CIVIL LAW UPDATES APRIL 2021[1]

INDEX

CASE NAMES

Attorneys Fidelity Fund Board of Control v Love (170/2020) [2021] ZASCA 44 (14 April 2021)

BENNETT AND ANOTHER v THE STATE 2021 (2) SA 439 (GJ)

Botha t/a Tax Consulting SA v Renwick (2019/35217) [2021] ZAGPJHC 37 (13 April 2021)

Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd and Others (10530/2020) [2021] ZAWCHC 65 (16 April 2021)

Competition Commission of South Africa v Group Five Construction Limited (195/20) [2021] ZASCA 37 (8 April 2021)

Global Environmental Trust and others v Tendele Coal Mining (Pty) Ltd and others (Centre for Environmental Rights and others as *amici curiae*) [2021] 2 All SA 1 (SCA)

Helen Suzman Foundation v Robert McBride and Others (1065/2019) [2021] ZASCA 36 (7 April 2021)

Johannesburg Society of Advocates and another v Nthai and others 2021 (2) SA 343 (SCA) Also reported as: Johannesburg Society of Advocates and another v Nthai and others [2021] 2 All SA 37 (SCA)

Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter [2021] JOL 50051 (GJ)

MAGIC VENDING (PTY) LTD v TAMBWE AND OTHERS 2021 (2) SA 512 (WCC)

MASHELE v BMW FINANCIAL SERVICES (PTY) LTD AND ANOTHER 2021 (2) SA 519 (GP)

[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

McMillan v Bate Chubb & Dickson Incorporated (299/2020) [2021] ZASCA 45 (15 April 2021)

Mineral Sands Resources (Pty) Ltd v Reddell [2021] 2 All SA 183 (WCC)

Nedbank Limited v TIS Invest (Pty) Ltd and Others (44366/2020) [2021] ZAGPPHC 207 (9 April 2021)

RAF V LPC WRITS AND ATTACHMENTS SUSPENDED FOR ROAD ACCIDENT FUND

SAGLO AUTO (PTY) LTD v BLACK SHADES INVESTMENTS (PTY) LTD 2021 (2) SA 587 (GP)

School Governing Body, Paarlzicht Primary School v Member of Executive Council for Education, Western Cape and others [2021] 2 All SA 241 (WCC)

SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS v CAPE TOWN CITY AND OTHERS 2021 (2) SA 565 (WCC)

United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others [2021] 2 All SA 90 (SCA)

Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others (3268 / 2021) [2021] ZAWCHC 67 (19 April 2021)

Zuma v Democratic Alliance and Another (1028/2019) [2021] ZASCA 39 (13 April 2021)

SUBJECT INDEX

Appeal- Amicus curiae persisting in appeal despite settlement by parties – amicus impermissibly seeking to expand issue for adjudication – interpretation of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 – renewal of tenure of executive director of Independent Police Investigative Directorate not at instance of incumbent but within remit of Parliamentary Committee on Policing – events overtaking settlement agreement – order sought by amicus not viable. Helen Suzman Foundation v Robert McBride and Others (1065/2019) [2021] ZASCA 36 (7 April 2021)

Appealability of interim orders have been adapted to accord with the equitable standard of the interests of justice – Order confirmed as interim in effect as well as in form, and interests of justice not requiring that an appeal be entertained. United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others [2021] 2 All SA 90 (SCA)

Appeal-lapsing of appeal – application for condonation – factors to be considered – condonation granted – Attorney Fidelity Fund – claims against the Fund under s 26(a) of Attorneys Act 53 of 1979 – monies paid into firm of attorneys' trust account

and subsequently stolen – s 48(1)(a) of the Act – when claimant became aware of the theft. Attorneys Fidelity Fund Board of Control v Love (170/2020) [2021] ZASCA 44 (14 April 2021)

Attorney Fidelity Fund – claims against the Fund under s 26(a) of Attorneys Act 53 of 1979 – monies paid into firm of attorneys' trust account and subsequently stolen – s 48(1)(a) of the Act – when claimant became aware of the theft. Attorneys Fidelity Fund Board of Control v Love (170/2020) [2021] ZASCA 44 (14 April 2021)

Consumer protection — Consumer agreement — Unfair, unreasonable or unjust terms — What constitute — Consumer Protection Act 68 of 2008, s 48. MAGIC VENDING (PTY) LTD v TAMBWE AND OTHERS 2021 (2) SA 512 (WCC)

Interdict – Interdictory relief – Cessation of mining operations – Grounds for application not established and interdict not justified Global Environmental Trust and others v Tendele Coal Mining (Pty) Ltd and others (Centre for Environmental Rights and others as *amici curiae*)
[2021] 2 All SA 1 (SCA)

Interdict – Interim interdict – Appealability – Section 17(1) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success there is some other compelling reason why the appeal should be heard United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others [2021] 2 All SA 90 (SCA)

Judge — Temperament — Expected to be stoic and thick-skinned — Litigants may raise impropriety of judge's conduct and, without fear, seek recusal. BENNETT AND ANOTHER v THE STATE 2021 (2) SA 439 (GJ)

Jurisdiction- Summary: Competition Act 89 of 1998 – interpretation and application of s 62 – whether the high court has jurisdiction to hear review application – whether the Competition Tribunal has exclusive jurisdiction. Competition Commission of South Africa v Group Five Construction Limited (195/20) [2021] ZASCA 37 (8 April 2021)

Legal practitioner — Advocate — Misconduct — Application for readmission — Nature of proceedings — Onus on applicant seeking readmission to show exceptional circumstances — General Council of the Bar of South Africa and constituent bars' standing in readmission applications, and their role as custodes morum of advocates' profession, confirmed — Legal Practice Act 28 of 2014, s 44(2). Johannesburg Society of Advocates and another v Nthai and others 2021 (2) SA 343 (SCA) Also reported as: Johannesburg Society of Advocates and another v Nthai and others [2021] 2 All SA 37 (SCA)

Litigation – Abuse of court processes – Purpose or motive of litigation is relevant to the question of abuse of process, and litigation brought for an ulterior purpose is impermissible – Strategic Lawsuits or Litigation Against Public Participation (SLAPPs), intended to intimidate or disable opponents and critics constituting

impermissible use of court process to achieve an improper end. Mineral Sands Resources (Pty) Ltd v Reddell [2021] 2 All SA 183 (WCC)

Litigation against RAF- The RAF is to pay all claims older than 180 days before this date and all writs and warrants of attachment based on orders or settlements not older than 180 days are suspended from 1 May 2021 until 12 September 2021. RAF V LPC WRITS AND ATTACHMENTS SUSPENDED FOR ROAD ACCIDENT FUND

Litigation-agreement not to sue-enforceable Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd and Others (10530/2020) [2021] ZAWCHC 65 (16 April 2021)

National Credit Act-Credit agreement — Consumer credit agreement — Debt enforcement — Whether payment of arrear amount specified in notice issued under s 129 of NCA preventing enforcement of credit agreement, even if, at time payment made, consumer having fallen into further arrears beyond that mentioned in notice — National Credit Act 34 of 2005, ss 129 and 130. MASHELE v BMW FINANCIAL SERVICES (PTY) LTD AND ANOTHER 2021 (2) SA 519 (GP)

Prescription: firm of attorneys sued for breach of mandate arising out of drafting an antenuptial contract subsequently found invalid by court – whether prescription begins to run on date of judgment declaring the antenuptial contract invalid – prescription begins to run as soon as the creditor acquires knowledge of the facts necessary to institute action –whether costs of two counsel should be awarded. McMillan v Bate Chubb & Dickson Incorporated (299/2020) [2021] ZASCA 45 (15 April 2021)

Recusal — Application — Abuse — As strategic or tactical device — Inappropriate — Should not become standard weapon in litigant's arsenal but to be used for true objective of securing fair trial — Unfounded aspersions cast on judges could lead to loss of faith in judiciary. BENNETT AND ANOTHER v THE STATE 2021 (2) SA 439 (GJ)

Review application – delay – State Attorney Act 56 of 1957 – neither s 3(1), nor s 3(3), authorises the State to cover private legal costs – whether just and equitable to order repayment of public monies paid without any legal basis. Costs – unwarranted allegations that scandalise the court – punitive costs as a mark of displeasure and to vindicate the integrity of the court. Zuma v Democratic Alliance and Another (1028/2019) [2021] ZASCA 39 (13 April 2021)

Review application – Grounds of bias, failed to consider relevant considerations, failure to comply with mandatory requirements and irrationality all found to be unsustainable where decision-maker properly applied mind and took into account all relevant factors. School Governing Body, Paarlzicht Primary School v Member of Executive Council for Education, Western Cape and others [2021] 2 All SA 241 (WCC)

Review application – Late filing of application – Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the

date on which the person concerned was informed of the administrative action, became aware of the action and the reason for it, or might reasonably have been expected to have become aware of the action and/ or the reasons – Where adequate explanation was provided for delay, late filing of application condoned. School Governing Body, Paarlzicht Primary School v Member of Executive Council for Education, Western Cape and others [2021] 2 All SA 241 (WCC)

Security for costs- defendant resided overseas and did not own immovable property in South Africa-dismissed Botha t/a Tax Consulting SA v Renwick (2019/35217) [2021] ZAGPJHC 37 (13 April 2021)

Settlement agreements- set aside- not made an order of court, where payment had already been made to the attorneys. Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter [2021] JOL 50051 (GJ)

Spoliation-Mandament van spolie or interim interdict - access to servers – Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others (3268 / 2021) [2021] ZAWCHC 67 (19 April 2021)

Summary judgment — New requirements of rule 32(2)*(b)* discussed. SAGLO AUTO (PTY) LTD v BLACK SHADES INVESTMENTS (PTY) LTD 2021 (2) SA 587 (GP)
Summary judgment-liquidity test-how applied Nedbank Limited v TIS Invest (Pty) Ltd and Others (44366/2020) [2021] ZAGPPHC 207 (9 April 2021)

Unlawful occupation — Eviction — Evictions from and demolition of informal dwellings whether occupied or unoccupied — During state of disaster such evictions and demolitions to be in terms of court order only. SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS v CAPE TOWN CITY AND OTHERS 2021 (2) SA 565 (WCC)

CASES

Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter [2021] JOL 50051 (GJ)

Settlement agreements- set aside- not made an order of court, where payment had already been made to the attorneys.

In two actions brought on behalf of children against the RAF the court was asked to make the settlement agreements an order of court, where payment had already been made to the attorneys.
Fisher J discusses the Contingency Fees Act; payment by the RAF in terms of settlement agreements in the absence of court orders; the duties on attorneys in children's claims against the RAF; and the protection of funds for children.
The settlement agreement for the first matter is declared invalid and in both cases directions are made for the fees and funds.
The conduct of three practitioners is referred to the Legal Practice Council for

investigation.

RAF V LPC WRITS AND ATTACHMENTS SUSPENDED FOR ROAD ACCIDENT FUND

Litigation against RAF- The RAF is to pay all claims older than 180 days before this date and all writs and warrants of attachment based on orders or settlements not older than 180 days are suspended from 1 May 2021 until 12 September 2021.

The RAF is experiencing severe financial difficulties and its implosion is imminent and will have disastrous consequences for the country.

The fund seeks an order, either in terms of Uniform Rule 45A or the common law or section 173 of the Constitution, suspending all writs of execution and attachments based on court orders already granted or settlements reached for a period of 180 days.

Meyer J (Adams and Van der Westhuizen J concurring) grants an order suspending all writs and attachments, based on court orders already granted or settlements already reached, until 30 April 2021.

See further directions in the order at para [45].

Nedbank Limited v TIS Invest (Pty) Ltd and Others (44366/2020) [2021] ZAGPPHC 207 (9 April 2021)

Summary judgment-liquidity test-how applied

The plaintiff prays for summary judgment against the third, fourth, sixth and seventh defendants ("the defendants") for payment of monies due by the first defendant in terms of Instalment Sale Agreements, an operating rental agreement and an overdraft facility entered into between the plaintiff and first defendant. The third, fourth, sixth and seventh defendants are cited in their capacities as sureties for the amounts due by the first defendant.

DEFENCES

[2] The defendants raised various technical defences in their answering affidavits. Mr Labuschagne, counsel for the defendants, to his credit, indicated that the defendants only rely on two defences, to wit:

[2.1] liquidity; and

[2.2] election and waiver.

Liquidity

[3] The liquidity defence was raised as a point *in limine.*

[4] The point, in my view, however, pertains to the merits of the summary judgment application and is not capable of separate determination.

[5] Rule 32(1) reads as follows:

"*32(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —*

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs."

[6] In proving the amount due and owing by the defendants the plaintiff, *inter alia*¸ attached certificates of balance to its particulars of claim.

[7] The certificates are issued in terms of the provisions of clause 6 of the suretyship agreements, which clause reads as follows:

"*6. The nature and amount of our obligation, as well as the interest payable in respect thereof, shall be determined and proved by a certificate purporting to have been signed by a manager or accountant for the time being of any branch or the head office of Nedbank, whose capacity or authority it will not be necessary to prove [or any other form of evidence contemplated in* section 109(3) *of the* National Credit Act, 2005*, if applicable]. This certificate or any other form of evidence, as the case may be, will upon the mere production thereof be binding on us and be proof of the contents of such certificate on the face of it and of the fact that such amount is due and payable in any legal proceedings against us, and will be valid as a liquid document against us of its proving such claim."*

Conclusion

[29] In view of the aforesaid conclusions, the defendants have not set out any defence to the plaintiff's claim and the plaintiff is entitled to summary judgment.

Order

[30] In the premises, I grant the following order:

1. Summary judgment is granted in favour of the Plaintiff against the Third, Fourth, Sixth and Seventh Defendants, jointly and severally the one paying the other to be absolved, as follows:

1.1 R86,427.77 (eighty-six thousand four hundred and twenty-seven rand and seventy-seven cents) plus interest on the aforementioned amount at 8.25% per annum (prime plus 1.25%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.2 R75,236.94 (seventy-five thousand two hundred and thirty-six rand and ninety-four cents) plus interest on the aforementioned amount at 8.00% per annum (prime plus 1%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.3 R211,901.48 (two hundred and eleven thousand nine hundred and one rand and forty-eight cents) plus interest on the aforementioned amount at 8.00% per annum (prime plus 1%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.4 R6,248,745.43 (six million two hundred and forty-eight thousand seven hundred and forty five rand and forty three cents) plus interest on the aforementioned amount at 17.50% per annum (prime plus 10.50%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.5 Costs of suit on an attorney and client scale.

4. The application for summary judgment against the First Defendant is postponed *sine die*.

Botha t/a Tax Consulting SA v Renwick (2019/35217) [2021] ZAGPJHC 37 (13 April 2021):

Security for costs- defendant resided overseas and did not own immovable property in South Africa-dismissed

Summary judgment was granted against defendant who later served an application for rescission. Plaintiff then demanded security for costs for the rescission application and for future litigation, on the basis that defendant resided overseas and did not own immovable property in South Africa. Plaintiff estimated that the costs for the rescission application alone would amount to R100,000.

Du Bruyn AJ discusses the application for security under Rule 47 and the opposed application for condonation of the lateness, with a useful discussion of the case law and good cause in Rule 27.

The condonation application and the security application are dismissed.

[1] This is an opposed belated application for security under rule 47 and an opposed application for condonation of the lateness. For the sake of convenience, the parties are referred to as they are cited in the action under the above case number. Thus, the Applicant is referred to as the Plaintiff and the Respondent is referred to as the Defendant. Where documents are quoted in which the parties are referred to differently, such references are changed to the Plaintiff and the Defendant respectively.

The relevant history of the litigation between the parties

[2] The litigation between the parties that is relevant to this application started with an application by the Plaintiff for leave to sue the Defendant by edictal citation. That application was granted on 29 January 2020.

[3] The Plaintiff served a summons on the Defendant by email on 12 February 2020. The Defendant filed a notice of intention to defend and a plea on 25 February 2020.

[4] The Plaintiff launched a summary judgment application and alleges that it was served on the Defendant on 16 March 2020. The Plaintiff also alleges that the set down in respect of the hearing of the summary judgment application was served on the Defendant by email on 20 March 2020 and on 28 April 2020. The Defendant admits that the Plaintiff's attorney sent the summary judgment application to him by email during March 2020. He denies, however, having received any of the notices of set down in respect of that application. Summary judgment was granted against the Defendant on 18 May 2020 on an unopposed basis.

[5] On 10 July 2020, the Defendant served an application for rescission of the judgment granted against him. The parties' legal representatives confirmed at the hearing of the present applications that the Plaintiff filed his answering affidavit in the rescission application on 11 August 2020 and the Defendant his replying affidavit on 19 August 2020. The rescission application is still pending.

Helen Suzman Foundation v Robert McBride and Others (1065/2019) [2021] ZASCA 36 (7 April 2021)

Appeal- Amicus curiae persisting in appeal despite settlement by parties – amicus impermissibly seeking to expand issue for adjudication – interpretation of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 – renewal of tenure of executive director of Independent Police Investigative Directorate not at instance of incumbent but within remit of Parliamentary Committee on Policing – events overtaking settlement agreement – order sought by amicus not viable.

[1] This is a peculiar appeal. It does not involve as primary participants the disputants in the court below. Rather, it is an appeal by an amicus curiae, after the dispute in the court below was settled and an agreement between the litigating parties was made an order of court. The peculiarity is amplified because of an attempt by the amicus, before us, to extend the scope of the initial dispute. The appeal was pursued on the basis that the court below ought not to have acceded to the settlement agreement, as it offended against applicable legislation and the Constitution and that courts are thus precluded from authorising such agreements. The background culminating in the present appeal, which is before us with the leave of this court, is set out hereafter.

Background

[2] The first respondent, Mr Robert McBride, was the executive director of the Independent Police Investigative Directorate (IPID), appointed to that position on 1 March 2014, in terms of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the Act). That section provides for the appointment of the executive director of IPID, and for the renewal of the incumbent's tenure after the expiry of the first five years in office. Section 6(1), (2), and (3) of the Act read as follows:

'(1) The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.

(2) The relevant Parliamentary Committee must within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.

(3) In the event of an appointment being confirmed—

(a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and

(b) such appointment is for a term of five years, which is renewable for one additional term only.'

[3] Shortly before Mr McBride's five-year term of office ended, he engaged the Minister about its renewal. The correspondence referred to below concerning this

issue is important, because it explains how the dispute between him, on the one hand, and the Minister and the Parliamentary Committee on Policing (the PCP), on the other, arose and explains why the settlement agreement took the form that it did.

[4] On 5 September 2018, Mr McBride wrote to the Minister to inform him that his term of office was coming to an end that he wanted to know whether the Minister intended to 'retain or extend [his] contract'. It is not clear what transpired between this date and 13 November 2018, when Mr McBride wrote to the Minister again. He recommended that a process be started to fill his position – whether by 'retention, extension or not' – so that IPID could function properly.

[5] On 16 January 2019, the Minister responded in writing, as follows:

'I hereby inform you that I have decided not to renew or extend your Employment Contract as Executive Director of IPID. You are hereby advised that your last official working day will be on Thursday, the 28th of February 2019.'

[65] What can be distilled from what is set out above is that our courts consider it important to admit amici that will play their rightful role but also ensure that the participation of amici is kept within appropriate bounds.

[66] In the present case the HSF, in its presentation to the court below of the basis on which it sought to be admitted, as set out in para 20 above, took the view that the legislation in question was not specific about who the responsible authority was for taking the decision to re-appoint and that its proposal that it be left to the incumbent to decide was the only constitutionally viable interpretation. It did not have regard to the fundamental difficulties with that perspective as outlined above. There was no challenge to the constitutionality of the legislation, in the event it was only capable of being read to mean that the power to re-appoint lay with the PCP. The decisions of the Constitutional Court referred to earlier about parliamentary oversight might have proved to be an insurmountable stumbling block.

[67] The attempted broadening of the scope of the challenge before us as to the lack of guidelines in the processes of the PCP, which was not foreshadowed at all, either in the application for admission as an amicus and certainly not by any of the parties, is impermissible. There was no evidence on which such an adjudication could take place and there was no attempt by the HSF, in the court below, to adduce such evidence which would then, in turn, have given the opposing parties a right to challenge by way of evidence and submissions of their own. What an amicus should not be permitted to do is to make out an entirely new case on appeal without the necessary evidence and without regard to due process. As pointed out above, events have overtaken the agreement reached by the parties. The order sought by the amicus would have Mr McBride re-instated in a post he does not intend to return to. At least notionally, it would displace the present executive- director of IPID and at the very least would render his appointment questionable, without him or her being heard. It is at this point that an amicus ceases to be an amicus and becomes a

litigant. It is thus not unsurprising that Corruption Watch exited the scene after the settlement agreement between the primary disputants.

The order

[68] It will be clear from our reasoning that the appeal must fail. No costs order was made by the court below when it made the settlement an order. In dismissing the HSF's application for leave to appeal, however, the court below ordered it to pay costs. When granting leave to appeal, this court set aside that costs order. In its place it ordered that 'the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal'. On the basis of the *Biowatch* principle,**[31]** no order of costs will be made in this appeal.

[69] The appeal is dismissed.

Competition Commission of South Africa v Group Five Construction Limited (195/20) [2021] ZASCA 37 (8 April 2021)

Jurisdiction- Summary: Competition Act 89 of 1998 – interpretation and application of s 62 – whether the high court has jurisdiction to hear review application – whether the Competition Tribunal has exclusive jurisdiction.

[1] This is an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court), in terms of which it dismissed an application under rule 30 of the Uniform Rules**[1]**, brought by the appellant, the Competition Commission (the Commission) established in terms of s 19 of the Competition Act 89 of 1998 (the Act). In that application the Commission challenged, inter alia, the high court's jurisdiction to determine a review application initiated by the respondent, Group Five Construction Ltd (Group Five).

[2] In the review application before the high court Group Five sought the following principal orders:

'1. Declaring that the initiation of the complaint under CC case number 2009Feb279 in terms of **section 49B(1)** of the **Competition Act 89 of 1998**, by the respondent, as well as all steps taken by the respondent pursuant thereto, were and are unlawful and invalid;

2. Declaring that the respondent granted the applicant immunity from prosecution of a contravention of the **Competition Act 89 of 1998** in respect of the construction and refurbishment of stadia for the 2010 FIFA World Cup;

3. Reviewing, setting aside and declaring invalid the respondent's decisions:

3.1 to refer a complaint against the applicant to the Competition Tribunal in respect of the construction and refurbishment of stadia for the 2010 FIFA World Cup; and/or

3.2 in that referral, to seek an administrative penalty against the applicant;

(collectively referred to as decisions)'

[3] The background leading to proceedings in the high court and culminating in the present appeal are set out hereafter. On 10 February 2009, the Commission initiated a complaint in terms of **s 49B(1)[2]** of the Act against various construction companies, including Group Five, into conduct relating to the construction in South Africa of FIFA 2010 World Cup stadia. This followed a research project that was conducted by the Commission in May 2008 prompted by an escalation in costs in the construction of the stadia. The Commission decided to investigate possible collusive conduct between various companies in contravention of s 4(1) of the Act.

[4] Section 4(1)*(b)* prohibits restrictive practices between firms in horizontal relationships (competitors). Prohibited conduct involves (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering.

[5] Due to the secretive nature of cartels involved in collusive dealings of the kind targeted by the Act, the Commission had devised a policy known as the Corporate Leniency Policy (CLP), which is geared towards encouraging those involved in cartels to disclose to the Commission prohibited practices in order to combat offensive conduct.**[3]** Those who approach the Commission with the necessary information that would result in institution of proceedings against a cartel will not be subjected to prosecution in relation to their involvement in or with the alleged cartel.**[4]** They are initially granted conditional immunity, which is made final when conditions set out in the CLP have been met.**[5]** Immunity is granted in return for full disclosure and full co-operation in pursuing the other cartel members before the Tribunal established in terms of s 26 of the Act.**[6]**

[26] For this kind of review the Tribunal's jurisdiction is not mentioned in s 62(2). Only the CAC is, and its powers are not exclusive either. The jurisdiction of the high court is not excluded under that section in terms of s 62(3)*(b)*. Accordingly, this means that the Commission's alternative argument in relation to concurrent jurisdiction must also fail. In any event, *Telkom* is no authority for the proposition advanced by counsel for the Commission, regarding concurrent jurisdiction. That case dealt with concurrent jurisdiction between the Commission and another regulatory body, ICASA. In that case Telkom had instituted review proceedings in the high court to set aside the Commission's decision to refer a complaint to the Tribunal in terms of s 8 of the Act. It argued that the issue initiated and referred to the Commission and the Tribunal fell outside the powers of the competition authorities but was a matter for ICASA to deal with. The Tribunal was held to be an appropriate forum to determine whether the provisions in Chapter 2 of the Act were contravened.

[27] In conclusion, the issues raised on review by Group Five are not of a specialist nature which s 62(1) exclusively reserves for the CAC and the Tribunal. They do not pertain to the interpretation of issues in Chapters 2, 3 and 5 of the Act which are pending before the Tribunal. Instead, they relate to questions of legality concerning the validity and lawfulness of the initiation and the referral of the

complaint. Notably, the Commission's powers are set out in Chapter 4, which is not mentioned among the Chapters in s 62(1)*(a)*. In the circumstances, the high court was correct in its finding that the challenge of jurisdiction had no merit.

[28] For these reasons, the appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

Zuma v Democratic Alliance and Another (1028/2019) [2021] ZASCA 39 (13 April 2021)

Review application – delay – State Attorney Act 56 of 1957 – neither s 3(1), nor s 3(3), authorises the State to cover private legal costs – whether just and equitable to order repayment of public monies paid without any legal basis. Costs – unwarranted allegations that scandalise the court – punitive costs as a mark of displeasure and to vindicate the integrity of the court.

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. It concerns decisions purportedly made in terms of s 3 of the State Attorney Act 56 of 1957 (the Act)**[1]** to pay State funds to a private firm of attorneys for legal costs incurred by the applicant, Mr Jacob Gedleyihlekisa Zuma, in respect of court proceedings relating - or incidental - to his prosecution for corruption and related offences. The respondents, invoking the constitutional principle of legality, sought orders: (a) reviewing and setting aside the decisions and each of the related payments; and, (b) directing Mr Zuma to pay back the money.

[2] The two judges who considered the application referred it for oral argument in terms of the provisions of **s 17(2)***(d)* of the **Superior Courts Act 10 of 2013**. Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for an applicant to convince the court that he or she has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application, to a large extent, had to address the merits of the appeal.[2]

[3] Inasmuch as the appeal raises a point of statutory interpretation, the application had to succeed. On that score, the high court has spoken and, absent an appeal, the judgment will continue to apply. Future litigants are entitled to the benefit of this Court's view on the question. In the circumstances, we considered it appropriate to grant leave to Mr Zuma to proceed with the appeal. That opened the door to a full consideration of the substantive merits of the appeal itself.

[4] In December 1994, Mr Zuma was elected the National Chairperson of the African National Congress (the ANC) and chairperson of the ANC in KwaZulu-Natal. After the 1994 elections, he was appointed to serve in the first democratic government of the Republic of South Africa. Initially, he served at a provincial level as the Member of the Executive Committee (MEC) for Economic Affairs and Tourism in the KwaZulu-Natal Province. Following the 1999 general elections, Mr Zuma was

appointed the Deputy President of the country. He ascended to the Presidency on 9 May 2009 - a position that he occupied until his resignation on 14 February 2018.

[5] On 23 August 2003, the National Director of Public Prosecutions (the NDPP) (at that time Mr Bulelani Ngcuka) announced that a certain Mr Shabir Shaik would be indicted on charges of corruption. It was alleged that between October 1995 and September 2002, Mr Shaik personally, and some of the corporate entities that he controlled, had made numerous payments totalling a substantial amount of money to or on behalf of Mr Zuma. Somewhat surprisingly, Mr Zuma was not indicted together with Mr Shaik (and his corporate entities). In 2005, Mr Shaik was convicted on two counts of corruption and one of fraud and sentenced to an effective term of imprisonment for a period of 15 years. Mr Shaik's appeals to this Court[3] and the Constitutional Court[4] were subsequently dismissed.

The appeal is dismissed with costs, including those of two counsel, to be paid on the attorney and client scale.

Attorneys Fidelity Fund Board of Control v Love (170/2020) [2021] ZASCA 44 (14 April 2021):

Appeal-lapsing of appeal – application for condonation – factors to be considered – condonation granted – Attorney Fidelity Fund – claims against the Fund under s 26(a) of Attorneys Act 53 of 1979 – monies paid into firm of attorneys' trust account and subsequently stolen – s 48(1)(a) of the Act – when claimant became aware of the theft.

Attorney Fidelity Fund – claims against the Fund under s 26(a) of Attorneys Act 53 of 1979 – monies paid into firm of attorneys' trust account and subsequently stolen – s 48(1)(a) of the Act – when claimant became aware of the theft.

The issue in this appeal is whether the Attorneys Fidelity Fund Board of Control is liable to pay Mr Love the sum of R10 million which was misappropriated after being deposited into an attorney's trust account.

Carelse AJA discusses condonation for the late filing of the application for leave to appeal; section 48(1)(a) of the Attorneys Act 53 of 1979 that requires a claimant to notify the Fund of any claim within three months of the claimant becoming aware of the theft of money paid into a trust account; and the Fund's special plea that the claimant failed to comply with this section.

The court finds that the Fund's special plea on the issue of non-compliance with the Act should have been upheld by the trial court. In the result the trial court and the full court erred in refusing to grant condonation for the late filing of the application for leave to appeal and dismissing the special plea.

The order of the High Court is replaced with one granting condonation and upholding the special plea.

[1] The issue in this appeal is whether the appellant, the Attorneys Fidelity Fund Board of Control (the Fund) is liable to pay the respondent (Mr Love) the sum of

R10 million which was misappropriated after being deposited into Turnbull and Associates attorney's trust account. The Fund is a statutory body originally established in terms of the Attorneys Act 53 of 1979 (the old Act).One of the objectives of the Fund is to reimburse persons who may suffer pecuniary loss as a result of the theft of money which had been entrusted to the attorney.**[1]** The Fund is now regulated in terms of the Legal Practice Act 28 of 2014 that came into operation on 1 November 2018. Because Mr Love's claim arose before 1 November 2018 this appeal is governed by the provisions of the old Act.

[2] Section 48(1)*(a)* of the old Act requires a claimant to notify the Fund of any claim within three months of the claimant becoming aware of the theft of money paid into a trust account.

[3] On 7 October 2013, Mr Love gave the Fund notice of his R10 million claim against the Fund. On 4 September 2014, the Fund rejected the claim on the grounds that Mr Love had failed to give the Fund written notice of the claim within three months of him becoming aware of the theft of the R10 million.

[4] On 13 August 2013, Mr Love instituted proceedings in the South Gauteng Division of the High Court (the trial court) for payment of the R10 million. In a special plea, the Fund pleaded:

'2. Plaintiff's failure to comply with section 48(1)(*a*) of the Attorneys Act, 1979.

. . .2.7 The aforesaid accounts clearly show, and the plaintiff would accordingly reasonably have known, that although no further noteworthy deposits were made to the said trust account, the entire R10 000 000.00 deposited by the plaintiff had been stripped out of that account by the end of July 2011 and large amounts had been transferred periodically to the business account of Turnbull & Associates [*sic* Incorporated] in the period between 4 April 2011 and 28 July 2011;

2.8 Accordingly, there was clearly an objective basis for the plaintiff's stated conviction that Pavoncelli had misappropriated the R10 000 000.00 that he, the plaintiff, had deposited, which objective basis and stated conviction establish actual knowledge of the plaintiff that the monies he had deposited, as aforesaid, had been stolen;

2.9 Consequently, the plaintiff already knew by no later than 28 November 2012, and probably as early as 15 May 2012, that his monies had been stolen by Pavoncelli but only submitted his claim to the defendant on 7 October 2013, well outside of the three months of him having acquired actual knowledge of the theft as is prescribed in section 48(1)*(a)* of the Attorneys Act, 1979 and, in the premises, the plaintiff's claim did not meet the mandatory requirements of the said section and was rightly rejected by the defendant.'

[5] The trial was heard by Mokose AJ. In an oral judgment read on 19 June 2017, Mokose AJ dismissed the special plea and granted judgment in favour of Mr Love. On 21 September 2017, the Fund applied for leave to appeal against the judgment and order of the trial court. On 26 October 2017, it applied for condonation for the late filing of its notice of appeal. On 14 December 2017, the trial court dismissed an

application for condonation on the grounds that the Fund had failed to give a full explanation for the delay. It accordingly dismissed the application for leave to appeal on the ground that it was late and had no prospect of success.

McMillan v Bate Chubb & Dickson Incorporated (299/2020) [2021] ZASCA 45 (15 April 2021):

Prescription: firm of attorneys sued for breach of mandate arising out of drafting an antenuptial contract subsequently found invalid by court – whether prescription begins to run on date of judgment declaring the antenuptial contract invalid – prescription begins to run as soon as the creditor acquires knowledge of the facts necessary to institute action –whether costs of two counsel should be awarded.

Mr McMillan claimed damages from a law firm for breach of breach of mandate arising out of the drafting an antenuptial contract subsequently found invalid by court. The High Court upheld the firm's special plea that the claim had prescribed.

On appeal, **Zondi JA** discusses the three-year extinctive prescription period In terms of s 11(d) of the Prescription Act 68 of 1969; when Mr McMillan had acquired knowledge of all the necessary facts on which to sue the firm; the circumstances in which he was made aware that the antenuptial contract could be invalid; and whether prescription began to run on the date of the judgment declaring the antenuptial contract invalid.

The appeal is dismissed with costs.

[1] On 13 October 2017, the appellant, Mr McMillan, instituted action in the Eastern Cape Division of the High Court, East London against the respondent, a law firm, for damages for breach of an oral mandate. The summons was issued on 13 October 2017. The record does not indicate when it was served. The respondent delivered a special plea in terms of which it contended that the appellant's claim had prescribed. By agreement between the parties, the court a quo (Makaula J) made an order in terms of rule 33(4) of the Uniform Rules of Court (the separation order) that certain specified issues including those arising from the respondent's special plea, be separately adjudicated before all other issues.

[2] Makaula J, after hearing evidence on the separated issues, upheld the special plea. The learned judge considered it unnecessary to determine the further issues raised in the separation order in the light of his conclusion on the prescription point. He granted the appellant leave to appeal to this Court. The parties agreed that if we were to uphold the appeal in respect of the prescription issue, we should deal with other issues separated, rather than referring the matter back to the court below.

[3] I consider it convenient to deal first with the prescription point, because if the appeal in respect thereof is dismissed, it will become unnecessary to consider the

further issues in the separation order. The issue is whether the court a quo was correct to hold that when the summons was issued on 13 October 2017, the appellant's claim had become prescribed. Stated differently, the question is: when did prescription start to run in respect of the appellant's claim for damages against the respondent? In terms of s 11(*d*) of the Prescription Act 68 of 1969 (the Act), this claim is subject to a three-year extinctive prescription period. The respondent alleged that prescription started running on 9 or 12 May 2014, when its director had advised the appellant to consult a different attorney, as he had a potential claim against the respondent, and not on 18 October 2016, when the high court declared that the antenuptial contract was invalid, as contended by the appellant. The respondent claimed that the three-year prescription period ended on 12 May 2017. On that premise, by the time the summons was issued, his claim had already prescribed.

[4] The answer to this question depends on the interpretation of s 12(3) of the Act and its application to the facts of this case. The respondent bears the onus to prove that the appellant's claim had become prescribed by 13 October 2017.

[5] For the purposes of the adjudication of the prescription point, the following facts are common cause or not seriously disputed. During or about November 1998, and at East London, the appellant and the respondent entered into an oral agreement in terms of which the appellant gave the respondent an oral mandate to prepare an antenuptial contract for the purposes of regulating the financial affairs of the intended marriage between the appellant and one Rosemary Lois Jannaway (the appellant's former wife).

[6] The express and material terms of the oral mandate given to the respondent, according to the appellant, were that the respondent should prepare a written antenuptial contract which would exclude all community of property between the appellant and his former wife, and for the accrual system to apply to the marriage. The antenuptial contract should exclude from the accrual all the business assets owned by the appellant, comprising a farm together with livestock and implements, shares, and loan accounts, valued at R810 105.

[7] The respondent accepted the mandate as aforesaid, and prepared an antenuptial contract which they presented to the appellant and his former wife for signature on 1 December 1998. The appellant alleged that in breach of the oral mandate, the respondent failed to prepare the antenuptial contract in accordance with their instructions.

Litigation-agreement not to sue-

This is an opposed application in which the applicant seeks an order to enforce an agreement not to sue. In the alternative, an order is sought to stay the certain proceedings**[1]** and for these disputes between the parties to be submitted to private arbitration. The applicant is a public listed company holding shares in Capitec Bank. The first respondent is a special purpose vehicle which was established to acquire shares in and to the applicant on behalf of a black economic empowerment consortium.**[2]** The first respondent is a wholly owns subsidiary of the second respondent. The first and second respondents shall be referred to as the respondents, unless otherwise specifically indicated.

[2] The respondents concluded an agreement with the applicant in terms of which they undertook to not institute legal proceedings against the applicant relying upon the conclusion of a particular commercial transaction. It is the applicant's case that the respondents concluded this later transaction with the full awareness of their rights after obtaining prior independent legal advice thereon. The respondents' case is that this agreement not to sue is against public policy and should not be enforced. The applicant contends for a breach of the agreement by the respondents by instituting the action.

[3] In the alternative, the applicant seeks an order , that the respondents be directed to refer their disputes raised in the action to private arbitration. This position taken by the applicant is buttressed by a suite of agreements between the applicant and the respondents in terms of which the parties specifically agreed to refer their disputes to be resolved by the arbitration process.

[4] The applicant, the respondents and the Industrial Development Corporation, concluded a linked set of signed agreements during 2016. This was the frontrunner to the applicant issuing (10) million ordinary shares to the first respondent. The parties had intersecting motives for concluding this sale share transaction. The applicant desired to increase its direct transformation shareholding with a view to achieving the targets for transformation ownership as set out in the Financial Sector Code, under the Act. The respondents in turn hankered to obtain shares in the applicant, while the IDC coveted to support the transformation of the banking sector in South Africa. This is a complex matter and accordingly I have discussed in this judgment what seems to me of the greatest importance. It must not be inferred that from my failure to refer specifically to any argument or contention, that I was unaware of it, or that I ignored it.

THE FACTUAL MATRIX

[5] An important agreement relevant for present purposes is the subscription agreement dated 12 December 2006. It contains no less than (3) sets of restrictions connected with share disposal aimed primarily at maintaining a direct transformation shareholding in the applicant. This latter agreement also includes an arbitration covenant, which is the first of the two arbitration agreements on which the respondent relies for the alternative relief it seeks in this matter.

[6] The first respondent, sold (5 284 735) of its (10 000 000), ordinary shareholding in the applicant to the PIC. This left the first respondent with a remaining shareholding of (4 715 265), shares in the applicant. During the course of the following year, dissatisfaction loomed in connection with the selling restrictions imposed upon the second respondent and in turn, its shareholders. The second respondent thereupon approached the applicant and requested the applicant for a waiver in connection with the agreed selling share sale restrictions. The applicant refused on the bases that these restrictions were dominant to the entire purpose of the subscription agreement

[34] It seems clear to me that this is a case where the respondents all agreed and accepted expressly that they understood what they were agreeing to in the consent agreement. The correct position in our law on this score has been recently clearly re-stated in Beadica.[35] In short, in establishing whether a clause should be enforced includes a consideration of whether the parties negotiated with equal bargaining power and whether they understood what they were agreeing to. In this matter, it is clear that the parties were possessed of equal bargaining power and they must have understood what they were agreeing to. The consent agreement was after all, at their request.

[35] The facts demonstrate that the respondents chose voluntarily to consent to the terms of the subject clause. This brings me to the public policy arguments and debate. Public policy in this context, falls to be constitutionally infused. This means that a court may refuse to enforce certain contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy.[36] In Barkhuizen,[37] this was categorized as a measured balancing exercise.

[36] This refusal by a court must, for obvious reasons, be used sparingly. In general public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This, especially where the contract was entered into freely and voluntarily. The respondents in this case attract the onus of exhibiting that the subject clause was and is against public policy.[38] The subject clause was agreed to for specific reason and purpose. The applicant was concerned that if it took part in the transaction it would lead to further possible exposure and litigation by the respondents. At the same time, the applicant did not want to frustrate the transaction. This was because the applicant was not a direct party.

[37] The only ‘interest’ that the applicant had in the transaction was in relation to its transformation threshold. This is precisely why the applicant’s consent was required. The transaction was not at the instance of the applicant and the applicant stood nothing to gain from the transaction.

[38] Besides, the subject clause does not prohibit the respondents from litigating against the applicant for any breach of the consent agreement. If it were so, this would clearly be in violation of public policy considerations. The subject clause, in my view, is very limited and specific. The terms of the subject clause prevent the respondents from relying on the transaction in order to litigate against the applicant.

[39] The respondents argue that if the terms of the subject clause are enforced, then in this event, it would in effect amount to a violation of their constitutionally enshrined rights.[39] To counter this argument, the applicant contends for the position that their argument is against the enforcement of the clause, not its validity. The argument is that the respondents voluntarily relinquished their rights which are very limited in scope. This, after having obtained legal advice before entering into the framework agreement and the consent agreement. The respondents themselves, at the time, considered the terms of the subject clause to be fair and reasonable in the circumstances.

[40] The respondents freely surrendered certain limited rights in return for the applicant's consent to the transaction as embodied in the suite of agreements. Further, at the time of concluding the transaction the respondents themselves considered these rights to be fair and reasonable, which they in turn waived freely and voluntarily. Under these particular circumstances, in my view, the public policy argument falls to be somewhat diluted.

[41] Further, the respondents' case is that it would be unfair to enforce the subject clause for the following reasons: that they claim that their transformation status as threshold shareholders is relevant: that the applicant owed to them a duty to protect the value of their shares and they claim that they had no commercial power to prevent the applicant's abuse of certain of the terms of the subscription agreement. These arguments bear scrutiny.

[42] In Beadica, it was effectively held that no unique rules apply to contracts designed to promote transformation and empowerment. The core reasoning was that any special rules would undermine section 9(2)[40] and so would:-

'deter other parties from electing to contract with beneficiaries…or force beneficiaries to offset the increased risk by making concessions on other contractual aspects during contract negotiations'[41]

[43] Besides, the applicant did not owe the respondents any contractual or general duty to protect the value of their shares in these peculiar circumstances. There is no such general duty in law, and also no contractual duty. It must also be borne in mind that in this matter the respondents were clearly possessed of equal bargaining power and the playing fields were level when the consent agreement was negotiated and concluded. The respondents warranted that they understood the terms of the consent agreement and they accepted the transaction to be reasonable and fair. The first respondent desired to enter into the transaction so as to settle a tax liability of its own making. The first respondent elected to enter into the said share sale.

[44] In essence, the applicant seeks an order for specific performance. The respondents contend for a difference between a withdrawal and a dismissal of the

current action proceedings at their instance. This is clearly a matter of judicial discretion. This discretion must be exercised judicially and must not produce an unjust result. Specific performance by the respondents is possible in that they could simply file a notice withdrawing the action against the applicant.[42]

[45] By contrast, if the court did not grant specific performance, it could be argued that this result would be unjust, against public policy and unduly harsh. I say this because in the consent agreement the respondents specifically agreed to not institute legal proceedings against the applicant wherein they sought reliance upon the transaction. When they did this it was with the full awareness of their rights and after obtaining independent legal advice. In my view, the respondents are in breach of the terms of the subject clause of the consent agreement by pursuing the action proceedings as currently formulated against the applicant. Further, taking into account the circumstances of this matter, neither the agreement not to sue, nor the enforcement thereof, violates against public policy.

[46] I say this further because it is now settled law that contractual interpretation is an objective process of attributing meaning to the words used in a document recited in the context of the document as a whole and having regard to the apparent purpose of those words.[43] Put in another way, if all references to the transaction were omitted from the respondents' particulars of claim, as currently formulated, the respondents would have no cause of action.

[47] In the result , in my view the respondents fall to be ordered to withdraw their current action against the applicant. It goes without saying that I accordingly need not deal with the alternative claim and counter-applications in connection with the referral of any disputes between the parties to the process of private arbitration. The subscription agreement[44], provides that any costs awarded in a dispute in connection with or arising from the agreements will be recoverable on an attorney and client scale. Further, the employment of at least two counsel in the circumstances was reasonable because of the range of questions of law raised in these proceedings.

[48] The following order is granted: -

1. That the respondents are hereby ordered to withdraw the action instituted by them in this court against the applicant (on or about the 19th June 2020, under case reference number 7532/2020), within (10) court days of date of this order.
2. That the respondents' counter-applications are dismissed.
3. That the respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant's costs (including the costs of (2) counsel, where so employed) of and incidental to this application, and the counter-applications on the scale as between attorney and client, as taxed or agreed.

Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others (3268 / 2021) [2021] ZAWCHC 67 (19 April 2021)

Mandament van spolie or interim interdict - access to servers –

Vital Sales suspended its branch manager, who was believed to have been in league with Vital Engineering. The next day, Engineering barred Sales access to the servers, allegedly to protect its proprietary and confidential information, because of an alleged breach by Sales.

Wille J provides the reasons for the earlier interim order interdicting Engineering from denying Sales access to the servers and systems. The court discusses Sale's application for an order restoring the "possession" of its information on the communal server, with access to emails, records and an accounting system, so that it could conduct its business; new matters in a replying affidavit; hearsay evidence; misjoinder; jurisdiction; and the mandament van spolie.

[1] In these urgent opposed motion proceedings, the applicant sought an order that the respondents restore to it, 'possession' of its information housed on a communal server**[1]**. This, together with access to its emails and records on an accounting system.**[2]** In short, the applicant's intellectual property was allegedly possessed through its access to these servers and systems. The applicant required access to the server and the system, so it says, so as to conduct its business. Alternatively, the applicant sought an interim interdict to restore its access to the systems and servers, pending the institution of further proceedings against the respondents.

[2] The alleged dispossession occurred on the 16th of February 2021, when the applicant's access to the servers and systems was barred by the respondents. It became common cause that the first respondent obstructed the applicant's access to the servers and systems on the 16th of February 2021. The respondents' case was that they were entitled to touch this obstruction. This, because the applicant had breached an 'arrangement' by accessing the first respondent's proprietary and confidential information on the servers and systems. The first respondent averred that it was entitled to take all reasonable and necessary steps to protect its proprietary and confidential information on the subject servers and systems. This because of the alleged breach by the applicant.

[3] To counter this, the applicant avers that its alleged breach of the arrangement is irrelevant as the spoliation remedy is aimed at redressing unlawful self-help and restoring the parties to their status *ante omnia*. Further, the applicant contends for the position that it never had access, nor could it obtain access, to the first respondent's proprietary and confidential information on the servers or systems. This may very well be a factual dispute, but more about this later. The trigger to the termination of applicant's possession was allegedly the suspension of the applicant's branch manager on the 15th of February 2021. The said branch manager was believed to have been in league with the respondents. This then, was the nub of the dispute before me on application.

Johannesburg Society of Advocates and another v Nthai and others 2021 (2) SA 343 (SCA)
Also reported as: Johannesburg Society of Advocates and another v Nthai and others [2021] 2 All SA 37 (SCA)

Legal practitioner — Advocate — Misconduct — Application for readmission — Nature of proceedings — Onus on applicant seeking readmission to show exceptional circumstances — General Council of the Bar of South Africa and constituent bars' standing in readmission applications, and their role as custodes morum of advocates' profession, confirmed — Legal Practice Act 28 of 2014, s 44(2).

A disciplinary committee, appointed jointly by the Pretoria Society of Advocates (PSA) and the Johannesburg Society of Advocates (JSA), had found Mr Nthai, who was a member of both, guilty of (among other things) corruptly attempting to solicit a bribe from the opposing side to settle a matter against his own client's interest. The PSA, on the disciplinary committee's recommendation, instituted proceedings culminating in the High Court, Pretoria, striking him from the roll of advocates on 15 April 2013.
In October 2018 Mr Nthai applied ex parte to the Limpopo Division of the High Court, Polokwane, to be readmitted as an advocate. The readmission application was served only on the Polokwane Society of Advocates (POLSA). After being informed that the application had been launched, the PSA and the JSA successfully applied for leave to intervene, the court also ordering the application to be served on the Legal Practice Council (the LPC).
The application for readmission — opposed by the JSA, the PSA and the LPC but supported by POLSA — was successful, the High Court accepting expert evidence that Mr Nthai was driven to his impugned actions by anxiety and depression (see [79]); that he had been sufficiently punished for it and that he should be forgiven (see [83]); and that positive character references attesting to his rehabilitation indicated it would 'make no mistake in readmitting him' (see [87]).
It further held that the JSA and the PSA did not have locus standi in the readmission application; that the GCB (which did not participate in the proceedings) and its constituent bars had been stripped of their role as *custodes morum* of the advocates' profession by the establishment of the LPC and may no longer make submissions in applications to strike advocates from the roll or to readmit applicants; and that the JSA, PSA and GCB ceased to exist as statutory bodies as of November 2018 when the Legal Practice Act 28 of 2014 (LPA) was brought into force and were in the same position as deregistered companies (see [19]and [27]).
The High Court subsequently denied leave to appeal, also granting Mr Nthai's application in terms of s 18 of the Superior Courts Act 10 of 2013 for the readmission order to be executed in full pending the outcome of the application for leave to appeal. The present case concerned the JSA's appeal against both orders, with the GCB as intervening party, to the Supreme Court of Appeal (with its leave iro of the readmission order, and automatically iro the s 18 order).
Held, as to standing and the custodes morum issue
Each of the JSA and the PSA had an ongoing interest in the adherence of advocates to the highest professional standards, and whether an applicant for admission or readmission was a fit and proper person. The fact that the LPC also had such an interest did not deprive the JSA or the PSA of its own interest — and therefore legal standing — in legal proceedings such as this. In any event, a person may intervene in an application if such person has a direct and substantial interest in the outcome of the litigation. Moreover, our law recognised that associations that existed to promote the interests of their members had the power to intervene in litigation that

affects those interests. Advocates had a legal interest in protecting the status and dignity of their profession. (See [30] and [33].)
It was well established that the GCB and its constituent bars, including the JSA and the PSA, were the *custodes morum* of the advocates' profession. The High Court was accordingly wrong to conclude that the GCB, the JSA and the PSA were no longer *custodes morum* of the advocates' profession and to conclude that the JSA and the PSA had no standing in the readmission application. The GCB and its constituent bars were voluntary associations with legal capacity as governed by their constitutions, and not statutory bodies, as supposed by the High Court. Likening them to 'deregistered companies' was likewise inapt. (See [35] and [37].)
Accordingly, insofar as a legal practitioner or juristic person was entitled under s 44(2) of the LPA to approach a High Court for relief 'in connection with' a complaint of misconduct against a legal practitioner, this must be interpreted to include applications concerning the readmission of advocates previously removed from the roll on account of misconduct, and to empower the bars — juristic entities with legal personality having an interest in promoting and protecting the advocates' profession — to involve themselves in readmission applications and other matters concerning the professional misconduct of advocates. (See [26].)
Held, as to readmission
It was difficult to imagine a more egregious transgression of the norms of professional conduct. Properly characterised, what Mr Nthai did transcended mere professional misconduct; on his own version it constituted a serious crime. While the evidence disclosed that he had acted in conflict with the duties of an advocate in various respects, neither of the experts went so far as to aver positively that depression or anxiety was the primary, or for that matter even a contributing, factor in the transgressions. Yet the High Court held that his condition provided a full explanation for his transgressions. In the absence of such evidence, it was not possible to conclude that Mr Nthai was not a person inherently prone to dishonesty; or the fact that he was currently asymptomatic for depression and anxiety meant that he was not at risk of similar transgressions in the future. (See [44], [47] and [79] – [80].)
To focus on forgiveness and whether Mr Nthai had been sufficiently punished, as the High Court did, was to fundamentally misconceive the nature of the enquiry. Where, as here, an applicant for readmission had demonstrated a propensity for inherent dishonesty, only in the most exceptional of circumstances — where they have worked to expiate the results of their conduct and satisfied the court that they had changed completely — would a court consider readmission at all. Mr Nthai did not demonstrate such exceptional circumstances. It followed that the High Court failed to apply the appropriate test — it did not find exceptional circumstances of the kind required. The appeal would accordingly be upheld.

BENNETT AND ANOTHER v THE STATE 2021 (2) SA 439 (GJ)

Recusal — Application — Abuse — As strategic or tactical device — Inappropriate — Should not become standard weapon in litigant's arsenal but to be used for true objective of securing fair trial — Unfounded aspersions cast on judges could lead to loss of faith in judiciary.

Judge — Temperament — Expected to be stoic and thick-skinned — Litigants may raise impropriety of judge's conduct and, without fear, seek recusal.

The two accused in a case involving 3000 white collar crimes, including racketeering as intended in the Prevention of Organised Crime Act 121 of 1998 — committed more than 20 years ago — brought an application for the recusal of the court. The first judge allocated to the matter recused herself and then the accused sought the recusal of the two lead prosecutors. The Supreme Court of Appeal overturned the High Court's judgment granting the application. The second judge appointed then took ill and the matter was then allocated to the present judge in 2015, after the indictment had been served on the accused in July 2005.
The court dismissed the recusal application, remarking that more and more recusal applications were being brought as strategic or as tactical tools or simply because a litigant did not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners brought or threatened to bring recusal applications was cause for concern. The recusal of a presiding officer, whether a magistrate or judge, should not become standard equipment in a litigant's arsenal but should be exercised for its true intended objective, namely to secure a fair trial in the interests of justice in order to maintain both integrity of the courts and the position they ought to hold in the minds of the people whom they served. (See [113].)
The court observed that judges were expected to be stoic and thick-skinned. What was expected of presiding judges was clear, as was the right of litigants to raise improper conduct by judges and, without fear, to seek recusal. But litigants and their legal representatives at the same time bore a responsibility not to seek recusal as a tool. The ongoing unfounded aspersions cast on judges could bring about a loss of faith in the judiciary and bring it into disrepute.

MAGIC VENDING (PTY) LTD v TAMBWE AND OTHERS 2021 (2) SA 512 (WCC)

Consumer protection — Consumer agreement — Unfair, unreasonable or unjust terms — What constitute — Consumer Protection Act 68 of 2008, s 48.

In an application in terms of the PIE Act * for the eviction of first respondent from premises pursuant to cancellation of a lease, a forfeiture clause (*lex commissoria*), providing for the summary cancellation of the contract if the lessee fell into default, was invoked to cancel a lease for non-payment of rental. One of the first respondent's defences was that she was not an 'illegal occupier' as contemplated in PIE; the lease was not validly cancelled because the *lex commissoria* constituted an 'unfair, unreasonable or unjust term' as contemplated in s 48 of the Consumer Protection Act (the CPA).
Held
The contextual indications of what the legislature contemplated by a term that might be 'unfair', suggested that it would be one that was exploitative of the consumer. The provisions of the CPA should not be construed so as to purport to invest in the courts a power to refuse to enforce contractual terms on the basis that their enforcement would, in the judge's subjective view, be unfair, unreasonable or unduly harsh; they should rather be construed as, in certain respects, codifying the established principle that courts will refuse to enforce contractual provisions that are so unfair, unreasonable or unjust that it would be contrary to public policy to give effect to them. (See [7].)

Forfeiture clauses were common features of lease agreements and there was nothing lacking in good faith about their incorporation. Had it been the legislative intention to override the rich body of jurisprudence that has held them to be enforceable according to their tenor and that the courts have no equitable jurisdiction to relieve a debtor from the effect of them, the statute would have provided as much unequivocally. (See [8].)
The invocation of the forfeiture clause to cancel the contract did not result in the lessee's summary eviction from the premises. If she were to stay on as an unlawful occupier after the cancellation of the lease, as she did, any ensuing eviction would fall to be regulated in terms of the PIE Act, which was expressly directed at the constitutionally enshrined right against arbitrary eviction (s 26(3)). The first respondent did not discharge the onus of establishing that enforcement of the forfeiture clause would be contrary to public policy. The application would accordingly be granted.

MASHELE v BMW FINANCIAL SERVICES (PTY) LTD AND ANOTHER 2021 (2) SA 519 (GP)

Credit agreement — Consumer credit agreement — Debt enforcement — Whether payment of arrear amount specified in notice issued under s 129 of NCA preventing enforcement of credit agreement, even if, at time payment made, consumer having fallen into further arrears beyond that mentioned in notice — National Credit Act 34 of 2005, ss 129 and 130.

After Ms Mashele had fallen into arrears in respect of her payment obligations in terms of the instalment sale agreement she, as purchaser, had entered into with BMW, the latter issued, on 28 January 2016, a notice in terms of s 129(1) of the National Credit Act 34 of 2005. The notice alerted Ms Mashele that she was R14 925 in arrears, and invited her to remedy her default within 14 days. BMW dispatched the letter by registered mail on 3 February 2016. A relative of Ms Mashele, it was alleged, collected the letter on 18 March 2016. When no response was forthcoming, BMW sued in the High Court, and obtained an order cancelling the agreement, and authorising the repossession of the vehicle purchased (the determination of the amount outstanding was postponed). In the present application Ms Mashele sought the rescission of that order, arguing that it was erroneously sought and granted within the meaning of rule 42(1)*(a)*. The basis for this claim was that, on 6 February 2016 — before court proceedings were launched — she paid BMW R15 000, more that the amount claimed in terms of the notice. Ms Mashele acknowledged that on 1 February 2016 another debit order was returned unpaid such that she was still in fact in arrears as at 7 February 2016. Ms Mashele argued, however, that any reasonable consumer, on receipt of the notice, and seeing the date of demand being 28 January 2016, would, as she had, have assumed that the payment of 6 February 2016 was sufficient to cure the default, and have believed that they were entitled to a further s 129 notice before BMW took any further enforcement action. She concluded that BMW's failure to send a further notice before instituting enforcement proceedings rendered the judgment erroneously sought and granted.
Held, that s 129 required the consumer's notice to be drawn to the default as it stood at the time the notice was issued. But the aim of the s 129 notice was not simply to procure the payment of the amount set out in it. It was to ensure that payments in

terms of the agreement were brought up to date or that any other dispute arising from the agreement was referred to the appropriate forum. (See [29].)
Held, further, that a credit provider was not enjoined from approaching a court simply because further payments had been made since it issued the s 129 notice. Section 130(1)*(b)* only prevented enforcement where the consumer had brought their payments up to date or had otherwise responded to the notice without rejecting the proposals contained in it. Likewise, a court was not enjoined from determining proceedings to enforce a credit agreement simply because the amount demanded in the s 129 notice had been paid, unless that payment had the effect of eliminating the arrears due under the agreement.
Held, accordingly, that there was nothing in s 129 or 130 of the NCA that prevented BMW from approaching a court or the court from determining the proceedings brought by BMW. Ms Mashele did not respond to the s 129 notice. She ignored it. She did not bring her payments up to date. She did not engage with the contents of the notice and seek to develop and agree a plan to restructure or catch up on her payments. (See [32].) In the circumstances there was no statutory bar to BMW approaching the court and to the High Court granting the relief it sought (see [33]). Application for rescission dismissed.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS v CAPE TOWN CITY AND OTHERS 2021 (2) SA 565 (WCC)

Land — Unlawful occupation — Eviction — Evictions from and demolition of informal dwellings whether occupied or unoccupied — During state of disaster such evictions and demolitions to be in terms of court order only.

In the course of the national state of disaster proclaimed in March 2020 in the wake of the Covid-19 pandemic, first respondent, the City of Cape Town, had come to evict individuals from informal dwellings on City, nature conservation and private land, and had then demolished the structures concerned (see [10], [24] and [26]). Here the applicants applied urgently to interdict such action and for further relief, and the following order, in essential part, was granted (see [80]):

- The City, its land-invasion unit, and any private contractors the City employed were interdicted from evicting persons from and demolishing informal dwellings whether occupied or unoccupied, throughout the Metropole, while the state of disaster endured, except in terms of an order of court. (It was accepted that occupied structures were protected by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and evictions therefrom could only occur by virtue of court order (see [39]). As to unoccupied structures, the City asserted that neither PIE nor the Constitution required eviction or demolition to be in terms of a court order (see [40]). The court however concluded that judicial supervision was justified (see [54] – [55]). This in a context where City officials decided whether structures were unoccupied and where such decisions were sometimes arbitrary, with officials making the decisions in their own cause, without public hearing, and unguided by rules, legislation or policy, and where PIE, properly interpreted, required supervision in cases of doubt (see [46.4], [47], [50] and [52]).)
- Where the City, the land-invasion unit or contractors conducted evictions and demolitions of occupied or unoccupied informal dwellings under order of court, such demolitions and evictions were to be performed in a manner respectful of the dignity

of the evictees, without excessive force, and without destroying or confiscating materials of the evictees.

- Any police present at such demolitions and evictions were to ensure they were conducted lawfully, and that evictees' dignity was protected.

SAGLO AUTO (PTY) LTD v BLACK SHADES INVESTMENTS (PTY) LTD 2021 (2) SA 587 (GP)

Practice — Judgments and orders — Summary judgment — New requirements of rule 32(2)*(b)* discussed.

Vindication — Rei vindicatio — Action for return of motor vehicles — Right of possession — Whether sale agreements lawfully terminated — Summary judgment procedure — Application for summary judgment refused.

The applicant applied for summary judgment in a vindicatory action for the recovery of a number of motor vehicles in terms of rule 32 of the Uniform Rules of Court, as amended with effect from 1 July 2019. The respondent argued that it was, under the written agreements concluded between the parties, rightfully in possession of the vehicles. It argued that the applicant did not, as alleged by it, lawfully terminate the written agreements between the parties because it did not comply with the applicable notice requirements.

The court, having examined recent precedent, pointed out that the amended rule required the applicant to satisfy the court that there was no defence on the merits (see [40]). It had to identify the facts on which its claim was based and engage with the contents of the plea in order to substantiate its averments that the defence was not bona fide and was raised only to delay the claim (see [45], [52]). In turn the defendant (respondent) had to meaningfully engage with the additional material required to be incorporated in the plaintiff's affidavit in support of summary judgment (see [55]).

The court, while satisfied that the applicant's affidavit in support of its application for summary judgment complied with the provisions of the amended rule 32 (see [54]), was not satisfied that the respondent lacked a bona fide defence: the applicant had failed to comply with the abovementioned notice requirements, which would have given the respondent the opportunity to rectify any breach (see [60]). In the circumstances, summary judgment would be refused and the defendant granted leave to defend.

Global Environmental Trust and others v Tendele Coal Mining (Pty) Ltd and others (Centre for Environmental Rights and others as *amici curiae*) [2021] 2 All SA 1 (SCA)

Civil Procedure – Interdictory relief – Cessation of mining operations – Grounds for application not established and interdict not justified

Mining, Minerals and Energy – Mining without environment authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 – Whether such environment authorisation was required – Section 24F(1)(a) of Act prohibiting commencement of listed activities in the absence of environmental authorisation – Any allegation of breach of section 24F(1)(a) requiring identification

of listed activity alleged to have been commenced without environmental authorisation and date on which that activity commenced.

In the High Court, the appellants sought an order interdicting the first respondent ("Tendele") from conducting mining operations at a mine in KwaZulu-Natal. They contended that Tendele was mining without the necessary statutory authorisations and approvals. The interdict sought was far-reaching, and would have the effect of closing Tendele's operations.

In contending that Tendele's mining operations were unlawful, the appellants stated that there was no environment authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA"); no land use authority, approval or permission from any municipality having jurisdiction; no waste management licence issued by the fourth respondent, the Minister of Environmental Affairs (the "Minister") in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008; and no written approval in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the "KZN Heritage Act") to damage, alter, exhume or remove any traditional graves.

The dismissal of the application led to the present appeal.

Held – In the majority judgment that section 24F(1)(a) of NEMA prohibits the commencement of listed activities in the absence of environmental authorisation. Listed activities are those identified in terms of section 24(2). As the appellants failed to allege that Tendele was conducting any of the listed activities at the mine, the founding affidavit lacked the necessary allegations to sustain the alleged ground of unlawfulness. Any allegation that Tendele had breached section 24F(1)(a) had to identify the listed activity alleged to have been commenced without environmental authorisation and the date on which that activity commenced.

Regarding the accusation of absence of municipal land use authority, the appellants maintained that Tendele was undertaking mining operations in contravention of the KwaZulu-Natal Planning and Development Act 6 of 2008 and the Spatial Planning and Land Use Management Act 16 of 2013. Those allegations were not pleaded in the affidavits and Tendele was never afforded an opportunity to respond to such a case. Moreover, the municipalities confirmed that no planning approval or land use approval was required for the continuation of mining operations by Tendele.

In terms of section 20 of the National Environmental Management: Waste Act, no person may commence, undertake or conduct a waste management activity except in accordance with a waste management licence or the requirements or standards determined in terms of section 19(3). A waste management activity is defined in the Act. The appellants' failure to identify any aspect of Tendele's operations that would require a waste management licence, rendered this objection unsustainable.

On the last issue, the Court noted Tendele's admission that it had previously removed or altered traditional graves, without being in possession of the necessary authorisations and its efforts and commitment to rectify its past failures. There being no reasonable apprehension that Tendele would again relocate or exhume graves without the appropriate approval, an interdict would not be justified.

The appeal was accordingly dismissed.

In a minority judgment, the view was that Tendele had never disputed the allegation that its mining operations incorporated listed activities. The dissenting view was that environmental authorisation to conduct a listed activity, in terms of section 24(2) of NEMA, is a requirement for mining, and therefore Tendele's mining operations were said to be unlawful.

United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others [2021] 2 All SA 90 (SCA)

Civil Procedure – Interim interdict – Appealability – Section 17(1) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success there is some other compelling reason why the appeal should be heard – Appealability of interim orders have been adapted to accord with the equitable standard of the interests of justice – Order confirmed as interim in effect as well as in form, and interests of justice not requiring that an appeal be entertained.

In June 2018, the appellants sent the President of South Africa a letter in which it was alleged that the respondents had conducted themselves unlawfully in various ways in relation to the Public Investment Corporation (PIC). The letter was also published on the website of the first appellant (the "UDM").

Pending an action for damages for alleged defamation, the respondents sought interim relief in the High Court. The Court granted an interim interdict against the appellants forbidding the repetition of certain remarks they had made publicly about the respondents. Leave to appeal was granted but when the appeal was heard, the matter was struck off the roll on the ground that the interim order was not appealable.

Held – In the majority judgment, that the crux of the dispute was whether the order was final in effect and was therefore appealable, or, if its true nature was in fact interim, whether the interests of justice warranted an appeal against it to be entertained.

An application for leave to appeal is regulated by section 17(1) of the Superior Courts Act 10 of 2013. In terms thereof, leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; the decision sought on appeal does not fall within the ambit of section 16(2)(a); and where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

Case law shows that the general principles on the appealability of interim orders have been adapted to accord with the equitable and more context-sensitive standard of the interests of justice favoured by our Constitution.

In the High Court, the question to be decided was simply whether, *prima facie*, the appellants' published remarks were defamatory and whether an interim interdict inhibiting the repetition of those remarks pending a trial was appropriate. The order then granted could not plausibly be interpreted as having final effect. The Court

confirmed that the order was interim in effect as well as in form, and that the interests of justice did not require that an appeal be entertained.

In two dissenting judgments, it was pointed out firstly that there is no absolute bar against subjecting interim orders to an appeal. An interim order may be appealed if the interests of justice, based on the specific facts of a particular case, so dictate. The dissenting opinions found that the High Court was aware of the fact that interim interdicts are not ordinarily appealable but exercised its discretion to grant the appellants leave to appeal on the basis that the interests of justice warranted that its interim order be the subject of an appeal. The dissenting opinions agreed that such decision was correct.

Mineral Sands Resources (Pty) Ltd v Reddell [2021] 2 All SA 183 (WCC)

Litigation – Abuse of court processes – Purpose or motive of litigation is relevant to the question of abuse of process, and litigation brought for an ulterior purpose is impermissible – Strategic Lawsuits or Litigation Against Public Participation (SLAPPs), intended to intimidate or disable opponents and critics constituting impermissible use of court process to achieve an improper end.

Two mining companies, involved in the exploration and development of major mineral sands projects in South Africa, sued three environmental attorneys and three community activists for defamation and damages in the in the sum of R14,25 million, alternatively the publication of apologies. The plaintiffs alleged that each of the defendants had made defamatory statements relating to plaintiffs' mining operations and activities. The defendants raised two substantially identical special pleas in each of the three separate actions, and in response, the mining companies raised exceptions to the special pleas. The Court held at the outset that the second special plea was not sustainable, and therefore it was necessary to determine only the exception to the first set of special pleas.

In the first special plea, the defendants averred that in bringing their actions, the plaintiffs' conduct amounted to an abuse of process; and/or use of court process to achieve an improper end and to use litigation to cause the defendants' financial and/or other prejudice in order to silence them; and/or violated the constitutional right to freedom of expression. It was contended that the mining companies' actions were brought for the ulterior purpose of discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the mining companies; and intimidating and silencing members of civil society, the public and the media in relation to public criticism of the mining companies. The special pleas thus introduced a novel Strategic Litigation Against Public Participation ("SLAPP") defence.

Held – Common law affords the courts the inherent power to stop frivolous and vexatious proceedings when they amount to an abuse of its processes. Our courts have repeatedly referred to the purpose or motive of litigation as being relevant to the question of abuse of process. Litigation which is brought for an ulterior purpose is impermissible.

Section 16 of the Constitution protects the broader concept of freedom of expression. An order preventing a person from making allegedly defamatory statements is a drastic interference with that right, and is granted only in extremely circumscribed and narrow circumstances, and only after considering the prejudice to the public.

SLAPPs are Strategic Lawsuits or Litigation Against Public Participation, meritless or exaggerated lawsuits intended to intimidate civil society advocates, human rights defenders, journalists, academics and individuals as well as organisations acting in the public interest. In essence, SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes. Distinguishing a SLAPP suit from a conventional civil lawsuit involves competing policy considerations in determining which activities should be protected from legal action.

In the present litigation, it became evident that the plaintiffs' strategy was that the more vocal and critical the opponent was, the higher the damages amount claimed. Public participation is a key component in environmental activism, and the detrimental effect of SLAPP can be detrimental to the enforcement of environmental rights and land use decisions. The Court was satisfied that the defamation suit was not genuine and *bona fide*, but merely a pretext with its only purpose to silence its opponents and critics. It was confirmed as a SLAPP suit, and the first set of special pleas was a valid defence to the action. The first set of exceptions was accordingly dismissed with costs.

School Governing Body, Paarlzicht Primary School v Member of Executive Council for Education, Western Cape and others [2021] 2 All SA 241 (WCC)

Constitutional and Administrative Law – Appointment of school principal – Review application – Grounds of bias, failed to consider relevant considerations, failure to comply with mandatory requirements and irrationality all found to be unsustainable where decision-maker properly applied mind and took into account all relevant factors.

Constitutional and Administrative Law – Appointment of school principal – Review application – Late filing of application – Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reason for it, or might reasonably have been expected to have become aware of the action and/ or the reasons – Where adequate explanation was provided for delay, late filing of application condoned.

Upon the position of principal of the third respondent school becoming vacant in July 2018, the applicant (as the school governing body) commenced a process of recruiting a new principal for the school. The post was advertised by the second respondent, who was the provincial Head of Education. After the shortlisting and interview process, the applicant chose the fifth respondent (Mr Oordmeyer) for the position. It alleged that it was forced to also submit the name of the fourth respondent (Mr Duraan) by the Western Cape Education Department's

representative (Mr Dalvey) who had overseen the interview process. The second respondent, after the required assessments were done, appointed Mr Duraan as the principal.

The present application was for the review of the above decision. The grounds of review were that the second respondent was biased; failed to consider relevant considerations in making the decision; unlawfully delegated his powers and failed to comply with mandatory requirements. It was also contended that the decision was unreasonable and irrational.

Held – As the application was filed out of time, the second respondent raised an objection of unreasonable delay in seeking review. Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reason for it, or might reasonably have been expected to have become aware of the action and/or the reasons. Section 9(1) provides for extension of the period. In the present matter, the court noted the extended exchange of correspondence between the parties after the impugned decision was made. That adequately accounted for the delay in seeking review, and condonation was thus granted.

The accusation of bias was based on the allegation that the second respondent was closely acquainted with Mr Duraan, and the involvement of Mr Dalvey during the interview and nomination process. Neither of those allegations was found to be sustainable, and the complaint of bias was rejected.

Equally unfounded was the contention that the second respondent had failed to consider relevant considerations. The Court found that all relevant material before the second respondent was given proper consideration, and that he had properly applied his mind to the facts.

For a decision to be impugned on the basis of lack or reasonableness, it must have been so unreasonable that no reasonable decision maker could have come to the same decision. The court noted that the second respondent was faced with two suitable and competent candidates. While he had to accord sufficient weight to the recommendations of the applicant, he had the power to exercise his own discretion. There was nothing to indicate that the second respondent's appointment of Mr Duraan was so bereft of reason to an extent that it should be set aside.

The submission that the second respondent had failed to comply with mandatory requirements related to the requirement in section 6(3)(c) of the Employment of Educators Act 76 of 1998, that three names be submitted. The Court found the second respondent's condoning the submission of only two names in this case to be acceptable.

Finally, a decision can be reviewed if it bears no rational relation to the reasons given. The Court found the decision of the second respondent viewed objectively, to be rational and unquestionable.

The application for review was dismissed.

END-FOR NOW