LEGAL NOTES VOL 4/2021

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SA LAW REPORTS APRIL 2021

GUARDRISK INSURANCE CO LTD v CAFÉ CHAMELEON CC 2021 (2) SA 323 (SCA)

Insurance — Policy — Business insurance policy — Business interruption — Infectious disease cover — Covid-19 — Clause providing cover for loss resulting from business interruption caused by notifiable disease occurring within 50 kilometres of insured businesses' premises — Whether insured's loss covered.

After the government imposed the national Covid-19 lockdown in March 2020, Café Chameleon's business, a restaurant, incurred substantial losses that it sought to recoup from its insurer, Guardrisk (see [1] and [6] – [7]).

The portions of the contract in issue provided as follows: 'Loss as insured by this section resulting [from] interruption or interference with the Business due to . . . *(c)* notifiable Disease occurring within a radius of 50 kilometres of the Premises' (see [11]). 'Notifiable disease' was defined as an 'illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which a competent local authority has stipulated shall be notified to them . . .'. (see [11]).

When Guardrisk came to reject Café Chameleon's claim, it obtained a declarator that Guardrisk was liable to indemnify it for its losses (see [2] and [7]). The High Court later granted Guardrisk leave to appeal (see [2]).

Guardrisk's substantial arguments against liability, and the response of the Supreme Court of Appeal to each of them, were as follows:

- *No competent local authority had by law stipulated that the disease be notified to it*. *Rather, national legislation had obliged that certain diseases, which would include Covid, should be reported to the local authority concerned* (see [15]). Held, that this contention was contrary to the proper approach to interpreting insurance

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

contracts, which was to construe them 'liberally . . . in favour of the insured' (see [13] and [16]).

- *Loss following closure of premises as result of government orders was not covered* (see [17]). Held, that a notifiable disease usually required a government response, and this entailed that the response was part of the insured peril — a conclusion supported by English authority (see [19] – [20] and [56]).
- *The parties could not have thought of the possibility of a pandemic at the time they contracted, and so could not have intended that the infectious disease clause would cover one* (see [23] – [24]). Held, that the parties' intention was not determined on what they subjectively believed at the time of contracting, but what objectively, having regard to language, context and purpose, they could be taken as having intended (see [24]).
- *The policy only covered a response to a local occurrence of disease, not a response to a countrywide outbreak* (see [32]). Held, that nothing in the language of the clause supported this interpretation, and the parties must be taken to have contemplated that a response to a solely local or both local and extra-local outbreak would be covered (see [33]).
- *There was no causal link between the outbreak of Covid in the 50-kilometre radius of the business premises and the business interruption: eliminate the outbreak and the business interruption would still have occurred, brought on by the national lockdown* (see [44]). Held, that the insured risk was Covid and government's response to it, so but for the event (Covid and the response), the business would not have been interrupted, making the outbreak in the 50-kilometre radius the factual cause of the business interruption (see [45]).
- *A response to the local outbreak did not cause the interruption, a response to the national outbreak did* (see [46]). Held, viewed differently, that the response to the national outbreak was indeed the cause of the interruption, in that the locality concerned (Cape Town) accounted for a large proportion of the national Covid cases, and that this could be seen as a concurrent cause of the interruption, together with the response to the local outbreak (see [48]).
- *The local outbreak was insufficiently closely linked to the lockdown for it to be the legal cause of the business interruption* (see [49] – [50]). Held, that it had been accepted that the lockdown was the proximate cause of the interruption, and that English authority supported this approach (see [51] and [57] – [58]).

Appeal dismissed (see [68]).

JOHANNESBURG SOCIETY OF ADVOCATES AND ANOTHER v NTHAI AND OTHERS 2021 (2) SA 343 (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.

PRESIDENT, RSA AND ANOTHER v WOMEN'S LEGAL CENTRE TRUST AND OTHERS 2021 (2) SA 381 (SCA)

Marriage — Muslim marriage — Whether state obliged to enact legislation recognising such — Executive and legislature given 24 months to remedy failure of Marriage Act 25 of 1961 and Divorce Act 70 of 1979 to recognise Muslim Marriages — Common-law definition of marriage unconstitutional in excluding Muslim marriages.

This appeal concerned three matters which were consolidated in the High Court (see [13]). In the first, the Women's Legal Centre brought proceedings asserting that the state had failed to recognise marriages under Sharia law; that this infringed several constitutional rights; that s 7(2) of the Constitution obliged the state to pass legislation recognising Muslim marriages; and that the President and executive had not complied (see [8]).

The second matter concerned Mrs Faro who had been married to one Mr Ely under Muslim law. He had obtained a divorce (*Talaq*), this had been revoked, and he had died (see [9]).

Later on, Mr Ely's daughter from another marriage procured a decision of the Muslim Judicial Council that the marriage was annulled, but despite this Mrs Faro obtained appointment as executrix. Thereafter the Master resolved that the winding-up could not proceed until resolution of the marital-status dispute. It then met with the Council

and the daughter and concluded the marriage had terminated, and another executrix was appointed. She had proceeded with the winding-up, Mrs Faro had objected to the estate account, and the Master had dismissed the objection. (See [10] – [11].) This resulted in Mrs Faro bringing proceedings and obtaining a declarator that the marriage subsisted at Mr Ely's death and that she was a 'spouse' under the Intestate Succession Act 81 of 1987 and a 'survivor' in terms of the Maintenance of Surviving Spouses Act 27 of 1990. Subsequently she approached the High Court for determination of related issues (see [11]).

The third matter concerned Mrs Esau who was married to Mr Esau under Islamic law. She sought to interdict the Government Employees Pension Fund paying a pension interest to Mr Esau pending an action for payment of it to her, where the action was based on the state's failure to pass legislation recognising and regulating Muslim unions (see [12]).

The matters came, as mentioned, to be consolidated, and were heard before the full bench. It declared that the state was obliged by s 7(2) of the Constitution to enact legislation recognising Muslim marriages as valid and to regulate their consequences (see [13]). Thereafter the matter came before the Supreme Court of Appeal (see [14]).

There the appellants, the President and Minister of Justice conceded that the failure to recognise the validity of Muslim marriages infringed the rights of dignity, equality and access to court of women in those marriages, as well as the rights of children born under them (see [15]).

This left three issues for decision: whether the state was constitutionally obligated to enact legislation recognising the validity and regulating the consequences of such marriages; whether s 15 of the Constitution had been infringed; and whether certain interim relief should be retrospective (see [22]).

The court *held* that the state was not obliged by international law or any specific constitutional provision to enact the legislation, and nor under s 7(2) of the Constitution could it order so: such order would infringe the separation of powers and was unsupported by authority (see [24] – [25] and [43]).

As to infringement of s 15, the court found in the negative, as with the request for retrospectivity (see [47] – [48]).

Ordered, in summary, that the appeal and cross-appeals succeeded in part, and that the order of the full bench should be replaced with an order, as follows (see [51]):

- The Marriage and Divorce Acts were inconsistent with the Constitution in failing to recognise Muslim marriages as valid and to regulate such recognition's consequences;
- section 6 of the Divorce Act was unconstitutional in failing to provide mechanisms safeguarding minor or dependent children on dissolution of such marriages;
- section 7(3) of said Act was unconstitutional in failing to provide for redistribution of assets on dissolution, as was s 9(1) in failing to provide for forfeiture of benefits;
- these declarations suspended to allow the President, Cabinet and Parliament to legislatively remedy these defects; and
- pending such legislation, any existing Muslim marriage, or Muslim marriage terminated but subject to proceedings, could be dissolved under the Divorce Act.
- Section 12(2) of the Children's Act 38 of 2005 applied to Muslim marriages concluded after the date of the order.

- The common-law definition of marriage was unconstitutional in excluding Muslim marriages.
- The Minister of Justice to determine procedures by which the Master could resolve disputes as to validity of Muslim marriages in claims involving the Maintenance of Surviving Spouses Act and Intestate Succession Act.

MILESTONE BEVERAGE CC AND OTHERS v SCOTCH WHISKY ASSOCIATION AND OTHERS 2021 (2) SA 413 (SCA)

Competition — Unlawful competition — False representation as to character, composition or origin of product — Alcoholic beverage made from vodka masquerading as Scotch whisky — Unlawful and contrary to statute — Application for interdict granted — Liquor Products Act 60 of 1989, s 11(2)*(d)* and s 12.

Intoxicating liquor — Statutory prohibition of on misdescription of liquor product — Capable of founding interdict to restrain offending conduct — Liquor Products Act 60 of 1989, s 11(2)*(d)* and s 12.

The respondent (the SWA, a trade organisation representing the Scotch whisky industry), sought an interdict preventing the appellant (Milestone) from manufacturing and distributing two alcoholic beverages, under the names 'Royal Douglas' and 'King Arthur', that masqueraded as Scotch but were in fact vodka-based. The SWA argued that Milestone projected a false Scottish provenance for their products. Having initially failed to comply with the SWA's demands that it desist, Milestone later replaced their initial get-ups with very similar ones (see [2] and [24] for depictions). But Milestone nevertheless continued to market and sell Royal Douglas in its original get-up. It was agreed between the parties that Milestone's products were not whisky and had no connection to Scotland or even the UK. Besides their Scottish or British-sounding names, the Milestone products, in both their original and replacement formats, had tartan-style get-ups and used expressions such as 'premium quality' and 'double distilled'. Less prominent were the words 'spirit aperitif' and 'whisky flavoured'. The contents were artificially coloured to look like whisky. The alcohol percentage was stated to be 43,5% while it was actually less than 35%. According to uncontested expert evidence, the taste was sweet and medicinal and lacked the barley or grain notes typically associated with Scotch (see [48], [49]).
The SWA's case rested on two legs, namely, misrepresentation by Milestone as to the attributes, character, composition and origin of its products and, secondly, trade in contravention of s 12 of the Liquor Products Act 60 of 1989 (the Act), which prohibits conveying a false or misleading impression of the nature of a liquor product. The principal issue before court was whether Milestone's products were being marketed in a way that was likely to lead a significant section of the public to believe they had attributes that they actually lacked, giving rise to confusion, or the likelihood of confusion.
Held
While competition in trade was healthy and to be encouraged, it had to be carried on fairly and lawfully (see [1]). Unlawfulness was determined according to the objective norm of public policy, ie by how a substantial number of the public would perceive the product. Here the issue was whether Milestone's products were being marketed in a way that was likely to lead a significant section of the public to think that they

had some attribute or attributes which they did not possess, giving rise to confusion or the likelihood of confusion (see [18]).

Scotch whisky was a distinctive product with an established reputation and goodwill. While Milestone agreed that there was no connection to Scotland and that Milestone products were not whisky, Royal Douglas was replete with Scottish indicia, including a tartan-patterned background and used the name 'Douglas' — a clan name that was strongly associated with Scotland — and a crested label, all of which indicated a beverage steeped in a Scotch whisky tradition. This invited the obvious question of why those names and heraldic symbols were chosen. (See [19].)

The court had to take a common-sense approach to labels and the visual impressions created by them. The first impression on a customer was likely to be that the products were whiskies. Upon closer scrutiny the interplay of the other influencing factors — such as the labelling, the stated alcohol strength of 43,5% and the expressions 'premium quality' and 'double distilled', all of which are closely associated with whisky — was likely to reinforce that impression. Nothing suggested their true nature and everything that they were what they were not. The products and their get-up would lead a significant section of the public to believe that they had attributes that they did not truly possess. (See [23].)

The replacement get-up remained likely to confuse customers into believing that the product is whisky and even that it has a connection with Scotland, thereby representing that it is Scotch whisky in circumstances in which Milestone, having sailed so close to the wind, should have distanced its products from any such suggestion. It should have departed significantly from the initial get-up. But its continued use of the words 'whisky flavoured', 'King Arthur', Royal Douglas, 'double distilled' and of artificial colouring showed that Milestone failed to create a get-up that was not suggestive of whisky or Scotland. In the circumstances the court a quo could not be faulted for holding that there was a likelihood of confusion created by the replacement Royal Douglas and King Arthur get-ups. (See [25], [31] and [33].)

As to the statutory cause of action, s 12 of the Act meant that the product could be sold only if the description matched the content. Milestone's product was marketed as whisky-flavoured, which was not even possible because taste was subjective. Carried to its logical conclusion, on its construction Milestone would be able to put anything into a bottle, call it whisky-flavoured, and remain in line with the Act, a proposition that could be rejected out of hand. Milestone's product also contravened s 11 and s 12 of the Act by representing itself as whisky or whisky-flavoured beverage with an alcohol content of 43,5%. (See [35] – [36], [43], [50].)

The next question was whether the SWA was entitled, under the Act, to interdictory relief or restricted to a statutory remedy. Since there was precedent for the view that the purpose of an interdict was to restrain future or continuing breaches of a statute, whereas the statutory remedy related to past breaches, it followed that the SWA was entitled to the interdictory relief sought. (See [51], [53], [57].)

The appeal would therefore fail and the interdict sought by the SWA granted. Milestone would be prohibited from using the existing get-ups, misleading terms like 'whisky', 'Scotch' or 'Scotland', insignia evocative of Scotland, and from representing their products to be whisky or whisky-flavoured.

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.

CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA AND ANOTHER v LC 2021 (2) SA 471 (GJ)

Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Requirements — Exceptions to peremptory return of child — Discussion of applicable law — Hague Convention on Civil Aspects of International Child Abduction (1980) as incorporated into South African Law in terms of Schedule to Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, arts 3, 12 and 13.

Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Best interests of child — Whether best-interests principle, as enshrined in Constitution and Children's Act, was self-standing defence enjoying hierarchical supremacy to Hague Convention for children present in jurisdiction of South Africa.

In an application instituted in the Johannesburg High Court, the second applicant alleged that on 3 December 2019 the respondent, his wife, had wrongfully removed their minor children from the jurisdiction of Ontario, Canada, where they were habitually resident, to South Africa, from where they had all originally relocated. He, along with the Central Authority for the Republic of South Africa, accordingly applied in terms of art 12 of ch III of the Hague Convention for the return of the children to the jurisdiction of Ontario, Canadian Central Authority.

The respondent argued that it had been agreed between herself and the second applicant that the respondent and the children's interrupted residency in Canada from August 2018 until December 2019 would be on a trial, as opposed to permanent, basis. Subsequent to the second applicant and respondent's originally making plans to relocate from South Africa to Canada, their relationship had become severely strained, with the second applicant on occasion threatening divorce. This fact, along with others (see [26]), turned her against the idea of relocating with the children. The second applicant, however, was adamant in his wish to relocate to Canada. The parties hence agreed to the trial arrangement. The respondent alleged, however, that in Canada her relationship with the second applicant did not improve, and that the latter became abusive and controlling. She alleged that the child G was subjected to bullying at the school at which he was enrolled, and had been diagnosed with Sensory Processing Disorder (SPD). The respondent decided to permanently return to South Africa with the children at the expiry of the trial period. She did so with, she alleged, the consent of the second applicant on the understanding that they would not be returning to Canada. She further noted that the second applicant had raised no objections to the children settling into their old lives in South Africa, during which time he had had regular contact with them, and had been aware of their enrolment in school.

The respondent accordingly raised the defence that the second applicant had failed to establish one of the requirements for a successful application for the return of a child in terms of the Hague Convention, namely 'habitual residence' by the children in the requesting state prior to their retention in South Africa. She relied too on the exception provided in the Hague Convention to the peremptory return of a child, namely consent or acquiescence to the removal or retention of the child by the left-behind parent (art 13*(a)*). In addition, relying on another exception in the Hague Convention (art 13*(b)*), she contended that there was a grave risk the child G would be exposed to physical or psychological harm or otherwise placed in an intolerable situation should he return to Canada, given the bullying and the SPD he experienced, and given the drastic change a move from South Africa back to Canada represented. Finally, the respondent argued that in applying the 'best interests' principle, as provided for in both the Constitution and the Children's Act, the children should not be returned to Canada. In this regard the respondent contended that the best-interests principle was a self-standing defence and enjoyed hierarchical supremacy to the Hague Convention for children present in the jurisdiction of South Africa. Put differently, the argument was that once the jurisdictional requirements were met, the best-interests standard should trump the provisions of the Hague Convention.

The court, in considering the questions of habitual residence and consent/ acquiescence, which it viewed as interlinked, accepted the version of the respondent, its being supported by the evidence, that the respondent and the children's stay in Canada had been on a trial basis; and that the second applicant

had consented to the permanent return of the respondent and the children to South Africa (see [66] – [67], [70] — [77]). The court affirmed that the second applicant had also, subsequent to the children's removal, failed to expeditiously demand their return, or raise any objections (see [71] – [72]), thereby creating the impression that the children could remain in South Africa (see [73]). The court also found that in Canada the children had failed to learn another language, such as French, had gone to school but had not integrated well, and had not developed social relationships with peers or even daycare institutions as part of their lifestyle (see [68]).
The court held that there was not a strong and readily perceptible link between the children and Canada, and based on, inter alia, the above considerations, found that the children were not habitually resident on 3 December 2019 (see [69]), and the Hague Convention therefore was not of application (see [78]). The court went on to hold that, even if it were mistaken in such conclusion, the application should be declined on the basis that the second applicant had consented to the removal of the children as contemplated in art 13*(a)*, and, failing that, had acquiesced in their retention in South Africa (see [77] – [78]].
The court went on to consider the defence raising the threat of a 'grave risk'. The court held that the facts averred by the respondent did not rise to the level of 'grave psychological harm' (see [88]). All the concerns raised by the respondent, the court held, could be ameliorated through the fashioning of a proper protective order (see [89]).
Furthermore, the court rejected the argument raised by the respondent that the best-interests principle was a self-standing defence enjoying hierarchical supremacy to the Hague Convention. The court relied on constitutional jurisprudence which it asserted had not been altered by the Children's Act. (see [105]). It held that the Hague Convention provided sufficient avenues for a court to consider the best interests of the child, that is, through the availability of exceptions to the peremptory return of a child (see [101 – [105]). The court held there was no inconsistency or need for one to trump the other — the Children's Act and the Hague Convention complemented each other (see [105]).
The court dismissed the application

FRAMATOME v ESKOM HOLDINGS SOC LTD 2021 (2) SA 494 (GJ)

Engineering and construction — Dispute resolution — Contractual adjudication — Application for enforcement of adjudicator's decision — Consequence of adjudicator's giving decision in respect of dispute that was not referred to him — Distinction between adjudication and arbitration — Rationale for adjudication — Courts to respect and enforce adjudicator's decision as binding, unless clear case made out that adjudicator had exceeded his jurisdiction.

The present matter concerned the enforceability of the decision of an adjudicator appointed in terms of an engineering and construction contract, in circumstances in which it was claimed that such adjudicator had exceeded their jurisdiction in making such a decision. The facts were that the applicant, as contractor, and the respondent, as employer, had entered into an engineering and construction contract for, inter alia, the design, manufacture, transportation, installation and commissioning of replacement steam generators by the applicant for the respondent (at the Koeberg Nuclear Power Station). The contract provided for the appointment of an 'adjudicator'

to decide disputes arising under or in connection with it. The contract further provided that the decision of the adjudicator was binding on the parties unless and until it was revised by the 'arbitration tribunal', and that it was to be enforced as a matter of contractual obligation between the parties.
In the present application, heard before the Johannesburg High Court, the applicant sought, inter alia, to enforce a decision of the adjudicator dated 23 July 2019 as a contractual obligation. This decision had followed an earlier decision of the adjudicator of 11 December 2018 — addressing a referral by the applicant — that had provided that the change by the respondent's project manager, of the definition of key dates in the contract, amounted to a 'compensation event', and that the project manager was to complete the assessment of such event in accordance with the contract. The decision of 23 July 2019 provided that the project manager had failed to make a full assessment of the compensation event timeously, as a consequence of which the quotation contained in the applicant's previous referral would be deemed to be accepted by the respondent.
The respondent opposed the relief sought. It pointed out that the adjudicator was a creation of contract and derived power only from the contract. The contract empowered the adjudicator *to decide disputes referred to him under the contract*. The respondent argued that the adjudicator, on the facts, had given a decision in respect of a dispute that was not referred to him. In such circumstances, the same consequence would follow as applied in respect of a decision given by an arbitrator that had no jurisdiction: the decision was a nullity, and did not even require setting aside.
The court in considering the present matter acknowledged that arbitration and adjudication were not the same, the latter process being intended as a speedy mechanism for settling disputes on *a provisional and interim basis*, and requiring the decision of adjudicators to be enforced pending the final determination by arbitration. (See [37].) It was the position of the applicant that setting aside the adjudicator's disputed decision *would undermine this rationale*.
Held, that courts ought to respect and enforce the adjudicator's decision as binding upon the parties. This was so, *unless a 'respectable case' or a clear case had been made out that the adjudicator had exceeded their jurisdiction* (see [45]), in which case the appropriate course of action would be to refuse to enforce such a decision (as opposed to reviewing or setting it aside, which task should be left to the arbitration tribunal) (see [38]).
Held, further, that, where the adjudicator's jurisdiction was disputed in proceedings such as the present, ie for enforcement of the adjudicator's decision, it was, essentially, for the court to determine whether it had been shown that the adjudicator had answered *the wrong question*. If it was merely shown that the answer itself was wrong, but was in respect of the right question, it would not have been shown that the adjudicator had exceeded their jurisdiction and the parties were bound by that answer. (See [48].)
Held, further, that establishing whether the right question had been answered involved the proper construction of the instruments in terms of which the dispute was conveyed to the adjudicator, such as the notice(s) of dispute or referral letter(s) and accompanying submissions of the parties, but also, importantly, in light of the agreed powers of the adjudicator. (See [49].)
Held, that it had been clearly shown that the adjudicator's finding of 23 July 2019 did not decide the dispute that the applicant referred to him: The adjudicator framed the question to be decided as whether the project manager had made the assessment

(as directed in terms of the adjudicator's decision of 11 December 2018) *timeously*; whereas, as was apparent from the notice of adjudication, the question called to be decided was whether the assessment made was correct or not and if so whether it could be construed as a disregard for the adjudicator's decision of 26 February 2019. Accordingly, the respondent had a very good prospect of successfully establishing at the arbitration that the adjudicator had acted outside his jurisdiction, and the decision was not binding upon the parties and was unenforceable. (See [57] – [60].)
Accordingly, it was not appropriate to enforce such decision in the interim. The court could not find that the respondent was in breach of a decision that had been adequately shown to be a nullity. (See [64].)
Application dismissed.

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.

PLATTEKLOOF RMS BOERDERY (PTY) LTD v DAHLIA INVESTMENT HOLDINGS (PTY) LTD AND ANOTHER 2021 (2) SA 527 (WCC)

Sale — Pre-emption — Subject-matter of right of pre-emption sold as integral part of larger package for globular amount — Whether right of pre-emption triggered — Appropriate remedy — Foreign-law approaches considered — Point of departure always construction of pre-emption clause — Where, as in present case, clause implying that pre-emption properties were subject of package-deal offer by third party, applicant would be entitled to purchase them on same terms and conditions as package deal.

A lease agreement between the applicant and first respondent afforded the former a right of pre-emption in respect of the leased premises, two of eight separately registered portions of a farm collectively known as Plattekloof. The pre-emption clause imposed a negative obligation on the lessor *not* to conclude an agreement of sale with a third-party offeror without first offering the property to the lessee on the same terms and conditions as had been offered to it.

When the first respondent sold all the portions together to a third party for one globular amount of R17 million, the applicant sought the enforcement of a sale of the leased portions to itself at R4 million. This was a price it contended could be determined by inference from the circumstances surrounding the conclusion of the contract with the third party, ie that it showed that the price of R17 million offered by the third party comprised an amount of R13 million that it had previously been willing to pay for six of the portions not subject to the lease, R4 million being the balance and also what the applicant had indicated to the first respondent it would be willing to pay for the two leased portions. (See [10] and [19].)

The applicant and first respondent were each represented by their sole shareholders and directors, respectively Mr Vermaak and Mr Schmitz. Mr Vermaak was aware at the time the right of first refusal was granted that Mr Schmitz wanted to dispose of the entire farm and that there might be issues with his ability to do so if the two portions let to the applicant be sold separately from the remaining portions. (See [11] – [16].)

At issue was the legal position when the premises in respect of which a party enjoys a right of pre-emption becomes the subject of an offer to purchase or a contract of sale as an integral part of a larger package, and the concluded transaction does not determine a price for the pre-emption property considered on its own. In such a case, the question is whether the holder, whose right has been triggered by the sale of the pre-emption property as part of a larger package, is required to buy the whole package or only the component that is subject to the right of first refusal, and if the latter, how the price of the component is to be determined. (See [21] and [31].)

The court considered how this issue is dealt with in foreign jurisdictions. One approach (relied on by the first respondent) is that the package deal does not trigger the right of pre-emption because it entails the sale of something completely different; another is that the package deal does not trigger the holder's right of pre-emption but

entitles them to interdictory relief prohibiting the grantor from selling the pre-emption property as part of the package; a third that it gives the holder the right to purchase the pre-emption property alone upon the conclusion by the grantor of a package deal with a third party (which raised the question as to how the price of the pre-emption property is to be determined); and a fourth that the holder's right to exercise his right of pre-emption embraces the whole package. (See [29] – [34].)

Held

The first respondent's contention is without merit. A sale of the whole of a farm comprising of a number of sections or portions must, in and of itself, entail the sale of each and every one of those portions. The right of first refusal was accordingly triggered when the third party made an offer to purchase the entire farm on terms and conditions that were acceptable to the first respondent. (See [29] and [36].)

The point of departure must always be a construction of the terms of the pre-emption agreement in issue. Where a preference clause imposed a positive obligation to offer the property to the holder first, the appropriate remedy (before the conveyance of the property to a bona fide third party had occurred) would be a prohibitory interdict. Where, as in the present case, the preference clause imposed a negative obligation on the lessor, the appropriate remedy was specific performance. The holder would only be entitled to a prohibitory interdict in such circumstances if they could show that the package deal was a mala fide manoeuvre to avoid honouring the right of pre-emption. It would be different if the terms of the contract bound the grantor to hold the pre-emption property available to be sold only on its own and not as part of a package with some of the grantor's other property. However, to hold that such a rider fell to be implied in the grant of a right of first refusal or whether a tacit term to that effect might be imputed, would depend on the peculiar facts of the given case. (See [25] – [26], [30] and [32].)

Here, the wording of the pre-emption clause implied that if the pre-emption properties were the subject of a package-deal offer by a third party, the applicant would be entitled to purchase them on the same terms and conditions as the package deal. In exercising the right to acquire the two erven on the same terms and conditions as the third party was prepared to do, the applicant would therefore, in the circumstances of the offer made by the third party, have had to purchase the whole farm for R17 million. The character of the constituent portions of the farm was such that the property did not lend itself to a pro rata allocation between the parts of the whole. The parties to the pre-emption agreement must have appreciated that, when they concluded the agreement of lease including the right of first refusal, the applicant would have to take the whole package because the package deal reflected the terms and conditions upon which the third party would acquire the pre-emption property. (See [36] and [37].)

The relief sought by the applicant was inconsistent with the remedy it became entitled to, and the application would accordingly be dismissed. (See [38] and [40].)

RAMAH FARMING v GREAT FISH RIVER WATER USERS ASSOCIATION AND OTHERS 2021 (2) SA 547 (ECG)

Water — Water rights — Trade in — Whether abolished by statute — Interpretation of provisions of statute dealing with retention and sale of water use entitlements — National Water Act 36 of 1998.

The applicant sought an order declaring that it was entitled to 250 000 cubic metres of water for use on 20 hectares of land in respect of Lot 67, Great Fish River Settlement, and 305 000 cubic metres for use on 24 hectares of land in respect of Lot 68 of the same settlement. The first and second respondents opposed the claim; and the second respondent, the owner of neighbouring plots, by way of a counterclaim sought an order that the applicant's rights were limited to 12 and 2,8 hectares of water use entitlements in relation to Lots 67 and 68, respectively, and that the applicant had taken possession of the property subject to encumbrances in terms of agreements of sale entered into by its predecessors in title.
Subsequent to the coming into operation of the National Water Act 36 of 1998 (the Act) on 1 October 1998, Lots 67 and 68 were sold on six occasions, the last occasion being when the penultimate owner sold it to a company of which he remained a director. The second purchaser after the coming into operation of the Act purported to sell parts of its water entitlements to the second respondent who then approached the applicant to sign documents for a licence application in terms of s 25(2) of the Act. The applicant refused to sign the documents. The applicant contended that trading in water use entitlements had been abolished by the Act and it was the intention of the legislature to do away with the old practice of trading in water rights. This being so, the predecessor had acted unlawfully by withholding or purporting to withhold certain water use entitlements to the subsequent purchaser. The second respondent contended that the practice of trading in water rights, which existed at the commencement of the Act, had not been abolished by it, as there was no express or implied prohibition against such trading. The Act was not to be interpreted in any event so as to extinguish existing rights and obligations unless the statute clearly provided differently or its language clearly showed such a meaning.
The court held that the language of the Act underscored, rather than inhibited, the practice of trading in water use entitlements. This interpretation also resonated with the principle that the Act was not to be interpreted so as to extinguish existing rights and obligations unless it clearly provided otherwise. It was common cause that such rights existed prior to the promulgation of the Act. However, any such transaction entered into at private law relating to water use entitlements had to comply with the provisions of the Act otherwise it would be unlawful and could constitute an offence under s 151(1)*(a)* of the Act. (See [31] – [33].)
In respect of the particular transactions in question, the court held that s 25 made it clear that the section required a surrender of the entitlement for a particular purpose, that being to facilitate a particular licence application under s 41. The transactions in question were not countenanced by s 25 and it would stretch the language used in that section to say that it allowed for transactions of that nature. When the seller in question withheld a portion of the water use entitlements in its sale to its successor and thereafter purported to retain them for some six years before they were sold to the second respondent, he clearly did not 'surrender' the entitlements 'in order to facilitate a particular licence application under s 41'. Nowhere in the papers was it suggested that this was indeed so. Likewise, when it purported to sell those rights to the second respondent this was also not done in the form of a surrender to facilitate a licence application. That was exemplified in the fact that a licence application was in the process of being made by the second respondent some 12 years after the initial transaction had taken place. That could never have been a contemplated 'particular' licence application for the purposes of s 25. (See [45] – [47].) The order sought by the applicant would accordingly be granted.

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.

SAMSODIEN v SAMSODIEN AND OTHERS 2021 (2) SA 601 (WCC)

Land — Conditions and restrictions — Modification or removal — Court's statutory power to remove restrictions — Meaning of 'restrictions' — Not covering removal of usufructuary rights — Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, s 2(1).

Section 2(1) of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 provides that 'any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument . . . may apply to the court for the removal or modification of such restriction[s]'.
The word 'restrictions' in s 2(1) does not include a usufruct; a usufruct is part of the panoply of rights which make up ownership, and accordingly it cannot provide the power to this court effectively to remove or restrict a usufructuary right. The law is clear: restrictions are restrictions. If the Act had meant removal of rights, it would have said so expressly.

SUNWEST INTERNATIONAL (PTY) LTD AND ANOTHER v WESTERN CAPE GAMBLING AND RACING BOARD AND ANOTHER 2021 (2) SA 607 (WCC)

Gaming and wagering — Revenue — Gambling tax — Taxable income — What constitutes — Non-cashable credits issued by casino to player's slot-machine card as part of loyalty programme — Only actual revenue taxable; credits revenue neutral and not taxable — Western Cape Gambling and Racing Act 4 of 1996, s 64.

Sun International (Pty) Ltd, a casino group, had requested confirmation from various casino boards that it could implement a method of calculating adjusted gross revenue (AGR) by excluding non-cashable credits (the Freeplay credits). These were allocated to a casino player's card by the applicants, as a reward for loyalty and were

available for the player to use at slot machines at applicant's casinos; they were denominated in rand value but not redeemable for cash.
However, the first respondent (the casino board), along with second respondent (the provincial treasurer), took the view Freeplay credits were taxable. Turning to the court, Sun International (Pty) Ltd sought, amongst other relief, a declaratory order that Freeplay credits did not constitute part of the 'drop' for purposes of the computation of AGR in terms of s 64 of the Western Cape Gambling and Racing Act 4 of 1996 (the Act) read with sch III, and thus that such Freeplay credits did not form part of the taxable revenue.
The Act defines 'drop' as 'in relation to . . . cash-less slot machines, the *amount deducted from players' slot accounts* as a result of slot machine play'. At issue was the meaning of 'drop', more particularly whether the words 'amount deducted from players' slot accounts' should be interpreted to mean 'actual revenue'.
Held
The applicants did not receive any revenue from games played using Freeplay credits. It would be irrational to require the operator of a licence to pay tax on a revenue neutral position. The imposition of tax should not be arbitrary; an irrational requirement would amount to the 'arbitrary' deprivation of property as contemplated in s 25 of the Constitution. (See [25] and [28] – [29].)
The word 'amount' must be given a more sensible and businesslike interpretation; it was *not* sensible for it to be read to include Freeplay credits. The meaning of 'amount' should sensibly be interpreted to mean 'actual revenue'. The declaratory relief would accordingly be granted.

TAYLOR v ROAD ACCIDENT FUND 2021 (2) SA 618 (GJ)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Irregular settlement — Scheme to avoid court scrutiny of inflated claim by not seeking to make settlement order of court — Connivance of bankrupt RAF decried — Such settlements unconstitutional and payment of settled claims by RAF irregular and ultra vires — Conduct of legal representatives referred to Legal Practice Council; conduct of doctors referred to Health Professions Council; conduct of actuary referred to Actuarial Society of SA.

In two cases involving claims against the Road Accident Fund (the RAF), the parties claimed to have settled the matters and did not want the court to make an order. In both cases the same set of attorneys strenuously resisted court oversight of the settlement agreements despite the Judge President's Practice Directive 2.1. The directive was aimed specifically at RAF settlements, which had been identified as a vulnerable area which required court oversight because of the vast amounts of public funds at stake.
No evidence was led in either of the two present cases. The court pointed out that this was yet another example of a general approach by which legal representatives attempted to evade judicial scrutiny of RAF settlements that were strongly suggestive of dishonesty and gross incompetence on the part of those involved. The approach of attorneys and the RAF in seeking to avoid the court's jurisdiction by forgoing orders of court in settled matters was just the latest gambit to evade court scrutiny (see [3], [15]). Meanwhile the RAF, targeted by fraudsters, latterly unrepresented by counsel, bankrupt and on the verge of total collapse, sought itself to avoid judicial oversight (see [5], [10], [12], [16] – [17]).

The court's interrogation of the present matters revealed a modus operandi whereby a relatively modest claim was brought and the case management process undertaken on those pleadings. In the actuarial calculation, the income of the plaintiff pre-accident was inflated and/or the aspirations of the plaintiff were exaggerated or even fabricated in order to suggest a career progression when there was none. Those fallacious assumptions were used by the actuary to calculate a loss of earning capacity which yielded significantly inflated figures because of the exponential nature of the calculation, and the actuarial report was then used as a basis for an amendment of the claim without any oversight. The RAF was not represented and was overwhelmed by the sheer volume of cases, and/or the officials were pliable, and they therefore placed undue reliance on the representations of the plaintiffs' attorneys as to the loss. As to general damages, underqualified and sometimes pliable doctors were used to suggest the injuries were more serious than they in fact were. (See [123].)

In respect of the plaintiffs' attorneys' arguments that, once the parties had settled, the court's jurisdiction was terminated, that the agreement was valid whether it was extrajudicial or embodied in a court order, and that the court should simply remove the matter from its roll and have no further part in the matter, the court found that while the RAF was entitled to settle claims, the settlement had to be lawful and consistent with statute and the Constitution. The RAF had to comply with the fundamental values and principles governing public administration under the Constitution to ensure that the use of its funds was a proper expenditure of public resources. (See [127].)

The conduct of litigation by state organs was an exercise of public power that had to be constitutionally compliant and uphold the rule of law. But the RAF, instead of insisting on an order of court, chose to acquiesce in the tactics adopted by the attorneys. It was disquieting that the RAF was conducting its business in such a reckless manner while insolvent. (See [128].)

Since the RAF's officials had acted unlawfully in concluding the settlements, they were void ab initio (see [130]). However, the court was not entitled to interfere with the settlement, other than by a review brought by an interested party, and no such review was before court (see [132]).

But that could not be the end of the inquiry. The way in which the legal representatives on both sides and the officials who had handled the claims had conducted themselves was of grave concern, as was the manner in which the medical and actuarial reports had been obtained. This required further investigation, and to this end their conduct would be referred to their various professional governing bodies. (See [133].)

SA CRIMINAL LAW REPORTS

S v TIRY AND OTHERS 2021 (1) SACR 349 (SCA)

Prevention of crime — Offences — Contraventions of s 2(1) of Prevention of Organised Crime Act 121 of 1998 — Racketeering in contravention of s 2(1)*(e)* and s 2(1)*(f)* — Possible duplication of convictions — Difference between two offences explained. —

The first and second appellants were charged in count 1 with managing an enterprise conducted through a pattern of racketeering activities in terms of s 2(1)*(f)* of the Prevention of Organised Crime Act 121 of 1998 (POCA), and in count 2 with conducting or participating in an enterprise conducted through a pattern of racketeering activities in terms of s 2(1)*(e)* of POCA. They were also charged with 43 separate counts of theft of petroleum products. The activities involved the theft of consignments of fuel which were diverted to the first appellant's tank farms from where they were sold to his customers. The first appellant was convicted on counts 1 and 2 and the other counts of theft, whereas the second appellant, the first appellant's partner, was acquitted on the first count, but convicted on the second count, as well as on various counts of theft. On appeal, the court raised the question of the possible duplication of convictions arising from counts 1 and 2.
Held, that s 2(1)*(e)* of POCA catches the manager who was involved actively in the conduct of the enterprise through a pattern of racketeering activity, whilst s 2(1)*(f)* catches the manager whose hands were clean, but who knew or ought reasonably to have known that the enterprise was being conducted through a pattern of racketeering activity. Knowledge of what subordinates were doing, or ignorance where there ought reasonably to be knowledge, sufficed to attract liability. Once that distinction was recognised, it appeared that charging and convicting someone of both offences might well involve an impermissible splitting of charges. The fact that the state in the present matter relied on precisely the same facts for both charges immediately suggested that there was an improper splitting of charges. What is more, the first appellant's active involvement in the conduct of the enterprise brought him squarely within s 2(1)*(e)* and there was no need to invoke s 2(1)*(f).* (See [110] – [111].)
The majority decision in *S v Prinsloo and Others* 2016 (2) SACR 25 (SCA) doubted.

ECONOMIC FREEDOM FIGHTERS AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2021 (1) SACR 387 (CC)

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

Second applicant, Mr Malema, had made certain statements directed at third parties, encouraging them to occupy land (see [7] – [8]). This had caused the National Prosecuting Authority (NPA), represented by second respondent, to charge Malema with incitement under s 18(2)*(b)* of the Riotous Assemblies Act 17 of 1956: inciting others to commit the offence of trespass (see [10]). Section 18(2)*(b)* provides, inter alia, that '(a)ny person who . . . incites . . . any other person to commit . . . any offence . . . shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable' (see [26]).
First applicant, the Economic Freedom Fighters (EFF), and Malema had then challenged the constitutionality of s 18(2)*(b)* and the applicability of the Trespass Act 6 of 1959, and sought the review and setting-aside of the NPA's decision to charge Malema (see [11]).

The High Court found s 18(2)*(b)* unconstitutional and invalid insofar as it made an inciter liable to the punishment of the party committing the offence, but dismissed the challenge to the applicability of the Trespass Act (see [14] and [16]).
Here the EFF and Malema sought the Constitutional Court's confirmation of the order of invalidity and also applied directly for leave to appeal (see [21] and [78]). This on an apparently unsuccessful challenge to the breadth of the Riotous Assemblies Act (its application to 'any offence'), and for an interpretation of the Trespass Act, such that it did not apply to unlawful occupiers under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), or the Extension of Security of Tenure Act 62 of 1997 (ESTA) (see [15] and [17]).
The court ruled that it had jurisdiction: it was required to confirm or disconfirm the order of invalidity, and the other issues (overbreadth, applicability to unlawful occupiers) involved interpreting legislation so as to be constitutionally compliant (see [18] and [20]). A point of general importance was also involved: landlessness and homelessness (see [20]).
Leave to appeal directly had also to be granted: the point for confirmation and the further points were entwined, and it would be the most economical course to adjudicate them together (see [23] – [24]). There were, moreover, prospects of success on the overbreadth challenge (see [24]).
As for confirmation, this would be declined: a court was not, as the High Court considered, compelled to impose the same punishment on the inciter as the actual perpetrator (see [25] and [29]). The court retained discretion as to sentence (see [27]).
But s 18(2)*(b)* by its breadth (incitement to 'any offence') limited the right to freedom of expression, and this limitation was unjustifiable (see [34] and [65]). This on weighing the right's importance ('critical to our democracy and healing the divisions of our past') (see [42]); the limit's important but ordinary, rather than 'pressing', purpose ('crime prevention') and its broad extent ('minor' and 'major' offences) (see [49], [63]); the inadequacy of proposed systemic protections (sentencing and prosecutorial discretion, the burden of proof, accused's defences, the intention element) (see [53]); and less restrictive means (narrowing the provision to serious offences) (see [63] – [64]).
Remedially, the provision could be narrowed to serious offences (see [70]).
As for s 1(1) of the Trespass Act, its interpretation would require deciding its constitutionality, which was refused (see [73] – [74]).
Ordered: confirmation of the High Court's invalidation declined and its order set aside; leave to directly appeal granted; s 18(2)*(b)* declared inconsistent with s 16(1) of the Constitution and invalid; the declarator suspended for 24 months; and in that time the provision to read 'any serious offence'. A declarator that the Trespass Act did not apply to unlawful occupiers under PIE declined. (See [78].)
The dissenting judgment would also have declined to confirm the High Court's order of invalidity and to have interpreted the Trespass Act (see [79] and [157]). But, unlike the majority, it would not have found s 18(2)*(b)* unconstitutional (see [79]). It agreed that the section limited the right, but found this justified (see [90] and [154]).
It considered that the right was of high importance ('at the heart of our constitutional democracy'), but not unqualified, or superordinate to other rights (see [95], [118]); and equally, the limit's purpose — 'crime prevention' — was of high importance (see [119] and [123]). As to extent, the limit was 'relatively minor' ('a prohibition against exhorting others to commit a crime') (see [125]); and it was causally connected to its purpose (see [131]). Insofar as an alternative, less restrictive, means, that proposed

(reading in 'serious' before 'offence') was vague and possibly overconfining of Parliament (see [151] – [152]); where seen in context (the burden of proof, requirement of mens rea, prosecutorial and sentencing discretion, the provision's sentence limit) the section was less invasive of the right than proposed (see [138] – [139] and [142] – [144]).

S v NM 2021 (1) SACR 440 (LP)

Rape — Sentence — Child offender — Application of provisions of s 28(1)*(g)* of Constitution.

In a matter that came before the court by way of automatic review in terms of s 85(1) of the Child Justice Act 75 of 2008, the child offender (17 years old when the offence was committed) was convicted of the rape of a 15-year-old girl and was sentenced to 17 years' imprisonment, of which five years were suspended. The court was satisfied that the conviction was in order but was concerned at the sentence imposed, given that the trial court had found that he was an immature youth at the time of the commission of the offence.
Held, that, although the trial court had correctly referred to the provisions of s 28(1)*(g)* of the Constitution, which provided that every child had the right not to be detained except as a measure of last resort and for the shortest appropriate period, it had overemphasised the seriousness of the offence and misdirected itself by imposing a lengthy sentence in circumstances where it was duty-bound to impose the shortest appropriate term of imprisonment. An appropriate term of imprisonment would be one of eight years' imprisonment in the circumstances. (See [11] and [16] – [18].)

MOTSA v MINISTER OF JUSTICE AND OTHERS 2021 (1) SACR 444 (GJ)

Extradition — Review of — On grounds of irrationality and irregularity — Contention that applicant could be sentenced to death and executed in eSwatini — Undertaking by Minister of Justice and Constitutional Affairs in eSwatini applicant that would not be executed held to be sufficient assurance — Application failing.

The applicant applied for the review and setting-aside of the decision of the Minister of Justice that he be surrendered to the Kingdom of eSwatini, on the basis that it was irrational and irregular. He also sought to review the decision of the magistrate who committed him to prison on 14 November 2014, attacking it on the same grounds. All the parties accepted that the state may not surrender a person to another country if it would expose such person to a real risk of the imposition and execution of the death penalty. However, the applicant alleged that his extradition to the Kingdom might well result in such if he was convicted on the charge of murder, and consequently faced a real risk of a violation of his right to life, human dignity and right not to be treated or punished in a cruel, inhuman or degrading way, in breach of s 7(2) of the Constitution. In respect of the decision of the magistrate, the applicant alleged that the magistrate had not properly considered this fact. As to the Minister, it appeared that when considering the matter, the Minister had before him an undertaking and confirmation by the Minister of Justice and Constitutional Affairs of the Kingdom that,

should the court pronounce the death sentence against the applicant, he as Minister of Justice would ensure that the King was advised to substitute the death penalty with a life sentence. The applicant argued in this respect that this was not sufficient assurance. There was also a second undertaking, but it was common cause that that undertaking had not served before the Minister when he took the decision to surrender the applicant.
Held, that the magistrate had in fact taken into account the possibility of the death penalty being imposed and also considered the undertaking, but the question of the execution, as opposed to the imposition of the death penalty, was not an issue which the magistrate should properly have had regard to: the extradition magistrate, conducting an inquiry in terms of s 10(1) of the Extradition Act 67 of 1962, had no power to consider whether the constitutional rights of the person sought to be extradited might be infringed upon extradition, and was a matter for the Minister. (See [9] – [10].)
Held, further, that the death penalty in the Kingdom was not mandatory and was therefore only a possibility and not a real risk. The undertaking given by the Minister removed any real risk of a death sentence being executed in the unlikely event of it being imposed, and the Minister had correctly relied upon the undertaking in coming to his decision. The application to review both decisions accordingly had to fail.

S v JOSEPHS 2021 (1) SACR 450 (WCC)

Review — Automatic review — In what cases — Correctional supervision imposed in terms of s 276(1)*(h)* of Criminal Procedure Act 51 of 1977 — Not constituting sentence of imprisonment and accordingly not subject to automatic review.

The magistrate sentenced an accused to two years' correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 and sent the matter on automatic review. When the reviewing judge queried why the matter had been sent on review, the magistrate replied that the sentence exceeded the court's jurisdiction.
Held, that correctional service in terms of s 276(1)*(h)* was not a sentence of imprisonment, but was a non-custodial sentence imposed on an accused person under strict conditions such as house arrest, community service, rehabilitation and compulsory attendance of certain programmes. The matter was accordingly not subject to automatic review.

MARSLAND v ADDITIONAL MAGISTRATE, KEMPTON PARK AND ANOTHER 2021 (1) SACR 454 (SCA)

Extradition — Application for — Requirements under Extradition Act 67 of 1962 — Southern African Development Community Protocol on Extradition — Request for extradition — Transmission through diplomatic channels — No requirement that request be received by Minister directly.
Extradition — Application for — Requirements under Extradition Act 67 of 1962 — Southern African Development Community Protocol on Extradition — Request for extradition — Arrest effected under provisions of s 5(1)*(b)* of Act — No requirement in those circumstances that Minister issue notice under s 5(1)*(a)* of Act.

The appellant was arrested at OR Tambo International Airport in Johannesburg on 12 July 2019 whilst en route to Germany after Botswana had caused Interpol to issue a red notice for his provisional arrest. The arrest was effected through a warrant issued by a magistrate in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962. The matter was postponed on a number of occasions and on 23 August 2019 the prosecutor handed the magistrate a note verbale from Botswana dated 17 July 2019, requesting the extradition of the appellant; a letter from the Department of International Relations and Cooperation (the Department) addressed to the Director-General of Justice and Constitutional Development, enclosing the note verbale; and a letter from the office of the Director-General of Justice dated 12 August 2019 addressed to the National Director of Public Prosecutions, enclosing the note verbale as received from the Department, in which letter he requested the NDPP to 'kindly note that the Department is to submit a memorandum to the Minister requesting the Minister to issue a notification in terms of s 5(1)*(a)* of the Extradition Act'. The appellant contended that, as the period of 30 days contemplated in art 10(5) of the Southern African Development Community Protocol on Extradition (the Protocol) had lapsed since the arrest and no application had been received for his extradition, his detention was unlawful. The magistrate dismissed the application, finding that the application for his extradition had in fact been received by the Minister and the second respondent prior to the expiry of the 30-day period referred to in art 10(5) of the Protocol. His application for review of that decision was dismissed by the High Court on similar grounds. On appeal the appellant contended that, as of 12 August 2019, the Minister had not received the request from Botswana for his extradition, as contemplated in art 6 of the Protocol, and, furthermore, the Minister had by that date not issued a notification in terms of s 5(1)*(a)* of the Extradition Act to commence the extradition.

Held, that the note verbale constituted a request by Botswana for the extradition of the appellant as envisaged in the Act, and the Protocol and a dossier were attached to it with a request that it be handed over to the relevant department. The request and the supporting documents were received by the Department and forwarded to the Director-General. Therefore, the request was 'transmitted through the diplomatic channel, and received by the Ministry of Justice, as required by art 6. There was no substance therefore to the appellant's argument that the request for his extradition had not been properly received as of 12 August 2019. His contention that the request had to be received by the Minister directly was an interpretation that was in conflict with the words and context in which those words were used in art 6. (See [17] – [18].)

Held, further, that the appellant's argument, that a s 5(1)*(a)* notice had to be issued by the Minister as evidence that a request for the extradition of the appellant had been received, could not be accepted either, as the appellant's arrest had been effected in terms of s 5(1)*(b)* of the Extradition Act. The two paragraphs of the subsection provided for two separate procedures for the arrest of a person sought to be extradited, and the arrest therefore could be in terms of one or the other paragraph. (See [19].) The appeal was accordingly dismissed.

ALL SA LAW REPORTS 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)

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.

Johannesburg Society of Advocates and another v Nthai and others
[2021] 2 All SA 37 (SCA)

Legal Practice – Application for readmission as advocate – Duties borne by advocates to court and to clients to be of complete honesty, reliability and integrity – Court must be satisfied that applicant for readmission was a fit and proper person and that his readmission would involve no danger to the public or the good name of the profession, failing which admission is not permissible.

The first respondent ("Mr Nthai") was an advocate appointed to act as lead Counsel on behalf of the South African Government before the International Arbitration Tribunal in a dispute with Italian nationals on a mining-related issue. Before the arbitration hearing could commence, the claimants expressed a willingness to withdraw the claim the issue of costs stood in the way. During meetings with the CEO of one of the claimant companies, Mr Nthai attempted to solicit a bribe of R5 million, in return for which he undertook to ensure that the South African government would agree to settle the dispute on the basis that each party would pay its own costs, thus potentially saving the claimants millions, at the expense of his client, the government. When that came to light, a complaint was lodged with the Pretoria Society of Advocates in which Mr Nthai was a member. At the end of disciplinary proceedings, Mr Nthai's name was struck from the roll of advocates in 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. His application was successful and the appellants obtained leave to appeal.

Held – Advocates bear a duty to the court and to their clients to be of complete honesty, reliability and integrity. The profession has strict ethical rules to prevent malfeasance.

The Court began by explaining the nature of such proceedings; the onus to be discharged by an applicant seeking readmission; and the role of professional bodies in an application of this kind.

In the readmission application, the Court had to be satisfied that the applicant was a fit and proper person and that his readmission would involve no danger to the public or the good name of the profession.

Mr Nthai's misconduct was not a casual or momentary lapse of judgment, but was carefully calculated and zealously pursued. He pursued personal enrichment at the expense of his client and, ultimately, the taxpaying public. Before the court he deliberately downplayed the full extent of the allegations or showed no true cognitive appreciation of their seriousness.

The High Court failed entirely to appreciate the full import of the transgression, and the appeal against its order was upheld with costs.

National Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and others [2021] 2 All SA 72 (SCA)

Transport – National Road Traffic Act 93 of 1996, section 73 – In any prosecution relating to the driving of a vehicle on a public road, if it becomes necessary to prove who the driver of such vehicle was, in the absence of evidence to the contrary, section 73(1) creates a presumption that such a vehicle was driven by the owner thereof – Applicability to trailers – Court finding that section 73(1) can only apply to a vehicle that is itself capable of being driven, and is not applicable to a trailer.

In any prosecution relating to the driving of a vehicle on a public road, if it becomes necessary to prove who the driver of such vehicle was, in the absence of evidence to the contrary, section 73(1) of the National Road Traffic Act 93 of 1996 creates a presumption that such a vehicle was driven by the owner thereof. Section 73(2) creates a similar presumption whenever a vehicle is parked in contravention of any provision of the Act.

The respondents, who owned some 2000 trailers for hire, instituted proceedings against the appellant, the National Minister of Transport, in the High Court, seeking an order declaring that the presumptions contained in section 73(1), (2) and (3) did not apply to trailers. In the alternative, they sought an order that the prosecution of the owner of a trailer under section 73(1), (2) and (3) for an offence involving the driving or parking of a vehicle towing, or having parked a trailer, was unlawful and inconsistent with the Constitution. The respondents' action was motivated by the ongoing difficulties they encountered with traffic and prosecuting authorities involving charges preferred against them for traffic violations involving their trailers whilst in the possession and control of their customers. Most of the traffic violations involved offences committed whilst the vehicle towing the trailer was being driven. Invariably, the commission of the offence was captured on camera. In many instances, the rear number plate of the towing vehicle was obscured by the trailer and the camera could then only capture the number plate of the trailer which was then depicted on the resultant photograph. Charges would then be brought against the respondents. The prosecuting authorities in doing that, would rely on section 73(1) because the identity of the driver of the towing vehicle was unknown to them since the camera could not capture the towing vehicle's registration number due to it being obscured by the trailer in tow.

While the parties agreed that the presumptions in section 73 derogated from the rights of accused persons in terms of section 35(3)(h) of the Constitution, at issue was whether the derogation was justifiable in terms of section 36 of the Constitution. The High Court found for the respondents, leading to the present appeal.

Held – The issue on appeal was primarily one of statutory interpretation, relating to the ambit and effect of section 73(1). The essential dispute between the parties was whether, as a matter of statutory interpretation, section 73(1) was applicable to a trailer as defined, that is, "a vehicle which is not self-propelled and which is designed or adapted to be drawn by a motor vehicle".

The process of statutory interpretation involves simultaneous consideration of the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which it is directed. The definition of a vehicle in section 1 of the Act established that although a trailer is a vehicle, section 73(1)'s central focus is the driver of the vehicle who has allegedly committed an offence in the course of driving the vehicle concerned on a public road. The section thus provides that where in a prosecution relating to the driving of a vehicle, it is necessary to prove who was driving such vehicle, there is a presumption that such a vehicle was driven by the owner thereof. "Driving" and "driver" bear their ordinary meanings, that is, to manipulate a vehicle's controls to regulate its speed and direction and any other activity incidental thereto. Therefore, section 73(1) can only apply to a vehicle that is itself capable of being driven, and is not applicable to a trailer.

The appeal was dismissed with costs.

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.

Cooper and another NNO v Myburgh and others [2021] 2 All SA 114 (WCC)

Corporate and Commercial – Company law – Section 424(1) of the Companies Act 61 of 1973 – Where the business of a company has been carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party thereto, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company – Director's actions, which were not to the advantage of company's creditors, constituting reckless or fraudulent conduct within the meaning of section 424(1) of the Companies Act, attracting personal liability for company's debts.

As co-liquidators of a company ("Transport"), the applicants sought a declaration in terms of section 424(1) of the Companies Act 61 of 1973 that one or more of the respondents should be responsible, without any limitation of liability, for all of the company's debts.

A trust established by the first respondent ("Myburgh") was the owner of Transport. Myburgh was also the sole shareholder of the second and third respondents ("Trucking" and "Hauliers"). Myburgh was the sole director of Transport, which was liquidated at his instance. He was also the sole director of Trucking and Hauliers.

Held – Section 424(1) provides that where the business of a company has been carried on recklessly or with intent to defraud creditors of the company or creditors of

any other person or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party thereto, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

When a company finds itself in financial difficulty, and especially if it is in a state of insolvency, those charged with the carrying-on of its business are obliged in addressing the situation to have reasonable regard for the interests of its creditors. The premise is that those involved in the carrying on of a company's business should not ordinarily permit it to continue to trade or carry on business in circumstances where it is reasonably foreseeable that it will be unable to pay its debts when they fall due. If that situation should arise, there is a duty on the persons concerned to conscientiously consider liquidation, business rescue, or a compromise with the creditors. A director has an affirmative duty to safeguard and protect the affairs of the company.

The evidence established that by 2014, Transport began experiencing serious financial difficulty. Myburgh responded by taking steps which could not be seen as being to the advantage of the company's creditors. On the contrary, they were manifestly, and foreseeably, to their prejudice. Myburgh, with the knowledge that Transport could not legitimately continue to trade because it was factually and commercially insolvent, decided to dispose of its assets to another company controlled by him. The effect of the transactions was to deprive Transport's creditors with currently due and payable claims of any hope of recovery. The Court accordingly held that a clear case of reckless, if not fraudulent, conduct within the meaning of section 424(1) of the Companies Act had been made out against Myburgh, and it issued a declaration that he bear personal liability for Transport's debts.

The Court then turned to the position of the trustees of the trust, whose authorisation, *qua* shareholders of Transport, was a prerequisite to the company's ability to dispose of all of its operational assets. The Court held that the disposal of the company's assets may be characterised as carrying on its business. The conduct of a company's business is ordinarily undertaken by its directors and employees, not by its shareholders. However, section 115 of the Companies Act 71 of 2008 introduces an exception to the ordinary position by taking control of the disposition of the greater part of a company's assets out of the hands of the directors and to put it in the hands of the shareholders. When shareholders exercise the control reserved to them in terms of section 115 over the alienation of a company's assets or undertaking they are obliged to have regard not only to their own interests, but also to the effect of their decision on the company's ability to meet its obligations to third parties. The seventh and eighth respondents, in blindly endorsing whatever Myburgh, as their co-trustee, put before them for signature implied that they abdicated their responsibilities as trustees. While that supported the conclusion that the trustees should be exposed to being declared personally liable in terms of section 424(1) of the 1973 Companies Act, the sixth to eighth respondents were joined in their capacity as co-trustees of the trust, not personally. The claim against the trustees in their personal capacity could succeed only if it were shown that the trust was a sham. That was not shown in this case. The claim against the sixth, seventh and eighth respondents thus could not succeed.

Dart v Chairperson of the DAC of Stellenbosch University and others
[2021] 2 All SA 141 (WCC)

Education – Tertiary institution – Breach of university disciplinary code by student – Disciplinary Committee's sanction increased by appeal committee, resulting in expulsion of student – Application for review based on allegations of bias, failure by appeal committee to comply with provisions of disciplinary code, and taking into account irrelevant considerations while ignoring relevant considerations – In absence of grounds for interfering with appeal committee's decision, court dismissing review application.

Having been involved in the conceptualisation and production of racially divisive posters which were subsequently erected on the campus of the fourth respondent university, the applicant was charged with breaches of the university's Disciplinary Code. The university's Central Disciplinary Committee ("CDC") found him guilty of contravening two rules of the Disciplinary Code, and imposed a sanction of 100 hours of community service and completion of a restorative assignment.

The applicant appealed the CDC's decision to the Disciplinary Appeal Committee ("DAC"), which dismissed the appeal, and increased the sanction imposed by the CDC to one of immediate expulsion from the university.

In terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, the applicant sought to review the DAC's decisions.

Held – In applications for review, the question is not whether a court agrees with the decision made by the decision maker, but whether it was one that the decision maker could reach.

The applicant's grounds for review included allegations of bias; failure by the DAC to comply with the provisions of the Disciplinary Code; and taking into account irrelevant considerations while ignoring relevant considerations. The arguments made in support of the allegations of bias were held to be unfounded.

The challenge based on contentions that the DAC failed to take relevant considerations into account and took irrelevant considerations into account was also unfounded, and failed.

The final ground of review was that the decision of the DAC to dismiss the appeal in the first instance was not rationally connected to the information before it, and the decision was so unreasonable that no reasonable decision maker could have so exercised the function of deciding the appeal. The Court was unswayed by the contentions made in that regard. The applicant raised two specific grounds of review in respect of the increase of sanction, *viz* that the decision of the DAC to increase the sanction was not rationally connected to the information before it, and that the decision was so unreasonable that no reasonable decision maker could have so exercised the

function of deciding the appeal. The fact that the DAC did not give the applicant notice of the possibility of the increase in sanction could not be relied on by the applicant as he had not raised it in the founding papers. The same applied with regard to the alleged disparity between the sanctions imposed on the applicant and two fellow students.

The application was dismissed.

Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and others [2021] 2 All SA 160 (GP)

Mining, Minerals and Energy – Holder of mining right – Responsibilities – Pumping and treatment of water until closure of mine – Section 43(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 – Where pumping had been conducted in order to mine, the holder of a mining right remains responsible for pumping and treatment of water until a closure certificate is issued, in order to maintain the status quo until such time as the cessation of pumping can be properly regulated.

The applicant ("EMC") had acquired the underground and surface operations of a gold and uranium mine in 2014. In September 2016, EMC ceased underground mining operations at the mine ("Ezulwini") as the underground mine was no longer economically viable. Surface mining-related operations, including in particular, gold metallurgical processing operations, were however ongoing at the mine. In order to undertake the underground mining operations at Ezulwini, EMC and its predecessors pumped groundwater from the underground workings which resulted in the dewatering of the Gemsbokfontein West Dolomitic Compartment. In its founding affidavit, EMC stated that notwithstanding the cessation of underground operations at Ezulwini, EMC continued to pump and treat water from the underground workings at a cost of approximately R21,1 million per month. It wished to cease the pumping of water from the defunct underground workings, and in 2017, it applied for two authorisations to cease the pumping. The authorisations having been refused, EMC brought the present application for a declaration that neither an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 and the Environmental Impact Assessment Regulations, nor an amendment to the water use licence issued to EMC in terms of the National Water Act 36 of 1998, was required to cease the pumping of water from the defunct underground workings.

A counter-application was brought by the sixth respondent ("Goldfields") for a declaration that EMC remained responsible for the pumping and treatment of extraneous water from the underground workings of the Ezulwini mine until at least when the Minister issued a closure certificate in terms of section 43 of the Mineral and Petroleum Resources Development Act 28 of 2002 to EMC or such longer period as contemplated in section 24R of the National Environmental Management Act 107 of 1998. Further relief sought was for EMC to maintain the shafts and pumping infrastructure required for the pumping and treatment of water from Ezulwini's underground workings and to allow the fifth and sixth respondents access to the Ezulwini mine for purposes of inspection.

Held – In respect of the latter two prayers mentioned above, Gold Fields had not established that it had a clear or even *prima facie* right to the relief sought nor had it demonstrated a reasonable apprehension of any harm should the relief not be granted. There was no basis for granting those orders.

Section 43(1) of the Mineral and Petroleum Resources Development Act provides that the holder of a mining right "remains responsible" for the pumping and treatment of extraneous water until the Minister has issued a closure certificate in terms of the Act to the holder. In other words, where pumping was actually being conducted in order to mine, the holder of the mining right remains responsible for pumping and treatment of water until a closure certificate is issued, in order to maintain the status

quo until such time as the cessation of pumping can be properly regulated. Goldfield's application for declaratory relief as set out above was thus granted.

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.

S v Rautenbach [2021] 2 All SA 206 (GJ)

Criminal law and procedure – Appeal against conviction on charges of murder and theft – Assessment of evidence to establish cause of death – Totality of evidence which had to be considered pointing to shooting of victim by appellant rather than suicide.

Criminal law and procedure – Appeal against sentence imposed in respect of conviction of murder and theft – Court agreeing that sentence failed to take into account the fact that the appellant was in custody for possibly up to two years before being sentenced, and consequently reducing sentence on appeal.

The appellant was charged with five offences. Although he pleaded guilty only to unlawful possession of cannabis and methaqualone (mandrax), he was convicted on all the other charges – *viz* murder of his father, theft, and unlawful possession of a firearm and of ammunition. He received an effective sentence of 18 years' imprisonment, with a further 6 months' imprisonment suspended for five years on the usual conditions. The present appeal was against conviction and sentence.

The murder charge led to a sentence of 16 years' imprisonment (the bulk of the overall sentence). The appellant's father's body was found in the garage of their house. The deceased had been shot with his own rifle. The bullet passed through the palette in an upward trajectory which meant that the barrel of the rifle was in the deceased's mouth when the shot was fired. The appellant was found in possession of his father's car in which was strewn bed linen and clothing belonging to the deceased. Four rounds of shot gun ammunition were found in the cubbyhole of the car. Cannabis and mandrax were also found at the house.

With regard to the conviction, the appellant argued that the trial court refused to allow the reception of vital evidence, that there was only circumstantial evidence linking him to the death of the deceased and that was insufficient to allow a finding that there was not another reasonable explanation accounting for the deceased's death. The appellant also attacked the credibility findings in respect of two of the main witnesses and the finding that after the incident blood and whitish substances were visible on the appellant's chest, the substances being identified as fragments of bone or brain. The grounds of appeal against the sentence imposed were based both on an alleged error in law, in that a court must give reasons if it is to exceed the minimum sentence for the specific offence, and that the one year and four months spent in custody pre-conviction should have been taken into account with all other factors as amounting to mitigating

circumstances. Finally, it was argued that the cumulative effect of the sentences induced a sense of shock.

Held – The main issue in respect of the murder charge was whether the cause of death arose from the bullet wound and if so whether the deceased had placed the rifle there himself and taken his own life or whether the appellant had killed him.

Examining the facts surrounding the death of the deceased, the court highlighted various actions on the part of the appellant, which were irrational. The court pointed to conduct of the appellant which was quite deliberate and focused when it mattered. Explaining that the totality of the evidence ultimately matters, the court pointed to the forensic evidence, the evidence of State witnesses on essential facts which were independently corroborated (and the reliability of which could not be gainsaid) and the untruthful version given by the appellant on the most critical elements of the case. Rejecting the idea of suicide, the Court was satisfied that the appellant was guilty of killing his father. The appeal against conviction was dismissed.

However, the sentence failed to take into account the fact that the appellant was in custody for possibly up to two years before being sentenced. The sentence in respect of murder was reduced to fifteen years' imprisonment and that for theft reduced to five years' imprisonment, all sentences to run concurrently with that imposed for the murder. The effective sentence was therefore 15 years' imprisonment.

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.

Shevel v Alson Development Sea Point (Pty) Ltd and another
[2021] 2 All SA 260 (WCC)

Property – Lease agreement – Cancellation of agreement due to breach of contract, and obtaining of order of eviction – Appeal against eviction order – Grounds of appeal averring inadequate legal representation, factual misdirection by magistrate and prospect of being rendered homeless found to be without merit.

In terms of a lease agreement entered into with the first respondent, the appellant took occupation of a flat on 1 February 2013. In 2019, he fell into arrears with the rent due. After he failed to pay the rent for February, March and April 2019, the first respondent gave him notice and then cancelled the agreement on 30 April 2019. The applicant failed to vacate the property, causing the first respondent to obtain an eviction order.

In his appeal against the eviction order, the appellant claimed that he had not had a fair trial in the court *a quo*, that the magistrate had erred in relation to his earning capacity, and that if the present Court confirmed the order, he would be rendered homeless.

Held – In contending that he had not had a fair trial, the appellant complained that his legal representative had failed to prepare adequately for the hearing and, further, did not adhere to his instructions to her. Having considered the record of proceedings in the court *a quo*, and in particular the detail traversed in the submissions to the court, the present Court held that the appellant's complaint was unfounded.

On the evidence around the appellant's income, the court accepted that he might not have earned the amount pointed to in the lower court, as the said amount was made up of earnings and money obtained from friends of the appellant. The alleged misdirection was not material, and the court confirmed the correctness of the finding that there was sufficient money available to the appellant every month to enable him to find alternative accommodation. The court's view that the appellant was unlikely to be rendered homeless, based on the evidence, was also confirmed on appeal.

The magistrate had properly exercised his discretion under section 4(6) of the Prevention of Illegal Occupation from and Unlawful Occupation of Land Act 19 of 1998 in evicting the appellant and giving him just more than a month to vacate. There was no reason to interfere with the order of eviction or its terms.

As the date stipulated in the eviction order had come and gone, the court had to affix a new date by which the appellant had to be out of the property. It was pointed out that the country currently under a Level 3 Lockdown under the Disaster Management Act, 57 of 2002, which made the eviction of persons from their places of residence subject to ministerial regulation. Having regard to the circumstances of this matter, the Court held that it would not be just and equitable to suspend the operation of the eviction order until the suspension of the current State of Disaster. The Court was satisfied that it would be just and equitable to order the appellant to vacate the flat within four weeks of its order.

Thales South Africa (Pty) Ltd v National Director of Public Prosecutions NO and others [2021] 2 All SA 274 (KZP)

Criminal Law and Procedure – Authorisation of prosecution by National Director of Public Prosecutions – Application for review – Whether authorisation of prosecution was inconsistent with the principle of legality – Section 2(4) of the Prevention of Organised Crime Act 121 of 1998 provides that a person shall only be charged with committing an offence contemplated in sub-section (1) if a prosecution is authorised in writing by the National Director of Public Prosecutions – Where sufficient information was placed before the National Director of Public Prosecutions on which it could be rationally concluded that there was reasonable and probable cause to believe that the alleged criminal conduct had been committed by the accused, authorisation of prosecution was lawfully valid.

In June 2005, the conviction of an individual ("Mr Shaik") and a number of corporate entities led to the fourth respondent and the Deputy Director of Public Prosecutions, KwaZulu-Natal, addressing a memorandum to the National Director of Public Prosecutions at the time, Mr V Pikoli, on the prospects of a successful prosecution against Mr J Zuma. That was followed by a further memorandum to Mr Pikoli to deal with the possibility of prosecuting the applicant ("TSA") and a subsidiary ("Thint"). On 13 November 2007, the prosecution team submitted a formal application in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998 to the second respondent, as it now wanted to include for the first time a racketeering charge in terms of section 2(1)(e) of the Act in the indictment against Mr Zuma, TSA and Thint. On 14 December 2007, the second respondent signed an authorisation in terms of section 2(4) for the inclusion of the racketeering charge in the indictment against Mr Zuma, TSA and Thint. On 24 May 2018, the prosecution team requested the third respondent to sign a fresh authorisation in terms of section 2(4), as the original authorisation signed by the second respondent could not be located, and Thint was no longer an accused, due to it having been deregistered. On 6 June 2018, the third respondent signed the current authorisation for Mr Zuma and TSA to be tried on a charge of contravening section 2(1)(e). TSA sought to have that decision by the third respondent reviewed and set aside on the ground that it was inconsistent with the principle of legality.

The parties were *ad idem* that the issue before the court was in essence whether the second or third respondents (the "NDPPs") rationally concluded that there was reasonable and probable cause to believe that TSA had, directly or indirectly or with common purpose, participated in an enterprise run by Mr Shaik, through a pattern of racketeering activity.

Held – Section 2(4) provides that a person shall only be charged with committing an offence contemplated in sub-section (1) if a prosecution is authorised in writing by the National Director. TSA contended that the authorisations failed the test of legality.

The Court had to consider what exactly was placed in front of the NDPPs in order for them to gauge objectively whether there was sufficient evidence before them on which they could rationally conclude that reasonable and probable cause existed that TSA had committed the alleged racketeering acts. Setting out the history of the matter, the Court found that sufficient information was placed before the NDPPs on which they could rationally conclude that there was reasonable and probable cause to believe that TSA had, directly or indirectly or with common purpose, participated in the enterprise run by Mr Shaik, through a pattern of racketeering activity compromising the planned, ongoing, continuous or repeated participation or involvement in at least two Schedule 1 offences.

The application was accordingly dismissed.

Value Logistics Limited v Kuhn and another [2021] 2 All SA 298 (ECP)

Corporate and Commercial – Restraint of trade – Enforcement of restraint agreement and confidentiality undertaking – A party wishing to enforce a restraint needs do no more than to invoke the provisions of the contract and prove the breach – The party seeking to avoid enforcement must prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint

– Where duration and geographical extent of the restraint not reasonable, court having power to adjust terms of restraint.

In 2019, the first respondent ("Kuhn"), who had been previously employed by the applicant ("Value Logistics"), again assumed employment with the company. His contract of employment contained a covenant in restraint of trade and a confidentiality policy. However, in 2020, he resigned from his employment with Value Logistics and took up employment with the second respondent ("Jungheinrich"). On the day that he handed in his letter of resignation, his manager brought to his attention the restraint and confidentiality policy. When Kuhn went ahead and assumed employment with Jungheinrich, Value Logistics brought the present application to enforce the restraint of trade agreement and a confidentiality undertaking. It also sought to enforce a non-solicitation undertaking given by Jungheinrich to Value Logistics in a contract (the "FML Agreement") between them.

Value Logistics stated that Jungheinrich was its competitor, and was also a customer until the FML Agreement was terminated. It discovered that Kuhn had emailed a service manual to himself before leaving employment, leading to the suspicion that he intended to use it to Jungheinrich's benefit. According to Value Logistics, the pool of customers in Port Elizabeth was limited and due to the close customer connection which Kuhn had established and extensive confidential information which he was privy to during the eight years he was employed by Value Logistics, he was in a position to solicit business away from the company in favour of Jungheinrich.

Held – It was not in dispute that Jungheinrich was a competitor of Value Logistics, and that Kuhn's employment in each company had overlapping elements. Having regard to Kuhn's own version of his employment with Value Logistics, the court found that he had breached the restraint. It referred to case authority which established that the party wishing to enforce a restraint needs do no more than to invoke the provisions of the contract and prove the breach. The party seeking to avoid enforcement must then prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint.

The Court found that Value Logistics had made out a case for the relief sought, and that Kuhn's own admissions strengthened that case.

The next question was whether the duration and geographical extent of the restraint were reasonable. It had to be considered whether the restraint was wider than necessary to protect the protectable interest. In this case, the restraint was unreasonable in respect of both time and extent. The duration was reduced from two years to twelve months, and the geographic restriction was adjusted.

As against Jungheinrich, the Court pointed out that at common law, it is not unlawful to solicit the services of another business's employee. In any event, there was no suggestion on the papers that Jungheinrich's motives in offering Kuhn a job were anything but legitimate. Moreover, the FML Agreement was a temporary arrangement intended to be of relatively short duration. To prohibit all Value Logistic's employees for a period of two years after the termination of the FML Agreement from taking up employment with Jungheinrich was indefensible and the clause was unenforceable.

END-FOR NOW