LEGAL NOTES VOL 3/2021

Compiled by: Matthew Klein

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ECONOMIC FREEDOM FIGHTERS AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2021 (2) SA 1 (CC)

Constitutional law — Human rights — Freedom of expression — Whether crime of incitement to 'any offence' constitutional — Constitution, s 16; Riotous Assemblies Act 17 of 1956, s 18(2)*(b)*.

Second applicant, Mr Malema, had made certain statements directed to third parties encouraging them to occupy land (see [7] – [8]). This had caused the National Prosecuting Authority (NPA), represented by second respondent, to charge Malema with incitement under s 18(2)*(b)* of the Riotous Assemblies Act 17 of 1956: inciting others to commit the offence of trespass (see [10]). Section 18(2)*(b)* provides, inter alia, that '(a)ny person who . . . incites . . . any other person to commit . . . any offence . . . shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable' (see [26]).
First applicant, the Economic Freedom Fighters (EFF), and Malema had then challenged the constitutionality of s 18(2)*(b)* and the applicability of the Trespass Act 6 of 1959, and sought the review and setting-aside of the NPA's decision to charge Malema (see [11]).
The High Court found s 18(2)*(b)* unconstitutional and invalid insofar as it made an inciter liable to the punishment of the party committing the offence but dismissed the challenge to the applicability of the Trespass Act (see [14] and [16]).
Here the EFF and Malema sought the Constitutional Court's confirmation of the order of invalidity and also applied directly for leave to appeal (see [21] and [78]). This on an apparently unsuccessful challenge to the breadth of the Riotous Assemblies Act (its application to 'any offence') and for an interpretation of the Trespass Act such that it did not apply to unlawful occupiers under the Prevention of Illegal Eviction

[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!**

from and Unlawful Occupation of Land Act 19 of 1998 (PIE) or the Extension of Security of Tenure Act 62 of 1997 (ESTA) (see [15] and [17]).
The court ruled that it had jurisdiction: it was required to confirm or disconfirm the order of invalidity, and the other issues (overbreadth, applicability to unlawful occupiers) involved interpreting legislation so as to be constitutionally compliant (see [18] and [20]). A point of general importance was also involved: landlessness and homelessness (see [20]).
Leave to appeal directly had also to be granted: the point for confirmation and the further points were entwined, and it would be the most economical course to adjudicate them together (see [23] – [24]). There were moreover prospects of success on the overbreadth challenge (see [24]).
As for confirmation, this would be declined: a court was not, as the High Court considered, compelled to impose the same punishment on the inciter as the actual perpetrator (see [25] and [29]). The court retained discretion as to sentence (see [27]).
But s 18(2)*(b)* by its breadth (incitement to 'any offence') limited the right to freedom of expression, and this limitation was unjustifiable (see [34] and [65]). This on weighing the right's importance ('critical to our democracy and healing the divisions of our past') (see [42]); the limit's important but ordinary, rather than 'pressing', purpose ('crime prevention') and its broad extent ('minor' and major offences) (see [49], [63]); the inadequacy of proposed systemic protections (sentencing and prosecutorial discretion, the burden of proof, accused's defences, the intention element) (see [53]); and less restrictive means (narrowing the provision to serious offences) (see [63] – [64]).
Remedially, the provision could be narrowed to serious offences (see [70]).
As for s 1(1) of the Trespass Act, its interpretation would require deciding its constitutionality, which was refused (see [73] – [74]).
Ordered: confirmation of the High Court's invalidation declined and its order set aside; leave to directly appeal granted; s 18(2)*(b)* declared inconsistent with s 16(1) of the Constitution and invalid; the declarator suspended for 24 months; and in that time the provision to read 'any serious offence'. A declarator that the Trespass Act did not apply to unlawful occupiers under PIE declined. (See [78].)
The dissenting judgment would also have declined to confirm the High Court's order of invalidity and to have interpreted the Trespass Act (see [79] and [157]). But, unlike the majority, it would not have found s 18(2)*(b)* unconstitutional (see [79]). It agreed that the section limited the right but found this justified (see [90] and [154]).
It considered that the right was of high importance ('at the heart of our constitutional democracy'), but not unqualified, nor superordinate to other rights (see [95], [118]); and equally, the limit's purpose — 'crime prevention' — was of high importance (see [119] and [123]). As to extent, the limit was 'relatively minor' ('a prohibition against exhorting others to commit a crime') (see [125]); and it was causally connected to its purpose (see [131]). Insofar as an alternative, less restrictive means, that proposed (reading in 'serious' before 'offence') was vague and possibly overconfining of Parliament (see [151] – [152]); where seen in context (the burden of proof, requirement of mens rea, prosecutorial and sentencing discretion, the provision's sentence limit) the section was less invasive of the right than proposed

MAHLANGU AND ANOTHER v MINISTER OF LABOUR AND OTHERS 2021 (2) SA 54 (CC)

Constitutional law — Human rights — Right not to be unfairly discriminated against — Indirect discrimination — Concept of intersectional discrimination discussed and applied — Constitution, s 9(3).

Constitutional law — Human rights — Right of access to social security — Infringed by COIDA's denial of social security assistance to domestic workers — Constitution, ss 27(1)*(c)* and 27(2); Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1xix*(d)*(v).

Constitutional law — Human rights — Right to dignity — Infringed by COIDA's denial of social security assistance to domestic workers — Constitution, s 10; Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Constitutional law — Legislation — Validity — Exclusion of domestic workers from COIDA's definition of 'employee' — Declared constitutionally invalid with retrospective effect from commencement of Interim Constitution, 1994 — Compensation for Occupational Injuries and Diseases Act 130 of 1993, of s 1xix*(d)*(v).

Labour law — Employee — Domestic worker — COIDA's denial of social security assistance to domestic workers — Discriminatory and infringing right to social security — Constitution, ss 27(1)*(c)* and 27(2); Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1xix*(d)*(v).

Labour law — Workmen's compensation — Compensation under COIDA — Denial of social security assistance to domestic workers — Discriminatory and infringing their right to social security — Constitution, ss 27(1)*(c)* and 27(2); Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1xix*(d)*(v).

Section 1xix*(d)*(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) excludes domestic workers employed in private households from the definition of 'employee', thereby denying them compensation in the event of injury, disablement or death in the workplace.
Here, the Constitutional Court confirmed High Court orders declaring s 1xix*(d)*(v) invalid to the extent of this exclusion, with retrospective effect to the commencement of the Interim Constitution. The court, however, differed on the constitutional rights infringed. The majority held that:

- COIDA must be read and understood within the constitutional framework of s 27 and its objective of achieving substantive equality, so that social security assistance in terms of COIDA was a subset of the right of access to social security under s 27(1)*(c)* of the Constitution. Furthermore, the obligation under s 27(2) to take reasonable legislative and other measures, within available resources, included the obligation to extend COIDA to domestic workers. The failure to do so in the face of the respondents' admitted available resources constituted a direct infringement of s 27(1)*(c)*, read with s 27(2) of the Constitution. (See [52], [59] and [66].)
- The differentiation between domestic workers and other categories of workers was arbitrary and inconsistent with the right to equal protection and benefit of the law under s 9(1); and — applying the concept of 'intersectionality' — it also amounted to indirect discrimination, under s 9(3). (See [73], [75], [84] – [85], [90], [93], [95], [102] and [105] – [107].)
- Domestic workers have endured the indignity of multiple intersecting forms of discrimination. The exclusion of domestic workers from benefits under COIDA had

an egregious discriminatory and deleterious effect on their inherent dignity (s 10). (See [108], [114] – [115].)
The first minority judgment (at [132] – [182]) found no infringement of ss 9(3), 10 or 27, and would have disposed of the matter on the basis of a s 9(1) infringement alone; the second (at [183] et seq) agreed with the main judgment, except iro the s 27 infringement (where it agreed with the first minority judgment).

GOVERNMENT EMPLOYEES MEDICAL SCHEME AND OTHERS v PUBLIC PROTECTOR AND OTHERS 2021 (2) SA 114 (SCA)

Public Protector — Powers — Investigation — Whether having jurisdiction to investigate medical scheme — Public Protector Act 23 of 1994, ss 6(4) and 6(5).

Public Protector — Powers — Subpoena — Preconditions for issue of — Public Protector Act 23 of 1994, ss 7(4)*(a)* and 7(5).

Second respondent, Mr Ngwato, became embroiled in a dispute with first appellant, a medical scheme, about his qualification as a member and his entitlement to a subsidy, and lodged a complaint about this with the Registrar of Medical Schemes (see [4] – [5]).
The scheme subsequently, and before any ruling of the Registrar, changed its policies, and Ngwato was recognised as a member (see [5]). The Registrar thereafter made its ruling, dismissing Ngwato's subsidy complaint (see [5]).
Dissatisfied, Ngwato appealed to the Appeal Committee of the Council for Medical Schemes, which also ruled against him on the subsidy (see [6]).
At this point Ngwato had at his disposal an appeal to the Appeal Board of the Council, but he chose not to exercise it, opting instead to lay a complaint with the Public Protector, the first respondent (see [7]).
After an initial investigation she closed the matter as unsubstantiated, but when Ngwato applied for review of this decision, she wrote to the scheme (see [8]). This was more than a year after the Appeal Committee's ruling (see [8]). In her message she requested the scheme to attend a meeting at her offices to clarify issues surrounding the complaint (see [8]). The scheme's response, which drew attention to its private nature, was that the Protector lacked jurisdiction to investigate the complaint under the Public Protector Act 23 of 1994 (see [9]).
Thereafter third appellant, the scheme's legal advisor and second appellant, its principal officer, informally met the Protector, but she refused to discuss the jurisdictional issue (see [10]).
About 10 months later the second and third appellants received a subpoena to attend before the Protector and to produce certain documents (see [10] – [11]). At this stage the scheme applied to the High Court for a declarator that the Protector lacked the jurisdiction to investigate the complaint, and for the setting aside of the steps taken in the purported investigation, including the subpoenas (see [12]).
At about the same time the scheme's attorneys wrote to the Protector, asking that the subpoena hearing be stayed pending determination of the application and that second and third appellants be excused attending (see [13]).
The request was declined, the Protector asserting that the application was an attempt to frustrate the investigation and in violation of the Constitution (see [13]).
The scheme's response was to request the Protector to reconsider, and to inform her

that it would not deliver the documents or allow second and third appellant to attend (see [14]).
The Protector declined the request, recording that the attendances would only be excused if the documents were delivered and that should the scheme persist with the application, she reserved the right to apply for an order of contempt of the Protector against second and third appellant (see [15]).
Second and third appellant then applied urgently to the High Court for an order that leave be granted them to intervene in the scheme's application, and that the subpoena issued them be suspended pending the outcome of the scheme's application (see [16]). The application succeeded (see [16]). However, when the scheme's application came before the High Court, together with, once again, the urgent application, the scheme's application was dismissed and the suspension of the subpoena was set aside (see [17]). Thereafter, with the High Court's leave, the scheme and second and third appellant appealed to the Supreme Court of Appeal (see [17]).
The issue on appeal in respect of the scheme's application, was whether ss 6(4)*(a)*(ii), 6(4)*(a)*(v) or 6(5)*(a)* or *(b)* gave the Protector the power to investigate Ngwato's complaint (see [20]).
As to s 6(4)*(a)*, it provides inter alia that 'the Public Protector shall be competent to investigate . . . any alleged . . . (ii) . . . improper conduct . . . by a person performing a public function; . . . [or] (v) act . . . by . . . a person performing a public function, which results in unlawful . . . prejudice to any other person.' (See [19].)
Held, on an analysis of a medical scheme's character, that it did not perform a public function, and accordingly that s 6(4)*(a)*(ii) or (v) did not give the Public Protector the investigative power she claimed (see [21] – [23] and [38]).
As for s 6(5), it provides inter alia that 'the Public Protector shall . . . be competent to investigate any alleged . . . *(a)* maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder . . . ; [and] *(b)* . . . improper conduct . . . by a person performing a function connected with his . . . employment by an institution . . . contemplated in paragraph *(a)* . . .'.
Held, as to s 6(5)*(a)*, that the scheme was not an institution in which the state was the majority or controlling shareholder, nor had it been shown to have conducted itself in the manner in s 6(5)*(b)* (see [26] and [35 – 36]). Accordingly, neither section gave the Protector her claimed investigative power (see [38]).
With regard to the urgent application to suspend the subpoena, the court *held* that the power to subpoena was contingent on a complaint suggesting conduct in ss 6(4) or (5) (see [47]); that properly interpreted, the Act only allowed issue of a subpoena once preliminary investigation into whether to fully investigate had been undertaken, and a decision had been made to fully investigate (see [47] – [48]); and that a subpoena could only be used where there was appreciable risk, judged objectively, that the evidence concerned could not be obtained in a less invasive way (see [44]).
Appeal upheld, and the order of the High Court set aside and replaced with an order upholding the scheme's application; declaring the Protector lacked the power to investigate; and confirming the urgent order

JOINT VENTURE AVENG (AFRICA) (PTY) LTD/STRABAG INTERNATIONAL GMBH v SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LTD 2021 (2) SA 137 (SCA)

Contract — Specific contracts — Demand guarantee or performance guarantee — Autonomy from underlying contract — Whether, in terms of underlying contract, beneficiary under performance guarantee prevented from demanding payment — Force majeure as factor where guarantee unconditional — Position in South Africa (autonomy of guarantee) compared to foreign jurisdictions — Semble: Provided autonomy protected, room existing to follow foreign practice.

In this case the court dealt with the tension inherent between autonomous performance guarantees and restrictions in the underlying contracts (for example, that the beneficiary cannot invoke the guarantee in certain circumstances). In South African law the autonomy principle, ie the independence of the performance guarantee from the underlying contract, has been consistently recognised by the courts (see [7], [9]).

The first respondent (Sanral) had employed the appellant (the JV) for a civil engineering project. The second respondent had issued a performance guarantee in favour of Sanral in respect of the construction contract (the underlying contract). The construction was beset by violent disruptions that led to the intermittent suspension of the works. The JV gave Sanral notice to terminate the underlying contract on the basis of force majeure represented by the civil unrest. Sanral denied the existence of force majeure and gave the JV an ultimatum to withdraw its notice of termination, failing which it would itself terminate.

The dispute over whether the disruptions constituted force majeure was referred to arbitration. The JV sought Sanral's assurance that, pending the arbitration proceedings, it would not call up the performance guarantee. Sanral however decided to do so, prompting the JV to institute proceedings to interdict Sanral from calling up the guarantee pending the arbitration proceedings. This was on the ground that Sanral had not met conditions in the underlying contract, thus limiting its right to call up the guarantee.

The JV argued that South African law should be developed to recognise an exception to the autonomy principle so that, where the underlying contract restricted or qualified a beneficiary's right to call up the guarantee, a contractor would be entitled to interdict a beneficiary from doing so until the conditions in the underlying agreement were met (the underlying contract exception).

The High Court held that the JV had not made out a prima facie case that the disruption of the works constituted force majeure and dismissed the application.

On appeal, the Supreme Court of Appeal — after noting recent developments in English and Australian law regarding recourse to performance guarantees — stated that there was room in South African law to allow some contractual qualification, but with the clear caveat that it would only apply if the contractor could show that the other party would breach a term of the underlying contract by having recourse to the performance guarantee. The terms of the underlying contract could not, however, readily be interpreted as conferring such a right. (See [7] – [17].)

Sanral relied on clause 4.2*(d)* of the underlying contract, which stated that Sanral could not make a claim under the performance guarantee except for an amount to which the employer was entitled under the contract in the event that it should become entitled to termination under subclause 15.2, irrespective of whether notice

of termination had been given. The SCA ruled that the guarantee was an unconditional one and the second respondent was obliged to pay on receipt of a written demand from Sanral, which could be made if in Sanral's opinion and sole discretion the JV had for any reason failed to complete the services in accordance with the conditions of the contract. The JV's failure to complete the project, be it due to force majeure or otherwise, fell into this category. In other words, the reason for such failure was irrelevant and Sanral was entitled to payment before any underlying dispute between it and the JV was determined.

ABSA BANK LTD v MARE AND OTHERS 2021 (2) SA 151 (GP)

Practice — Service — Delivery of process to chosen domicilium citandi — Summons affixed to grass — Uniform Rules of Court, rule 4(1)*(a)*(iv).

In this matter applicant bank lent first respondent a sum and secured it with a mortgage bond over a property first respondent owned (see [4]). First respondent was to repay the loan sum in instalments (see [4]).
Later, however, she fell in arrears with her payments, and the bank served a s 129 notice on her at the property, which was her chosen domicilium citandi (see the National Credit Act 34 of 2005 and [5]). The sheriff effected this service by attaching this notice, so his return said, to the property's gate (see [5]). When there was no response, the bank served summons. In this instance the service was effected by fixing the summons to the property's grass (see [6]). (The property itself was a smallholding with a residence on it in which first respondent lived (see [17] and [27]).)
No notice of intention to defend was forthcoming, and the bank obtained default judgment, first respondent being ordered to pay the loan sum, interest and costs, and the property being declared specially executable (see [7]).
Later it was attached, sold in execution, and registered in the name of the purchaser, second respondent, and the proceeds were deposited in an account of the bank, and not credited to first respondent's loan debt (see [7] – [8]).
In time the purchaser attended at the property, and this, said first respondent, was the first moment that she came to be aware of all that had occurred (see [9]). She thereupon proceeded for rescission under rule 42, with the court rescinding the default judgment, voiding the attachment and sale, and directing the registrar of deeds, fourth respondent, to re-register the property in her name (see [2] and [10]).
Appellant then sought leave to appeal, which was refused in respect of the rescission, but granted in respect of the voiding of the attachment, sale and transfer and the direction to re-register the property in first respondent's name (see [3]).
On appeal the full bench considered authority on the situation of a judgment that was void ab initio, subsequent sale in execution, and transfer of the property (see [13]). It allowed for vindication of the property, on the basis that the sheriff would not have the power in such an instance to sell and transfer (see [14]).
This raised when a default judgment would be void ab initio, which would occur in the scenario where there was no power to grant it (see [15]). Such could be where service was not in accordance with the rules (see [15]).
Here, on first respondent's evidence, which was not refuted, the property had no gate, so there could not, plainly, have been service of the s 129 notice by attachment thereto (see [20] – [21]).

The further issue was whether leaving the summons on the grass was 'service' contemplated by rule 4(1)*(a)*(iv) (see [21]). It allows for service where 'the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen' (see [24]). A further requisite though for proper 'delivery' was that the mode of delivery should be one that in the ordinary course would bring the process to the attention of its intended recipient (see [26]). This had not been the case in leaving the summons on the grass and accordingly there had not been service under rule 4(1)*(a)*(iv) (see [27]). (Proper delivery would have been achieved by handing the summons to first respondent personally, by giving it to her employee, slipping it under or fixing it to the front door, or depositing it in the post-box (see [27]).)
Absent proper service, the judgment was void ab initio, and the subsequent sale and transfer of the property were invalid (see [28]). It was thus open to first respondent to vindicate it (see [28]).
As for the order of reinstatement of ownership, this should stand, as it had not been opposed by second respondent and it left it open to him to proceed for his losses (see [30]).
Appeal dismissed

ELLAURIE v MADRASAH TALEEMUDDEEN ISLAMIC INSTITUTE AND ANOTHER 2021 (2) SA 163 (KZD)

Constitutional law — Human rights — Right to freedom of religion — Constitution not guaranteeing practice or manifestations of religion — Islamic Madrasah directed to tone down call to prayer so that it was not audible in neighbouring home.

The applicant, Mr Ellaurie, lived opposite the first respondent, a school for Islamic religious studies (Madrasah) that five times daily issued calls to prayer which the Madrasah agreed were meant to be heard throughout the surrounding neighbourhood. Ellaurie, a Hindu, believed Islam to be a false religion that discriminated against non-believers, and sought an interdict directing the Madrasah to tone down the calls on the grounds that they invaded his private space and deprived him of the enjoyment of his property. He also wanted the Madrasah banned from the area.
Held
Ellaurie's attempt to portray Islam as an invalid religion was misguided, the court being in no position to decide on the issue (see [11] – [13]).
While s 15 of the Constitution guaranteed freedom of religion, it did not guarantee the practice or manifestations of religion (see [16]). The call to prayer, a manifestation of Islam, was not Islam itself (see [16]).
Others were obliged to respect Ellaurie's right to the use and enjoyment of his property (see [17]). Since the Madrasah did not claim that it was essential, in order to practice its religion, that the call to prayer be made in such a way that it interfered with Ellaurie's use and enjoyment of his private space, he only had to prove interference with this right (see [19]). The proximity of the call and its purpose to be heard throughout the neighbourhood created probabilities that favoured Ellaurie's version that it interfered with his private space (see [17] and [20]). No alternative remedy being available, the Madrasah would be ordered to ensure that its calls were

not audible inside Ellaurie's home (see [21]). Such relief would not negatively affect how the Madrasah practiced its religion

OLIVE MARKETING CC v EDEN CRESCENT SHARE BLOCK LTD AND OTHERS 2021 (2) SA 170 (KZD)

Servitude — Praedial servitude — Creation and registration — Nature and terms — Overview of applicable law.

Servitude — Praedial servitude — Registration of — Where registration of notarial deed of servitude not occurring simultaneously with registration of transfer of servient tenement — Whether rendering servitude invalid.

Servitude — Praedial servitude — General Servitude — Registration of — Lack of servitude diagram — Whether rendering servitude invalid.

The first defendant, Eden Crescent Shareblock Ltd, was the owner of Erf 11496 in Durban (the subject property). This property adjoined Erf 12424, owned by the plaintiff. The first defendant had purchased the subject property for purposes of a retirement scheme, and acquired the leasehold rights therein from the eThekwini Municipality in terms of an agreement of sale concluded on 28 July 1994. That agreement provided that a parking servitude over the subject property would be created in favour of the adjoining property as dominant tenement, registered by notarial deed of servitude simultaneously with registration of transfer of the property in the name of the purchaser, whereby parking for at least 250 motor vehicles would be secured over the subject property in favour of the dominant tenement. It further provided that the purchaser was entitled to charge a tariff for the use of the parking, which tariff could not exceed the average amount charged for a similar period of time for parking by parking garages in the vicinity. The property transfer was registered on 16 April 1996. Later, on 18 February 1997, the parking servitude was registered under notarial deed of servitude, in terms similar to those in the sale agreement, and the deeds of transfer of the subject property and dominant tenement duly endorsed. What gave rise to the present proceedings was the first defendant's failure to comply with attempts by the plaintiff to enforce the servitude and access parking on the first defendant's property. The plaintiff in March 2010 launched the present application in the Durban High Court, seeking an order declaring the parking servitude over the first defendant's property valid and enforceable; directing the first defendant to make available parking for at least 250 motor vehicles on its property for the exclusive use of the plaintiff's property; and to pay the plaintiff's damages calculated from March 2010 in the sum of R6 680 000, together with interest.
The first defendant denied that the notarial deed of servitude constituted or established a servitude and/or that the deed was validly registered. It also denied that the deed of servitude conveyed any rights with respect to the subject property, on , inter alia, the following grounds (see [10]):

(a) No servitude diagram demarcating the survey area was attached to the deed of servitude. This was in breach of reg 73(2) made in terms of s 10 of the Deeds Registries Act 47 of 1937 (the Deeds Registries Act).

(b) The terms in the deed of servitude were vague and inadequate to describe the rights and obligations created under the deed.

(d) The deed of servitude was registered after the transfer of the first defendant's property, and therefore amounted to an alienation of immovable property as

contemplated by s 8(1)*(c)* of the Share Blocks Control Act 59 of 1980 (the Share Blocks Control Act), which required a special resolution of the shareholders of the first defendant, which did not take place. Further, the grant of the servitude constituted an alienation of land as contemplated by the provisions of s 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988 (HDSRP Act), which required the consent of at least 75% of the holders of rights of occupation in the housing development scheme, which, again, was not obtained.

The court first provided a detailed summary of the law relating to the creation, nature, terms and registration of praedial servitudes (see [68] – [79]). Having done so, it considered the legal consequence of the parties' agreement to create a servitude, vis-à-vis the creation of the servitude, especially given the fact there was not simultaneous registration of the servitude with the registration of transfer of the subject property. The court held as follows:

- It was the clear intention of the eThekwini municipality and the first defendant to create a praedial servitude, and the agreement of sale accurately reflected this intention (see [81]). Further, by its signature to the sale agreement, the first defendant had bound itself to grant and register the servitude as owner of the servient property (see [85]). And the plaintiff had an entitlement to compel the first defendant to cooperate in procuring registration of the servitude, because this was a requirement for the creation of the real right that the parties had bargained for (see [87]).
- Accordingly, although the servitude was not registered simultaneously with the transfer, the first defendant could not resile from its obligation to register the servitude when ownership of the property passed to it, as it was the clear intention of the parties to the sale to create a praedial servitude in perpetuity, enforceable against the first defendant and all its successors-in-title (see [87]).
- Further, there was not any shortcoming in the conduct of any of the parties involved in the transactions by permitting the registration of the transfer of the first defendant's property to go ahead without the simultaneous registration of the servitude. There was no prohibition to the registration of a notarial deed of servitude after the registration of transfer of the property in the Deeds Registries Act, provided, as here, that the necessary consents of all interested parties were obtained. (See [88].)

The court next considered the special resolution defence. This it rejected as having no merit. In this regard it held as follows:

- The first defendant could not rely on its status as a share block company and compliance required with the provisions of the Share Blocks Control Act *to avoid its contractual obligation to give effect* to the unregistered servitude and to cooperate in the registration of the servitude that was agreed in the sale agreement. It could have been compelled to comply with its obligation in law to convert the personal right into a real right by the registration of the servitude (had there been no special power of attorney executed on behalf of the servient tenement). (See [94].)
- Further, the special resolution requirement under s 4B of the HDSRP Act was not applicable because the registration of the servitude did not impact on a right of occupation under the Act. It prohibited alienation of land intended to be used for residential purposes and not parking areas. It was evident that the parking bays were not included in 'the right of a purchaser of a housing interest' because the parking bays were let or sold separately to residents on the first defendant's property. (See [95].)

The court dismissed the defence pertaining to the lack of a diagram and vagueness. It held that the servitude in question was expressed in general terms and, accordingly, in terms of the law, a diagram was not a requirement for its registration (see [99] and [102]). The registrar of deeds, the court held, could not be said to have erred in registering such servitude (see [110]). The court further rejected the argument that the terms in the notarial deed of servitude were, due to vagueness, inadequate to describe the rights and obligations under the deed (see [110]). The court stressed that the approach that was taken, of leaving for later determination the question of exact location, ensured a level of flexibility, which made practical sense as the first defendant and the plaintiff would be in a better position once the retirement scheme was developed to determine what would best suit the residents of the planned retirement home and ensure the plaintiff's access to its parking civiliter modo (see [102]).
The court held that the deed of servitude K173/97 was valid (see [126]), and granted a declarator to such effect (see [159]), and confirmed that the servitude entrenched the right of the dominant tenement to access 250 parking bays on the first defendant's property (see [126]). The court further ordered the first defendant to make such parking available on the subject property for the exclusive use of patrons of the adjoining property (see [159]).
The court went on to address the question of damages. In this regard, the court confirmed that an owner of the dominant tenement may claim damages from the party that had interfered with its rights under the servitude if it could satisfy the normal requirements for an action in delict (see [133]). The court found that, in the present case, the first defendant had, with intent, deliberately refused the plaintiff access to parking on its property (see [139]), which conduct caused the plaintiff to suffer economic loss through diminished rentals because of the withheld access to parking (see [142]). The conduct in question was also wrongful: the registered servitude, a limited right in property giving the plaintiff a right to parking on the first defendant's property, was deserving of protection; the failure to do so would undermine the nature of property rights as a whole, because registration of title and rights to property is the cornerstone which underpinned the constitutionally entrenched right to property in s 25 of the Constitution (see [138]). The court accordingly concluded that first defendant was liable in delict for the loss of diminished rental claimed by the plaintiff (see [145]). (The court however held that any damages sustained by the plaintiff more than three years prior to 17 April 2013 had prescribed.

RESIDENTS, INDUSTRY HOUSE v MINISTER OF POLICE AND OTHERS 2021 (2) SA 220 (GJ)

Constitutional law — Human rights — Right to privacy — Statutory search and seizure — Without warrant — Area search in police cordoning-off operation under s 13(7)*(c)* of South African Police Services Act 68 of 1995 — Police powers conferred by provision overbroad and violating right to privacy under s 14 of Constitution — Declaration of invalidity suspended to give Parliament time to amend s 13(7)*(c)*.

Constitutional law — Human rights — Right to privacy — Statutory search and seizure — Without warrant — Authorisation granted for ulterior motive — Invalid.

Criminal procedure — Search and seizure — Search — Without warrant — Constitutionality — Area searches in police cordoning-off operation under s 13(7)*(c)* of South African Police Services Act 68 of 1995 — Police powers conferred by provision

overbroad and violating right to privacy under s 14 of Constitution — Declaration of invalidity suspended to give Parliament time to amend s 13(7)*(c)*.

In issue was the constitutionality of warrantless searches conducted by the police under s 13(7)*(c)* of the South African Police Services Act 68 of 1995 (the impugned provision). The police were authorised to cordon off an area and search persons inside it in the interests of public safety or public order. As required by s 13(7), the authorisations were, following applications by police station commanders, signed by provincial police commissioners.
In May 2018 the police, acting in terms of the autorisations, cordoned off a high-crime area of inner Johannesburg and conducted a warrantless search of the homes and persons of 3000 occupants of 11 buildings. During the course of the operation several illegal immigrants were arrested. The applicants, residents of one of the buildings, invoked the alleged unconstitutionality of the impugned provision to have it quashed, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the revocation of the commissioners' decisions to authorise the operation.
The applicants alleged that the impugned provision violated the right to privacy in s 14 of the Constitution and that s 22 of the Criminal Procedure Act (CPA) in any event adequately catered for warrantless searches. The police argued that the impugned provision did not limit the right to privacy more than what was reasonable and justifiable as intended in s 36 of the Constitution.
Held
The scope of the relief sought by the applicants, namely an order declaring the whole of s 13(7) to be unconstitutional because it infringed the s 14 of the Constitution, was impermissibly broad: neither ss 13(7)*(a)* nor *(b)* infringed right to privacy. The section as a whole was an important legislative mechanism that allowed the police to effectively discharge their constitutional mandate. (See [21] – [22].) But the power conferred by the impugned provision, s 13(7)*(c)*, to search someone's person, home and property, and then to seize their possessions, was a violation of the right to privacy. What was for the court to assess was whether the limitation was reasonable and justifiable under s 36 of the Constitution. (See [24] – [25].)
Section 13(7) could have achieved its ends through other means less damaging to the right to privacy. There were less restrictive measures like those provided by s 22 of the CPA to achieve the purpose the impugned provision. The extent of the invasion of the innermost component of the right to privacy authorised by the impugned provision was substantially disproportionate to its public purpose. It was overbroad insofar as it also permitted warrantless, extensive, and intrusive searches of private homes and the persons inside them. It was furthermore deficient in failing to guide the police how searches were to be conducted. It clearly did not pass constitutional muster. The declaration of invalidity would be suspended for 24 months to give the legislature time to cure the defect. (See [45] – [50].)
As to the PAJA review, the authorisations in question, which gave the police blanket permission to carry out warrantless searches in the areas specified in the application, contravened s 13(7) since its ambit did not extend to authorising the police to carry out warrantless searches and seizures. Therefore, the decisions would be set aside in terms of s 6(2)*(f)*(i) of PAJA. (See [63] and [66].)
The commissioners' decisions to issue the authorisations were, moreover, taken for an ulterior purpose or motive since the raids were intended mostly to achieve objectives other than 'to restore public order or ensure the safety of the public in a particular area'. Rather, the objectives were to arrest illegal immigrants and to enable

the City to deal with the problem of inner-city hijacked buildings. (See [68] – [69] and [72].)
Since 'public order' had a broader 'public collective' connotation than simply the maintenance of law and order, each of the applications had to demonstrate that the intended operations were necessary to restore the normality and security of the local community, but no such motivation appeared in any of the applications considered by the decision-makers. They had not applied their minds to the material before them before issuing the authorisations and had simply rubberstamped them. They would be reviewed and set aside.
The undisputed facts showed abuse and infringement of the applicants' rights to privacy and dignity. They were entitled to a declaratory order that the searches, seizures, fingerprinting and arrests conducted at their homes unjustifiably infringed their right to dignity and privacy as protected by ss 10 and 14 of the Constitution.

SOUTH AFRICAN AIRWAYS SOC LTD (IN BUSINESS RESCUE) AND OTHERS v NATIONAL UNION OF METALWORKERS AND OTHERS 2021 (2) SA 260 (LAC)

Labour law — Dismissal — Dismissal for operational requirements — During business rescue — Whether business rescue practitioner may commence retrenchment process under LRA before conclusion of business rescue process — Preservation of jobs among aims of process — Hence no retrenchments before conclusion of process/production of rescue plan — Labour Relations Act 66 of 1995, s 189; Companies Act 71 of 2008, s 136(1)*(b)*.

Company — Business rescue — Business rescue practitioner — Powers — Dismissal — For operational requirements — Whether practitioner may commence retrenchment process under LRA before conclusion of business rescue process — Preservation of jobs among aims of process — Hence no retrenchments before conclusion of process/production of rescue plan — Labour Relations Act 66 of 1995, s 189; Companies Act 71 of 2008, s 136(1)*(b)*.

Business rescue practitioners may not retrench employees in the absence of a business rescue plan.
The appellant, SAA, found itself in dire financial straits and went into business rescue. Before the business rescue practitioners (the second and third appellants) finalised the business rescue plan, they issued notice under s 189(3) of the Labour Relations Act 66 of 1995 (LRA) informing employees that they could be dismissed for operational requirements (retrenched) and that they should enter into consultations with SAA on, inter alia, ways to avoid retrenchment. Under the LRA s 189 retrenchments are prohibited during the 60-day consultation process.
The practitioners also offered voluntary separation packages that were accepted by some employees. The unions argued that the moratorium on retrenchments during business recue proceedings also prevented practitioners from seeking to secure voluntary retrenchments.
The first respondent, Numsa, together with other unions representing SAA's employees (the unions), refused to take part in the consultation process and applied to the Labour Court for a ruling that the LRA s 189 notices were premature and unlawful because they were issued before the production of a business rescue plan. The unions asked that the consultation process be halted pending the execution of the plan. The Labour Court ruled in favour of the unions. The judgment hinged on the

interpretation of s 136(1) of the Companies Act 71 of 2008 (CA), which states that employees retained their jobs during business rescue and that any retrenchment 'contemplated in the . . . business rescue plan is subject to [LRA] section 189 and 189A'. The Labour Court ruled that CA s 136 offered complete protection against dismissal during business rescue proceedings. It found, however, that nothing prevented practitioners from offering a voluntary severance package to avoid retrenchment.
SAA appealed to the Labour Appeal Court and the unions counter-appealed, attacking the Labour Court's ruling on voluntary severance.
Held
Companies Act s 136 had to be interpreted in the light of the business rescue procedure's aim to rescue the *whole* company, not just its business or parts of it, and thus to retain jobs (see [29]). The words 'any retrenchment of any such employees contemplated in the . . . business rescue plan' in CA s 136(1)*(b)* signify a plan that would conceptualise the commercial rationale for retrenchments. The *raison d'être* for the enactment of CA s 136(1)*(b)* was to safeguard employees from being subjected to retrenchment without a business rescue plan (see [31]). And CA s 150 made it plain that the rescue plan, which under ss (2) had to explain its effect on the number of employees, had to precede any retrenchment. This put paid to any suggestion that the retrenchment process could begin without one (see [32]). Therefore, the Labour Court's conclusion, that the issuing of the LRA s 189 notice by the practitioners, absent a business rescue plan, was premature and unfair, and had to be withdrawn, was correct (see [40]). Appeal dismissed.
As to the counter-appeal, the Labour Court did not make any appealable order regarding the offer of voluntary retrenchment packages. And in any event, there was no reason why the practitioners could not unilaterally offer voluntary severance packages to the employees. Therefore, the cross-appeal had no merit and would be dismissed. (See [43].)

SCOTT AND OTHERS v SCOTT AND ANOTHER 2021 (2) SA 274 (KZD)

Curator — Curator ad litem — Application to appoint — Standing — Distinction between rules 57(2)*(e)* and 57(3)*(b)* — Burden of proof — Degree of unsoundness of mind — Peremptory nature of rules 57(1) – (3) — Waiver of requirement of doctors' reports — Impact of Bill of Rights — Potential for rule's abuse — Compulsion to submit to medical examination — Uniform Rules of Court, rule 57.

Applicants were the son, three daughters and brother of first respondent, and second respondent was first respondent's wife. Applicants sought appointment of a *curator ad litem* under Uniform Rule 57, an order compelling first respondent to undergo medical examinations for purposes of the curator ad litem's report, and an interdict on second respondent bringing first respondent home from hospital to a place under her control (see [5]).
The court, in dismissing the application (see [66] – [67]), considered:

- The standing requirement of rule 57(2)*(a)* (see [30], [49]).
- The requirement of rule 57(2)*(c)* (facts showing unsoundness of mind), and its separateness from the requirement of rule 57(3)*(b)* (affidavits by doctors on mental condition) (see [32]).
- The burden of proof in an application for a *curator ad litem* (see [37] – [38], [60]).
- The degree of unsoundness of mind required (see [62]).

- The peremptory nature of rule 57(1), (2) and (3)'s requisites (see [48], [61]).
- Whether the requirement of doctors' reports (rule 57(3)*(b)*) could be waived (rule 57(4)) where the patient instructed his doctors not to disclose his information to the applicants for a curator ad litem (see [39]).
- The impact of the Bill of Rights on the rule's interpretation (see [63]).
- The potential for the rule's abuse (see [64]).
- When an individual could be compelled, for purposes of a *curator ad litem* reporting to the court, to submit to a medical examination (see [5], [33] – [34], [65]).

TONELERIA NACIONAL RSA (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2021 (2) SA 297 (WCC)

Revenue — Customs and excise — Classification articles for customs duty — Proper approach to interpretation where conflict between tariff heading and explanatory note — Oak staves which mimic effect of oak barrelling in wine fermentation — Whether 'other coopers' products' in tariff heading 4416.00 — Whether words 'other coopers' products' confined to products in production at any one point in time — Customs and Excise Act 91 of 1964, sch 1.

Applicant company had imported planks of oak, termed in commercial use 'staves', which had been manufactured by a foreign company, and which were designed to be suspended in tanks of wine during fermentation, so mimicking oak barrelling (see [1] – [2]).
The respondent, the Commissioner of the SA Revenue Service, had initially classified the planks under tariff heading 4421.90.90 ('other articles of wood'), carrying a customs duty of 20% of dutiable value, but later, on objection, had changed that to heading 4409.29.90 ('Wood . . . continuously shaped . . . along any of its edges, ends or faces . . . '), bearing duty at 10%. (See [3], [5] – [6] and sch 1 to the Customs and Excise Act 91 of 1964.)
This classification was here appealed agains under s 47(9)*(e)* of the Act, with applicant contending heading 4416.00 ('Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves'), which carried no duty, was applicable (see [1] and [3]).
The first issue was whether the staves fell within the words 'other coopers' products', with the court concluding they did (see [39]). In coming to this conclusion it considered that the staves were made by coopers using the methods of cooperage (see [14], [16], [20] – [21]), for use in the industry with which cooperage was closely associated (see [20] – [21]), and for a purpose fulfilled by the barrels coopers supplied (see [15], [20] – [21]); that nothing restricted the words 'other coopers' products' to products in production at any one point in time (see [22], [28]); and that the World Trade Organisation's explanatory notes allowed this reading (see [6] – [7], [9], [29] and [31]).
The court also considered, obiter, that where there was a conflict between such explanatory notes and a tariff heading, the latter should prevail (see [32] and [34] – [35]).
The court upheld the appeal and declared that tariff heading 4416.00 applied, and that the determination of heading 4409.29.90 should be set aside, and replaced with 4416.00 (see [52]).

SACR MARCH 2021

S v DOOREWAARD AND ANOTHER 2021 (1) SACR 235 (SCA)

Prosecution — Prosecutor — Decision to prosecute — Not function of prosecutor to place contradictory evidence before court, leaving court to make of it what it will — Prosecutor required to carefully assess evidence in police docket before deciding to charge accused.
Trial — Discharge of accused at close of state case — Failure to do so where no credible evidence against accused, conflicting with right to be presumed innocent and remain silent.

The two appellants were convicted in the High Court of murder, kidnapping, intimidation, theft, and the pointing of a firearm. The convictions arose from an incident when the appellants had seen two boys stealing sunflower heads from their employer's farm. They gave chase and caught one of the alleged thieves, a 15-year-old boy (the deceased). The state's case rested on the evidence of a single witness who said that he had seen the appellants throw the boy off the back of the moving bakkie on various occasions, changing the number of times this happened to between one and three occasions. The witness claimed to have also been assaulted by the appellants. The first policeman the witness reported to refused to take a statement from him on the basis that he was 'crazy'.
On appeal, the court per Ledwaba AJA and Ponnan JA, held that the state witness's evidence was too unreliable to be relied upon and that the convictions could not stand (per Ledwaba AJA para 43 and per Ponnan JA para 133). Molemela JA would have altered the conviction on the count of murder to one of culpable homicide. (See [74].)
The death of the boy provoked an outcry in the local community who demanded action by the South African Police Service (the SAPS) and a violent protest erupted which caused the appointment by the provincial commissioner of the SAPS of a senior officer to investigate the incident. However, the matter did not seem to be properly investigated and the arrest and charging of the appellants may have been inappropriate. In this regard Ponnan JA remarked that prosecutors had at their disposal the full machinery of the state and it was for a prosecutor to establish the guilt of the accused beyond reasonable doubt. To that end the prosecutor had to place before a court credible evidence in support of the alleged crime and it was for that prosecutor to evaluate the conduct of the police and the strength of the state's case that would be actively presented to a court. It was not the function of a prosecutor 'disinterestedly to place a hodgepodge of contradictory evidence before court', and then to leave the court to make of it what it will. Had there been a sufficiently careful assessment of the evidence in the docket, the public interest and the law, perhaps some doubt would have been entertained as to whether there was reasonable and probable cause to believe that the appellants were guilty of an offence, and that conviction was a reasonable prospect. The prosecution's case consisted of a single witness's say-so and nothing more. No effort appeared to have been made by the investigating officers to satisfy themselves as to the truthfulness and reliability of the witness's account of events, and even the most perfunctory interrogation of his version ought to have satisfied them of his mendacity. Not only

was there no objective corroboration, but his version, such as it was, was riddled with inconsistencies and contradictions. (See [81] – [85].)
Furthermore, when the prosecution closed its case, both appellants applied to be discharged in terms of s 174 of the CPA and, save for two of the counts, the applications were refused. Why precisely the applications for a discharge in respect of the remaining charges were filed was not apparent, but the state witness could not safely be relied upon. Thus, at the close of the state case, there was simply no reliable evidence upon which to found a conviction, and to place the accused on his defence in those circumstances was to conflict with the presumption of innocence or to infringe the accused's right of silence and his freedom to refrain from testifying.

OOSTHUIZEN v MAGISTRATE, HERMANUS AND OTHERS 2021 (1) SACR 278 (WCC)

Search and seizure — Search warrant — Validity of — No expiry date provided for in warrant — Warrant of force until executed — Specification of expiry date salutary practice, but not commanded by Criminal Procedure Act 51 of 1977.
Search and seizure — Search warrant — Validity of — Particularity regarding alleged offence — Wrong provision identified or confusion created by description of suspected offence, rendering warrant invalid.
Search and seizure — Search warrant — Validity of — Category of articles liable to be seized strikingly broad and permission granted for seizure of 'all electronic equipment' failing to sufficiently distinguish between devices themselves and material on devices — Scope of privacy risks posed by search and seizure of electronic communication devices significant — Warrant invalid.

The applicant applied for the setting-aside of a search warrant issued by a magistrate in terms of s 21, read with s 20 of the Criminal Procedure Act 51 of 1977 (the CPA), authorising one Capt Rossouw of the South African Police Service to enter and search the applicant's premises and to seize articles, including cannabis and cannabis oil. In seeking the order, the applicant contended that the objective jurisdictional facts for the issue of the warrant were not present; that the warrant was vague, overbroad and not reasonably intelligible; and that the magistrate had failed to apply his mind properly to the issue of the warrant. It was argued that as the warrant contained no date next to the words 'warrant valid until' on which the warrant would 'expire' and that this rendered the warrant overbroad in its duration. It was further argued that the warrant made incorrect reference to provisions of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act). The applicant also took exception to the articles which Capt Rossouw was entitled to seize, which included a category of articles described as '(a)ll electronic equipment which include cell phones, desktop computers, laptops and iPads'.
Held, that s 21(3) of the CPA provided that a search warrant was of force until it was executed. The specification of an expiry date for a warrant would plainly be a salutary practice but it was not one commanded by the CPA. Since in the present case the warrant was executed on the same day on which it was issued, it was not possible to say that the magistrate would not have cancelled the warrant if it was not executed within a reasonable period of time and that attack on the warrant accordingly had to fail. (See [45] – [47].)
Held, further, that the provisions of the Drugs Act which proscribed possession of and dealing in cannabis were ss 4*(b)* and 5*(b)* respectively, whereas the warrant

identified as the suspected offences contravention of ss 4*(a)* and 4*(b)* which proscribed possession of and dealing in entirely different substances. Part III of the warrant did make reference to 'Cannabis and Cannabis oil', but included in parentheses after these words, a reference to 'Dronabinol', a substance which was listed as a dangerous dependence-producing substance in part II of sch 2 to the Drugs Act and was expressly excluded from the reference to cannabis in part III to sch 2. Captain Rossouw's affidavit also erroneously identified s 5*(a)* of the Drugs Act as the provision which prohibited the cultivation of cannabis and the manufacture of cannabis oil and his affidavit made no reference to dronabinol. (See [50] and [52].)
Held, further, that the requisite particularity was absent not only when the relevant provision governing a statutory offence was not identified, but also when the wrong provision was identified or when confusion was created by the description of the suspected offence. The errors in the warrant not only rendered it invalid on the grounds of vagueness and a lack of reasonable intelligibility, but also evinced evidence of the magistrate's failure to apply his mind properly in issuing the warrant. (See [57] and [59].)
Held, further, that the category of articles liable to be seized was strikingly broad. While the description 'all electronic equipment' was arguably narrowed by the reference to specific types of electronic devices, the warrant did not distinguish between the devices themselves and any material or information stored on them, let alone identify the material to be seized as material which might have a bearing on the suspected offence. The scope of the privacy risks posed by the search and seizure of electronic communication devices was significant. (See [69] – [70] and [72].) The warrant accordingly fell to be set aside.

S v NDLOVU AND OTHERS 2021 (1) SACR 299 (ECG)

Evidence — Admissibility — Constitutional exclusion, under s 35(5) of Constitution Act 108 of 1996, of evidence obtained in a manner that violates any right in Bill of Rights — Evidence not conscripted and appellants not compelled to participate in discovery of articles in chalet — Breach of the appellants' right to privacy not undermining reliability of evidence — Police officials having acted in good faith — Evidence relevant and essential to substantiate charges — Evidence admissible.

Conservation — Rhino horn — Unlawful hunting of — Sentence — Various charges arising from 10 incidents of rhino poaching occurring over period of three years at various farms and nature reserves — Effective sentence of 25 years' imprisonment not disproportionate to seriousness of offences.

The appellants were charged in the High Court with various charges arising from 10 incidents of rhino poaching that occurred over a period of three years at various farms and nature reserves in the Eastern Cape. Each of the 10 incidents gave rise to five counts. The court convicted the three appellants on most of the counts and they were sentenced to lengthy periods of imprisonment, resulting in an effective sentence of 25 years' imprisonment. They were granted leave to appeal on petition on two grounds, namely whether the trial court acting in terms of s 35(5) of the Constitution correctly allowed physical evidence found as a result of the unlawful search of premises to become part of the evidential material placed before it by the state; and whether the cumulative effect of the sentences rendered the sentences shockingly disproportionate. The evidence that had been discovered during the

course of a police operation was found in a chalet at a resort and included a freshly removed rhino horn; a tranquilising dart gun and darts; a yellow bow saw; rounds of .22 blank ammunition; knives; a cordless drill; and six cellphones. It was acknowledged that the search was not authorised by the provisions of the Criminal Procedure Act 51 of 1977, but the trial court found that the admission of the evidence would not adversely affect the fairness of the trial or be detrimental to the administration of justice. On appeal,
Held, that, the evidence in the case was not conscripted and the appellants were not in any way compelled to participate in the discovery of the articles in the chalet. Furthermore, the breach of the appellants' 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 appellants' right to privacy. The admission thereof accordingly did not render the trial unfair. (See [38].)
Held, further, on the facts, that the trial court correctly found that the police officials had acted in good faith and that the violation of the appellants' rights was not planned or part of a deliberate strategy by the police to act with reckless disregard of those rights in the investigation of the matter. (See [49].)
Held, further, that the evidence found in the chalet was important to the successful prosecution of the appellants. It was highly reliable, relevant and essential to substantiate the charges, proving the direct involvement of the appellants in the incident of rhino poaching in the area, as well as indirectly in incidents elsewhere in the province. It went without saying that the crimes were indisputably serious and impacted heavily on community interests, and the trial court correctly found that the evidence ought to be admitted as its exclusion would cause harm to the administration of justice. (See [54] – [55].)
Held, as regards the cumulative effect of the sentence, that 25 years was a long period of imprisonment, but it could not be said that the trial court had exercised its discretion improperly or unreasonably. The personal circumstances of the appellants and the direct consequences of the sentences imposed could not outweigh the seriousness of the offences, and the impact of their commission on those interests which were sought to be protected by the law. The appeal against the sentence accordingly also had to be dismissed.

S v ERNEST 2021 (1) SACR 324 (KZP)

Evidence — Witness — Calling by court — Section 186 of Criminal Procedure Act 51 of 1977 — When appropriate — Conflict between evidence of witness and contents of medico-legal report — Court ought to have called pathologist.

The appellant was convicted in a regional magistrates' court of murder. The appellant's defence was one of private defence in that he alleged that the deceased, who had previously threatened him, approached him together with two other men, holding a firearm in his hand (pointed at the ground) and threatening to kill him. At the time the appellant had his back to his vehicle. He cocked his firearm and fired two warning shots into the tar road which caused the deceased's companions to flee, but the deceased kept on moving towards him. Fearing for his life, he fired at the deceased and killed him. It was conceded on appeal that the magistrate had made several misdirections on the evidence and that the evidence of the eyewitness (the deceased's girlfriend) relied upon by the state was contradicted by the pathologist's

report — it described the bullet entry wound as being 'distant entry wounds' whereas the witness said that the appellant had shot the deceased from one foot away.
Held, that, faced with a potential contradiction between the version of the appellant and the findings in the medico-legal report, which was crucial, the regional magistrate ought to have exercised her discretion in terms of s 186 of the Criminal Procedure Act 51 of 1977 to call the pathologist to clarify the wounds and injuries suffered. The magistrate had erred in interpreting the pathologist's report and using it as a yardstick to determine that the appellant exceeded the boundaries of self-defence. (See [24].)
Held, further, that it was evident from the record that the magistrate, in reaching that conclusion, had disregarded the evidence tendered by the appellant. Some action on his part was required to protect his own life and in a split second he decided to shoot two warning shots, which did not deter the deceased. Instead, he kept on advancing towards him with a firearm. The state had failed to prove unlawfulness and the appellant's conduct in defending himself against the deceased, constituted self-defence. The appeal had to be upheld.

S v NKHAHLE 2021 (1) SACR 336 (FB)

Appeal — Record — Lost, destroyed or incomplete — Mechanical recording of proceedings defective — Reconstruction made impossible by lack of notes of any of participating parties — Failure to keep such notes deprecated.
Appeal — Record — Lost, destroyed or incomplete — Mechanical recording of proceedings defective — Steps to be taken to ensure that records properly recorded and stored and that contemporaneous notes by parties be kept for period of five years.

The appellant applied for condonation for leave to appeal against a conviction and sentence for robbery. This application was refused but the High Court granted leave to appeal, on petition, in respect of both convictions and sentences imposed upon the appellant. The appeal was, however, complicated by the fact that the record was not only incomplete, but was so defective that it did not reflect the plea proceedings or any of the evidence of witnesses who testified before the court a quo. Only the judgment and sentence had been transcribed. The proceedings had allegedly been mechanically recorded (according to the court’s handwritten notes), however the recording clerk stated in an affidavit that it was subsequently established that no server had been installed for the recording machine. Neither the prosecutor, nor the Legal Aid attorney had any notes available that would help with reconstructing the record and the regional magistrate was unable to find his notes, less than two years after the conviction.
After remarking that it would have expected all relevant parties, but the regional magistrate in particular, to have kept notes and ensured that they were properly preserved and stored, the court found that it was most disturbing that the stenographer had not done her most basic duties: either to switch on the machine and test the machine and all the microphones before the start of proceedings, or to listen back to the recordings from time to time, namely during teatime, lunchtime, or immediately after the day’s proceedings. If that had been done, she would have picked up early on the very first day of the proceedings that nothing had been recorded. (See [15].)

The court stated that, in view of similar failures in the past, the following procedure be adhered to in future: all presiding officers, prosecutors and legal practitioners appearing for accused persons, should keep their own notes for at least a period of five years; magistrates, prosecutors and legal representatives had to ensure that their notes were systematically kept, either according to date of finalisation of a case, case number, the accused's name or all of those; stenographers that did not know how the system worked should not be appointed, and if there were system changes, they should be properly trained before they were allowed to do important work such as the recording of proceedings; stenographers should be called upon to inform the presiding officer verbally, and preferably in writing on a daily basis, that they had done spot checks throughout the day and that the machines were operating properly; courts should be concerned in granting condonation for late applications for leave to appeal, years after the event, especially where the records were either missing or totally incomplete; and security should be beefed up at all courts to prevent tampering and/or theft of court records or notes. (See [26].)
The appeal was upheld and both convictions and sentences set aside.

ALL SA MARCH 2021

Economic Freedom Fighters and others v Manuel (Media Monitoring Africa Trust as *amicus curiae*) [2021] 1 All SA 623 (SCA)

Personal Injury/Delict – Defamation – Defences – Lack of animus iniuriandi – A defendant wishing to avoid liability must raise a defence that excludes either wrongfulness or intention, and as disseminator of defamatory statement, bears onus of rebutting either wrongfulness or intention – Serious allegations made without regard for truth or potential for harm leading to onus of establishing defence not being discharged.

In the wake of an announcement that a committee chaired by the respondent ("Mr Manuel") had recommended to the President that Mr Edward Kieswetter be appointed as the new Commissioner of the South African Revenue Service ("SARS"), the second applicant ("Mr Ndlozi"), in his capacity as the national spokesperson of the first applicant (the "EFF"), issued a statement. The statement expressed the EFF's objection to the proposed appointment, describing it as nepotistic and corrupt, and went on to make disparaging remarks about Mr Kieswetter. It was published on the EFF's social media platform.

Mr Manuel instituted an application in the High Court, claiming a declaration that the allegations made about him in the statement were false and defamatory and that its publication was and remained unlawful. He also sought consequential relief. The court granted the relief claimed, subject to varying the terms of the interdict claimed by Mr Manuel. He refused leave to appeal. On application to the present Court, an order was granted referring the application for oral argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013.

In deciding whether leave to appeal should be granted, the court had to consider the merits of Mr Manuel's case and the merits of the defences advanced by the applicants.

Held – Determining whether a statement was defamatory involves a twofold enquiry. First, one establishes the meaning of the words used. Second, one asks whether that meaning was defamatory in that it was likely to injure the good esteem in which the

plaintiff was held by the reasonable or average person to whom the statement was published. Where the injured party selects certain meanings in order to point the sting of the statement, they are bound by the selected meanings.

The statements made by Mr Ndlozi were clearly defamatory. It was then to be presumed that the publication was wrongful and intentional, that is, published with the intention to injure (the *animus iniuriandi*). A defendant wishing to avoid liability must raise a defence that excludes either wrongfulness or intention. The publisher of the defamation bears the onus of rebutting either wrongfulness or intention. The applicants in this matter could not rely on the defences of truth, public interest or fair comment as the requirements in each case were not met. The applicants attempted to place reliance on the defence of reasonable publication – linked to which was their alleged lack of *animus iniuriandi*. The court found the applicants to have fallen woefully short of discharging the onus on the issue of publishing the statement without *animus iniuriandi*. Serious allegations had been made without regard for truth or potential for harm.

The Court granted leave to appeal and upheld the appeal only to a limited extent. The order to publish a retraction and apology and the award of damages were set aside The determination of the quantum of damages and whether a retraction and apology had to be published would take place after oral evidence was led.

Eskom Holdings Soc Limited v Resilient Properties (Pty) Ltd and others (Sakeliga NPC as *amicus curiae*) and related matters
[2021] 1 All SA 668 (SCA)

Constitutional and Administrative Law – Cooperative governance – Section 41 of the Constitution and section 40 of the Intergovernmental Relations Framework Act 13 of 2005 requiring Organs of State to make reasonable effort in good faith to settle intergovernmental disputes.

Mining, Minerals and Energy – Electricity – Interruption of electricity supply – Energy supplier's powers and duties – Section 21(5) of the Electricity Regulation Act 4 of 2006 – Before invoking power under section 21(5) to interrupt supply of electricity to entire municipality, national energy supplier must, as an organ of State, be mindful of its constitutional obligations.

Two municipalities, the Emalahleni Local Municipality ("ELM") and the Thaba Chweu Local Municipality ("TCLM"), due to failure to pay for their bulk electricity supply, faced the threat of having their supply interrupted by the supplier ("Eskom"). Eskom was the appellant in two of the three appeals, and TCLM was the first appellant in the third appeal.

In 2017, Eskom took a decision to interrupt the bulk supply of electricity to the ELM and TCLM as they had persistently failed over several years to pay for the bulk electricity supplied by Eskom, in breach of their contractual obligations. They subsequently also failed to honour their payment obligations undertaken in terms of the acknowledgment of debt arrangements that they had each signed. Eskom's decision was opposed by, *inter alia*, the first respondents ("Resilience" and "Chambers") in the two Eskom appeals. Resilience and Chambers and the associated companies had fulfilled their own payment obligations to the ELM and TCLM in which they were based. They argued in the High Court that Eskom was obliged to supply

electricity to all end-users in terms of its distribution licence, and its decision to interrupt the supply of electricity to the entire municipality conflicted with its licence conditions. Eskom's decision was also said to constitute an impermissible exercise of self-help, inconsistent with the rule of law and the right of access to courts under section 34 of the Constitution. The third contention was that the decision was in breach of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 as Eskom failed to consider all relevant facts, particularly the potential damage to the environment as a result of sources of water being contaminated due to damage to the municipal water and sewage systems. Finally, it was argued that Eskom had not exhausted the co-operative governance mechanism provided for in section 41 of the Constitution and section 40 of the Intergovernmental Relations Framework Act 13 of 2005 to resolve its disputes with the municipalities before taking its decision.

The High Court granted an order reviewing and setting aside Eskom's decision on the grounds that it had failed to comply with the requirements of cooperative governance, as referred to above, and the failure to exhaust alternative remedies.

Held – Electricity is a component of the basic services that municipalities are constitutionally and statutorily obliged to provide to their residents. The Court set out the specific constitutional and statutory obligations that municipalities in the local sphere of government bear.

In support of its decision, Eskom relied on section 21(5) of the Electricity Regulation Act 4 of 2006 which regulated its powers and duties. The Court confirmed that before Eskom decides to invoke its power under section 21(5) to interrupt the supply of electricity to an entire municipality, it must, as an organ of State, be mindful of its constitutional obligations.

Eskom was also required to comply with section 41(3) of the Intergovernmental Relations Framework Act before taking the decision. Section 40 requires an organ of State, such as Eskom, to make every reasonable effort, in good faith, to settle the dispute without recourse to litigation. Moreover, where a dispute is of a financial nature, as in these proceedings, Eskom and the ELM and the TCLM were required to promptly take all reasonable steps necessary to resolve the dispute.

The Eskom appeals were accordingly dismissed.

TCLM's appeal related solely to a costs order made by the High Court against the appellants in that appeal. TCLM was mulcted in costs despite not having opposed the application by Chambers and no relief being sought against them. The High Court overlooked the fact that the principal target of the relief sought was Eskom. The appeal of the TCLM appellants was thus upheld.

Guardrisk Insurance Company Limited v Café Chameleon CC [2021] 1 All SA 707 (SCA)

Insurance – Business interruption indemnity – Extension to losses caused by notifiable disease – Interpretation of indemnity clauses – A notifiable disease almost always carries the risk of a government response, making closure following a government order part and parcel of the insured peril.

The respondent ("Café Chameleon") operated a restaurant and had an insurance policy underwritten by the appellant "(Guardrisk"). Following the outbreak of the Covid-

19 pandemic, Café Chameleon's business was interrupted due to the government having instituted a national lockdown in response to the pandemic, and it suffered a loss of income. The policy indemnified it against loss from business interruption due to notifiable diseases, but Guardrisk believed that the indemnity did not extend to the circumstances of this case.

Café Chameleon consequently sought a declaration in the High Court that Guardrisk was liable to indemnify it for any loss since 27 March 2020, arising from the interruption of its business due to the lockdown. The present appeal was against the granting of the declaratory order by the High Court.

Held – The clause (the "infectious diseases clause") that was the subject of the dispute indemnified the insured for loss resulting in interruption of business due to notifiable disease occurring within a radius of 50km of the premises. A notifiable disease referred to ". . . illness sustained by any person resulting from any human infectious or human contagious diseases, an outbreak of which the competent local authority has stipulated shall be notified to them." Café Chameleon's position was that once it was accepted that there were occurrences of Covid-19 in Cape Town, within 50km of its business, the government's response to it through the imposition of a national lockdown was part of the insured peril covered by the infectious diseases clause. Guardrisk maintained, on the other hand, that the government's generalised response to the pandemic was not what was covered, and that what was covered was a public health response aimed only at local occurrences of the disease within 50km of the business.

While the defined events covered by the policy typically required physical damage to property, an extension to the requirement included loss for events that did not cause damage to property, but occurred within a specified radius of the insured premises. As insurance contracts are contracts of indemnity, they should be interpreted reasonably and fairly to that end.

The trigger for coverage under the infectious diseases clause was that it be notifiable. Diseases are notifiable when the law requires it to be reported to government authorities. The Court accepted Café Chameleon's core submission that a notifiable disease almost always carries the risk of a government response, making it part and parcel of the insured peril. Guardrisk's contention that the policy did not indemnify business interruption due to closure following a government order thus failed. That conclusion rendered the question of causation (ie whether the insured peril, being the presence of Covid-19 in Cape Town and the government's response, was the cause of the business interruption) superfluous. However, the Court considered the issue and found both factual and legal causation to have been established.

The appeal was accordingly dismissed.

Knoop NO and another v Gupta (Tayob as Intervening Party) [2021] 1 All SA 726 (SCA)

Corporate and Commercial – Company law – Business rescue – Application for removal of business rescue practitioners – Court having discretion either to grant or to refuse an order for removal of a business rescue practitioner, which discretion is exercisable if one or more of the grounds for removal set out in section 139(2) of the

Companies Act 71 of 2008 has been established on a balance of probabilities – Factual findings must be made and considered to determine whether a case for removal was established.

The respondent ("Mrs Gupta"), her husband, and his two brothers (collectively referred to as the "Guptas") were equal shareholders of two companies ("Islandsite" and "Confident Concept") which were placed under voluntary business rescue in terms of resolutions taken by their respective boards of directors under section 129(1), read with section 129(2), of the Companies Act 71 of 2008 (the "Act"). The business affairs of the Guptas came to public attention through media reports – particularly in connection with the State capture commission of enquiry. In consequence of allegations made about the Guptas, a number of companies in the group through which the Guptas conducted their business activities became unable to continue with business operations because the major banks in South Africa were not prepared to afford them banking facilities. That was why Islandsite and Confident Concept were placed under supervision and went into voluntary business rescue. For the same reason, six other companies in the group were placed under business rescue at the same time. All the companies were controlled by the Guptas. And were subsidiaries of Islandsite through another entity ("Oakbay").

The appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners ("BRPs") of Islandsite and Confident Concept. They also held appointments as BRPs in respect of some of the other companies in the Oakbay Group.

In November 2018, the respondent launched an application in the Gauteng Division of the High Court, for the removal of Messrs Knoop and Klopper as BRPs of the two companies. Various grounds for seeking removal were advanced. The Full Court granted an order for the removal of the BRPs. Leave to appeal to the present Court was subsequently granted.

Held – The judgment under appeal contained no analysis of the factual case made by Mrs Gupta and no factual findings in respect of the alleged conduct of the BRPs. The factual allegations against the BRPs had to be substantiated by evidence. Factual findings needed to be made and considered to determine whether a case for their removal had been established. In order for the BRPs to know what it was they were charged with doing, or omitting to do, and in what respects their conduct of the business rescue was said to be deficient, specific facts needed to be set out in the founding affidavit to which they could respond in order to defend their administration.

Business rescue practitioners can only be removed by a court order under section 130 of the Act, or under the provisions of section 139. The court has a discretion either to grant or to refuse an order for removal of a BRP. The discretion is exercisable if one or more of the grounds for removal set out in section 139(2) has been established on a balance of probabilities. However, proof of a ground for removal alone does not dictate that an order for removal must follow.

Section 140(3)(a) and (b), which were also invoked by the respondents was held to be of no assistance in determining whether in a particular case the court should order the removal of a BRP.

Examining each of the specific complaints against the BRPs, the court found that with one exception, the allegations were not proven, and none of them provided

grounds for the removal of the BRPs. The grounds advanced by the Full Court in support of its conclusion that the BRPs should be removed were found to be unfounded.

The appeal was accordingly upheld with costs.

Municipal Employees Pension Fund and another v Mongwaketse [2021] 1 All SA 772 (SCA)

Employment Benefits and Retirement – Pension funds – Admission to membership of person not qualified to be member – Claim by member for refund of fund contributions – A party to a void contract who seeks to recover money paid in terms of that contract does so in terms of an enrichment action, conventionally the condictio indebiti – Requirements are that the party against which the claim is made must have been enriched at the expense of the claimant, the claimant was impoverished, and the enrichment must have been unjustified, having occurred without legal cause.

The appellant (the "MEPF") was a pension fund which had admitted the respondent as a member when she was not qualified in terms of its rules to be a member. Although the respondent's employment contract did not mention that she was obliged to become a member of a retirement fund, she was under the impression that it was compulsory. She accordingly asked about joining a fund and was given, and completed, an application form for membership of the MEPF. The fund accepted her as a member and contributions amounting in total to 29,5% of her monthly salary were deducted from her salary and made on her behalf by the municipality which employed her.

In 2014, the respondent discovered that she was not qualified to be a member of the MEPF, and that she would not be credited with all the contributions made on her behalf. In 2017, she submitted a complaint to the Pension Funds Adjudicator. The complaint raised the question of what the MEPF owed the respondent as a result of her being admitted as one of its members and paying contributions, when she was not qualified for membership. The Adjudicator ordered the MEPF to repay, with interest, all the contributions made to the MEPF in respect of the respondent until such contributions ceased. On appeal to it in terms of section 30(P) of the Pension Funds Act 24 of 1956, the High Court upheld the Adjudicator's ruling.

Held – The relationship between a pension fund and its members is governed by the rules of the fund, relevant legislation and the common law. The crucial question was whether the respondent's application for membership of the MEPF and its acceptance validly constituted her as a member of the MEPF. If so, she was bound by the rules. The Court agreed with the court below and the Adjudicator, that the respondent could not be a member of the fund as the rules prevented that.

A party to a void contract who seeks to recover money paid in terms of that contract does so in terms of an enrichment action, conventionally the *condictio indebiti*. There are four general requirements for such a claim, namely, that the party against which the claim is made must have been enriched; that such enrichment was at the expense of the claimant; that the claimant was impoverished; and that the enrichment must have been unjustified, that is, must have occurred without legal cause (*sine causa*). All four elements were satisfied in this case. The order upholding the respondent's claim to a refund of her contributions to the MEPF, that is, all the contributions made

in her name, whether characterised as member contributions or employer contributions, was confirmed, and the appeal dismissed.

In the first of two dissenting judgments, it was agreed that the respondent could not become a member of the MEPF, but the consequence of that conclusion was disputed. The issue for determination by the Adjudicator was whether in addition to her contribution (which she had already paid), the respondent was also entitled to her employer's contribution. Without providing reasons, the Adjudicator held that the MEPF was obliged to refund the total amount of all the contributions made by her and those deemed to have been made by the employer. The dissenting opinion was that the employer could only have paid contributions to the MEPF if there had been a valid pension fund contract in place. It was also held that the respondent's claim did not comply with the definition of a "complaint" and she did not fall within the definition of a "complainant" in section 1 of the Pension Funds Act. That led to the conclusion that the Adjudicator lacked jurisdiction and the first dissenting judge would have upheld the appeal.

The second dissenting judgment also stated that the Adjudicator lacked jurisdiction, but differed with the first dissenting opinion in that it was held that the respondent had in fact been admitted to membership of the fund, and therefore did fall within the definition of a complainant. It was held that having found that the respondent was not a member, the Adjudicator had no power other than to dismiss her claim for lack of jurisdiction.

President of the Republic of South Africa and another v Women's Legal Centre Trust and others (United Ulama Council of South Africa and others as *amici curiae*) and related matters [2021] 1 All SA 802 (SCA)

Constitutional and Administrative Law – Muslim marriages – Lack of legal recognition – State's obligations – Enactment of legislation – While section 7(2) of the Constitution imposes a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights, for a court to order the State to enact legislation, on the basis of section 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers – Court, instead, granting declaratory order that Marriage Act 25 of 1961 and the Divorce Act 70 of 1979, as well as specified provisions thereof, were unconstitutional insofar as they failed to recognise and provide for Muslim marriages.

Marriages solemnised according to the tenets of the Islamic faith (Muslim marriages) have never been recognised nor regulated by South African law as valid marriages. The matters before the Court highlighted the plight of Muslim women and children and the injustices suffered by them as a result.

In 2015, the Women's Legal Centre Trust (the "WLC"), an organisation established to advance women's rights by conducting constitutional litigation and advocacy on gender issues, launched a semi-urgent application in the High Court against the President of the Republic of South Africa (the "President"), the Minister of Justice and Constitutional Development ("Minister of Justice"), the Minister of Home Affairs, the Speaker of the National Assembly, and the Chairperson of the National Council of Provinces, being the first to the fifth respondents. The WLC contended that the State had failed to recognise and regulate marriages solemnised in accordance with the tenets of *Sharia* law and was consequently in breach of sections 7(2), 9(1), 9(2), 9(3), 9(5), 10, 15(1), 15(3), 28(2), 31 and 34 of the Constitution. It

argued further that section 7(2) of the Constitution obliged the State to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages, and that the President and Cabinet had failed to fulfil this obligation. In the alternative, it essentially sought orders declaring the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979, as well as specified provisions thereof, unconstitutional insofar as they failed to recognise and provide for Muslim marriages. That application was consolidated with two others (by women married by Muslim rites), and heard together in the High Court. The Court confirmed the State's obligations to enact legislation to recognise Muslim marriages. The President and Cabinet together with Parliament, were directed to rectify the failure within 24 months of the date of the order.

An appeal and cross-appeal came before the present Court. The Court narrowed the issues to the following: whether the Constitution places an obligation on the State to prepare, initiate, introduce and bring into operation legislation to recognise Muslim marriages as valid marriages and to regulate the consequences of such recognition; whether the provisions in question are inconsistent with section 15 of the Constitution; and whether the interim measure should have retrospective operation as contended for.

Held – Rights to protection of children from Muslim marriages are infringed in that upon the dissolution of the marriage they are not afforded the automatic court oversight of section 6 of the Divorce Act in relation to their care and maintenance. In addition, they are not protected by a statutory minimum age for consent to marriage. The non-recognition of Muslim marriages for women infringed the right to access to courts under section 34 of the Constitution.

The WLC's case was that section 7(2) of the Constitution placed an enforceable obligation on the State to enact the legislation that it advocated for. In terms of section 7(2), the State is under a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 7(2) is a broad general provision that must be read in the context of the Constitution and specifically in the context of the doctrine of separation of powers. For a court to order the State to enact legislation, on the basis of section 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of sections 43, 44, and 85 of the Constitution. The relevant portion of the High Court order was set aside and replaced with the declaratory orders that the WLC had sought in the alternative.

The declarations of constitutional invalidity were referred to the Constitutional Court for confirmation, and were suspended for 24 months to enable the President and Cabinet, together with Parliament, to remedy the situation by either amending existing legislation, or passing new legislation.

Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and others [2021] 1 All SA 829 (ECG)

Civil Procedure – Pleadings – Answering affidavit – Late filing – Filing of replying affidavit in response to late answering affidavit signifying acceptance of the fact that the answering affidavit was not to be treated as a nullity – Where an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of Rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit.

The first respondent, an entity conducting a wind farming operation, erected a wind turbine on a farm owned by the fifth respondent. The applicant, a property-owning company, whose farm was adjacent to the farm owned by the fifth respondent, claimed acquisitive prescription in respect of the land upon which the wind turbine was erected and sought the removal of the wind turbine. The first respondent denied that the applicant had acquired the land through acquisitive prescription and pleaded, in the alternative, that the applicant was estopped from claiming a right of prescription. The first and fifth respondents brought a counter-application for compensation in lieu of removal of the wind turbine and tendered such compensation.

Held – Parties agreed that a preliminary issue relating to the late filing of the first respondent's answering affidavit and the applicant's replying affidavit should be decided separately. A related question was whether, in delivering a replying affidavit, the applicant had effectively abandoned or foregone its right to complain about the late delivery of the answering affidavit. The court was of the view that the delivery of a replying affidavit was an acceptance of the fact that the answering affidavit was not to be treated as a nullity. It held that where, as in this case, an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit. If condonation was going to be an issue, then the applicant was required to have engaged the first respondent on the issue and to have conveyed to it that it regarded its answering affidavit as an irregular step because it had been delivered outside of the time period. As the applicant had already responded to the matter in the answering affidavit, requiring the first respondent to bring an application for condonation would be a waste of time.

The preliminary issue was decided in first respondent's favour and the answering affidavit to the main application was admitted.

Director of Public Prosecutions, Western Cape v Kouwenhoven and a related matter [2021] 1 All SA 843 (WCC)

Criminal law and procedure – Extradition proceedings – Applicability of audi alteram partem rule – An extraditee has no rights and the audi alteram partem rule does not apply in proceedings involving request by prosecutor for a stated case, and the stating of the case by the magistrate – The right to be heard in extradition proceedings applies only prior to any judicial decision being taken against the extraditee.

Criminal law and procedure – Extradition proceedings – Jurisdiction – Meaning of requirement in section 3(1) of the Extradition Act 67 of 1962 that offence allegedly committed by extraditee should have been committed "within the jurisdiction of" the requesting State – Requesting State must have jurisdiction to try the person in question for the offence, including where applicable the jurisdiction to try such person for an offence committed outside the territory of the requesting State.

Criminal law and procedure – Extradition proceedings – Right of appeal – In terms of section 310 of the Criminal Procedure Act 51 of 1977, the State enjoys a limited right of appeal on points of law, in respect of decisions made in favour of an extraditee in extradition proceedings.

In the first of two matters before the court, the Director of Public Prosecutions, Western Cape (the "DPP") appealed against the discharge of the respondent ("Mr

Kouwenhoven") by the Cape Town Magistrate's Court in terms of section 10(3) of the Extradition Act 67 of 1962. At the DPP's request, and accepting that the appeal was brought in terms of section 310 of the Criminal Procedure Act 51 of 1977, the Magistrate's Court stated a case on three questions of law for consideration by the present Court.

The second matter was an application by Mr Kouwenhoven to review the decisions of the DPP to deliver a notice of appeal and a notice of intention to prosecute the appeal and the decision of the Magistrate's Court to state a case. Mr Kouwenhoven sought related declaratory orders that those actions were inconsistent with the Constitution and that section 310 of the Criminal Procedure Act 51 of 1977 has no application to orders of discharge under section 10(3) of the Extradition Act. In the alternative, he sought a declaratory order that a person discharged under section 10(3) has a right to be heard before a magistrate states a case in terms of section 310, and he sought the review of the stated case on the basis that he was not afforded such right.

Mr Kouwenhoven, a Dutch national, was convicted by a Dutch court of the illegal supply of weapons in Liberia and Guinea and of participating in war crimes in those countries. The crimes were committed outside of the Netherlands, but were such that the Netherlands exercised extraterritorial jurisdiction. By the time he was convicted and sentenced, Mr Kouwenhoven was in Cape Town, where he was arrested on a warrant issued by a magistrate in terms of section 5(1)(b) of the Extradition Act.

At his extradition hearing, one of Mr Kouwenhoven's defences was that he could not be extradited because the crimes were not committed within the Netherlands (the jurisdiction question). The Magistrate's Court upheld that contention and discharged him in terms of section 10(3).

The three issues in the present proceedings were whether section 310 of the Criminal Procedure Act applies to an extradition discharge; if so, whether Mr Kouwenhoven was entitled to be heard before the magistrate stated a case; and if the two preceding questions were decided in favour of the DPP, whether the magistrate was right on the jurisdiction question.

Held – In terms of section 310, the State enjoys a limited right of appeal on points of law, in respect of decisions made in favour of an extraditee in extradition proceedings.

On the question of whether the *audi alteram partem* rule applies to section 310, the court confirmed that an extraditee would have the right to be heard in extradition proceedings prior to any judicial decision being taken against them. A request by the prosecutor for a stated case, and the stating of the case by the magistrate is intended to be purely facilitative in nature and for the benefit of the court and the parties in any appeal. The extraditee has no rights in that regard, and the *audi alteram partem* rule does not apply.

Regarding the jurisdiction issue, the court referred to the European Convention on Extradition (the "Convention"), to which South Africa and the Netherlands were parties – as well as the Extradition Act. It concluded that the requirement in section 3(1) of the Extradition Act that the offence should have been committed "within the jurisdiction of" the requesting State requires the requesting State to have jurisdiction to try the person in question for the offence, including where applicable the jurisdiction to try such

person for an offence committed outside the territory of the requesting State. That conclusion led to the appeal being upheld.

Dragon Freight (Pty) Ltd and others v Commissioner for South African Revenue Service and others (South African Clothing and Textile Workers Union as Intervening Party) [2021] 1 All SA 883 (GP)

Constitutional and Administrative Law – Customs and excise – Seizure of imported goods by South African Revenue Services ("SARS") based on alleged under-declaration of value – Decision to seize goods constituting administrative action which was found to be procedurally unfair – Insofar as decision was influenced by error of law, and as SARS took irrelevant considerations into account and ignored relevant considerations, court finding decision unreasonable and reviewable.

In August 2020, the first respondent ("SARS") took a decision to seize 19 containers containing goods which had been imported by the second to the seventh applicants in terms of section 88(1)(c) of Customs and Excise Act 91 of 1964 (the "Act"). The detention of the goods was based on the suspicion that the value had been under-declared in order to enable the applicants to pay less customs duty than they were lawfully required to pay. The applicants applied for the review and setting aside of SARS' decision not to release the goods.

The first applicant ("Dragon Freight") was a clearing agent acting on behalf of the second to seventh applicants, who were importers.

Held – In its attempting to establish the transactional value of the goods imported and that the prices declared by the applicant importers were fabricated, SARS relied on Export Declarations which were not fully legible and which had no bearing on the 19 containers which were the subject of this application. The Export Declarations were thus irrelevant and unreliable for their contents could not assist in the determination of the transaction value of the imported goods. The inferences drawn and the conclusions reached could not be rationally connected to the seizure decisions.

The Court consequently concluded that the administrative action taken by SARS to seize the 19 containers was procedurally unfair in that SARS ignored the information presented to it by the applicants. SARS was materially influenced by an error of law in that it relied on hearsay evidence in the form of Export Declarations without verifying the veracity of the contents. Irrelevant considerations were taken into account and relevant considerations were not considered rendering the decisions arbitrary and capricious. The impugned decision was so unreasonable that no reasonable person could have so exercised the power or performed the function in the manner it was done.

The application for review accordingly succeeded.

LD v JD [2021] 1 All SA 909 (GJ)

Family Law and Persons – Marriage – Divorce – Nature of accrual claim – An accrual claim is not a claim to a share in the other spouse's assets themselves, but is a deferred equalisation claim.

Family Law and Persons – Marriage – Pending divorce – Spouse's accrual claim – A spouse's accrual claim in terms of section 3 of the Matrimonial Property Act 88 of

1984 only arises at the dissolution of the marriage and the determinative date for calculating the value of that accrual claim is the date of dissolution of the marriage – In terms of section 8(1) of the Matrimonial Property Act, a spouse seeking order for immediate division of accrual must satisfy the court that the marriage is subject to the accrual system; that she would have a right to share in the accrual of the estate of the other spouse at the dissolution of the marriage; that such right is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse; and that other persons will not be prejudiced by an immediate division of the accrual – Failure to show right to share in the accrual of estate of other spouse at dissolution of marriage, resulting in entitlement to immediate division of the accrual not being established.

After instituting divorce proceedings against the respondent, the applicant approached the court on an urgent *ex parte* basis and obtained *inter alia* interim relief preventing her husband as respondent from dissipating various assets pending the finalisation of the divorce action and for immediate division of the accrual in the parties' respective estates in terms of section 8(1) of the Matrimonial Property Act of 1984, calculated as at 30 September 2019. The present application was for the court to grant a final division of the accrual as at 30 September 2019 and that the interim interdictory relief presently in place be extended until the finalisation of the divorce action and/or determination of applicant's accrual claim. The applicant accordingly made use of two methods to seek to protect what she contended was her contingent right to share in the accrual, namely interim interdictory proceedings pending the determination of the accrual claim and an immediate division of the accrual in terms of section 8(1) of the Matrimonial Property Act.

Held – Save for the statutory exception which is the subject of the present judgment, a spouse's accrual claim in terms of section 3 of the Matrimonial Property Act only arises at the dissolution of the marriage and that the determinative date for calculating the value of that accrual claim is the date of dissolution of the marriage. The risk is that one spouse may seek to dissipate his or her assets in anticipation of the dissolution of the marriage and the resultant determination of the value of the accrual claim.

An accrual claim is not a claim to a share in the other spouse's assets themselves, but is a deferred equalisation claim. The contingent nature of the accrual claim, until it vests upon dissolution of the marriage or an immediate division in terms of section 8, has an impact on the interim interdictory relief that may be available.

Absent agreement on the extent of the accrual claim or agreement to refer the determination of the extent of the accrual claim to a third party, the court must decide the extent of the accrual claim. That is a function of the court that cannot be delegated to a third party without agreement by the parties.

In terms of section 8(1), the spouse who seeks an order for the immediate division of the accrual must satisfy the court that the marriage is subject to the accrual system; he or she would have a right to share in the accrual of the estate of the other spouse at the dissolution of the marriage; such right is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse; and other persons will not be prejudiced by an immediate division of the accrual. A spouse seeking an immediate division must demonstrate that he or she will have an accrual claim if immediate division is ordered by the court.

The applicant *in casu* failed to demonstrate her entitlement to an immediate division of the accrual as she could not demonstrate that she would be the beneficiary of an accrual claim. However, the court granted interdictory relief to preserve her *prima facie* contingent right to share in the accrual of the estate, until determination in the trial proceedings of whether she had an accrual claim.

END-FOR NOW