LEGAL NOTES VOL 2/2021

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AFRIBUSINESS NPC v MINISTER OF FINANCE 2021 (1) SA 325 (SCA)

Government procurement — Procurement process — Validity of regulatory framework — Pre-qualification criteria in Preferential Procurement Regulations, 2017 — Criteria giving preference to tenderers belonging to 'designated groups' — Minister having exceeded powers under PPPFA — Regulations invalid — Preferential Procurement Policy Framework Act 5 of 2000, s 2.

The subject-matter of this appeal was the validity of the Preferential Procurement Regulations, 2017, promulgated by the Minister of Finance under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the Framework Act). One of the appellant's complaints was that the Minister exceeded his powers in promulgating the regulations because some introduced pre-qualification criteria favouring designated groups, effectively excluding others whereas s 2 of the Framework Act did not allow for disqualification of potential tenderers for state contracts.

Held

The framework for the evaluation of tenders prescribed in s 2 of the Framework Act provided firstly for the determination of the highest points scorer, and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. This framework did not allow for the preliminary disqualification of tenderers without any consideration of a tender as such. The Minister could not, through the medium of the impugned regulations, create a framework which contradicted the mandated framework of the Framework Act. Accordingly, the Minister's decision was ultra vires the powers conferred upon him in terms of s 5 of the Framework Act. The pre-qualifying criteria may well disqualify certain tenderers not otherwise disqualified by the Framework Act, a power that was reserved for the legislature. The appeal

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the June 2012 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

would therefore succeed; and a declaration follow, suspended for 12 months, that the regulations were inconsistent with the Framework Act 5 of 2000 and invalid.

ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD AND ANOTHER v BASSON AND OTHERS 2021 (1) SA 341 (SCA)

Financial institution — Financial services provider — Representatives and key individuals — Debarment — Debarment enquiry — Procedural fairness — Whether FSP may take into account relevant facts established in preceding disciplinary inquiry in which FSP's'representative and/or key individual was found guilty of misconduct — Whether FSP biased — Financial Advisory and Intermediary Services Act 37 of 2002, s 14.

Mr Basson was a 'registered representative' and a 'key individual' under the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act) in both appellants, respectively a fund management business and a financial services provider (FSP) in quasi-partnership. He was suspended from his employment with them, pending an investigation into allegations of misconduct, which culminated in a disciplinary inquiry where he was found guilty on several charges.
On advice of their compliance officer, the appellants resolved to debar Mr Basson as a representative of each company in terms of s 14(1)*(a)* of the FAIS Act. * The High Court however set aside Mr Basson's debarment, inter alia, on the bases that —
(a) the disciplinary proceedings were regulated by provisions of the Labour Relations Act 66 of 1995, and the results thereof could not inform the debarment proceedings as the latter fell under the FAIS Act and demanded a distinct inquiry (see [17]);
(b) there was a failure of procedural fairness in that he was not afforded an opportunity to make representations, and he was not required at the disciplinary hearing to address issues of his honesty and integrity or whether he was a fit and proper person (see [19] and [30]);
(c) that the debarment decision was biased because, amongst other reasons, the appellants prejudged Mr Basson's debarment, the decision having been based on the findings made by the chairperson of the disciplinary inquiry and on their compliance officer's advice (see [19] and [33].)
On appeal to the Supreme Court of Appeal, *held*:
As to *(a)* and *(b)*, that FSPs bear the duty under s 14 to debar representatives who do not meet the fit and proper requirement. The appellants, being private juristic entities, exercised their authority under s 14(1) to debar Mr Basson. In doing so they acted in furtherance of the objects of the FAIS Act, and in the public interest. While it was correct that the disciplinary enquiry was not directly concerned with whether Mr Basson was a fit and proper person to represent the appellants, the disciplinary inquiry afforded him the opportunity to respond to the transgressions under consideration, the nature of which pertinently implicated his honesty and integrity, raising the issue squarely whether he met the crucial requirement of a fit and proper person to be a representative and key individual under s 8(1) of the FAIS Act. Any further inquiry would have been absurd and unnecessary, and placed form above substance. The facts on which the debarment was founded had already been established in the disciplinary proceedings, after a full enquiry in which Mr Basson had participated fully. (See [30] – [32].)

As to *(c)*, that the FAIS Act vested the power to debar in FSPs, who inevitably would be aware of the misdeeds of the errant representative. This method of regulation thus accepted that some institutional bias may be present and would be tolerated in respect of debarment proceedings in terms of the FAIS Act. (See [35] and [39].) The appeal against the High Court's setting-aside of Mr Basson's debarment would therefore succeed.

CAPE TOWN CITY v CARELSE AND OTHERS 2021 (1) SA 355 (SCA)

Delict — Liability — Liability of city for injuries resulting from dog attack at resort under its control — Owner unlawfully bringing dog onto resort via gap in fence — Breach of legal duty to prevent harm to visitors — Municipality liable.

The City sought leave to appeal a decision of the Western Cape High Court which held it liable for injuries sustained by the first respondent in a dog attack at a City resort. The owner had unlawfully brought the dog onto the resort — which had access control and signage prohibiting dogs at its main entrance — via a 'side entrance' or large gap in the fence. The Supreme Court of Appeal refused leave to appeal, pointing out that the City had, by not closing the gap or posting a guard there, breached its legal duty to prevent harm to visitors and also been negligent in this respect.

GLOBAL & LOCAL INVESTMENTS ADVISORS (PTY) LTD v FOUCHÉ 2021 (1) SA 371 (SCA)

Contract — Formalities — Mandate requiring signed instructions — Whether financial services provider acted in breach of client's mandate by releasing funds on receipt of fraudulent email instruction — Whether ECTA applicable — Electronic Communications and Transactions Act 25 of 2002, s 13(3).

Electronic communications and transactions — ECTA — Whether applicable — Financial services provider with mandate requiring written instructions, releasing funds upon receiving fraudulent email instruction signed with electronic signature — Mandate not contemplating electronic signature — ECTA not applicable — Electronic Communications and Transactions Act 25 of 2002, s 13(3).

The appellant, Global & Local Investments Advisors (Pty) Ltd (Global), a financial services provider, was mandated to invest and manage money entrusted to it by the respondent, Mr Fouché. Fraudsters hacked Mr Fouché's email account, and using his authentic email credentials, sent three emails to Global during August 2016, instructing the latter to transfer specified amounts to bank accounts of named third parties. Two of the three emails containing the instructions to transfer money ended with the words: 'Regards, Nick', while the third ended with 'Thanks, Nick'. In response, Global paid out a total of R804 000 from Mr Fouché's funds.
The mandate specifically required Mr Fouche's signature for a valid instruction and made no mention of electronic signature. The High Court held that, absent his signature, Global's payment had amounted to a breach of the mandate and ordered Global to reimburse Mr Fouché. It rejected Global's submission that the word 'Nick' was Mr Fouche's electronic signature, the parties not having agreed to accept an

electronic signature as contemplated in s 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (ECTA, quoted in [5]). In Global's appeal to the Supreme Court of Appeal —

Held

In order to be able to resort to s 13(3) of ECTA, Global would have had to show that, in terms of the mandate, an electronic signature would suffice. However, the word 'electronic' was conspicuously absent from the mandate, and so the High Court could not be faulted for concluding that what was required was a signature in the ordinary course — in manuscript form, even if transmitted electronically — for purposes of authentication and verification. The appeal would accordingly fail.

MAWONGA AND ANOTHER v WALTER SISULU LOCAL MUNICIPALITY AND OTHERS 2021 (1) SA 377 (SCA)

Local authority — Municipality — Municipal manager — Whether municipal manager's statutory five-year employment contract may be renewed prior to expiry of five-year period — Whether post becoming 'vacant' upon expiry of fixed term, requiring nationally competitive bidding process — Local Government: Municipal Systems Act 32 of 2000, ss 54A and 57(6)*(c)*.

Section 57(6) of the Local Government: Municipal Systems Act 32 of 2000 (the MSA) provides that the employment contract for a municipal manager must be 'for a fixed term of employment *up to a maximum of five years*' and must 'stipulate the terms of the renewal of the employment contract'. Section 54A, which was inserted into the MSA by the Municipal Systems Amendment Act 7 of 2011 (the Amendment Act), introduced a nationally competitive process to appoint municipal managers 'if the post becomes vacant'.

The municipality appointed Mr Mawonga as municipal manager in August 2007, before s 54A was inserted, for a five-year fixed term subject to 'renewal'. His employment contract, twice extended before expiry, was terminated after legal advice that such extension without a competitive bidding process was unlawful.

In his appeal against the High Court's dismissal of his application to have the decision set aside, the Supreme Court of Appeal —

Held

Where an employment contract of a municipal manager had been renewed prior to the expiry of the fixed term of five years, the post becomes vacant as contemplated in s 54A(4) of the MSA upon the expiry of the fixed term of five years, requiring the post to be advertised nationally.

Section 57(6) determined the limits of the contract that may be concluded, and hence when a vacancy arose, while s 54A(4) stipulated how an appointment is to take place to fill that vacancy. The legislature determined that the contract must be for a fixed term that could not exceed five years. Any appointment made thereafter would be subject to the procedural constraints of s 54A(4), requiring a nationally competitive process.

A renewal in terms of s 57(6)*(c)* could therefore only occur if the contract did not run for the permissible maximum five years, subject to compliance with s 57(6)*(c)* in that the terms of renewal would have to have been stipulated in the contract and agreed between the parties. (See [23] – [29] and [32].)

The appeal would be dismissed.

BOBOTYANA AND OTHERS v DYANTYI AND OTHERS 2021 (1) SA 386 (ECG)

Practice — Judicial case management — Eastern Cape Division, Grahamstown — Case management also applicable to motion proceedings — Attempt to circumvent procedures — Court finding that application not properly set down — Application postponed — Uniform Rules of Court, rule 37A.

The applicants applied on an urgent basis for an order staying the administration of a deceased estate pending determination of the validity of the deceased's will. The respondents delivered a notice of intention to oppose but failed to deliver their answering affidavit on the stipulated date. The applicants enrolled the matter for hearing on a Thursday, six weeks from the date of issue of the application. When the matter was brought to the attention of the Judge President by the Registrar, the Judge President notified the parties that they would be required to address the court on the propriety of setting the matter down for hearing on a Thursday, a motion court day, without having a directive to that effect. Counsel for the applicants informed the court that her instructing attorney had approached the duty judge seeking a directive but was informed that a directive was not required because the matter was to be heard on a Thursday, which was a motion court day. The present inquiry was prompted because of uncertainty in the division as to whether a directive was needed. Counsel submitted that a directive by a judge permitting a litigant to set down an urgent application on a Thursday was, on a proper interpretation of rule 12*(d)* of the Eastern Cape Practice Directions, not a requirement.

The court ruled that the matter was to be examined not on whether Thursday was ordinarily a day on which a motion court sat, but rather the difference in the procedure followed when motions that were opposed and those that were not were being set down. That differentiation was significant: under rule 6(5)*(f)*(i) the Registrar allocates dates for the hearing of opposed motions while unopposed motions are set down by the applicant by placing the matter on the roll, usually on Tuesdays. Since the answering affidavits were not filed in time, the applicants ought to have asked the Registrar to set the matter down as an uncontested opposed application on the Tuesday roll. (See [11], [13], [15].)

The advent of judicial case management inaugurated a new dispensation for the setting-down of cases. By virtue of para 5.2.4 of the Norms and Standards for Judicial Officers — which made it incumbent on judicial officers to actively take cases from initiation to conclusion — read with rules 37A(1)*(b)* and 37A(2)*(a)* of the Uniform Rules of Court — which regulated case management — there was no reason in law or logic why case management should not, mutatis mutandis, also apply to motion proceedings. (See [17] and [20].)

By launching and pursuing the application heedless of the formalities set out above, the applicants arrogated to themselves the entitlement to appoint a date for the hearing of an application on a day set aside for opposed motions, which was for the Registrar to do. So, under the pretext of urgency, the applicants nominated a date that was both six weeks away and fell on a day set aside for the hearing of opposed motions. This sort of circumvention of the rules and procedures was unfair to other litigants and not in the interests of justice. (See [16], [26].)

Unopposed urgent matters should be set down on Thursdays only if so allocated by the Registrar. Since the present application was not properly set down, it would be postponed to a date to be arranged by the parties with the Registrar for hearing in the opposed motion court.

BOMBARDIER AFRICA ALLIANCE CONSORTIUM v LOMBARD INSURANCE COMPANY LTD AND ANOTHER 2021 (1) SA 397 (GP)

Contract — Specific contracts — Demand guarantee or performance guarantee — Fraud rule or exception — Interim interdict sought to restrain financial institution from making payment in terms of demand guarantee on basis, inter alia, that fraud rule or exception applied — Whether applicant prima facie established elements of fraud rule.

The first respondent (LIC), an insurance company, issued a performance guarantee in favour of the second respondent, the Passenger Rail Agency of South Africa (PRASA), pursuant to a construction contract concluded between PRASA and the appellant, Bombardier Africa Alliance Consortium (Bombardier). In terms of their contract, if a dispute arose between the parties in connection with the contract or the execution of the works, either party could refer the dispute in writing to a dispute adjudication board (DAB). The DAB's decision was binding 'unless and until . . . revised in an amicable settlement or an arbitral award'.

In a dispute referred to the DAB, Bombardier sought and obtained a ruling that it had lawfully cancelled the contract at the acceptance of PRASA's alleged repudiation, and that PRASA be directed forthwith to return the original guarantee to it. When PRASA nevertheless called upon LIC to make payment in terms of the guarantee, Bombardier unsuccessfully, by way of urgency, applied to the High Court for an interim interdict restraining Lombard from making payment to PRASA in terms of the guarantee, pending the final determination of an action to be instituted by Bombardier against LIC and PRASA for an order setting aside the demand for payment in terms of the guarantee.

Here, in Bombardier's appeal to the full court, the main issue was whether Bombardier established a prima facie right, although open to some doubt, to have the demand for payment in terms of the guarantee set aside on the ground that the fraud rule or exception applied. This was so, Bombardier claimed, because the demand had been fraudulently made; PRASA knew of the DAB decision, which was contractually binding and had to be given effect to unless and until it was revised in an arbitral award, but misrepresented to LIC that it was entitled to payment under the guarantee.

Held

Arbitration bound only the parties to it. The DAB's decision, while it was binding on PRASA, was only so vis-à-vis Bombardier and not LIC. While non-compliance with the DAB ruling might have amounted to a breach of contract on the part of PRASA, such breach and PRASA's demand for payment in terms of the guarantee despite the interim ruling, fell outside the 'narrow compass of fraud' that was required for the application of the fraud rule. Bombardier's allegations did not prima facie establish the fraud exception.

A contractually required bond was there to be called up, excepting only where in the clearest of cases fraud is illustrated. It was not fraudulent or in bad faith for PRASA, who has made a proper demand in terms of the guarantee, to insist on payment of the proceeds of the guarantee despite the DAB decision, which was not final and subject to review in arbitration proceedings — even if the basis upon which the guarantee was called up had been found in arbitration proceedings between PRASA and Bombardier to have been unjustified. (See [24] – [26], [28] and [93].) The appeal would therefore be dismissed.

BORCHERDS AND ANOTHER v DUXBURY AND OTHERS 2021 (1) SA 410 (ECP)

Land — Sale — Formalities — Signature — Seller signing deed of sale with electronic signature — ECTA not applicable — Electronic signature amounting to signature for purposes of ALA — Alienation of Land Act 68 of 1981, s 2(1)*(a)*; Electronic Communications and Transactions Act 25 of 2002, s 13(3).

Electronic communications and transactions — ECTA — Exclusions from application — Transaction for alienation of land — Seller signing deed of sale with electronic signature that was digitised version of handwritten signature — Alienation of Land Act 68 of 1981, s 2(1)*(a)*; Electronic Communications and Transactions Act 25 of 2002, s 13(3).

Section 4 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) provides that ECTA applies to any 'electronic transaction or data message', excluding those in sch 1, such as transactions for the alienation of land in terms of the provisions of the Alienation of Land Act 68 of 1981 (the Act).
In a transaction for the sale of land, the purchaser's offer to purchase was sent to the sellers by email, imported into an application on their cellular phones (DocuSign) and signed and initialled by using the application, which contained their sample signature and initials. In the purchaser's application to enforce the agreement, the sellers challenged the validity of the agreement on the ground, inter alia, that while theirs were electronic signatures as defined in ECTA, the s 4(3) exclusion applied so that their signatures would have had to comply with s 2(1) of ALA's requirements, which it did not.

Held

There was no evidence that the parties intended this to be an electronic transaction. (See [26].) The ordinary, popular, meaning of the verb 'sign' was 'sign by name or sign by mark'. The signatures and initials of the first and second respondents as contained in the DocuSign application were digitised versions of originally handwritten signatures and initials. Instead of insisting on form, courts followed a pragmatic approach to signatures, looking to whether the method of the signature used fulfilled the function of a signature — to authenticate the identity of the signatory. By affixing their signatures and initials to the contract, utilising the DocuSign application, the sellers signed the contract as envisaged in s 2(1) of the ALA, with the intention of being bound to the contract as seller.

KHAMMISSA AND OTHERS v MASTER, GAUTENG HIGH COURT, AND OTHERS 2021 (1) SA 421 (GJ)

Company — Winding-up — Liquidator — Appointment — Master appointing liquidators whom another Master had refused to appoint — Master functus officio after first decision and second appointment ultra vires — Companies Act 61 of 1973, s 370(1).

Company — Winding-up — Liquidator — Appointment — 'Person aggrieved' by appointment of liquidator — Not to be narrowly construed — Companies Act 61 of 1973, s 371.

The applicants, the joint liquidators of a company, sought the review and setting-aside of the appointment of the second and third respondents as liquidators. An

Assistant Deputy Master made a decision on 31 August 2017 to refuse to appoint the respondents as liquidators under s 370(1) of the Companies Act 61 of 1973 (the old Companies Act), but despite this, another assistant deputy Master on 25 October 2017 appointed the second and third respondents as liquidators.
The applicants argued that the decision to appoint the respondents was ultra vires since the Master was functus officio when the second decision was made. In turn, the respondents argued that the applicants lacked locus standi since they were not 'aggrieved persons' as intended in s 371 of the old Companies Act; that s 151 of the Insolvency Act 24 of 1936 did not apply; and that the applicants had disregarded the provisions of s 371, which was the only gateway for relief available to the applicants.
Held
The category 'person aggrieved' should not be narrowly construed. Here the essence of the grievance was an allegation of unlawful, arbitrary or capricious appointment and decision in an estate that the applicants were charged with. They were not busy bystanders or strangers to the issue and the applicants accordingly had locus standi to review and set aside the unlawful appointment alleged. (See [24] – [26].)
Section 371 was not the only provision dealing with a complaint about appointment and non-appointment of a liquidator. The dispute was not about a nomination or failure to appoint a liquidator but about the legal validity of the second appointment after a decision had been made on the same issue. In the circumstances recourse to the Insolvency Act remained available to the applicants. (See [30].)
The decisions of the Master were administrative action and the power to revoke or amend administrative decisions, once communicated, was limited. No power was given to the Master in terms of the Administration of Estates Act to revoke or amend decisions. Hence the Master was functus officio and not empowered to issue a second decision once the decision not to appoint the second and third respondents had been made. (See [33].)

MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KZN v NQUTHU MUNICIPALITY AND OTHERS 2021 (1) SA 432 (KZP)

Practice — Judgments and orders — Enforcement — Application to enforce previous consent order, stemming from certain interdict proceedings, which order applicant claiming granted it certain immediate relief against respondents on interim basis, pending final determination of proceedings — Court rejecting claim of respondents that order not granting interim relief, and finding that respondents were in wanton disobedience of such order — Application granted.

Appeal — Leave to appeal — Refusal by Supreme Court of Appeal — Referral by President of Supreme Court of Appeal for reconsideration — Application for — Whether application for reconsideration has effect of suspending order appealed against — Superior Courts Act 10 of 2013, s 17(2)*(f)*.

What originally gave rise to the present matter were decisions by the Nquthu Municipality (first respondent) and the council thereof (second respondent) to renew the contracts of employment of its municipal manager (third respondent), its chief financial officer (fourth respondent) and its Director: Planning and Economic Services (fifth respondent). It was the view of the MEC for Co-operative Affairs that such renewals had not taken place in accordance with applicable legal prescripts, and it accordingly requested certain information from the first and second

respondents. When that request was not complied with, it instituted an application in the High Court for certain interdictory relief. The matter came before Mahabeer AJ on 18 December 2018; however, after being called, the matter was stood down and, pursuant to discussions between the parties' legal representatives, it was decided that certain manuscript amendments be effected to para 2 of the original notice of motion in the form of a rule nisi with a view to taking a consent order. The amended order was handed to Mahabeer AJ, who signed it after having made some further amendments herself (see [2.4]). However, the order typed and issued by the registrar's office did not exactly match the manuscript order; certain indicated insertions were differently positioned; and certain words had been changed. The typed order purportedly ordered the suspension of the contract renewals pending the provision by the first and second respondents of certain information (which was requested), or pending the institution of review proceedings; however, the respondents were of the view that the parties' agreement as encapsulated in the manuscript order was not that there be an immediate suspension.

When not all requested information was forthcoming, the applicant launched review proceedings, on 27 March 2018, to set aside the contract renewals. The review application eventually came before Gorven J, who ruled the contract renewals to be illegal and ultra vires, and he set them aside. The respondents were unsuccessful in their attempts to seek leave from the High Court, and then from the SCA, to appeal such decision. This prompted them to file a request with the Judge President of the SCA to reconsider the SCA's refusal in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, which request was still pending.

In the interim, the third to fifth respondents did not vacate their posts, but continued to act in those capacities. This prompted the applicant in the present matter to seek an order, inter alia (and to comply with Gorven J) directing the respondents to comply with the order of Mahabeer AJ, and the third to fifth respondents to vacate and remain away from the first respondent's offices. The respondents opposed the relief, principally on two grounds. *(a)* They alleged that the interim order of Mahabeer AJ sought to be enforced did not exist in the terms alleged by the applicant, and one could not be in contempt of an order that did not exist (lis pendens argument — see [5.1]). *(b)* Further, they alleged that it was impermissible for the court to enforce the order granted by Gorven J, as the appeal process pertaining to that order had not been resolved. In this regard they referred to s 17(2)*(f)* of the Act, and submitted that the proviso contained therein suspended the operation of the order granted.

The court undertook to interpret the terms of the order, applying basic rules of interpretation (see [17].) The court acknowledged an element of ambiguity in the order (see [16] and [17]), but held that, when extrinsic circumstances surrounding the granting of the order were considered, it was clear the order issued by the registrar was to operate with immediate effect pending finalisation of the application (see [17] and [18]). The court added that, to the extent that the order issued by the registrar might have differed from what was agreed as per the manuscript order, an order stood until it was set aside by a court of competent jurisdiction. Until this was done, the order had to be obeyed even if it might be wrong. There was a presumption that an order was correct. (See [20].)

The court also addressed the impact of the application for reconsideration on the existing order by Gorven J. The court held that the refusal of a petition to the Supreme Court of Appeal for leave to appeal was a final determination of the application for leave to appeal, which refusal revived the operation and execution of

the order appealed against. An *application for reconsideration of such refusal did not suspend the original order*, the court held. (See [32].)
The court ultimately found that the respondents were in 'wanton disobedience' of the order of Mahabeer AJ (see [25]). It ordered the respondents to comply with the order with immediate effect, and the third to fifth respondents to vacate and remain away from the offices of the first respondent (see [36]).

MEC FOR ECONOMIC OPPORTUNITIES, WC v AUDITOR-GENERAL AND ANOTHER 2021 (1) SA 455 (WCC)

Auditor-General — Decision — Review — AG institution of public administration and its decisions subject to both administrative and legality review — Must exercise powers in predictable and non-retrospective manner — Principle of reliance not permitting office of AG to change approach midstream, ie once it had created reasonable expectation that it would act in certain way — New approach adopted in any event wrong — Qualified audit set aside on review.

Provincial government — Financial statements — Audit by Auditor-General — Qualified audit — Review — AG having wrongly adopted new, non-binding, accounting standard when it was too late for government to alter conduct accordingly — Qualified audit set aside on review.

The applicant applied for an order reviewing and setting aside (i) the Attorney-General's qualified audit of the Western Cape Department of Agriculture (the Department) for the years ending 31 March 2017 and 31 March 2018; (ii) the finding that the Department did not account for payments made to implementing agents in accordance with the requirements of the so-called 'modified cash standard'; (iii) the finding that the Department incorrectly budgeted and accounted for the payments as transfers and subsidies instead of either expenditure for capital assets or goods and services; and (iv) the finding that the Department irregularly entered into contracts with implementing agents without applying Treasury regulations.
The dispute arose in respect of payments by the Department to two entities, Casidra SOC Ltd, a provincial government business enterprise wholly owned by the Western Cape Government, and the Deciduous Fruit Producers Trust (Hortgro), an entity established by the deciduous fruit industry. Funds transferred to Casidra and Hortgro were used for the purposes of farmer settlement, draft relief, food relief, land-care projects and extended public works projects.
The key question was whether the payments constituted subsidies or payments for fees, rewards for services, payment for goods and services, or capital expenditure (see [7]).
In its annual financial statements, the Department classified the payments as subsidies and transfers and had done so since the 2007/2008 financial year. The Attorney-General (the AG) had never on this basis raised an objection to the accounts and had repeatedly given the Department's financial statements an unqualified audit. However, in respect of the 2016/2017 year, the AG qualified his audit on the basis that the Department had not accounted for those payments in accordance with the requirements of a reporting standard known as the modified cash standard, and found that the relationship between the Department and the two entities was one of principal and agent and that the payments should have been classified as goods and services or capital expenditure.

The same findings were made for the following financial year. The Department accepted that it was legally obliged to present its financial statements on a modified cash basis but contended that the detailed processes set out in the modified cash standard were not legally binding on it and, in any event, its allocation of the expenditure as 'transfer payments' was in accordance with the modified cash standard issued by the office of the Accountant-General in the National Treasury.

Held

Lacking a broad discretion as to the work undertaken, the AG, unlike the Public Protector, was purely an institution of public administration. Decisions of the AG's office were administrative action and subject to review under the Promotion of Administrative Justice Act 3 of 2000 and the principle of legality. The review inquiry was not limited to an evaluation of the reasonableness or rationality of the AG's finding. (See [17] – [18] and [20].)

In view of the fact that, by the time the AG warned the Department of its required treatment of the payments, the 2017 and 2018 financial years were over and it was no longer possible to amend the recording and accounting of those transactions, the conduct of the AG was procedurally unfair, given the acceptance by the AG of the Department's annual financial statements over many years. (See [29] – [30].)

The constitutional principles of reliance and rationality did not permit government institutions like the AG to create a situation in which subjects like the Department reasonably expected the institution to deal with a matter in a particular way but changed its position at a time when it was too late for the subject to tailor its behaviour accordingly. In the light of this, the AG's conduct was unconstitutional and invalid. (See [38], [43].)

The AG had, moreover, conflated the modified cash basis and the modified cash standard, asserting that reg 18.2 of the National Treasury Regulations (promulgated under the Public Finance Management Act 1 of 1999) made the latter standard legally binding. But reg 18.2 did not do so. Instead, it prescribed that accounts had to be prepared on a modified cash basis, like the Department had done. (See [69].) Hence the modified cash standard was not legally binding on the Department. (See [75].)

The Department did not receive anything of similar value in return for the payments to Casidra and Hortgro. They were therefore transfer payments and not payments for goods and services, as asserted by the AG. (See [85].)

It was incorrect to characterise the relationship between the Department on the one hand, and Casidra or Hortgro on the other, as a relationship between principal and agent. The latter entities had a legal relationship with the beneficiaries and not with the Department, and the AG was accordingly incorrect in producing a qualified audit opinion that the transfer of funds was for goods and services. (See [145].)

The AG's incorrect approach as to the meaning of 'principal and agent' meant that the impugned findings were made on the ground of irrelevant considerations. Moreover, its conclusion as to the nature of the relationship between the Department and Casidra and Hortgro was based on an incorrect understanding of the facts. The application would accordingly be upheld and the orders prayed for granted. (See [167] – [170].)

MICROFINANCE SA AND ANOTHER v NATIONAL CREDIT REGULATOR AND OTHERS 2021 (1) SA 487 (GP)

Credit agreement — Consumer credit agreement — Cost of credit — Limitation — Interest on deferred initiation fees — Whether permissible under NCA — National Credit Act 4 of 2005, s 101(1).

Credit agreement — Consumer credit agreement — Cost of credit — Limitation — Monthly service fee — Full service fee in last month of loan agreement — Whether permissible under NCA — National Credit Act 4 of 2005, s 101(1).

This matter dealt with the effect of limitations on the cost of credit imposed by s 101(1) of the National Credit Act 4 of 2005 (NCA). The first applicant, a non-profit company representing 1300 microlenders, sought declaratory orders in respect of aspects of the statutory requirements for the granting of credit in which they alleged uncertainty existed for credit providers and which impacted on the short-term unsecured credit industry.

The first issue related to the charging of interest on deferred initiation fees, and the second on the charging of a full service fee in the final month of a loan agreement.

The second applicant, the Banking Association of South Africa, representing all banks registered under the Banks Act 94 of 1990, was granted leave to intervene in the matter. The first applicant contended, in respect of adding interest on deferred initiation fees, that by deferring payment of what would otherwise be an upfront charge, namely the initiation fee, without charging interest on it, would be to extend free credit into the market which would render the provision of unsecured credit prohibitively unattractive to lenders, and that this would then impact negatively on the poorest consumers. The first respondent contended that the adding of interest on deferred payment of initiation fees would make the cost of unsecured credit too expensive for consumers.

In respect of the further question whether a credit provider was entitled to a full service fee of a credit agreement in the last month, the applicants argued that, after the first month of the credit agreement, their members were entitled to charge the full maximum prescribed service fee per month for the lifetime of the agreement, including the calendar month during which an agreement terminated.

Held

As to the first question, that there was nothing in the NCA that suggested that it intended to deprive credit providers of interest on deferred amounts. The interpretation of the NCA and its regulations contended for by the applicants was therefore the interpretation to be preferred in order to give a businesslike and purposive interpretation on the issue of charging of interest on deferred initiation fees. (See [3.22] and [3.24].)

As to the second question, that there was nothing to negate the first applicant's contentions. The monthly service fee was not required to be charged only on a pro rata basis for the calendar month in which the agreement terminated.

MOROPA AND OTHERS v CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND AND OTHERS 2021 (1) SA 499 (GJ)

Review — Grounds — Legality — Members of provident fund, as well as two previous commercial service providers (the companies) to Fund, bringing application against Fund to review decisions of latter to *(a)* terminate contracts with companies; and *(b)* to appoint certain parties to provide same services previously provided by companies — No legal standing on part of companies, given that, in absence of any claims of non-compliance by Fund with its contractual duties, they had no legal interest in matter —

Court also finding without merit member applicants' ground for review that Fund had failed to consult them prior to terminating contracts of companies — Court further rejecting claims of corruption on part of Fund — Application dismissed.

Practice — Parties — Locus standi — Own-interest litigant — To establish standing on basis of commercial own interests when challenging decision of private body, litigant must show that challenged decision affecting own rights or potential rights or interests — Exception, to effect that litigant claiming own interest and failing on this score may still be allowed to proceed with challenge if in interests of justice, applying only to decision of public body and not to decision of private body.

Costs — Attorney and own client costs — Whether part of South African law.

What gave rise to the present dispute heard before the Johannesburg High Court, were the decisions of the board of trustees of the Chemical Industries National Provident Fund (the Fund), a registered national provident fund, to —

(a) terminate the suite of contracts it had concluded with the company NBC in terms of which the latter provided to it administration and investment consulting services, amongst others; and

(b) appoint the companies Akani, Novare and Moruba to provide henceforth such services instead.

Consequently, aggrieved by such decision, NBC and a number of members of the Fund instituted a review application in the High Court. Both the member applicants and NBC sought to review and set aside the decision to terminate the contracts with NBC, and the appointment of Akani, Novare and Moruba as replacement parties. NBC in addition sought the removal of the PO and trustees of the Fund.

The standing of the parties

The court first addressed the question of the legal standing of NBC, which challenged the decision of the board to terminate its contract on the basis that the board was driven by an improper motive. The court firstly noted that NBC was challenging on the basis of its own commercial interests a decision of a private body (see [29] – [30] and [35]); it was not claiming to represent anyone else. Such a litigant, the court held, had to show that the challenged decision affected their own rights or potential rights or interests (see [35]). The court acknowledged that a litigant claiming own interest and failing on this score may still be allowed to proceed with the challenge if it was in the interests of justice; however, this exception, the court insisted, applied only to a decision of a public body and not to a decision of a private body. (See [32] – [34].).

The court noted that NBC did not have a right to the contracts it had lost (see [37]). (NBC accepted that the board complied with the terms of the contracts in terminating them (see [29]).) In addition, it could show no interest in which parties were appointed to replace it: none of its rights or potential rights were affected by that decision; which parties replaced it was a matter that rested solely in the discretionary hands of the Fund. Consequently, the court concluded, NBC has no standing to approach the court for the relief it sought. (See [37].)

The court also addressed the standing of the member applicants, which Akani challenged on the basis that these applicants were merely the alter ego of NBC. The court acknowledged the weighty evidence pointing to a lack of independence on the part of the member applicants, yet took the view that it would not be in the interests of justice to non-suit them (see [43]).

The case of the member applicants

In seeking the relief they did, the member applicants relied on the common law, incorporating the principle of legality, alternatively the provisions of PAJA. The member applicants' case lay in three contentions: there was a failure to consult regional advisory committees (RACs); decisions to appoint Akani, Novare and Moruba as replacement service providers were marred by corruption and/or a conflict of interests on the part of three board members.
The court held that member applicants were not entitled to rely on PAJA, as the decisions in question — the Fund's termination of the contracts, and its appointment of Akani — could not be classified as administrative action: The Fund, when taking the impugned decisions, was not 'exercising a public power or performing a public function'. Further, the relationship between the member applicants and the Fund was governed purely by contract. The fact that the contractual relationship was regulated by statute, the Pension Funds Act 24 of 1956 (the Act), did not change the nature of the relationship. When terminating the contracts and appointing Akani, the Fund was acting in terms of a contractual right and not exercising public power. (See [44] – [46].) The court went on to deal with the challenge on the basis of legality (see [47]). The court held that, in terms of the rules of the Fund, the board was under no obligation to consult the RACs (see [54] and [56]), and accordingly rejected the member applicants' first ground of challenge.
The court declined to pass judgment on the allegations of corruption, holding that they should be left to the Financial Sector Conduct Authority (FSCA) (see [72]), which had already started investigating them (see [14] and [63]) and had asked the court that it be allowed to exercise its powers and functions in terms of the Act (see [69]). The court referred to the constitutional principle that courts do not interfere with the work or usurp the powers or function of administrative bodies. Courts, it held, had to show deference to such bodies. (See [72].)
Finally, the court found that the member applicants had failed on the facts to establish that there had been a conflict of interest. (See [78] – [80].)
The court in conclusion dismissed the application for review (see [93]).
Costs
Akani sought the costs of three counsel on the scale as between attorney and *own client*. The court addressed whether such a scale of costs existed in South African law. After a detailed review of the case law on the topic (see [82] – [90]), the court concluded that it did not, and further declined to develop the law (see [90]). The court, however, concluded on the facts that Akani was entitled to a punitive costs order on the scale as between attorney and client.

PH OBO SH v MEC FOR HEALTH, KZN 2021 (1) SA 530 (KZD)

Damages — Bodily injuries — Medical expenses — Future medical expenses — Public healthcare defence — Application by defendant to amend plea to invoke 'public healthcare defence', viz that treatment claimed for available at no cost in public healthcare sector — Court refusing application, pointing out that allowing it would discriminate against poor — Premature in absence of appropriate legislation.

Medicine — Medical negligence — Negligence during childbirth at public hospital allegedly resulting in cerebral palsy — Public healthcare defence — Allowing it would discriminate against poor — Not available in absence of appropriate legislation — Court refusing respondent's application for amendment of plea to invoke public healthcare defence.

Damages — Application for interim payment under rule 34A of Uniform Rules — Rule relating only to claims for medical expenses and loss of income — Not providing for claims for general damages or loss of earning capacity.

The plaintiff, acting on behalf of her minor daughter who contracted cerebral palsy during birth at a hospital administered by the defendant, sought an interim payment of R1,5 million in respect of general damages and loss of earning capacity under rule 34A of the Unform Rules. The defendant in turn sought leave to amend its plea by invoking the so-called 'public healthcare defence', namely that the future treatment claimed for was available gratis, at the same or a better level, in the public healthcare sector. To facilitate the proposed amendment, the defendant sought the development of common-law principles that stood in its way. * And were a lump sum to be awarded, the defendant wanted payment to be spread over the child's lifetime. As to the rule 34A application, the court pointed out that it was established law that the rule provided only for compensation for medical expenses and loss of income, not general damages or loss of earning capacity. The plaintiff was, however, entitled to R1,53 million, (i) in respect of medical expenses (past and to be incurred in the near future); and (ii) as an advance on other damages to be proved. (See [7] – [8].) As to the proposed plea amendment, the court, after pointing out, (i) that the defendant was unable to identify state healthcare facilities that were as good as or better than private ones; and (ii) that allowing the defence might unlawfully discriminate against those who accessed their healthcare at state facilities, ruled that the matter was one for Parliament and refused to make the proposed amendment to the common law. (See [22] – [28].) The court accordingly granted the rule 34A application and dismissed the application for amendment.

SA v JHA AND OTHERS 2021 (1) SA 541 (WCC)
Prescription — Extinctive prescription — Judgment debt — What constitutes — Maintenance obligations in consent paper incorporated into divorce order — Whether amounting to 'debt' prescribing after three years or 'judgment debt' prescribing after 30 years — Prescription Act 68 of 1969, s 11*(a) and (d)*.

The first respondent caused a writ of execution to be issued against the applicant in respect of arrear maintenance dating back to July 1993, the date of their divorce order which incorporated a consent paper setting out applicant's cash maintenance obligations.
The writ was stayed pending the outcome of the present proceedings in which the applicant challenged the validity of the writ on the basis that the maintenance claim had prescribed. At issue was whether an undertaking to pay maintenance in a consent paper incorporated into a divorce order — given the fact that such an order did not have the character of a final judgment — was a 'judgment debt' prescribing after 30 years, or 'any debt' prescribing after three years, as contemplated in ss 11*(a)*(ii) and 11*(d)* of the Prescription Act 68 of 1968 (the Prescription Act).
Held
A consent paper that is made an order of court must be construed as a judgment of the court and, as such, was a judgment debt. Accordingly, the 30-year prescription period applied. A maintenance order formed part of a consent paper and should be treated no differently to any other part of the order; it was final and enforceable until varied or cancelled and like any other order must be carried out immediately.

SCALABRINI CENTRE AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT AND OTHERS 2021 (1) SA 553 (GP)

Immigration — Refugee — Asylum seeker — Covid-19 social relief grant — Asylum seekers eligible to receive grant.

First respondent, the Minister of Social Development, had published certain directions bearing on the individuals who qualified for a social relief grant created to ameliorate the effect of the Covid-19 pandemic (see [2] and [12]). The directions restricted access to the grant to South African citizens, permanent residents or refugees, and here first applicant, a juristic person, brought proceedings for a declarator that the directions were unconstitutional, to the extent that they denied asylum seekers and special permit holders access thereto (see [1], [6] and [16]). *Held*, that the exclusion infringed the latter parties' rights of access to social assistance, their rights to equality, and also dignity (see [20], [27], [34] and [42.2]). Ordered, that the directions be read into, to include special permit holders and asylum seekers as persons eligible for the grant (see [42.3]).

SJ v SE 2021 (1) SA 563 (GJ)

Marriage — Divorce — Rule 43 proceedings — Applicability of to parties married under Islamic law where talaq was issued.

Court — High Court — Referral of matter to full court — When permissible — Superior Courts Act 10 of 2013, s 14.

Practice — Parties — Amicus curiae — Admission of — Amicus being party's witness — Problematic.

The respondent raised a point in limine to an application in terms of rule 43 of the Uniform Rules that had been brought by his wife. Less than a week before the hearing of the application, the respondent issued a talaq against the applicant, to whom he had been married in terms of Islamic law, thereby divorcing her. The applicant's attorneys requested the matter to be heard before the full court, citing the importance of the matter to the Islamic community and the apparent uncertainty arising from decisions in other divisions.

The presiding judge held that she, sitting as a single judge in a matter, did not have the authority to refer a matter to the full court because s 14 of the Superior Courts Act 10 of 2013 removed this power, formerly granted by s 13(1)*(b)* of the Supreme Court Act 59 of 1959. After consideration of the matter in consultation with the Judge President, the request was rejected, inter alia, on the grounds that the request had been made late and no cogent reason for the delay had been advanced; that, although the matter was of importance to the Islamic community, the matter was not res nova; and that judgments by the other divisions of the High Court were not conflicting. (See [18.1].)

The court was also required to consider the status of the amicus curiae, a moulana who described himself as an Islamic scholar. Although his admission as amicus was achieved by agreement between the parties, neither of the parties had raised a constitutional issue in which he had an interest. More problematic was his personal involvement in the matter, having been approached by the respondent for assistance

in issuing a talaq certificate. To that extent, he was the respondent's witness in the proceedings. (See [24] and [26].)
In respect of the point in limine, the court held that the parties owed each other the reciprocal duty of support arising from their Islamic marriage and the question of the legal effect of the Talaq was issued in the pending divorce action. Until that issue was resolved there was a matrimonial dispute between the parties that served as the jurisdictional factor for the rule 43 application and the point in limine stood to be dismissed.

UNION-SWISS (PTY) LTD v GOVENDER AND OTHERS 2021 (1) SA 578 (KZD)

Practice — Trial — Electronic means — Considerations in respect of logistics, defendants' rights and assessment of witnesses.

In late 2018 applicant, which was the plaintiff in an action against the respondents, had been allocated a trial date in August 2020 (see [20]). But before that time, applicant sought an order that the trial proceed, and this by means of Microsoft Teams, audiovisual software allowing for meetings over the internet, between participants in physically separate locations (see [1] and [8]).
The legal background was a directive of the Minister of Justice that non-urgent matters could not be placed on the roll during the lockdown, but which gave heads of court a discretion to authorise hearing of matters by electronic means (see [15]).
In accord with this direction, the Judge President of the KwaZulu-Natal Division had issued his own direction, that where it was urgent for a trial to proceed, he, in his discretion, would direct further conduct of the matter (see [16] and [25]).
Applicant's application was made in light of this direction.
The court, while it refused the application on the ground that it was non-urgent (see [32] and [34]), addressed the logistics of an electronic trial (see [8] – [10] and [18]); its impact on the defendant's rights to confront a witness and put forward its version (see [19]); and the judge's ability to gauge demeanour (see [19] and [27]).

[33] In light of the novel issues raised in the application and the grounds on which it was brought, I deem it fair that each party bear their own costs. The first defendant was legally represented and significant indulgences were granted to enable the first defendant to place his version before the court. The plaintiff had legitimate grounds for bringing the application and it cannot be considered frivolous.
[34] In the result, I make the following order:
1. The application is dismissed.
2. Each party is to pay its own costs.

ROAD TRAFFIC MANAGEMENT CORPORATION v TASIMA (PTY) LTD 2021 (1) SA 589 (CC)

Labour law — Contract of employment — Transfer — Upon transfer of business as going concern — Role of legal causa in establishing whether business transferred as going concern — Proper approach to determination of effective date of transfer — Labour Relations Act 66 of 1995, s 197.

Section 197 of the Labour Relations Act 66 of 1995 regulates the automatic transfer of employees of a 'business' that is 'transferred' as a 'going concern'.
The respondent (Tasima) had obtained declaratory relief in the Labour Court (the LC), upheld on appeal to the Labour Appeal Court (the LAC), to the effect that the contracts of employment of certain of Tasima's employees were automatically transferred to the appellant, the Road Traffic Management Corporation (RTMC) under s 197. The LAC however disturbed the LC's finding that the effective date of transfer was the actual date of handing over the business, instead holding that it was the date of the *Tasima I* * order, ie the date that the transfer was ordered (see [109]). Here, in a majority decision ([1] – [136]) the Constitutional Court granted RTMC leave to appeal the LAC's s 197 order, and Tasima leave to cross-appeal the LAC's finding as to the effective date of transfer. At issue were:

- Whether s 197's jurisdictional requirements were met.

Held, a legal causa was a prerequisite for the application of s 197, and here it was the *Tasima I* order. What was ordered to be transferred was eNaTIS and related services as they stood after 9 November 2016. For the purposes of s 179, these constituted a 'business' (see [39], [44], [50], [62] and [65] – [66]); and one that was 'transferred' (see [86] – [93]) as a 'going concern' (see [102] – [106]).

- Whether the effective date of transfer was determined with reference to the physical handover of a business or the legal causa for the transfer of a business.

Held, The relevance of the legal causa in the determination of the effective date of transfer was that it determined the date on which the obligation to transfer arose. This would ordinarily be the effective date of transfer but it may, for equitable reasons, be necessary in exceptional instances — as in this case — to distinguish between the date on which the obligation to transfer arises in terms of the legal causa and the effective date of transfer. Therefore, because of Tasima's non-compliance with this court's order in *Tasima I*, the effective date of transfer was the date on which the RTMC physically took control of the eNaTIS and services. (See [111] – [113] and [122].)

SA CRIMINAL LAW REPORTS FEBRUARY 2021

S v MOAMOGOE 2021 (1) SACR 121 (SCA)

Appeal — Against sentence — Sentence imposed after plea-and-sentence agreement in terms of s 105A(1) of Criminal Procedure Act 51 of 1977 — Appellant contending that agreement not correctly recording what had been agreed — Court finding that was matter extraneous to record and had to be brought by way of review.

The appellant appealed against a sentence imposed on him in the High Court after a plea-and-sentence agreement in terms of s 105A(1) of the Criminal Procedure Act 51 of 1977 was entered into with the state. The sentence imposed was one of 25 years' imprisonment of which five years were suspended, and 10 years of the remaining 20 years' imprisonment were to run concurrently with another sentence of 10 years' imprisonment imposed in the regional court in another matter. The agreement and the court's order ended with the words: 'The effective sentence is 10 years' imprisonment.' The appellant had confirmed before the High Court that the sentence imposed was in line with his plea-and-sentence agreement, but he later applied for leave to appeal against the sentence when he queried his parole period. He based his appeal on the ground that the sentence of 20 years' imprisonment induced a sense of shock. Leave to appeal was refused and he then applied for

special leave to appeal to the Supreme Court of Appeal (the SCA), which was granted. When the matter came before the SCA, he alleged, for the first time, that the plea agreement did not accurately reflect the verbal agreement between him and the state and that it was the common intention of all the parties that he would serve a total of 10 years' imprisonment for both cases.
Held, that the fundamental question was whether, in the circumstances, the appellant could bring the matter by way of appeal or should have brought a review application. The terms of the agreement were clear and were confirmed by the appellant. What the appellant sought to raise, namely that the plea agreement did not correctly record what had been agreed, was a matter extraneous to the record. An appeal was decided on the record of the proceedings in the court a quo, which bound the court on appeal. The only possible remedy would have been to launch an application for review, setting out the allegations on affidavit so that the state could deal with them under oath. The appeal accordingly had to be dismissed. (See [9] – [12].)

S v ERGIE 2021 (1) SACR 127 (WCC)

Evidence — Witness — Children — Cautionary rule — Court a quo not referring to any of authorities on application of cautionary rule to child witnesses — In rape trial witness not properly explaining, even by use of doll, whether there had been sexual penetration.
Evidence — Production and admission of — Evidence tending to cause doubt on validity of conviction only becoming available during evidence in mitigation — Proper procedure — Section 309B(5) of Criminal Procedure Act 51 of 1977.

The appellant was convicted in the trial court of rape within the meaning of that term in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in that he had inserted a finger into the genital organs of the complainant who was 8 years old. The complainant testified that while watching television in the appellant's house, part of which her mother rented from the appellant, the appellant invited her to sit on his lap and whilst there he slipped his hand into the front of the tights that she was wearing and felt under her underwear and 'rubbed her vagina'. She told the court that her mother had taught her that term, but it was not canvassed with her precisely what she meant by the term. She was medically examined by a district surgeon approximately four and a half days after the alleged sexual assault and the only finding of note was that there were 'old tears' in her hymen. The doctor described the tears as having completely healed. He was unaware that the offence was alleged to have occurred only four and a half days before the examination and, when he was alerted to the fact, he said it was still possible and that children tended to heal very rapidly. It emerged only later, after the appellant had been convicted, and when evidence was being adduced in mitigation of sentence, that the appellant's wife had ascertained, from the wife of the complainant's biological father, that the complainant, who used to spend time at her father's residence in Kenilworth, had suffered from a vaginal infection a year or so before the date of the alleged sexual assault.
Held, that the magistrate's judgment did not convey or give assurance that she evaluated the complainant's evidence with anything approaching the critical scrutiny required and it was striking that she had not referred at all to any of the authorities on the application of the cautionary rule to child witnesses. (See [9].)

Held, that, apart from the complainant's answer to a leading question by the magistrate, one was left none the wiser as to whether the demonstration, involving the use of a doll, established that there had been sexual penetration. The effect of the district surgeon's evidence was that it was less than certain, indeed almost improbable, that the historical perforation of the complainant's hymen could have been related to the incident described by the complainant. (See [18] and [24].)
Held, further, that the proper course for the defence to have adopted, when it became apparent that evidence was available that might reinforce the cause of the old tears on the complainant's hymen, was to have signalled its intention to apply for leave to appeal and to have brought such an application immediately after the imposition of sentence, coupled with an application for new evidence to be heard in terms of s 309B(5) of the Criminal Procedure Act 51 of 1977. In the context of the defending attorney's manifest inadequacies, the magistrate was under a duty to have assisted by pointing out that that was a course to be considered in the circumstances. The magistrate might also have considered stopping the trial at that stage and sending the matter on special review in terms of s 304A*(a)* of the Criminal Procedure Act. (See [27] – [28].)
Held, further, that the combined effect of the trial court's failure to properly apply the applicable cautionary rules, the demonstration and reliability of the complainant's evidence in certain material respects, the tenuous nature of the corroborative medical evidence, and the reasonable possibility of there having been a false accusation, raised a reasonable doubt as to the appellant's guilt and the safeness of his conviction. The appeal had to be upheld. (See [54].)

S v MAVIMBELA AND OTHERS 2021 (1) SACR 145 (MM)
Court — Proper function of — Coordination and management of courts — Authority to coordinate courts lay with Judge President of division — Superior Courts Act 10 of 2013, ss 8(4)(*b*)*, (c*) and 8(6).

Court — Proper function of — Place of sitting of court — Regional court — Decision as to where regional court should sit, vesting in Judge President — Superior Courts Act 10 of 2013, ss 8(4)(*b*)*, (c*) and 8(6).

The Judge President of the Mpumalanga Division set down this matter for a special review because of the refusal by the Regional Court President (the RCP) of Mpumalanga for the regional court to sit at the Skukuza court building used by a periodical magistrates' court, located within the Kruger National Park, despite the Judge President having issued a directive in this regard in terms of s 8 of the Superior Courts Act 10 of 2013 (the Act).
Held, that the authority to coordinate the judicial functions of all magistrates' courts in a province lay with the Judge President of the division. When the Department of Justice and Correctional Services exited the management of the courts, the judiciary replaced it to ensure that there was a common systematic well-coordinated judicial management, and at the provincial level it was the responsibility of the Judge President to achieve this. (See [18].)
Held, further, that the RCP's reliance on ss 8(4)*(b)* read with s 8(6) of the Act was misplaced. Whereas the management of the judicial functions of each court rested with the head of that court, whether it was a Judge President or a magistrate, it was the Judge President who was responsible for the coordination of all magistrates' courts within that jurisdiction. The directives issued by the Judge President served to

coordinate the judicial functions of the court within the meaning of s 8(4)*(c)* and were accordingly valid and binding on the RCP. (See [20] – [22].)

KOUWENHOVEN v MINISTER OF POLICE AND OTHERS 2021 (1) SACR 167 (WCC)

Extradition — Warrant of arrest in terms of s 5(1)(*b*) of Extradition Act 67 of 1962 — Validity of — Urgency — Arrest in terms of art 16 of European Convention on Extradition — Urgency not jurisdictional fact for positive response by South African authorities to request from foreign state in terms of that article.
Extradition — Warrant of arrest in terms of s 5(1)(*b*) of Extradition Act 67 of 1962 — Validity of — Allegation that magistrate merely rubber-stamped application without bringing mind to bear on matter — Such allegation unfounded where magistrate, without having given reasons, had all necessary information placed before her in advance.
Extradition — Warrant of arrest in terms of s 5(1)(*b*) of Extradition Act 67 of 1962 — Validity of — Contention that founding affidavit in support of application for warrant of arrest defective by reason of having been deposed to before colleague of arresting officer — Evidence indicating that, although two police officers worked in same department, they worked in separate sections, independently of each other — Warrant of arrest valid.

The applicant applied for the setting-aside of the issuing by a magistrate of a warrant for his arrest in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act); his arrest and the proceedings before a magistrate; and the issue by the Minister of Justice of a notification in terms of s 5(1)*(a)* of the Act. He contended, inter alia, that the warrant was issued unlawfully, in that it was in breach of an undertaking given by the South African Police Service (SAPS) who, when applying for the warrant, failed to disclose the undertaking; there was no urgency as required by art 16 of the European Convention on Extradition; the magistrate had rubber-stamped the application; and the affidavit in support of the issue of the warrant was deposed to before one of the office's colleagues.
The applicant was a Dutch national who was convicted in his absence by the Court of Appeal in the Netherlands, of the illegal supply of weapons to the erstwhile president of Liberia, which was a contravention of the Dutch Sanctions Act, 1977, and in participating in war crimes committed by Liberian forces during the period 2000 – 2002. For these offences he was sentenced to 19 years' imprisonment. His appeal in the Netherlands was dismissed and in May 2019 he lodged a petition at the European Court of Human Rights, which matter was still pending when the present application was argued. The Dutch authorities requested via Interpol the provisional arrest of the applicant immediately after the applicant's conviction, which set the wheels in motion in South Africa the following day, 23 April 2017. The applicant's legal representatives were in contact with SAPS and an official of the Department of Justice who dealt with international legal relations and the applicant's attorney confirmed in writing to the latter that a provisional request for the arrest of the applicant would not be entertained. The official denied that a blanket undertaking was ever given. At the end of November 2017 the Department of Justice official discovered that the applicant's Camps Bay property had been sold and he became concerned that the applicant was winding up his affairs in Cape Town, with a view to

leaving the country, and impressed upon SAPS to effect the arrest. The SAPS Interpol officer applied for the warrant on 6 December 2017, which was issued by the magistrate in Pretoria, and two days later the applicant was arrested and brought before the magistrate in Cape Town. It was contended for the applicant that, although art 16 had been placed before the Pretoria magistrate before she issued the warrant, urgency was a jurisdictional fact which had to be present for art 16 to be invoked for the purposes of s 5(1)*(b)*, and that, because the applicant did not consider himself to be a fugitive from justice and was not about to flee South Africa in December 2017, coupled with the delay between the initial art 16 request of 22 April 2017 and the application to the magistrate on 6 December 2017, this jurisdictional fact had not been established, and that therefore the art 16 request could not be acted upon at all. It was also contended that the Pretoria magistrate had delivered her record of decision, but had not provided reasons for that decision, and that her failure to do so, in the face of the applicant's allegation of rubber-stamping, meant that such allegation had to be accepted by the court as correct.
Held, as to the urgency issue, that there was no rational basis for placing the interpretation for which the applicant contended above the clear wording of the explanatory report. Parties to the Convention would properly follow the accepted approach in the explanatory report and it was not for the court to simply override what the contracting parties themselves considered to be the best practice. In any event, the objective evidence showed that, from the day after the applicant was ultimately convicted in the Netherlands, the Dutch authorities were of the view that the request for his provisional arrest was an urgent one and it was not for the court to prescribe to the South African authorities what factors they should consider in any given case. Having regard to the wording of art 16.1, urgency was not a jurisdictional fact for a positive response by the South African authorities to a request from a foreign state in terms of that article. (See [58] – [59].)
Held, as to the rubber-stamping argument, to elevate what was almost standard practice in the judicial review of administrative decisions to a principle of general application in the judicial review of judicial decisions would be to set a dangerous precedent, particularly given the wide range of functions that magistrates performed as part of their duties in the lower courts. In any event, in the instant matter, the complaint was not that the magistrate failed to exercise a discretion properly, but rather that she failed to exercise any discretion at all and simply rubber-stamped the application. The difficulty faced by the applicant was that, on an objective perusal of the record of decision, the magistrate had before her all that was necessary to inform herself whether a warrant should be issued. All of the relevant requirements were evident and substantiated by the record itself. This was not to say that there may be instances where reasons should properly be provided, it was just that this was not one of them. (See [63].)
Held, as to the argument that the founding affidavit was defective, having been deposed to before a colleague of the deponent, it appeared that, while both officials worked at Interpol in Pretoria, they worked at separate 'desks' which worked independently of each other, and the commissioning officer had no involvement in any of the steps taken by SAPS relating to the applicant, other than acting as commissioner of oaths. There was no evidence of abuse of power or a gross violation of the applicant's rights as a result, and the affidavit was valid. (See [66] and [78].)

BENNETT AND ANOTHER v THE STATE: IN RE S v PORRITT AND ANOTHER 2021 (1) SACR 195 (GJ)

Trial — Presiding officer — Recusal of — More and more recusal applications being brought as tactical device or because litigant did not like outcome of interim order — Recusal of presiding officer should not become standard equipment in litigant's arsenal, but should be exercised for true objective of securing fair trial.

The two accused in a case involving 3000 white-collar crimes, including racketeering under the provisions of the Prevention of Organised Crime Act 121 of 1998, committed 20 years ago, brought an application for the recusal of the court. The first judge allocated to the matter recused herself and then the accused sought the recusal of the two lead prosecutors. The Supreme Court of Appeal overturned the High Court's judgment granting the application. The second judge appointed then took ill and the matter was then allocated to the present judge in 2015, after the indictment had been served on the accused in July 2005.
The court dismissed the recusal application, but remarked that more and more recusal applications were being brought as a tactical device or simply because the litigant did not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners brought or threatened to bring recusal applications was cause for concern. The recusal of a presiding officer, whether a magistrate or judge, should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective, which was to secure a fair trial in the interests of justice in order to maintain both integrity of the courts and the position they ought to hold in the minds of the people whom they served.

S v QUMBA 2021 (1) SACR 227 (ECM)
Trial — Accused — Legal representation of — Legal representative withdrawing for 'ethical reasons' — Legal representative acting on Legal Aid instructions — Magistrate not requiring legal representative to make application for withdrawal and not advising accused of right to legal representation by other Legal Aid representative, but hurriedly proceeding with case — Gross irregularities committed vitiating conviction and sentence.

In a matter that came before the court on automatic review it appeared that at a certain stage the accused's legal representative, who was from Legal Aid South Africa, withdrew for what he called 'ethical reasons'. The magistrate proceeded to advise the accused of his right to legal representation by an attorney of his choice, at his own expense, but stopped short of advising him of his right to legal aid. The accused then chose to conduct his own defence.
Held, that it was the court who allowed the withdrawal of a legal representative upon application for such withdrawal, after having been advanced good cause for such request. In the present case, the legal representative made no such application but merely informed the court that he was out of the case. Had the magistrate followed the proper steps of calling upon him to make a detailed application, she might not have denied the accused his right to legal aid. The legal representative had a duty to inform Legal Aid South Africa about his withdrawal and it was only Legal Aid South Africa which had a final decision whether to grant or refuse legal aid to the accused. (See [19].)

Held, further, that the hurried manner in which the trial was conducted after the withdrawal by the accused's attorney called for censure. The magistrate had violated the accused's constitutional rights and failed to ensure that he was provided with copies of the docket and/or any other information which would have assisted him to be fully prepared for trial. There had been serious, gross irregularities which called upon the court to interfere with the conviction. In the result, the conviction and sentence were set aside. (Paragraphs [20] – [21] and [29].)

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Doorewaard and another v S [2021] 1 All SA 311 (SCA)

Criminal law and procedure – Evidence – Mutually destructive versions – Approach of court – Court must consider credibility and reliability of witnesses, and evidence that is reliable should be weighed against evidence found to be false – Court must ultimately determine whether State has satisfied the requirement of proof beyond reasonable doubt.

At the heart of the present appeal was the death of a 15-year-old boy (the "deceased"). The State and the defence presented mutually destructive versions of the circumstances surrounding the boy's death.

The main witness for the State, Mr Pakisi, testified that on 20 April 2017, the appellants assaulted, mishandled and threw the deceased out of a moving van, and assaulted, kidnapped and intimidated Mr Pakisi. According to Mr Pakisi, he had been walking towards certain sunflower fields when he heard a gunshot. He then saw the second appellant holding a firearm and running towards a quad bike, which he drove towards the first appellant, who was in a van with an unknown white man. Mr Pakisi testified that he heard the deceased crying in the back of the van, before the second appellant threw him out of the moving van. After the appellants picked up the deceased again, they drove into the field, and on re-emerging, they confronted Mr Pakisi about what he had seen. He alleged that he was kidnapped, threatened and assaulted by the appellants. He stated that he subsequently attempted to lay charges against the appellants, but was met by a lack of cooperation by the police.

The appellants denied all the charges against them and specifically denied that they had been in the company of Mr Pakisi. They alleged that on the day in question, they had noticed two boys stealing sunflower heads from their employer's farm. They said that they had traced one of the boys. That was the deceased. The appellants alleged that the boy had agreed to take them to the other boy, and had sat in the back of their van, but had jumped out of the moving van during the drive, injuring himself.

The appellants were convicted in the High Court on charges of murder, kidnapping, intimidation, theft, and the pointing of a firearm. They obtained leave to appeal against their convictions.

Held – The State bears the onus to prove the guilt of an accused beyond reasonable doubt. Where there are two mutually destructive versions, as in this case, the court must consider the credibility and reliability of the witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has satisfied the requirement of proof beyond reasonable doubt.

In his case, there were serious evidentiary deficiencies due to the manner in which the case was handled and investigated by the police. There were also material discrepancies in the evidence of Mr Pakisi, who was a single witness with no corroboration to his evidence. The inference drawn by the trial court that the deceased had been thrown from the van was not supported by the facts. Even though the appellants' version regarding how the deceased vanished from their vehicle was unsatisfactory, the State did not prove its case beyond reasonable doubt. Consequently, the appeal was upheld and the appellants were acquitted.

In a minority judgment, it was stated that the murder charge should be replaced with one of culpable homicide in that the appellants had negligently caused the death of the deceased through not providing any medical assistance after he was injured.

Astral Operations Ltd t/a Early Bird Farm v O'Farrell NO [2021] 1 All SA 350 (KZD)

Corporate and Commercial – Contract – Claim for payment – Contractual terms – Whether provision that "usual price" at time of dispatch of goods would be charged meant the best price, not favouring any other customer – Neither trade practice nor express terms of contract supporting interpretation that charging different prices would be in breach of contract.

The plaintiff ("Astral") produced chicken in large quantities for ultimate sale into the consumer market. Most was sold directly to major supermarket chains, while smaller outlets were generally serviced by wholesalers who bought from Astral. One such wholesaler was a trust ("Nambitha") in which the defendants were trustees. Nambitha was a competitor of another wholesaler ("Dawoods"). In 2011, Nambitha found itself out-traded by Dawoods and its business of selling Astral products collapsed, leaving an unpaid balance owing to Astral.

In its claim against Astral, Nambitha averred that the debt arose from its purchase of the product from Astral. Nambitha contended that it was entitled to lower prices for the product in question, and that a debatement of Astral's account of its claim against Nambitha would reveal a lesser debt. In a claim-in-reconvention, Nambitha contended that throughout 2011 it was entitled to lower prices than those which were actually charged, and that it should be compensated for loss of profits, as well as the collapse of its business as it was out-traded by Dawoods because Astral afforded Dawoods better prices. Nambitha argued that it was entitled to the same prices.

Held – The first issue was the proper interpretation of the terms of the contract between the parties with specific reference to Astral's allegation that it charged its "usual prices" to Nambitha at the time of despatch of the goods. The second issue was whether the prices charged by Astral for the goods sold were the usual prices in the sense contended for by Nambitha (ie not favouring any other wholesale customer). That led to the question of whether Astral breached the contract in supplying other wholesalers at lower prices than those allowed to Nambitha.

Regarding the first issue, it had to be determined whether "the usual price" referred to in the contract between Astral and Nambitha meant the best wholesale price not undermined by the grant to any other wholesale customer of rebates or discounts or advertising allowances more advantageous than those afforded to Nambitha. Reliance

was placed on an enforceable trade usage or trade practice, or the importation of a tacit term into the agreement. The difficulty was that what Nambitha contended for was not clear or certain, and contradicted the express terms of the contract. That conclusion answered the first question against Nambitha and rendered the second issue irrelevant. It also addressed the third issue, in that it could not be found that Astral breached the contract by charging Dawoods more favourable prices than Nambitha.

A fourth issue raised by Nambitha's was that it had been induced to buy the goods, which it would not otherwise have purchased, through false representations by Astral. The evidence however, revealed no misrepresentations as relied on by Nambitha. There could therefore not have been any inducement to buy the goods underlying Astral's claim.

In the premises, judgment was granted in Astral's favour, and Nambitha's counter-claim was dismissed.

Bagnall NO and others v Van Acker NO and others [2021] 1 All SA 377 (WCC)

Wills, Trusts and Estates – Dispute amongst executrices of deceased estate – Application for removal of executrix – Whether, in light of allegations levelled against executrix, it could be said that she acted against the interests of the estate to such a degree that it warranted her removal – Removal ordered where executrix's conduct was untenable, and in conflict with her duties as executrix to act at all times in the best interests of the deceased estate, as opposed to her own.

Five sisters whose father (the "deceased") died in 2016, became embroiled in the present litigation involving the sale of the deceased's immovable property. The first respondent ("Van Acker") moved in with the deceased in 2010, allegedly to take care of him in his old age. She and her family lived in the property in Camps Bay without paying rent except for a non-market related amount for less than a year. During the last few months of his life, the deceased became increasingly frail and ill. As a result, a curator *bonis* was appointed by the court. By August 2014, due to the deceased's deteriorating health and unacceptable living conditions, it became necessary for him to be moved to a suitable frail-care facility. As none of the family members had the financial means to fund the care he needed, Van Acker's sisters (referred to by the court as the "four sisters") decided to sell the property in order to raise the necessary funds. An offer to purchase was received from a trust. The curator *bonis* requested the Master's consent to the sale, as he was bound to do in terms of the sale agreement. Van Acker objected thereto, contending that the property had not been sold for its market value. That resulted in the Master not rendering a decision before the death of the deceased.

After the death of their father, all five daughters were appointed as co-executrices of his estate. As co-executrices the four sisters were in favour of proceeding with the sale of the property to the trust. Van Acker took steps to prevent the transaction from proceeding, and sought to prevent the Master from granting the necessary statutory consent required in terms of section 42(2) of the Administration of Estates Act 66 of 1965.

In April 2017, the four sisters advised Van Acker, in their capacity as co-executrices, that she should start paying a market-related rental, alternatively that she should vacate the property so that it could be rented out at a market-related rental. She

refused to comply with the request. Consequently, the four sisters applied to the High Court for the removal of Van Acker as executrix, and for interim relief. An interim order was granted and the matter went before another court which dismissed the removal application and upheld a counter-application by Van Acker, declaring the sale agreement to be null and void.

On appeal, the Court had to address an application for condonation, by the appellants, for the late filing of the main appeal; the enforceability of the sale agreement; the application for the removal of Van Acker as executrix; and the purported appeal against the interim order.

Held – The evidence showed that agreement was reached between the parties, whereby Van Acker consented to the appeal in respect of the interim application being heard together with that in respect of the main application, which she was aware was contingent upon the outcome of the petition for leave to appeal. She must have realised that it would not be possible for the main appeal to be prosecuted in strict compliance with the provisions of rule 49(6) and (7) of the court's rules, and implicitly waived her right to insist on strict compliance therewith. In any event, even if the main appeal was found to have lapsed, it would be in the interests of justice to grant condonation therefor, and an order reinstating the appeal.

In the appeal against the declaration of the sale agreement as invalid, the four sisters, the *curator bonis* and the trust argued that the court granting the declaratory misinterpreted a clause which mentioned obtaining consent of the Master. The present Court held that the court a *quo* misdirected itself in its interpretation of the relevant clause. A reading of the terms of the agreement as a whole showed that the intention of the parties was that the consent of the Master would only be necessary insofar as it was required by the order of the court in the curatorship application. The Court dismissed Van Acker's contention that the agreement was null and void or unenforceable.

The court below refused to order the removal of Van Acker as executrix but did not properly deal with the allegations made against her by her co-executrices. It was clear that Van Acker failed to comply with the duties which were imposed on her in terms of the deceased's will. She conducted a campaign of obstruction and delay of the sale and transfer by every means possible, in order to prevent the sale, and by her conduct she prevented the estate from being wound up expeditiously. The question to consider was whether, in light of the allegations which were levelled against Van Acker by her sisters, it could be said that she acted against the interests of the estate to such a degree that it warranted her removal as executrix. A court should not lightly grant an order for the removal of an executrix. In this case, Van Acker's reasons for obstructing and delaying the due and expeditious winding-up of the estate could not be justified. Her conduct was untenable, and in conflict with her duties as executrix to act at all times in the best interests of the deceased estate, as opposed to her own. In those circumstances, the appeal in this regard succeeded and the application for Van Acker's removal as executrix was granted.

Finally, the Court dismissed the appeal against the interim order, as Van Acker had agreed to that outcome should the Court reach the above conclusions.

De Beer NO and others v Magistrate of Dundee NO and others
[2021] 1 All SA 405 (KZP)

Insolvency – Provisional liquidation – Appointment of provisional liquidators – Validity of acts by liquidators prior to formal appointment – Court having no power to declare valid any acts performed by provisional liquidator before appointment.

Insolvency – Provisional liquidation – Search and seizure operation – Search warrant – Execution of operation contrary to terms of warrant rendering operation unlawful.

The first applicant ("De Beer") was the sole director of the second and third applicants and the chairperson of sixth applicant. All the applicants were at the material time either employed at or operating from premises which were subject to a search and seizure operation.

In February 2020, a company ("Coinit"), whose sole shareholder was De Beer, was placed under provisional liquidation. Coinit had conducted business by enticing members of the public to participate in what turned out to be an unlawful Ponzi scheme. De Beer managed the scheme and he dealt with the money circulating in the scheme as his own money. Upon the provisional liquidation of Coinit, the fourth, fifth and sixth respondents were appointed joint liquidators on 5 March 2020.

On learning of the appointments, the fourth respondent ("Nel") proceeded to act in furtherance of his duties as joint provisional liquidator. He contacted various financial institutions advising them that he had been appointed joint provisional liquidator of Coinit and issued directions relating to financial affairs and records of Coinit. He proceeded to Coinit's premises, presented himself as a joint provisional liquidator and made enquiries relating the affairs, assets and documents belonging to Coinit. He then applied for a warrant to search and seize articles, books and documents belonging to Coinit. The magistrate authorised the issue of the warrant, which resulted in the seizure and removal of articles and documents from the premises. Nel directed the execution of the warrant.

The applicants contended that the above actions taken by Nel before 5 March when his appointment was certified, were unauthorised. They also contended that the warrant was invalid for vagueness and was overbroad; that it directed that it be executed by the sheriff and police officers not Nel or his agents; and that only articles and documents belonging to Coinit were covered by the warrant not the articles and documents that were indiscriminately removed and retained. Finally, it was submitted that the manner in which the warrant was executed resulted in the search, seizure removal and retention of the articles and documents being unlawful.

Held – The warrant was addressed to the sheriff of the relevant court, authorising and instructing him to enter and search the specified premises. The sheriff and police officers were to execute the warrant by themselves. That did not happen. Instead, the persons who entered the premises and conducted the actual search and seizure were not authorised by the warrant. Furthermore, the warrant was vague in failing to cite the name of the sheriff and the names of the police officers to execute the warrant, and in failing to identify the other premises it purported to authorise a search of.

On the issue of the validity of Nel's actions, the court held that Nel was not entitled to act as provisional liquidator before his appointment on 5 March 2020. The Court had no power to declare valid any acts performed by Nel as a provisional liquidator before he was appointed a provisional liquidator.

The application for the setting aside of the warrant was granted and the items seized from the applicants' premises were to be returned.

Gordhan v Public Protector and others [2021] 1 All SA 428 (GP)

Constitutional and Administrative Law – Public Protector – Jurisdiction – Section 6(9) of the Public Protector Act 23 of 1994 providing that except where the Public Protector in special circumstances, within her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported within two years from the occurrence of the incident or matter concerned – Absence of special circumstances rendering report reviewable.

Constitutional and Administrative Law – Public Protector – Review of report making adverse findings against office bearers – Report tainted by unsubstantiated allegations, flawed reasoning and bias by Public Protector and proposed incompetent remedial action.

A report issued by the first respondent (the "Public Protector") in July 2019 made adverse findings against the first applicant ("Minister Gordhan"), the eighth respondent ("Mr Pillay") and the ninth respondent ("Mr Magashula"). Minister Gordhan was accused of having established an unlawful intelligence unit at the South African Revenue Service, of misleading the National Assembly, and of irregularly appointing Mr Pillay. The present application was for the review and setting aside of the report. Mr Gordhan and Mr Pillay averred firstly that the Public Protector had no jurisdiction over the complaints under section 6(9) of the Public Protector Act 23 of 1994. Secondly, they contended that the Public Protector had failed to exercise her powers and functions in compliance with the Constitution and the Public Protector Act in that she had failed to act independently, impartially, and without fear, favour or prejudice. The third ground of review was that the Public Protector took into account irrelevant considerations, relied on discredited reports and failed to take into account the extensive evidence that was placed before her, particularly in the detailed affidavits submitted by Mr Pillay. Fourthly, it was submitted that the Public Protector's remedial action was *ultra vires*, unlawful, incapable of being implemented and fell short of the appropriate standard. Finally, the applicants alleged manifest bias against the applicants by the Public Protector.

Held – In respect of jurisdiction, section 6(9) of the Public Protector Act stated that except where the Public Protector in special circumstances, within her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported within two years from the occurrence of the incident or matter concerned. The complaints in the present case concerned matters that were older than two years, with some being more than ten years older. Despite repeated requests, the Public Protector failed to explain the special circumstances on which the exercise of her discretion was based. Concluding that there were no special circumstances present, the Court held that the review should succeed in its entirety on the first ground alone.

Proceeding nevertheless to consider the remaining issues, the Court found that the allegations made against Minister Gordhan, Mr Pillay and Mr Magashula were unsubstantiated. The Public Protector, in the course of her investigation and findings, was found to have displayed a lack of understanding of the Parliamentary Ethics Code and relevant law. She also ignored Mr Pillay's extensive evidence, thereby displaying

manifest bias. Her conclusions were based on flawed reasoning. The remedial action proposed in the report was not competent or appropriate, and the affected parties were not given a fair hearing before the report was published.

Insofar as the report directed the President of South Africa to submit an implementation plan to the Public Protector for her approval, indicating how the remedial action would be implemented, the Public Protector exceeded her powers.

Finally, the Court held that costs on a punitive scale was warranted as the conduct of the Public Protector was egregious.

Grassy Knoll Trading 78 CC t/a Fat Cactus and another v Guardrisk Insurance Company Limited [2021] 1 All SA 503 (WCC)

Insurance – Business interruption indemnity – Interpretation of indemnity clauses – Insured peril had to be factual cause and legal cause of loss or occurrence covered by insurance contract – Clause providing cover for business interruption caused by COVID-19 pandemic and government's response to it, provided there had been an occurrence of COVID-19 within the specified radius of insured's premises.

In March 2020, the COVID-19 pandemic was declared a national disaster in South Africa. Regulations were then issued in an attempt to curb the spread of the virus. That included a national lockdown and a prohibition on the sale of alcohol.

The applicants operated restaurants in Cape Town. The impact of the pandemic led to a decline in their business. That was exacerbated by the alcohol ban. They closed their restaurants in order to reduce their overall losses. In June 2020, the applicants submitted claims to the respondent ("Guardrisk") under a business interruption section of their insurance policy, for the losses which they suffered as a result of the interruption of their business. The policy clause upon which they relied (the "disease clause") insured them against loss resulting from interruption of, or interference with their business due to "Notifiable Disease occurring within a radius of 50km of the Premises". The claims were rejected on the ground that the applicants had not provided evidence that their loss was a consequence of a confirmed case of COVID-19 within the specified radius of their premises. Guardrisk maintained that the business interruption suffered by the applicants was not caused by the occurrence of COVID-19 within a 50 kilometre radius of their premises, which Guardrisk contended was the relevant insured peril, but by the global COVID-19 pandemic and the South African government's response it, which in Guardrisk's submission were not perils covered by the policy.

In the present application, the applicants sought a declaratory order that Guardrisk was obliged to indemnify them under the business interruption section of their insurance policy.

Held – Insurance contracts must be interpreted in accordance with the usual rules of interpretation, having regard to their language, context and purpose, and preferring a commercially sensible meaning over one that is insensible or at odds with the purpose of the contract. A commercially sensible meaning, in respect of an insurance contract, is a meaning that both the prospective insured and the insurer must have regarded as meeting their aims in concluding the policy.

The first aspect addressed by the Court was the required causal relationship between the notifiable disease peril and the business interruption in the insurance

policy. The general approach, unless a different intention appears from the insurance contract, is that the insured peril must be the factual cause and the legal cause of the loss or occurrence which is covered by the contract. When there are two or more possible causes of the loss or occurrence which is covered by the contract, a court must determine which is the proximate cause. The disease clause in this case was found to provide cover where the insured peril was the factual and legal cause of the insured's business interruption, and the proximate cause if there were other competing causes.

On a proper interpretation of the disease clause, the court concluded that the clause provided cover for business interruption caused by the COVID-19 pandemic and the government's response to it, provided that there had been an occurrence of COVID-19 within the specified radius of the insured's premises. The applicants were granted the declaratory relief sought regarding Guardrisk's liable to indemnify them for losses resulting from the business interruption.

Mzayiya v Road Accident Fund [2021] 1 All SA 517 (ECL)

Legal Practice – Ethical duties of legal representatives – Duty not to mislead court – Evidence of unprofessional conduct – Misrepresentation in particulars of claim and improprieties in signing and commissioning of affidavits resulting in matter being struck from roll and referred to professional bodies for investigation.

Application for default judgment was made by the plaintiff in a motor vehicle accident case. In his particulars of claim, the plaintiff alleged that an unidentified motor vehicle had collided with him on 20 March 2019. Compensation was sought from the defendant.

In an affidavit deposed to on 18 August 2020, the plaintiff's attorney ("Mr Klaas") admitted that the allegation that the accident occurred on 20 March 2019 was false, and it was stated that the accident in fact occurred on 15 February 2007, more than twelve years earlier.

Held – Several issues were of concern to the Court. No explanation was given for the misrepresentation and no amendment was sought to correct the date. Another troubling aspect raised by the court was the possibility that someone other than the plaintiff might have signed the affidavits. The affidavit in support of the claim was commissioned by the same advocate who appeared in court for the plaintiff. The Court questioned the propriety of the advocate's subsequently appearing in a matter where he had commissioned one of the affidavits relied upon in support of the application, he being at all material times under an ethical duty to maintain his independence in relation to his client and the litigation.

The Court held that the claim was a bogus one because it was based on the incorrect premise that the accident occurred on 20 March 2019 and that future medical expenses and loss of earnings should be calculated from that erroneous date onwards. How the incorrect date came to be used in the papers was a matter of concern as the accident reports clearly showed the correct date. Moreover, a draft order presented to court reflected the correct date, suggesting an attempt to obtain relief by way of a draft order containing facts materially different to what was contained in the particulars of claim and affidavit deposed to in support of the default application, and without the knowledge of the defendant.

The issues raised led the Court to explain the ethical standards required of legal practitioners. A legal practitioner has a pre-eminent duty to the Court not to embark on a litigation plan that will mislead the court.

As the particulars of claim upon which the application for default judgment was sought referred to a non-existent accident, the relief sought could not be granted. In any event, given the manner in which the plaintiff's legal representatives approached the court, the matter could not be entertained, and was accordingly struck from the roll. The court questioned whether the legal representatives who were responsible for lodging and prosecution of the claim and seeking default judgment might have been guilty of unprofessional conduct. As a result of the questions about their *bona fides*, the matter was referred to the appropriate bodies for further investigation. Should the plaintiff wish to proceed with the claim he was required, within 21 days, to bring a substantive application for leave to amend his particulars of claim to reflect the correct date of the accident and was required to give a full explanation as to the matters raised in the court's judgment.

Ndlovu and others v S [2021] 1 All SA 538 (ECG)

Criminal Law and Procedure – Evidence – Admissibility of evidence found as result of unlawful search – Section 35(5) of the Constitution not providing for automatic exclusion of evidence that was obtained in violation of a protected right – Where admission of improperly obtained evidence not rendering trial unfair, and not bringing administration of justice into disrepute, court admitting it as exclusion would cause harm to administration of justice.

Criminal Law and Procedure – Rhino poaching – Sentence – Whether cumulative effect of sentences imposed by trial court rendering sentences shockingly disproportionate – Court not finding sentences imposed too harsh.

The appellants were charged in the High Court with various charges arising from ten incidents of rhino poaching that occurred over a period of three years at various farms and nature reserves in the Eastern Cape. They were convicted on almost all the charges and were sentenced to lengthy periods of imprisonment, resulting in an effective sentence of 25 years imprisonment. They unsuccessfully applied for leave to appeal against their convictions and the sentences imposed, but were granted leave on petition on two limited and narrowly defined grounds.

Held – The questions on appeal were whether the trial court, acting in terms of section 35(5) of the Constitution, correctly allowed physical evidence found as a result of the unlawful search of a premises to become part of the evidential material placed before it by the State; and whether or not the cumulative effect of the sentences imposed by the trial court rendered the sentences shockingly disproportionate.

Regarding the first question, it was common cause that the police had entered and searched a chalet in which the appellants were present without a search warrant. The trial court found that to have been unlawful. The admissibility of evidence that has been obtained in a manner that violates rights guaranteed by the Bill of Rights is dealt with in section 35(5) of the Constitution. Section 35(5) envisages a two-step process. First, the evidence sought to be excluded must have been obtained in a manner that infringed upon a right guaranteed by the Bill of Rights. If it is found that the impugned evidence was so obtained, the second step is to determine whether the admission of the evidence will render the trial unfair, or bring the administration of justice into

disrepute. The section does not provide for the automatic exclusion of evidence that was obtained in violation of a protected right. The Court stated that the appellants were not in any way compelled to participate in the discovery of the articles in the chalet. Further, the breach of the appellant's right to privacy did not operate to undermine the reliability of the evidence. The articles were relevant real evidence that existed independently of any of the actions of the police officials, and would have been revealed independently of the appellant's right to privacy. Accordingly, the admission of the evidence did not render the trial unfair. The determination of whether the admission of the evidence would be detrimental to the administration of justice required a value judgment. The Court was satisfied that the trial court correctly found that the evidence ought to be admitted, as its exclusion would cause harm to the administration of justice.

It was also not found that the sentences imposed were too harsh.

The appeal was dismissed.

TN obo BN v Member of the Executive Council for Health, Eastern Cape [2021] 1 All SA 561 (ECB)

Civil Procedure – Court orders – Interpretation of – Court first looks to the plain meaning of the order to ascertain its meaning – If there is ambiguity in the meaning, then the court is entitled first to consider extrinsic evidence surrounding or leading to the order, and if there is still ambiguity in the meaning, the court is entitled to consider other relevant extrinsic evidence.

Civil Procedure – Defence of res judicata – Not applicable where issue in current proceedings was completely different to that which was raised and determined when court order was made.

Civil Procedure – Pleadings – Amendment of pleadings – At any point in the proceedings before judgment, either of the parties is entitled to apply to amend their pleadings.

Alleging medical negligence by the respondent's personnel at a hospital, in their handling of the delivery of the applicant's baby, the applicant (as plaintiff) sued the respondent for damages. The respondent conceded liability, leading to an order being taken by agreement. Subsequent to the granting of the court order, the respondent filed a Notice of Intention to Amend her plea. The envisaged amendment entailed the introduction of certain defences (the "DZ defences") referred to as public health system defences and arising from the Constitutional Court judgment in *Member of the Executive Council for Health and Social Development*, *Gauteng v DZ obo WZ* 2017 (12) BCLR 1528 (CC). The applicant replicated to the respondent's amended plea, taking issue with the introduction of the DZ defences, and contending that the issue of the respondent's liability and the basis thereof were *res iudicata* by reason of the court order.

The present application was brought in terms of Rule 33(4) of the Uniform Rules of Court as a stated case for adjudication by the court of the parties' conflicting contentions with regard to the import and meaning of the court order.

Held – The common law would require development if the DZ defences were permitted since, currently, it required an unsuccessful defendant to pay damages to a successful plaintiff on a "*once and for all*" basis in one upfront lump sum amount,

representing the net present value of the future medical costs. The common law required payment of damages in money, not in kind.

In interpreting court orders, the court first looks to the plain meaning of the order in order to ascertain its meaning. If there is ambiguity in the meaning, then the court is entitled first to consider extrinsic evidence surrounding or leading to the order. If there is still ambiguity in the meaning, the court is entitled to consider other relevant extrinsic evidence.

The Court found that the court order merely held the respondent liable for the applicant's proved damages referred to in the order. It made no reference at all to the manner in which such liability was to be discharged. It did not order payment as a manner of discharging such liability. It made no reference to the mode or manner of the respondent's settlement of the proven damages for which it had been held liable. Nothing in the order precluded the respondent from invoking the DZ defences. The DZ defences contemplated both monetary compensation as well as compensation in kind.

At any point in the proceedings before judgment (on *quantum*) either of the parties is entitled to apply to amend their pleadings. The applicant's interpretation of the court order suggested that the court that deals with the quantum aspect of the claim should not hear the respondent in relation to the pleaded defences in the amended plea. The respondent is sought to be precluded from leading the aforementioned evidence and not to have an opportunity to explain why she was of the view that the common law should be developed to allow for the DZ defences – despite the fact that she had amended her plea so as to incorporate such defences, without objection by the applicant. That was unconstitutional and could not be allowed.

For *res judicata* to apply, the previous determination must have been in relation to, at the very least, the same issue or cause. In this case, the court order in issue was in respect of merits (liability) only. The issue of *quantum* was completely different to that which was raised and determined when the court order was made. The Court thus made a finding against the applicant.

Trustees for the Time Being of the Burmilla Trust and another v President of the Republic of South Africa and another [2021] 1 All SA 578 (GP)

Civil Procedure – Particulars of claim – Exceptions to claim for "moral damages" – Liability of South Africa to compensate non-national where South African government breached international law outside country, causing economic loss which was suffered outside our borders – Exceptions upheld where no such liability found to exist resulting in particulars of claim not establishing legal causation.

The plaintiffs' claim was for constitutional damages, said to arise from the drastic curtailment of jurisdiction and capacity ("shuttering") of an international tribunal, before which the plaintiffs and others had a case pending against the Kingdom of Lesotho. Of the three claims set out in the amended particulars of claim, the first was for loss of profits – a claim said to have been ceded to the first plaintiff ("Burmilla"). The second claim was said to have been suffered personally by the second plaintiff ("Mr Van Zyl") as "moral damages" for humiliation, indignity and the like caused by harassment and intimidation. The third was for the wasted costs incurred in cases in other fora, all of which were from the plaintiffs' perspective ultimately unsuccessful, in an effort to prevent or reverse the shuttering or to have their claims against Lesotho heard in another forum.

Mr Van Zyl was a South African who controlled various Lesotho companies.

Plaintiffs' cause of action was that the South Africa government violated the plaintiffs' rights through its conduct in relation to the Southern African Development Community Tribunal (the "SADC Tribunal"). In brief, the Government was a party to a series of decisions of the Southern African Development Community ("SADC") which sought to alter and restrict the jurisdiction and reach of the SADC Tribunal, a body which the SADC had created. The intention behind those decisions was to render the SADC Tribunal unable to hear and pronounce upon a pending case before the SADC Tribunal brought by the plaintiffs and the Tributing Companies against Lesotho as well as three other cases then pending before the SADC Tribunal.

The defendants raised 14 exceptions to the particulars of claim. The court did not deal with all of them individually because there were certain issues of principle on which some of the exceptions had to be upheld and because the exceptions in some respects overlapped.

Held – A question in this case was whether the law should recognise liability under the South African Constitution to pay monetary compensation to a non-South African national for acts committed by South Africa in breach of our Constitution and in violation of international law, outside our borders, which caused economic loss which was suffered outside our borders. The Court held that morality, the convictions of the South African community and policy do not require that South Africa should be held liable to compensate a non-national where the South African government breached international law in circumstances such as the present. The plaintiffs' particulars of claim therefore did not establish legal causation, on the plaintiffs' claim for monetary compensation. The exceptions to the claim for moral damages were upheld.

The Court also upheld three other exceptions but dismissed the remainder.

The plaintiffs were granted leave to amend their particulars of claim.

Wilsnach NO v TM and others [2021] 1 All SA 600 (GP)

Family Law and Persons – Parent and child – Parenthood – Concept of parent – Right to inherit from child's estate – Mere status as biological parent not determinative of right to inherit from child's estate – Where parental obligations in terms of the Children's Act 38 of 2005 had never been fulfilled, parent not meeting factual or legal requirements of parenthood and not entitled to inherit from child's estate – Primary caregiver, although not a biological parent, recognised as a parent for purpose of inheriting as contemplated in section 1(1)(d) of the Intestate Succession Act 81 of 1987.

The first respondent and second respondent were respectively the father and mother of a child born in 2013 and diagnosed with cerebral palsy. The child died in 2018. The second respondent and the child lived with the third respondent (the "second respondent's mother") who provided them with a home and took care of their basic needs.

Upon the child's death, all three respondents laid claim to his estate. The first and second respondents based their claim on their status as parents, and the third respondent on her having been awarded parental rights and responsibilities by the court.

Held – It had to be determined whether each of the respondents qualified as a parent for the purpose of inheriting as contemplated in section 1(1)(d) of the Intestate Succession Act 81 of 1987.

The first respondent had nothing to do with his child since birth, largely because of the child's condition. He therefore at no time fulfilled his parental obligations in terms of the Children's Act 38 of 2005. To then regard him as a parent in terms of the Intestate Succession Act would offend against the constitutional scheme upon which that Act was founded. The Court ruled that the first respondent did not meet the factual or legal requirements of parenthood and was not entitled to inherit from the estate of the child.

While the second respondent's performance of her duties as mother was open to some question, she did care for the child in the first two years of his life. She was recognised as a parent in terms of both the Children's Act and the Intestate Succession Act.

The primary caregiver and dominant parental figure in the child's life was the third respondent. The Court described the pivotal role she played in the child's life and concluded that she was a parent for the purpose of inheriting as contemplated in section 1(1)(d) of the Intestate Succession Act.

The second and third respondents were to inherit in equal shares from the estate of the child.

END-FOR NOW