, despite having no apparent author or identification; not being signed at end; not initialled; not given under oath; not referred to in accompanying affidavit; and not linked to rest of documents.

In an appeal against an order for extradition granted after an extradition inquiry held in terms of ss 9 and 10 of the Extradition Act 67 of 1962 (the Act) to return the appellant to the Republic of Ireland to stand trial on numerous charges relating to the sexual assault of his daughter, the appellant contended that the certificate relied upon by the state in terms of s 10(2) did not state that it was a certificate, but was in the form of an affidavit seeking to place evidence before the court for decision. The appellant also argued that the information given by the prosecuting authority in Ireland was not from the official's own personal knowledge, but was based on a file forwarded to him. He complained further that the statement-of-offences document did not have an author or identification; was not signed at the end; was not initialled; was not given under oath; was not referred to in the affidavit which it accompanied; and was not in any way linked to the rest of the documents; and was accordingly inadmissible.
Held, that the Act did not prescribe what format a certificate in terms of s 10(2) should take, and it could be of an attesting nature and not merely record information. (See [12].)
Held, further, that the Act did not prescribe who the author of or deponent to a deposition, statement or affirmation submitted in terms of the provision should be, and the only prescribed requirement was that such a document should be certified and authenticated. To the extent that the affidavit in question was hearsay, it should in any event have been admissible in terms of the Law of Evidence Amendment Act 45 of 1988. (See [24] – [25].)
Held, further, that the context for the inclusion of a statement of offences was clear, namely the requirements of art 12.2*(b)* of the European Convention on Extradition (Paris, 13 December 1957). Its page-numbering was part of the sequence of documents foreshadowed by the contents page, indicating that it was part of the appendixes named in the contents page, and for these reasons it could therefore be considered to be incorporated by reference. (See [34].) The appeal was accordingly dismissed.

MSONGELWA v MINISTER OF POLICE 2020 (2) SACR 664 (ECM)
Damages — Measure of — For unlawful arrest and detention — Reprehensible conduct of police in not pursuing prosecution of plaintiff who was held in custody for 158 days — Damages of R5 million awarded.

The plaintiff instituted action against the defendant for damages for assault and for unlawful arrest and detention. He had been arrested at a tavern where he was visiting with friends, but was not told of the reason for the arrest and resisted. During

a struggle, a police official shot him in the ankle. He was taken to a hospital under police guard after which he was detained in the cells at a police station for four days. The conditions in the cell were appalling. He appeared in court on several occasions. when the matter was always remanded in custody. He spent a further period in the prison hospital and after a period of 150 days from his arrest he was released. It appeared from the police docket that the police had been guilty of gross misconduct in not showing any interest whatsoever in pursuing the prosecution of the plaintiff or communicating with the prosecutor on the plaintiff being granted bail. The claim for damages for assault was settled separately, with the defendant paying the plaintiff the sum of R2,5 million.
Held, that the conduct of the police and the whole matter had been reprehensible. There had been a lengthy period of detention of the plaintiff, but part of that related to his being detained in hospital, which was not comparable to being held in police or prison cells. In the circumstances an award of R5 million would be appropriate in respect of the claim for damages for unlawful arrest and detention. (See [17].)

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City of Cape Town v Carelse and others [2020] 4 All SA 613 (SCA)

Civil Procedure – Leave to appeal – Test for leave to appeal – Prospects of success – Where evidence establishing that findings of court below on critical issues of wrongfulness and negligence were unassailable, there were no prospects of success on appeal and leave to appeal refused.

Personal Injury/Delict – Visitor to public facility under control of City – Attack by dog – Claim for damages against City – Wrongfulness and negligence – Where officials were aware of risk at facility and took no steps to avert such risk, wrongfulness found to have been established.

In December 2013, while on a visit to a day camp under the control of the appellant (the “City”), the first respondent (“Fatiema”) was attacked by a pitbull owned by the second respondent (“Quinton”). The dog had been brought to the camp by the third respondent (“Dylan”).

Fatiema sustained serious physical injuries as a result of the attack, and developed post-traumatic stress disorder. She instituted action against the City in the High Court, claiming damages sustained as a result of the attack by the dog. The action was based on the alleged negligent breach of a legal duty to ensure the safety of visitors to the camp. The City defended the action and served third party notices, in terms of rule 13 of the Uniform Rules of Court, on Quinton and Dylan, claiming an indemnity or contribution from them in relation to any damages that might be awarded against it.

While admitting that it owed the public utilising the facility a duty of care, the City denied liability to Fatiema, stating that it had complied with its duty by taking reasonable precautionary steps to keep the facility safe and to ensure the safety of the public. Furthermore, it pointed to the fact that the dog was brought onto the premises unlawfully by a third party.

The High Court found that the City was liable for Fatiema’s proven damages, and that Quinton was liable to compensate the City for 50% of those damages. The present judgment was on the City’s application for leave to appeal.

Held – The primary question to be addressed was whether there would be reasonable prospects of success.

The High Court correctly held that allegedly negligent conduct in the form of an omission is not *prima facie* wrongful. Wrongfulness depended on the existence of a legal duty.

In seeking leave to appeal, the City stated that the court below erred in determining both wrongfulness and negligence against it and that there was a reasonable prospect of success in that regard. It also argued that the case raised pertinent questions in relation to liability of a municipality for the unlawful conduct of third parties.

The evidence established that the City was aware of the potential dangers that dogs presented at the facility. It had signs prominently displayed at the main entrance, warning the public in that regard. While the main entrance was manned by officials, the camp's officials were aware that dogs entered the facility, either on their own or led by owners or controllers at a weak point in the camp's fence – away from the main entrance. The officials did nothing to man that weak point, or to fix it. In those circumstances, the High Court correctly found against the City, and there were no prospects of success on appeal.

The application for leave to appeal was dismissed.

Government Employees Medical Scheme and others v Public Protector of the Republic of South Africa and others [2020] 4 All SA 629 (SCA)

Constitutional and Administrative Law – Public Protector – Powers of – Jurisdiction of Public Protector to investigate complaint against decision of medical aid scheme and to issue subpoenas in that regard – Section 6(5)(b) of the Public Protector Act 23 of 1994 empowering Public Protector to investigate any alleged abuse or unjustifiable exercise of power or unfair or improper conduct by person performing function connected with employment by a public institution or entity – Power to subpoena may only be exercised within confines of Public Protector Act – Public Protector lacking jurisdiction over private medical aid scheme.

The first appellant ("GEMS") was a medical scheme, involved in a dispute with the second respondent ("Mr Ngwato"). The latter sought to be recognised as the beneficiary of a member of the scheme after the death of the member. GEMS refused to recognise Mr Ngwato as a beneficiary as he was unable to produce a marriage certificate. That led to Mr Ngwato lodging a complaint in terms of section 47 of the Medical Schemes Act 131 of 1998 with the third respondent (the "Registrar").

In the interim, a policy change by GEMS regarding the status of life partners saw the requirement of a marriage certificate falling away. Accordingly, on 7 December 2015 Mr Ngwato was furnished with a membership certificate which confirmed that his benefit date was 1 June 2013. However, he was not happy with having to pay the full contribution himself, and sought to be regarded as eligible for a Government Pensions Administration Agency ("GPAA") subsidy. That claim was rejected by the Registrar and Mr Ngwato appealed to the fourth respondent, the Council for Medical Schemes (the "Council") which also ruled against him.

Instead of exercising his right of a further appeal to the Appeal Board of the Council, Mr Ngwato lodged a complaint with the Public Protector, making various allegations

against GEMS and the GPAA. Well over a year later, GEMS received an email from the office of the Public Protector, stating that although it had found the complaint to be unsubstantiated and closed the file, Mr Ngwato had applied for review of that decision. GEMS was requested to attend a meeting at the office of the Public Protector, to discuss certain issues raised in the complaint.

In response, GEMS explained that despite its membership consisting of government employees, it was a private medical scheme and not an Organ of State, nor a public entity, nor falling within any sphere of government. It challenged the jurisdiction of the Public Protector over the matter.

On 24 April 2018, two subpoenas purportedly issued under section 7(4)(a) of the Public Protector Act 23 of 1994 were served on GEMS' legal advisor and the second appellant, the Principal Officer of GEMS. They were required to appear in person before the Public Protector on 18 May 2018, as also, to produce a list of specified documents.

GEMS approached the High Court for declaratory relief in its jurisdictional challenge against the Public Protector. The Court found for the Public Protector, stating that even though GEMS was not a government or an Organ of State, it performed a public function in terms of national legislation and its functions were public in nature. The present appeal thus ensued.

Held – Section 6(5)(b) of the Public Protector Act allows the Public Protector to investigate any alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct by a person performing a function connected with his or her employment by a public institution or entity. The Public Protector was unable to bring herself within the ambit of the section. Furthermore, the nature of the complaint and the nature of the power exercised by GEMS, meant that the jurisdictional preconditions for an investigation in terms of sections 6(4) and (5) had not been met. The Public Protector accordingly did not have the statutory power to investigate the complaint.

The appeal thus succeeded.

MEC: Western Cape Department of Social Development v BE obo JE and another
[2020] 4 All SA 650 (SCA)

Personal Injury/Delict – Claim for damages – Injury to child at playschool – Place of care in terms of Child Care Act 74 of 1983 – Defective play equipment – Liability for negligence in delict depends on existence of legal duty owed to injured party by party sought to be held liable, to take steps to avoid or prevent harm-causing conduct giving rise to claim – Responsibility in place of care for general issues of safety, including construction and maintenance of playground equipment, is that of entity operating facility and persons employed in it and not that of MEC.

In 2008, the first respondent's daughter was playing on a swing at her playschool when a heavy cross-beam collapsed on top of her causing severe head and brain injuries and leaving her severely disabled. As a result, the first respondent ("Mr BE") sued the applicant (the "MEC") for damages. The MEC joined the second respondent municipality as a third party. Contributions were sought on the basis of contributory negligence in the event of the MEC being held liable to Mr BE. The High Court held

the MEC liable to pay the damages claimed by Mr BE and dismissed the MEC's claims against the municipality.

An application for leave to appeal and condonation was referred for oral argument to the present Court in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013.

Held – Leave to appeal was granted as the issues raised in the case were of general importance,

At the heart of the allegations of negligence against the MEC lay the fact that the swing that collapsed on the child was defectively designed and unsafe. A mechanical engineer testified as an expert witness, identifying three respects in which the design of the structure was defective. His evidence that the swing's design was defective was unchallenged. It was also not challenged that the ordinary use of the swing by the children in the school would cause the fixings to undergo stress and eventually break.

The essential question against that background was whether the MEC owed a duty to the child to protect her against the situation that occurred.

Liability for negligence in delict depends in the first instance on the existence of a legal duty owed by the party sought to be held liable to the injured party to take steps to avoid or prevent the harm-causing conduct that gives rise to the claim. Whether such a duty exists depends on whether the failure to take such steps was wrongful. The legal duty that the MEC was alleged to owe to the child was formulated against the background of the statutory provisions governing the entitlement to operate a place of care, in which category the school fell. The statute in question was the Child Care Act 74 of 1983 and the Regulations published in terms thereof. Regulation 30(4) stated that "Registration of . . . place of care . . . shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General."

The Court held that the responsibility for general issues of safety, including the construction and maintenance of playground equipment, was that of the person or organisation operating the facility and the persons employed in it as teachers, carers, assistants or ground staff. In that regard, the Court highlighted the distinction between public schools and places of care.

Having found that the MEC could not be held liable for the injury sustained by the child in this case, the Court granted leave to appeal and upheld the appeal.

Modise and another v Tladi Holdings (Pty) Ltd [2020] 4 All SA 670 (SCA)

Corporate and Commercial – Company law – Director of company – Directors have overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests of the company – Misappropriation of economic opportunity and acquiring such opportunity for own interest constituting breach of fiduciary duty.

The first appellant ("Modise") was identified by a fellow businessman ("Sandler") as a key player in an intended electrical conglomerate which would seek to do business with State-owned entities and municipalities in the energy sector. Sandler held a majority interest in an electrical company ("Muvoni"), which would need to comply with

Black Economic Empowerment ("BEE") requirements to become eligible to exploit whatever opportunities might become available.

Modise joined Muvoni's board on 1 December 2004 and was appointed Director and Chairman of the respondent ("Tladi") on 14 December 2004.

One of the opportunities which Sandler identified as worth pursuing concerned a company ("ARB") which was a major supplier of electrical equipment to Muvoni. Modise denied that Sandler had mentioned the ARB opportunity. In any event, in 2005, when ARB needed a new BEE partner, Modise and his company ("Batsomi Power") were offered the same deal that Sandler had identified as the ARB opportunity for Tladi. Modise accepted the offer.

That led to the present litigation, in which the High Court found that the appellants had misappropriated a corporate opportunity to buy shares in ARB, which opportunity properly belonged to Tladi. The Court also dismissed the appellants' special plea of prescription in respect of the claim against Batsomi Power.

Held – Directors have an overarching and paramount fiduciary duty to exercise their powers in good faith and in the best interests of the company. The duty encompasses at least three rules. Directors may not place themselves in positions of conflicts of interest or duty (the "no-conflict rule"); may not make secret profits (the "no-profit rule"); or acquire economic opportunities for themselves (the "corporate opportunity rule") that properly belong to the company. The latter was the most relevant to the present case. Modise not only failed to disclose the approach made to him by ARB, but also concealed the fact that he was pursuing the opportunity in his own interest. The Court rejected all the submissions made by Modise aimed at defending his conduct.

With regard to Batsomi Power, the second appellant, it was contended that the claim had prescribed and also that the case against it, being a separate legal entity, to account to Tladi, was not made. The court *a quo* dismissed both contentions. However, on appeal, the Court found that the claim against Batsomi Power was not part of the original cause of action. Instead, it was based on an entirely different cause of action and the prescriptive period had run. Accordingly Batsomi Power's appeal against the court *a quo*'s finding on prescription was upheld.

Modise's appeal was however, dismissed.

Municipal Employees' Pension Fund and others v Chrisal Investments (Pty) Ltd and others [2020] 4 All SA 686 (SCA)

Property – Co-ownership agreement – Termination of joint ownership of business and sale of assets – actio communi dividundo – Availability of remedy – Whether co-ownership was free or bound co-ownership – Bound co-ownership characterised by separate and distinct legal relationship between co-owners, of which co-ownership is but one consequence – Actio communi dividundo not available where relationship was one of bound co-ownership.

A 55% share in a business was disposed of by the owning companies to the first appellant (the "MEPF"). The business operated three shopping centres. At the same time as the sale agreement, the fourth respondent as the holding company ("Adamax"), concluded a detailed co-ownership agreement with the MEPF. That

agreement was firmly tied to the sale agreement by way of a condition precedent that made the sale agreement dependent on the conclusion of the co-ownership agreement. It contained detailed provisions in regard to its duration and the manner in which either party might dispose of their interest in the business.

The question raised in the present appeal was whether it was open to the sellers, the day after the agreements had been concluded and implemented and at all times thereafter, to ignore the detailed contractual arrangements and bring proceedings under the *actio communi dividundo* to terminate the joint ownership of the business and cause the properties on which the shopping centres stood to be sold.

Adamax claimed that it was open to it to invoke the *actio communi dividundo* immediately after the conclusion and implementation of the sale agreement and the co-ownership agreement or at any time thereafter because it afforded Adamax a right to demand that the co-owned assets be divided. The MEPF resisted that contention, pointing to the terms of the sale agreement and the co-ownership agreement as the basis for opposing the application of the *actio communi dividundo*. It contended that the application was an endeavour to subvert the provisions of the co-ownership agreement. The primary case was that the relationship between the parties was governed by the contracts and nothing else, and that the *actio* was accordingly unavailable to Adamax.

The High Court's finding for the respondents led to the present appeal.

Held – Co-ownership may be either free or bound co-ownership. Based on the authorities, the Court found that the distinction between free and bound co-ownership is that in the former the co-ownership is the sole legal relationship between the co-owners, while in the latter there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their relationship, which is governed by rules imposed by law, including statute, or determined by the parties' themselves by way of binding agreements. The relationship is extrinsic to the co-ownership, but is not required to be exceptional.

In terms of the common law, the *actio* is always available in the case of free co-ownership and never available in bound co-ownership. The Court found the co-ownership agreement to be sufficiently similar to a partnership or joint venture in the conventional sense that the co-ownership of the letting enterprise (the "primary asset") and that of the properties (the "subsidiary assets") should, like a partnership, be a case of bound co-ownership. As such, the *actio* was not available and the appeal had to be upheld.

Public Servants Association of South Africa and others v Government Employees Pension Fund and others [2020] 4 All SA 710 (SCA)

Constitutional and Administrative Law – Judicial review – Delay in seeking review – Courts have discretion to refuse a review application in face of undue delay, or to overlook delay.

Employee Benefits and Retirement – Pension fund – Decision to amend rule governing calculation of actuarial interest of members – Fund's rules requiring consultation before decision, in form prescribed by fund rules – Lack of prior consultation not capable of being cured by consultation with non-designated functionary after

implementation of decision – Failure to comply with requirement resulting in invalidity of decision.

In December 2014, the first respondent (the "GEPF") took a decision to amend the fund rule governing the calculation of actuarial interest of members. The decision was made, relying only on an actuarial valuation report, thus, without prior consultation with the first appellant (the "PSA") or any of the employee organisations prescribed by the rules. The appellants contended that the GEPF, in acting as it did, offended against the principle of legality.

Held – The challenge to the decision in this case was based on a failure to comply with the rules of the GEPF, which were mandated by the Pension Funds Act 24 of 1956. It was, in essence, a legality challenge.

The delay in launching the review application had to be addressed first, as it would determine whether the other questions were required to be addressed. Delay, and whether it should in the circumstances of a particular case be condoned, must be considered in a legality review. In respect of a legality review, the application must be initiated without undue delay and courts have the discretion to refuse a review application in the face of an undue delay or to overlook the delay. In considering whether the delay should be overlooked, a court will have regard to the delay and the attendant circumstances. On a conspectus of all the circumstances, including potential prejudice and having regard to the prospects of success on the merits, the Court held that the delay should be overlooked or excused.

On the merits, the Court confirmed that the required consultation had to precede the decision and had to take the form prescribed by the rules. The Court also disagreed that the failure by the GEPF to consult beforehand could be cured by its belated attempts to invoke the bargaining council as a forum through which, it was contended on behalf of the GEPF, the same result could be achieved. The rule was clear about the sequence of events: consultation had to occur first, followed by a decision. The rules prescribed a specific consultative process before arriving at a decision. It had to be followed. It was not followed and consequently the GEPF's decision was flawed and liable to be set aside.

The appeal was upheld with costs.

Aarifah Security Services CC v Jakoita Properties (Pty) Ltd and others [2020] 4 All SA 730 (GJ)

Property – Sale of property – Right of pre-emption – Validity of asserted exercise of a pre-emptive right, or right of first refusal, in respect of purchase of immovable property – Timeous exercise of right – A pre-emptive right can only become an agreement of sale between grantor and grantee if both execute it in writing, in compliance with formalities – Whether email sent before lapsing of right of pre-emption constituted proper exercise of right – Where email not purporting to make or accept a clear offer, and not compliant with Alienation of Land Act 68 of 1981, it could not be a valid exercise of the right of pre-emption.

The first respondent ("Jakoita") as owner of a commercial building, marketed it for sale in 2017. The applicant ("Aarifah") was a potential purchaser but ended up executing a lease as tenant of a portion of the building in September 2017. The lease contained a

right of pre-emption in favour of Aarifah. In December 2017, Jakoita executed a deed of sale as seller with the second respondent ("Nu-Line") as purchaser. It had informed Aarifah of an offer to purchase received from Nu-Line, and given it the opportunity to exercise the right of first refusal. According to the respondents, Aarifah had not exercised its right under clause 18 within 48 hours as required.

The dispute between the parties concerned the validity of an asserted exercise by Aarifah of a pre-emptive right, or right of first refusal, in respect of the purchase of the immovable property. The matter was in particular, concerned with the formal manner in which such a right is to be exercised, and when it can be said to have been exercised.

Held – The first important aspect of a right of pre-emption, as opposed to an option proper, is that, unlike an option, it is an enforceable right with respect to a sale despite the absence of any determination of the price or terms on which it is to be exercised. Our law currently is that a distinction should be made between the covenant embodying the pre-emptive right, and acts that turn it into an agreement of sale between the grantor and the grantee. The covenant embodying the pre-emptive right, even in respect of the sale of land, need not comply with the formalities. It is binding if it is proved as a contract deliberately concluded, conferring a personal right. The only way in which the pre-emptive right can become an agreement of sale between grantor and grantee is if both execute it in writing, in compliance with the formalities. The holder may enforce its pre-emptive right by submitting an offer that complies with the formalities if it were accepted, and compelling the grantor to countersign it, or having the registrar or some other official authorised to countersign if the grantor fails to do so, in the event that the grantor fails to countersign the holder's offer.

Applying the law to the facts, the Court concluded that Aarifah did not exercise its right of pre-emption in terms of the relevant clause of the lease agreement.

De Zalze Golf Club v Valuation Appeal Board for the Stellenbosch Municipality [2020] 4 All SA 754 (WCC)

Property – Leasehold rights – Valuation for purpose of municipal rates in terms of Local Government: Municipal Property Rates Act 6 of 2004 – Incorrect application of factors by Valuation Appeal Board of municipality – Where valuation not rationally related to reasons given for decision, court setting it aside and requiring Board to reconsider.

The applicant (the "Club") held a 99-year lease of its golf course from a home owners association ("HOA"). The golf course was located within a gated residential estate.

In 2014, the second respondent municipality valued the golf course at R10 million. The Club objected and after negotiation, it accepted a valuation of R9,705 million in November 2016. The valuations were valuations of the Club's leasehold. The leased area comprised 14 erven, the total area of which was 63,17 ha.

In March 2018, the municipality issued a supplementary valuation of the golf course in the amount of R97,5 million. The Club objected, relying on the report of a professional valuer ("Mr du Toit"). According to the Club, the leasehold should receive a purely nominal valuation because various restrictive documents had the effect that the leasehold had no value for a notional buyer. The second reason was that the presence of the golf course had caused a substantial enhancement in the value of the

residential properties in the estate and that to assign a material value to the golf course would result in double taxation.

Based on the report of its own valuer ("Mr Botha"), the municipality dismissed the Club's objection. The Club appealed to the first respondent (the "VAB") which considered both valuers' reports and issued its decision on 5 September 2018, valuing the golf course at R26,5 million.

The Club sought the review and setting aside of the VAB's decision. The six grounds of review which were raised were as follows. It was averred that the VAB was required to value the golf course as a whole, not the clubhouse buildings; that it ignored the fact that restrictions affecting the operation of the golf course made it impossible for the Club to dispose of its leasehold rights to a third party in a way that would enable the latter to operate the golf course as a profit-making business; and that the VAB wrongly rejected the enhancement/double taxation contention. The VAB was also said to have adopted Mr Botha's rental rate for the clubhouse, and that it adopted a 10% capitalisation rate, without any explanation. Finally, it was argued that the VAB failed to take into account comparable valuations addressed in Mr du Toit's report.

Held – The valuation (which was for purposes of municipal rates) and the appeal were regulated by the Local Government: Municipal Property Rates Act 6 of 2004.

Only two grounds of review were upheld by the court. The first related to the VAB's valuation of only the buildings on one of erven (Erf 296). The municipality's valuation of R97,5 million related to all 14 erven. While the VAB appeared to recognise that it was valuing all 14 erven, it accepted a methodology which focused on the buildings, most of which were located on Erf 296. The Club was correct in arguing that, in valuing the golf course as a whole, the VAB could not rationally confine itself to the buildings. A valuation which confined itself to the buildings disregarded relevant considerations (namely the impact, on the valuation, of the composite leasehold in respect of the land in its entirety).

The other successful ground of review was that the VAB had simply adopted Mr Botha's rental rate R110/m² for the clubhouse, without explaining why that rate was adopted and without addressing or giving reasons for rejecting the lower rates put up by Mr du Toit. The board did not show in what way it used the Club's financial results to reach the conclusion that a rental rate of R110/m² was an appropriate notional rent. The Court explained the approach to be adopted by it in such circumstances. If an administrative body has acted irrationally or without good reason in arriving at a decision, the decision should not be allowed to stand just because the court considers that the same result could be reached by a permissible or adequate line of reasoning. The applicant for review is entitled to have a proper decision from the body appointed by statute to make it. That is particularly important where one is dealing with a specialised subject such as property valuation. As the VAB's valuation was not rationally related to the reasons it had given for its decision, the Club's ground of review on this point was upheld. The value of R26,5 million placed on the applicant's leasehold rights by the VAB was set aside and the matter was remitted to the VAB for consideration afresh.

Public Protector v Speaker of the National Assembly and others [2020] 4 All SA 776 (WCC)

Civil Procedure – Interim interdict – Requirements – In the absence of mala fides, an application for an interdict restraining the exercise of statutory powers is not readily granted – Applicant for such interdict must establish clearest of cases.

Constitutional and Administrative Law – State institutions established under Chapter 9 of the Constitution – Removal of office bearers in Chapter 9 institutions in terms of section 194 of the Constitution – Rules in terms of which process is to be conducted – Validity of rules – National Assembly required by section 57(1) of the Constitution to create mechanisms for overseeing Organs of State and to make rules which define and give meaning to the grounds of removal for office bearers of Chapter 9 institutions – Court confirming lawfulness of new rules made.

In the present proceedings brought at the instance of the Public Protector as applicant, an interim interdict was sought preventing, in particular, the first respondent (the "Speaker") from taking any further steps in a process in the National Assembly that could result in the applicant's impeachment in terms of the provisions of section 194 of the Constitution. The applicant also sought to have the newly adopted rules (the "new rules") in terms of which the process was to be conducted, set aside.

The Speaker and the tenth respondent (the "DA") opposed the relief sought on the ground that the provisions of section 194 of the Constitution are the ultimate mechanism for the accountability of office bearers of Chapter 9 institutions, and provide for the National Assembly to remove any such office bearers on the basis provided therein.

On 6 December 2019, the National Assembly unanimously adopted the set of new rules in terms of which a removal in terms of section 194 is to be undertaken. The lawfulness of the process and the content of the new rules were the subject of the present application. The applicant also accused the DA of harbouring a vendetta against her. Following the adoption of the New Rules by the National Assembly, the DA made a request for the removal of the applicant in terms of the Rules. That culminated in the present application.

Held – The Public Protector is one of several State institutions established under Chapter 9 of the Constitution, and is subject to oversight by the National Assembly. The National Assembly is required by section 57(1) of the Constitution to create mechanisms for overseeing Organs of State and to make rules which define and give meaning to the grounds of removal for office bearers of Chapter 9 institutions.

The test for the granting of an interim interdict requires that an applicant establish a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the grant of the interdict and the absence of any other remedy. The Court confirmed that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. Contrary to the Public Protector's argument, the court endorsed the test as described in the case of *National Treasury and others v Opposition to Urban Tolling Alliance and others* (the "OUTA case") 2012 (11) BCLR 1148 (CC), where it was stated that in the absence of *mala fides*, an application for an interdict restraining the exercise of statutory powers is not readily granted. The applicant for such interdict must therefore establish the clearest of cases. In an effort to meet the OUTA test, the Public Protector levelled several allegations of *mala fides* against the Speaker and the

DA. The court stated that the DA was fully entitled as member of the National Assembly to engage the office of the Speaker with a request to initiate an impeachment process against the applicant. Any member in the National Assembly may do so if they have cause in terms of section 194 of the Constitution and the new rules to move for the removal of any office bearer of a Chapter 9 institution. The applicant, however, contended that the DA did so out of vengeance and part of its longstanding vendetta against her. The Court rejected the allegations of *mala fides*.

The applicant relied on alleged invalidity of the new rules on various grounds to establish her *prima facie* right to an interim interdict. She relied on fairness in most of her challenge to the rules, and raised the common law principles of natural justice of *audi alteram partem* and *nemo sua iudex in causa sua* protections as well as what she referred to as the procedural irrationality in both the content and procedures envisaged under the New Rules. Examining each of the contentions raised by the applicant, the Court found none of the grounds relied on to be sustainable, with the result that no *prima facie* right to the relief sought was established. The Court was also not satisfied that the remaining requirements for an interim interdict had been met.

Dismissing the application for an interim interdict, the Court ordered the applicant to pay the costs of the Speaker and the DA.

South African Legal Practice Council v Bobotyana [2020] 4 All SA 827 (ECG)

Legal Practice – Attorney – Gross misconduct – Application for striking from roll – Court must decide whether alleged offending conduct has been established on a preponderance of probabilities; whether practitioner in the discretion of the court is not a fit and proper person to continue to practise; and whether in all the circumstances removal from the roll and an order of suspension from practice is required – Gross dishonesty warranting striking from roll.

The respondent ("Bobotyana") was an attorney consulted by a client to facilitate the purchase of immovable property. More than R2 million was paid to the respondent by the client, to purchase the property.

The applicant (the "Legal Practice Council") sought to strike the name of Bobotyana off the roll of attorneys as well as prayers for ancillary relief.

The application, having been launched after 1 November 2018, had to be adjudicated in terms of the Legal Practice Act 28 of 2014 although the conduct of Bobotyana had to be adjudged in accordance with the law as it stood at the time that it took place, namely before the repeal of the Attorneys Act 53 of 1979 and when the rules of the previous Law Society were still applicable.

Held – The Legal Practice Act, like the Attorneys Act, requires that a person be fit and proper in order to practise as either an attorney or an advocate.

The court is obliged to embark upon a three-stage enquiry. It must first decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry. Second, the court must consider whether the person concerned in the discretion of the court is not a fit and proper person to continue to practise. That involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must inquire whether in all the circumstances the attorney is to be removed

from the roll of attorneys or whether an order of suspension from practice would suffice.

The Law Society which was, at the time, the watchdog of the profession, attempted to investigate the complaint against Bobotyana, but he refused to cooperate. Nevertheless, the Court found that the admitted facts revealed how Bobotyana systematically plundered his trust account in an exercise in theft and fraud. The numerous incidences of misappropriation of trust funds justified the conclusion that Bobotyana was not a fit and proper person to continue practising as an attorney.

A removal from the roll does not automatically follow a finding that the offending attorney is not a fit and proper person to practise as an attorney. The court must exercise a discretion in imposing the appropriate sanction. If the court is of the view that after a period of suspension the person will be fit and proper, the appropriate order ordinarily would be of suspension given the far-reaching consequences of removing an attorney from the roll. Before imposing a penalty of striking off, the court must be satisfied that the lesser penalty of suspension will not adequately give effect to objectives of the court's disciplinary powers over attorneys. The Court found no basis to deviate from the general rule that an attorney who has been shown to be dishonest should be struck from the roll of attorneys particularly where, as in the present matter, the dishonesty was gross. The respondent's name was struck from the roll of attorneys.

Stols v Garlicke and Bousfield (PKF (Durban) Incorporated and others as third parties)
[2020] 4 All SA 850 (KZP)

Corporate and Commercial – Contract of deposit – Investments procured from clients by lawyer working as consultant for law firm – Investor's demand for payment based on letter of undertaking – Legal validity of letter of undertaking – Alleged lack of authority of consultant to represent firm when concluding agreement binding on firm – Estoppel – Investor relying on representations made to him that the consultant was part of the firm, and firm's awareness that he was conducting a bridging finance business as part of his practice in same offices – Representations made leading to investor acting to his detriment in making investments, and law firm held to contract of deposit.

A consultant ("Mr Cowan") for the defendant law firm ("G and B") killed himself in November 2010 after admitting to having committed fraud and misrepresented facts to G and B's directors by inducing them to authorise certain fraudulent transactions. The firm was faced with numerous enquiries from people claiming to be G and B clients, enquiring as to the whereabouts of their funds, which they claimed Mr Cowan invested with G and B. The investors alleged that Mr Cowan had been running a bridging finance business on behalf of G and B for its clients who required short-term finance. The plaintiff ("Mr Stols") was one such person. He claimed to have made two investments totalling an amount of R7,5 million, and demanded payment thereof from G and B.

When his demand was not met, Mr Stols sued G and B for payment. In its plea, G and B admitted that Mr Cowan was an executive consultant and practising attorney at G and B, and that Mr Stols had caused an amount of R2 million to be paid into its trust account on 13 October 2010, but denied that Mr Cowan was authorised to conclude

any such contract on its behalf, or that Mr Cowan was authorised to execute an acknowledgment of debt on its behalf. G and B alleged further that Mr Cowan had entered into such contract for his own dishonest and illegal purposes. However, Mr Stols claimed that G and B was estopped from denying Mr Cowan's authority to enter into the contract or the acknowledgment of debt based on their representations which led him to believe that Mr Cowan was part of the firm, and the firm's awareness that Mr Cowan was conducting a bridging finance business as part of his practice housed in G and B's offices. Mr Stols also relied on the assurances allegedly given him by a director ("Mr Ramsay") of the firm regarding the propriety of the scheme run by Mr Cowan. Mr Ramsay denied those allegations.

Held – As referred to above, a serious dispute of fact existed between the versions of Mr Stols and Mr Ramsay, and that dispute had to be resolved in order to deal effectively with the issues for determination. The Court found that Mr Stols' version was to be preferred, cementing the fact that Mr Ramsay had not discouraged Mr Stols against the investments.

The first of the main issue to be decided was whether the contract on which Mr Stols sued was illegal. G and B purported to place reliance on various cases in support of its contention that the underlying contract was in fact illegal. However, the Court distinguished those cases, which all dealt with unlawful pyramid schemes. The scheme operated by Mr Cowan was one involving the provision of bridging finance, which was not unlawful. There was therefore no reason why Mr Stols' claim could not be validly based upon the contract in question.

The next question was whether Mr Cowan was authorised to sign the letter of undertaking – and if he was not, whether G and B was estopped from relying on the absence of authority. G and B contended that Mr Cowan did not have the authority to represent it when concluding any agreement binding on the firm, and in particular, to issue letters of undertaking. The evidence showed that Mr Cowan operated his bridging finance scheme as an executive consultant of G and B, with an office in G and B's premises. Importantly, G and B also allowed him to use its trust account for payments in connection with the scheme and to earn commission for the benefit of G and B in relation to the bridging finance transactions. That was sufficient to create the appearance of authority.

The Court was satisfied that Mr Stols had established that he acted to his detriment as a result of the representations made to him, and that he had proved his claim to hold G and B to its contract of deposit, concluded through Mr Cowan. Judgment was granted in his favour.

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