LEGAL NOTES VOL 5/2021

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SA LAW REPORTS MAY 2021

COMPETITION COMMISSION OF SOUTH AFRICA v PICKFORDS REMOVALS SA (PTY) LTD 2021 (3) SA 1 (CC)

Competition — Prohibited practice — Complaint — Referral to Competition Tribunal — Three-year time bar — Procedural time bar capable of condonation — Competition Act 89 of 1998, s 58(1)*(c)*(ii), s 67(1).

In November 2010 the Competition Commission initiated a complaint (the 2010 initiation) in which it argued that certain furniture removal firms had, in contravention of the Competition Act 89 of 1998 (the Act), engaged in collusive tendering in the form of 'cover quoting' — also known as 'bid rigging'. This is the practice of producing an artificially high quote from a competitor in order to win a contract (see [3]). The Commissioner cited several firms, indicating that they were the 'main companies implicated'. In a further initiation in June 2011, Pickfords was added as a respondent (the 2011 initiation). The Commission then filed a prohibited practice complaint against Pickfords in 2015 (the referral).

Pickfords excepted to the referral on the grounds that, of the 37 separate counts of prohibited practices mentioned in the 2011 initiation, 14 took place more than three years earlier, and were therefore time-barred under s 67(1) of the Act, which provides that a complaint may not be referred to the Tribunal if it was initiated more than three years after the alleged anti-competitive conduct had ceased (see [8]).

The Commission contended on the other hand that the three-year period only started to run once the Commission acquired knowledge of the prohibited practice and that it would be incorrect to apply the 2011 initiation date for time-barring purposes since it was a mere amendment of the 2010 initiation. The Commission also argued that non-compliance with the Act's time limits was subject to condonation under s 58(1)*(c)*(ii) of the Act (see [14] for the wording of this provision).

The issue was therefore which referral, 2010 or 2011, was the trigger event for the commencement of the three-year period provided for in s 67(1).

[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!**

The Competition Tribunal found in favour of Pickfords, ruling that its inclusion as a respondent in the 2011 referral was not an amendment of the 2010 referral, but rather a self-standing initiation. It held that the Tribunal's powers of condonation did not extend to s 67(1).
In an appeal, the Competition Appeal Court (CAC) found that while the 2011 referral was merely an amendment of the 2010 referral, Pickfords nevertheless only became a named party in 2011. The court held that the purpose of s 67(1) was to bar investigations into practices that had ceased and no longer endangered the public weal. It agreed with the Tribunal that its time bar was absolute and incapable of condonation.
In an appeal to the Constitutional Court Pickfords argued that permitting condonation would allow the Commission to 'turn back the clock', thereby defeating the purpose of s 67(1) and offending the principle of legality.

Held
The 2010 initiation was the trigger event. The CAC's finding that it was the 2011 initiation overlooked the Act's emphasis on the prohibited practice over the identity of parties implicated in it. (See [30] – [31], [56].) The 2011 initiation was merely an amendment of the 2010 initiation, which clearly stated that the investigation was ongoing. The reference to 'the main companies implicated' foreshadowed the possible addition of other firms at a later stage. (See [27], [56].)
Section 67(1) is a procedural time bar, and capable of condonation. The CAC erred in finding that s 67(1) was a limitation or expiry period and imposing an absolute substantive time bar. An absolute time bar would subvert (i) the purpose of the Commission to act as watchdog and enforcement vehicle in respect of transgressions of the Act, and (ii) the right of access to the Tribunal, the CAC and the courts. The interpretation of s 67(1) as a procedural time bar would better promote the spirit, purport and objects of the Bill of Rights, constitute a lesser infringement on the right of access to the courts, and also meet the rationality test. Therefore Pickfords' contention that it would offend the principle of legality and defeat the purpose of the Act to permit the Commission 'to turn back the clock' did not bear scrutiny. (See [38], [41] – [42], [47] – [48], [56].)
Section 58(1)*(c)*(ii), which afforded the Tribunal — save for the exclusions mentioned — an express, general power to condone non-compliance with the time limits in the Act, allowed the Tribunal, on good cause, to condone the non-compliance with s 67(1) (see [50], [56]).
Since the Competition Appeal Court was wrong to conclude that the Tribunal lacked such power, the appeal would be upheld. (see [57]).

ALTECH RADIO HOLDINGS (PTY) LTD AND OTHERS v TSHWANE CITY 2021 (3) SA 25 (SCA)

Review — Grounds — Legality — Self-review — Municipality seeking to review its own decisions to award tender and to enter into agreements pursuant thereto — Delay in bringing review — Whether unreasonable and excusable.
In this matter Tshwane City Municipality sought a legality review of its own decisions. The facts were as follows. In June 2015 the Municipality, following a tender process, awarded a tender to first appellant (Altech) for construction of a fibre Internet network for the City (see [2] and [5]). Pursuant thereto, the City incorporated second

appellant company (Thobela) which would contract with Altech to perform the construction and which would operate the network thereafter (see [5]). To this end in May 2016 the City concluded an agreement with Thobela for the construction and operation of the network (see [6]). Thereafter in August 2016 an agreement was entered into by the City, Absa Bank Ltd (supported by the Development Bank of Southern Africa) and Thobela under which Absa would loan sums to Thobela to meet its obligations to the City under its build and operate agreement with the City (see [7]).
Meanwhile, parallel to the conclusion of the loan agreement, and indeed the day before its signature, the municipal elections were held, and the DA came to take control of the City's governance from the ANC (see [11]).
Thereafter the DA appeared to set its sights on the project and in August 2017 the City instituted proceedings for review of its decisions to award the tender to Altech and to conclude the operations and loan agreements (see [12]).
That review was heard in May 2018 and in July 2019 the High Court set aside those decisions and declared the operations and loan agreements unenforceable (see [14]). In September it granted leave to appeal to the Supreme Court of Appeal (see [15]).
There the issue was whether the City's delay in bringing the review was unreasonable and, if it were, whether it could be condoned (see [19]).
The SCA found that it was indeed unreasonable and that it could not be condoned (see [71] – [72]). This on the following grounds:

- The length of the delay: by November 2016 all the facts supporting review were in the City s knowledge, yet it only proceeded in August 2017 (see [30]).
- The unsatisfactory explanation therefor that after the change of government time had been required to investigate the tender (see [22], [24] and [72]). This where most of the evidence in support of the review was known to the DA before the election (see [25]).
- The prejudice flowing from it: by January 2018 R610 million in costs had been incurred by Altech and Thobela and, by the time the review was heard in May 2018, 34% of the network had been built. Then after judgment in July 2019 the project was frozen, with what had been built unusable and the materials unsalveable for use in other projects (see [43], [67] and [72]).
- The City's unconscionable conduct in failing to warn the appellants of irregularities in the tender process or the susceptibility of their transactions to being impugned ([43], [45], [52] and [71] – [72]).
- The limited prospects of success of the review (see [53], [55], [61], [64] and [72]).

Appeal upheld, the order of the High Court set aside, and replaced with an order dismissing the City's application before it (see [77]).

ESKOM HOLDINGS SOC LTD v RESILIENT PROPERTIES (PTY) LTD AND OTHERS 2021 (3) SA 47 (SCA)

Electricity — Supply — Eskom — Duty to supply municipality in default — Whether Eskom entitled to interrupt supply of electricity to municipality for failing to pay for it — Electricity Regulation Act 4 of 2006, s 21(5).

In this matter, a pairing of two cases, private parties had paid their respective municipalities for electricity supplied to them, but the municipalities had, over a

period of years, failed to pay their supplier, Eskom, for it (see [7] and [17]). Ultimately this caused Eskom to interrupt the supply of electricity to the municipalities, which in turn brought the private parties to seek to review Eskom's decision (see [19] – [20]). The matter came before the High Court, which granted the relief sought (see [27]). Here, with leave of the High Court, Eskom appealed to the Supreme Court of Appeal (see [1]). In coming to dismiss the appeals, it considered the following (see [108]).

- Section 21(5) of the Electricity Regulation Act 4 of 2006 empowered Eskom to reduce or terminate supply of electricity to a customer without a court's prior authorisation (see [48] and [55]). (The section provides that a licensee may not reduce or terminate the supply of electricity to a customer, unless . . . *(b)* the customer has failed to honour . . . an agreement for the supply of electricity . . . .)
- The municipalities, despite contention otherwise, were customers for (in addition to being distributors of) electricity (see [7], [12], [15], [56] and [57]). Moreover Eskom could not reduce or terminate supply of electricity to them without resort to the dispute resolution provisions of the Intergovernmental Relations Framework Act 13 of 2005 and Local Government: Municipal Finance Management Act 56 of 2003, given the impact of such reduction or termination on a municipality's ability to meet its constitutional and statutory obligations (see [58], [60], [65] – [66], [78], [80] and [84]).
- In this regard the dispute here was as to the manner in which the municipalities' debt should be repaid and the remedies available to Eskom in the event of the municipalities' default (see [72] and [75]).
- Eskom's decision was irrational in its being taken in the full knowledge that the municipalities would be unable to repay their accumulated debt in the time given them; and it also offended the Promotion of Administrative Justice Act 3 of 2000 in being taken without regard to relevant considerations (see [89] and [91]).

The court also observed in passing that national and provincial governments should intervene to assist Eskom in recovering the debt owed it by the municipalities (see [95] – [97]).
Ordered, inter alia, that the appeals should be dismissed.

KNOOP NO AND ANOTHER v GUPTA AND ANOTHER 2021 (3) SA 88 (SCA)

Business rescue — Business rescue practitioner — Removal — Grounds — Court's discretion — General principles — Proof of grounds — Implications of practitioner being officer of court and subject to directors' duties — Companies Act 71 of 2008, ss 139(2) and 140(3).

The directors of a pair of companies (Islandsite and Confident Concept) had placed the companies in business rescue and appointed appellants (Knoop and Klopper) as business rescue practitioners (see [1]). Later a shareholder in both companies (Mrs Gupta, first respondent) applied for their removal on grounds that their staff were incompetent, they ignored and undermined the business rescue plans, they ignored offers for assets and insisted on sales by auction rather than private agreement, and they had breached the Value-Added Tax Act 89 of 1991 (see [15] and [16]). She alleged further that their conduct was in bad faith, involved failure to perform their duties and an insufficiency of care, that their interests were conflicted, that they lacked independence and that their conduct fell short of that of an officer of the court or director of a company (see [15], [30] and [34]).

The High Court upheld the application, ordered the practitioners removed, and later granted them leave to appeal to the Supreme Court of Appeal (see [2]).
In upholding the appeal, the SCA considered the following:

- The discretion of a court to remove a business rescue practitioner when one of the grounds in s 139(2) of the Companies Act 71 of 2008 is established (see [17]);
- general principles applying to removal (see [18]);
- proof of grounds of removal (see [18]);
- the grounds of incompetence or failure to perform duties (s 139(2)*(e)*); failure to exercise proper care (ss *(b)*); engagement in illegal acts (ss *(c)*); and conflict of interest or lack of independence (ss *(e)*) (see [20] – [24] and [142]);
- the implications of a business rescue practitioner being an officer of the court (s 140(3)*(a)*) and subject to the duties of a director (s 140(3)*(b)*) (see [30], [32] – [34] and [37]);
- that the facts failed to support the competence, business rescue plan, competitive offer or VAT complaints (see [40] – [41], [55], [78], [93], [100] and [108] – [109]);
- that the High Court had, by relying on irrelevant considerations and issues not raised in the papers, erred in failing to examine whether the evidence supported Mrs Gupta's case (see [13], [112], [114], [117], [119], [139] and [143]).

Appeal upheld and the High Court's order set aside and replaced with an order dismissing Mrs Gupta's application (see [146]).

KNOOP NO AND ANOTHER v GUPTA (EXECUTION) 2021 (3) SA 135 (SCA)

Appeal — Execution — Application to execute pending appeal — Requirements — Superior Courts Act 10 of 2013, s 18(1) and (3).

Appeal — Execution — Order for execution pending appeal — Appeal against — Automatic suspension of order for execution pending appeal — Whether court empowered to order that suspension would not operate — Court not empowered to do so — Such order a nullity — Superior Courts Act 10 of 2013, s 18(4).

What gave rise to the present matter was an order (the removal order) granted by the full court of the Gauteng Division of the High Court, Pretoria, removing the appellants (the appellant BRPs) as business rescue practitioners in respect of the companies under business rescue, Islandsite and Confident Concept, on the basis of their failure to perform their duties in terms of s 139(2)*(a)* of the Companies Act 71 of 2008, and the presence of a conflict of interest or lack of independence in terms of 139(2)*(e)*. The application resulting in such order had been instituted by the respondent, Ms Gupta (Gupta), a shareholder of the companies. In addition to granting the appellant BRPs leave to appeal against the removal order, the court granted the respondent leave to execute, in terms of s 18(1) and (3) of the Superior Courts Act 10 of 2013 (the SC Act). The appellant BRPs, as they were entitled to in terms of s 18(4)(ii) and (iii), lodged an extremely urgent appeal to the Supreme Court of Appeal against the execution order. This was the judgment in that matter.
Events subsequent to the granting of the execution order are of relevance. The directors of Islandsite and Confident Concept appointed new BRPs, Mr Tayob (who sought to intervene in these proceedings) and Mr Naidoo, who later purported to terminate business rescue proceedings in respect of Inslandsite and Confident

Concept. The implication of the above, the respondent argued in the present matter, was that the appellants had no locus standi to appeal, because their removal and replacement meant that they lacked any official capacity and standing to pursue the appeals as BRPs. Further, the respondent contended that the substitute BRPs had withdrawn the appeals insofar as they were appeals by the BRPs of Islandsite and Confident Concept. Further, the respondent claimed that, in consequence of the termination of business rescue, the appeals had become moot.

The above conduct seemingly stood in conflict with s 18(4)(i) of the SC Act, which provided that the operation of the execution order itself was suspended pending the outcome of an urgent appeal against that order (see [29]). The respondent sought to justify the actions on the basis of the execution order itself, which provided, amongst others, that '*(a)ny present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation of the order granted on the 13 December 2019* [ie the removal order]'. The High Court in granting such 'suspension order' sought to avoid what it termed the 'multiplicity of applications that would follow in view of the provisions of section 18(4)(iv)'. The court ruled it had an inherent right to prevent a toing and froing of litigants, and in line therewith it was entitled to make the order it did.

The SCA, before addressing the merits of the urgent appeal, considered too the validity of the full court's suspension order, and the consequences of nullity, should it be found that such order was invalid.

Held, that the full court's suspension order was invalid, for, inter alia, the following reasons:

- No such order was asked for in the application for leave to execute. None of the parties were called upon to address the court on this specific issue, and the court made the order mero motu. In the result it was granted without affording the appellants a hearing on the issue. (See [27].) Where an issue was not raised in the pleadings or affidavits in a case, and the order granted was one on which neither party had been heard, there was a breach of a fundamental constitutional right to a fair hearing (s 34).
- The order flew directly in the face of the statute that explicitly said that, pending an urgent appeal under s 18(4), the operation of an execution order was suspended (see [27]). The language of s 18(4)(iv) was explicit and allowed for no misunderstanding. The operation of an execution order was suspended pending the outcome of an urgent appeal against that order. That was the statutory position and a court could no more grant an order contrary to a statute than it could order a party to perform an illegal act. (See [29].)
- The inherent power of a court to regulate its own procedure could not be used to override the provisions of a statute directly governing the issue in question (see [27]).

Held, that the suspension order, being one that the full court had no power to make, was accordingly a nullity and could be disregarded (see [33]) – [34]). The nullity of the suspension order meant the following:

- The execution order was suspended pending this appeal, in terms of s 18(4)(iv) of the SC Act. The removal order was not yet effective.
- The appellants were not validly removed from office as BRPs.
- The directors of Islandsite and Confident Concept had not been entitled to act on the order for the removal of the appellants as BRPs in those two companies by

nominating new BRPs, and the appointments of Mr Tayob and Mr Naidoo were invalid. (See [35] and [68].)

- The purported withdrawal of the appeals was invalid and of no effect (see [36]).
- The appellants retained locus standi (see [37]).
- The notices of termination of business rescue in terms of s 132(2)*(b)* of the Companies Act were invalid and of no force and effect (see [42] and [68]). In this regard, the assertion by the respondent that there needed to be an application to set aside the termination was incorrect. The claim was based on a misconception, ie that termination was an official act of the Companies and Intellectual Property Commission (CIPC). (See [39].) The CIPC had no role to play in the process following a company's entering voluntarily into business rescue, beyond receiving and maintaining in its record the information about the commencement and termination of business rescue. There was accordingly no public act by the CIPC that had legal efficacy and required to be set aside. Instead, there was an entirely private process involving the company, the BRP and all affected persons. (See [41].) In the present circumstances, the termination of business rescue proceedings was by two people who were not the duly appointed BRPs. In such circumstances the termination was invalid and void. (See [42].)

Held, as to the merits of the appeal, that the three requirements for making an execution order had not been met (see [50]): The existence of exceptional circumstances was not established (see [60]). In this regard, when dealing with someone's removal from office, be it a BRP or a liquidator in relation to a company, or a trustee or an executor, or some other office bearer, the mere fact that the court had held that they should no longer fill that office did not, in and of itself, constitute exceptional circumstances. There had to be something more in the circumstances of the particular case that made the immediate implementation of the removal order necessary. (See [47] and [55].) Further, no irreparable prejudice to the respondent was established. Nor was the onus discharged of showing that the BRPs would not suffer irreparable harm as a result of an execution order being granted. (See [65].)

Held, in conclusion, that the urgent appeal had to be upheld (see [66]), and order at [68] granted.

PIETERS NO v ABSA BANK LTD 2021 (3) SA 162 (SCA)

Winding-up — Dissolution — Date of dissolution — When Registrar recording dissolution in Companies Register, not date of publication of notice of dissolution in Government Gazette — Companies Act 61 of 1973, s 419.

Winding-up — Liquidator — Completion of duties — Master's certificates in terms of ss 419(1) and 385 of Companies Act — Effect — Whether Master having power to reinstate liquidator subsequent to issuing of certificates — Companies Act 61 of 1973, ss 385 and 419.

The underlying issue to be resolved in the present matter was when a company was considered to be dissolved under the Companies Act 61 of 1973, which in turn called for a consideration of provisions in the Act dealing with dissolution: namely s 419, and in particular ss (2), which provides that the'Registrar shall record the dissolution

of the company and shall publish notice thereof in the prescribed manner', and ss (3) that '(t)he date of dissolution of the company shall be the date of recording referred to in subsection (2)'.

The relevant background facts were the following:
The appellant, having completed her duties as liquidator of the company Cell F, applied, in terms of s 385 of the Companies Act 61 of 1973, to the Master of the High Court for a certificate confirming that fact. The Master issued a certificate, in which it made such a confirmation, and in addition stated that the bond of security the appellant had furnished could be reduced to nil. The Master on the same day issued to the Registrar of Close Corporations and Companies a certificate in terms of s 419(1) of the Companies Act, certifying that the company Cell F had been completely wound up. Nearly five years later the appellant wrote to the Master of the High Court asking him to 're-issue' her certificate of appointment to enable her to pursue recovery of a potential asset of Cell F that had come to her attention. The Master complied, issuing a certificate recording that the appellant had been 're-instated' as liquidator. The appellant subsequently launched proceedings in the court a quo against the respondent, Absa Bank Ltd (Absa), claiming substantial damages. Absa successfully raised a special plea disputing the appellant's locus standi. The appellant appealed to the Supreme Court of Appeal.

The basis upon which the respondent claimed that the appellant had no locus standi to pursue its claim against it in the capacity as liquidator was that both the liquidator and the Master had fully and finally discharged their respective offices, Cell F having been finally wound up on 14 August 2003 when the Master certified in terms of s 419(1) of the Act that it had been 'completely wound up'. It was therefore not open to the appellant to request that her certificate of appointment be reissued, or to the Master to grant the request and 're-instate' her in that office. The crux of the appellant's response was that the company had never in fact been dissolved in terms of s 419(2) and (3) of the Act. The basis of this claim was seemingly that the Registrar had not published a notice of dissolution in the *Government Gazette*. For the appellant, the dissolution of the company was a consequence of publication in the *Gazette* and that it was only after publication that dissolution was complete.

Consequently, the appellant argued, the company remained in existence and in liquidation and that it was therefore permissible for the Master to reinstate her, thus clothing her with locus standing to pursue the present claim.

The SCA criticised the appellant's conception of dissolution under the Act. It stressed that the *recording* by the Registrar of the dissolution and *publication* of notice of the dissolution were two different acts. It held that s 419(3) reflected a clear legislative choice that it would be *the former* and not the latter date that would determine when the company was dissolved. Publication was merely a public intimation of an existing fact, namely that the company has been dissolved. (See [12].) Accordingly, the absence of publication in the *Government Gazette* was irrelevant to the question whether or not dissolution had taken place (see [16]).

The SCA held that the appellant had failed to discharge the onus she bore of establishing that her appointment was legally effective giving her locus standi to

bring the present claim, in that she had not proven that the Registrar had not recorded the dissolution of Cell F (see [18], [20] and [21]).

Even though the SCA held that the appeal could be dismissed on the above ground, it went on to consider whether, were Cell F not dissolved, the appointment would be valid. It held that it would not be. In its view, the issue by the Master of a certificate under s 385, permitting the liquidator to cause the bond of security to be cancelled, in conjunction with the issue of a certificate under s 419(1) that the company had been completely wound up, brought the winding-up process to an end and released the liquidator from office. Assuming in favour of the appellant that the company had not been dissolved and remained a company in liquidation, it was nonetheless a company in respect of which the liquidator's appointment had been terminated. If it transpired that there were further assets and this occurred between the completion of the winding-up and the company's dissolution, that required, at the very least, a fresh appointment of a liquidator, which could only be made in terms of s 377(1) of the Companies Act. That route was not followed in the present case. (See [25].)
The SCA accordingly dismissed the appeal (see [28]).

BANGIWE v ROAD ACCIDENT FUND 2021 (3) SA 172 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Liability of Fund — Whether liable where accident happened in underground mine — Road Accident Fund Act 56 of 1996, s 17.

Section 17 of the Road Accident Fund Act 56 of 1996 (the Act) provides for the liability of the Road Accident Fund and its agents for 'any loss or damage . . . suffered as a result of any bodily injury . . . caused by or arising from the driving of a motor vehicle by any person at *any place within the Republic*'.
The plaintiff, Mr Bangiwe, claimed damages from the defendant (the RAF) for injuries sustained in a motor vehicle accident which occurred in an underground mine. The RAF raised as a defence that 'any place' in s 17 did not mean 'anywhere', such as underground in a mine, so that the claim fell outside of s 17's ambit. In the adjudication of this defence as a separated legal issue —

Held
The use of the words 'any place within the Republic' in s 17 was deliberate and meant just that. The Act was social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle. It would be artificial to limit the RAF's liability simply on the basis that the accident happened underground in a mine when the Act stated, in no uncertain terms, that the accident must have happened at 'any place within the Republic'. (See [35] and [37] – [38].)

BELREX 95 CC v BARDAY 2021 (3) SA 178 (WCC)

Judgments and orders — Summary judgment — Application — Amended rule 32 — Defendant filing amended plea after commencement of application for summary judgment — Whether application for summary judgment can be granted in terms of amended rule 32 where defendant amending initial plea after application for summary judgment had commenced — Uniform Rules of Court, rule 32.

After the defendant, on 19 June 2020, had filed his plea to the plaintiff's summons, the latter filed an application for summary judgment, together with supporting affidavit, on 9 July 2020. The defendant *subsequently*, on 4 August 2020, *filed a notice of intention to amend his plea*, also raising a special plea. The defendant, on 7 August 2020, after the summary- judgment application had already been set down for hearing on 13 August 2020, filed his opposing affidavit, in which he essentially confirmed the contents of *his amended plea* and the grounds upon which he had based his special plea.
The court declined to make an order in respect of the summary judgment application (see [36]). In its reasoning for doing so, the court noted that the amended plea was not yet ripe for adjudication, given non-compliance with rule 28(2) (see [35]).

The court, however, noted that, even were the amended plea properly before court, it would be inappropriate for the matter to proceed to summary judgment. The particular facts and the recent changes to rule 32 presented the court with a predicament. The amended rule in subrule (2)*(b),* read with subrule 2*(a)*, obliged the plaintiff to, within 15 days after the delivery of the plea, deliver a notice of application for summary judgment, together with an affidavit in which it had to explain why the defence as pleaded did not raise an issue for trial. However, in terms of subrule (4), the plaintiff could adduce no further evidence otherwise than by this affidavit.

Accordingly, to proceed to summary judgment in circumstances such as the present — where the defendant had, after the commencement of the application for summary judgment, elected to amend its plea and base its opposing affidavit on such amended plea — would place the plaintiff at a disadvantage since he would not be allowed to adduce further evidence to explain why the defences as pleaded *in the amended plea* did not raise any issue for trial (see [24] – [25] and [35]). On the other hand, a court could not simply ignore the amended plea and opposing affidavit; to do so would defeat the purpose of the amended rule, which required that the nature and grounds of the defence and the material facts relied upon in the affidavit should be in harmony with the allegations in the plea; it would also be manifestly unfair and unjust to the defendant, who had a right to amend his plea at any stage of the proceedings before judgment. (See [35].)
The court ruled that the defendant's notice of amendment should take effect in terms of rule 28(2) as of the date of this judgment, for the plaintiff to exercise its rights in terms of the rule (see [37]). The court further granted the plaintiff leave to bring a fresh application on the amended plea, should such an application for amendment be allowed (see [38]).

CHONGQING QINGXING INDUSTRY SA (PTY) LTD v YE AND OTHERS 2021 (3) SA 189 (GJ)

Judicial case management — Gauteng Division, Johannesburg — Digital case management and litigation system — Compliance with relevant Practice Manual and Practice Directives in Covid-19 environment and thereafter — Failure to comply — Application struck from roll.

The Covid-19 pandemic forced the justice system to implement digital solutions to facilitate the ongoing dispensation of justice. Fortunately, the two Gauteng Divisions (Pretoria and Johannesburg) had by this time already piloted an electronic case management and litigation system for opposed motions. While the need for virtual court hearings might diminish as the pandemic abated, the electronic case management and litigation system would likely remain in operation. (See [2] – [3].)
The system was set out in the Judge President's Consolidated Directive of 18 September 2020. It was not self-standing but had to be applied together with the Uniform Rules of Court, the divisions' Practice Manuals and other directives. Legal practitioners were obliged to adhere to the outlined procedures and, in particular, ensure that an application was ripe for hearing before it was enrolled on the opposed roll, and that it remained so. Non-compliance invited punitive costs orders. (See [7] – [8].)

To address the problem of delays caused by the late filing of heads of argument, the Practice Manual provided that legal practitioners could only apply for a date on the opposed roll after practice notes and heads of argument had been delivered by the parties in a properly indexed and paginated file. The existing requirement that matters had to be case-ready before the allocation of a date on the opposed motion roll was reinforced by the introduction of the electronic system. Matters in which an opposed motion date hearing was sought had to contain 'a full set of relevant pleadings and documents in the uploaded file'. * Such documents included heads of argument, practice notes, and the like. (See [12] – [13].)

To prevent electronic court files from continually evolving, legal practitioners had to play their part. To prevent them from slipping out-of-time documents into electronic files, 'freeze dates' were implemented and provision made for matters to be struck from the roll, with punitive costs orders where the judge established that documents were uploaded out of time without condonation having been granted. (See [16].)
By applying for an opposed date, practitioners represented to the registrar that the matter was ripe for hearing. As pointed out above, they had to ensure, as far as practically possible, that it remained so. Where the applicant itself took steps that rendered its own matter no longer ripe for hearing, it could hardly complain if its opposed application was struck from the roll. (See [25] – [26].)
In the present case the court proceeded to strike an opposed application from the roll because the applicant had failed in numerous respects to comply with the procedures outlined above (see [51] – [54] and [61]).

CITY POWER SOC LTD v COMBINED PRIVATE INVESTIGATIONS CC 2021 (3) SA 202 (GP)

Contract — Legality — Contracts contrary to statute — Obligation of court to mero motu raise question of legality.

The applicant state-owned company, City Power, applied in terms of Uniform Rule of Court 31(2)*(b)* for the rescission of a default judgment granted against it in favour of the respondent, Combined Private Investigations (CPI). CPI's claims against City Power were for the payment of amounts owing and outstanding for services provided. The court ultimately rescinded the judgment on the basis that good cause had been shown, as per the requirements of rule 31(2)*(b)*, to do so.

One of the grounds upon which the court found that the applicant possessed a bona fide defence to one of the claims was that the contract upon which it was based breached the principle of legality. (See [11] – [13].) Such a defence had in fact not been raised by the applicant; the issue was raised mero motu by the court. However, in this regard the court held that, in light of the recent court decision of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (2018 (2) BCLR 240; [2017] ZACC 40) — which emphasised that s 172(1)*(a)* of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution — as well as other earlier case law, and having afforded adequate notice of the issue of the principle of legality, that it was not only entitled, but also obliged, to have raised the issue. (See [12].)

PRICEWATERHOUSECOOPERS INC AND ANOTHER v MINISTER OF FINANCE AND ANOTHER 2021 (3) SA 213 (GP)

Constitutional law — Legislation — Validity — Value-Added Tax Act 89 of 1991, s 39(7) — Late payment of tax — Obligation to pay interest — Remittal of interest — Whether failure of provision, to provide for remittal of interest in circumstances where non-timeous payment did not result in any financial loss to fiscus, irrational — Whether remittal scheme permitting arbitrary deprivation of property — Means chosen through vehicle of s 39(7) to regulate remittal of interest rationally connected to public good sought to be achieved, namely efficient VAT system requiring prompt settlement of tax debts — Provisions of s 39(7) not leading to deprivation of property as contemplated in s 25(1) of Constitution — Provision in question constitutionally valid — Constitution, s 25(1).

Revenue — Value-added tax — Late payment of tax — Obligation to pay interest — Remittal of interest — Whether failure of s 39(7) of VAT Act, to provide for remittal of interest in circumstances where non-timeous payment did not result in any financial loss to fiscus, irrational — Whether remittal scheme permitting arbitrary deprivation of property — Means chosen through vehicle of s 39(7) to regulate remittal of interest rationally connected to public good sought to be achieved, namely efficient VAT system requiring prompt settlement of tax debts — Provisions of s 39(7) not leading to deprivation of property as contemplated in s 25(1) of Constitution — Provision in question constitutionally valid — Value-Added Tax Act 89 of 1991, s 39(7); Constitution, s 25(1).

In terms of s 39(1) of the Value-Added Tax Act 89 of 1991 (VAT Act), persons liable for the payment of value-added tax (VAT) are obliged to pay interest on late payments of VAT. However, s 39(7) of the VAT Act permits the Commissioner to remit such interest payable, *if satisfied that the VAT*-liable *person's failure to pay timeously 'was due to circumstances beyond the control of the said person*'. In the present matter the applicants sought an order declaring s 39(7) of the VAT Act to be unconstitutional and invalid, on two grounds:
(1) It was irrational and arbitrary, in that it failed to provide — in the manner that the version of s 39(7) did before its amendment in April 2010 — for the remittal of interest on late VAT payments where, having regard to the output tax and input tax

relating to the supply in respect of which interest is payable, *the failure to make timeous payment did not result in any financial loss to the fiscus*.
(2) It permitted the arbitrary deprivation of property, in conflict with s 25(1) of the Constitution.

Held, having regard to the requirement of 'rationality' (see [40] – [42]), that the question to be addressed in the context of the present challenge was whether the means chosen through the vehicle of s 39(7) to regulate the remittal of interest were rationally connected to the public good sought to be achieved, namely *an efficient VAT system that requires the prompt settlement of tax debts* (see [43] and [44]). *Held*, that the purpose of imposing interest was not limited to compensating for loss (as had been argued by the applicants, and on which assumption they had largely based their assertion that it was irrational for the fiscus to retain interest it had levied under circumstances where there was no loss to the fiscus) (see [35] and [45]). The imposition of interest, as well as the provision for remittal of interest in defined circumstances, also served as an incentive and deterrent to ensure taxpayers complied with their obligations (see [36] and [45] – [46]).

Held, that, under the circumstances, the test for rationality had been met and it could not be contended that a system that triggered a right to remittal of interest based exclusively on the conduct of the taxpayer was irrational. Simply put, if the failure to pay VAT timeously was within the control of the taxpayer, the right to seek a remittal was excluded. There could be nothing irrational or arbitrary about such a system — it accorded with the objectives of the fiscus to advance an efficient and compliant system of tax collection. (See [49].)

Held, further, as to the 'arbitrary deprivation' argument, that the provisions of s 39(7) did not lead to a deprivation of property as contemplated in s 25(1) of the Constitution (see [66]). In order for an interference with property rights to constitute a 'deprivation of property' as contemplated in s 25(1) of the Constitution, there had to have been a 'substantial interference' or limitation going beyond the normal restrictions on property use found in an open and democratic society (see [58]). That threshold was not met here (see [63]). The obligations to pay tax, and interest upon failure to pay tax, as well as the framework allowing for the remittal of interest, were part of the normal restrictions on property use, indispensable in an open and democratic society, to enable the state to discharge its obligations towards its citizens (see [60] and [61], [64] and [65]). Application, accordingly, dismissed with costs (see [72]).

STANDARD BANK OF SA LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2021 (3) SA 228 (WCC)

Criminal law — Prevention of crime — Asset forfeiture — Final restraint order — Freezing of assets in which third party has interest — Bank seeking leave to intervene to obtain release of assets in which it held ownership or security and which were hence incapable of contributing to eventual confiscation order — Partial discharge of final restraint order nevertheless not permissible — To forestall bank's dilemma, restraint orders to be worded so as to ensure that affected assets not frozen — Prevention of Organised Crime Act 121 of 1998, s 26(10) and s 28.

The applicant applied for leave to intervene in an application in which the first respondent, the National Director of Public Prosecutions, had obtained a freezing (restraint) order under s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA) against the estate of the second and third respondents, and three other respondents, companies under his control. In seeking such leave, the applicant sought a variation order to secure the release of two motor vehicles and a house. It was the owner of the motor vehicles under an instalment-sale agreement and the house was security for loans advanced by the applicant to one of the companies. The second respondent opposed the application even though he was insolvent, and the trustees of his insolvent estate were cited as respondents in the matter. It appeared that there was no realisable value, as defined in POCA, in respect of any of the assets in question. The applicant relied on a report of the curator bonis that the only assets of realisable value in the insolvent estate of the second respondent were insurance policies. The criminal case against the second respondent had commenced earlier in 2019 and had been postponed to February 2020. The second respondent contended that the applicant should rather await the outcome of the criminal proceedings.

Held
There was, despite the inconvenience to the applicant and other creditors who found themselves in a similar position, nothing in POCA that allowed a creditor to obtain what was in effect a partial discharge of a final restraint order in circumstances such as the present. A portion of such an order could not be varied or discharged solely on the basis of an accounting exercise which determined that certain assets subject thereto had no realisable value for the purposes of a possible confiscation order. (See [24] and [26].)

There were several ways to forestall the dilemma that had emerged in the current matter. Restraint orders could be more carefully worded to ensure that assets which would not contribute to a confiscation order, and against which creditors should be allowed to proceed, were not frozen. Furthermore, creditors who found themselves in the applicant's position had to assert their rights before the restraint order was made final. (See [28].) The application for leave to intervene would be granted but the application for substantive relief dismissed.

VAN ASWEGEN v HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA AND OTHERS 2021 (3) SA 238 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Liability of Fund — Limits — 'Serious injury' threshold for general damages — Serious injury assessment report — Appeal against rejection of — Procedure — Condonation — Whether required for late filing of medico-legal reports — Road Accident Fund Act 56 of 1996, s 17(1A).

The applicant's serious injury assessment form, in her claim for general damages, having been rejected by the fourth respondent (the RAF), she appealed to the third respondent, the Road Accident Fund Appeal Tribunal (the Tribunal). The day before the hearing of the appeal, she served additional medico-legal reports on the second respondent, the Acting Registrar of the Health Professions Council of SA (the

HPCSA). That these were not forwarded to and considered by the Tribunal when it rejected her appeal, formed the basis of her complaint in the present case — her application to review the Tribunal's rejection of her appeal for lack of procedural fairness under s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In opposition the respondents raised a point in limine, that she failed to apply for condonation for the late filing of the medicolegal reports. This, they argued, amounted to non-compliance with the requirements of reg 3(4) of the regulations to the Act which provides for a condonation procedure in regard to a dispute as to the rejection of the serious injury assessment form by the RAF.

Held

The purpose of reg 3(4) was to achieve the timeous lodging of a dispute regarding serious injury assessments; not to prevent, on pain of having to apply for condonation, the advancement of further submissions, medical reports and opinions in support of the grounds upon which the HPCSA's rejection was being attacked. There was no procedure in the regulations by which further reports or submissions could be presented to the HPCSA. Without a procedure in place, it could not be said that the applicant, who desired to place further evidence before the Tribunal, may not do so or should be prevented from doing so. (See [11] and [14].)

The HPCsA's decision not to present the additional medicolegal reports to the RAF, in the absence of a condonation application, was accordingly wrong in law, and procedurally unfair in that the audi rule and the provisions of s 3 of PAJA were ignored or not applied in a fair and flexible manner. The HPCSA's approach, on its own, was procedurally unfair and rendered the Tribunal's decision invalid and subject to be reviewed and set aside. In addition, the conduct of the Tribunal, in failing to take into account the additional medicolegal reports which the applicant had made available, was procedurally unfair. The decisions were invalid and would be set aside. (See [21] – [22].)

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2021 (3) SA 246 (CC)

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Failure to provide for subject of surveillance to be notified post-surveillance that they were subjected to surveillance; to ensure independence of designated judge; to provide adequate safeguards for managing information; and to provide any special protections where subject of surveillance was practising lawyer or journalist — Amounting to unjustifiable infringement of rights to privacy and access to justice — Constitution, ss 14, 34, 35(3), 36(1) and 38; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 1 sv 'designated judge', 16(7)*(a)*, 17(6), 18(3)*(a)*, 19(6), 20(6), 21(6) and 22(7).

Telecommunication — Interception of communications — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — 'Designated judge' — Appointment of — Whether, absent express provision, RICA empowering Minister of Justice to make appointment — Regulation of Interception of Communications and

Provision of Communication-Related Information Act 70 of 2002, s 1 sv 'designated judge'.

Telecommunication — Interception of communications — State practice of 'bulk interceptions' of telecommunications traffic — Not authorised by s 2 of National Strategic Intelligence Act 39 of 1994 or any other law, and thus unlawful — Practice unlawful, given absence of any law authorising such practice.

The High Court had declared the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) constitutionally invalid, which declaration it suspended for two years together with interim relief (of insertions into RICA) to be applicable during the period of suspension. It also declared the state practice of 'bulk interceptions' of telecommunications traffic unlawful as not authorised by the National Strategic Intelligence Act 39 of 1994 or any other law.

In this application for the Constitutional Court's confirmation of the High Court's order, it was common cause that the surveillance of private communications limited the right to privacy. At issue was whether RICA's limitation of the right to privacy was reasonable and justifiable under s 36(1) of the Constitution, more particularly, whether RICA was unconstitutional to the extent that it unjustifiably failed to protect the right to privacy by —

- not providing for a subject of surveillance ever to be notified — even post-surveillance — that she or he was subjected to surveillance (notification issue).
- not ensuring the independence of the designated judge, * and lacking any form of adversarial process or other mechanism to ensure that the intended subject of surveillance was protected in the ex parte application process (the independence issue);
- not providing adequate safeguards regarding the archiving of data and accessibility of communications (the management of information issue);
- not providing any special protections where the intended subject of surveillance was a practising lawyer or a journalist (the lawyer, journalist issue).

In addition, two non-constitutional issues before the court were —

- whether there was a legal basis for the state to conduct bulk surveillance (the bulk communications surveillance issue); † and
- whether, absent express provision to that effect, RICA authorised the Minister of State Security to designate a judge (the power to designate a judge issue).

Held

As to bulk communications surveillance

The broad terms of s 2 of RICA served as authorisation for the practice of bulk surveillance. To interpret s 2(1)*(a)* of the National Strategic Intelligence Act 39 of 1994 as to authorise such practice would be to undermine RICA's express prohibition of communication interceptions without interception directions. The practice was thus unlawful and invalid, as there was no law that authorised it. (See [131] – [135].)

As to the power to designate a judge
Reading the definition and the provisions on the functions of a designated judge together, it would be the height of formalism to insist that the power to designate must be expressly provided in the substantive provisions of RICA. The conclusion has to be that the power to designate a judge was implicit in a proper conjoined reading of the definition of 'designated judge' and other provisions of RICA. There was no conceivable or compelling reason for not concluding that the power to designate was implied in the definition of 'designated judge' in s 1 of RICA; it was an implied primary power. (See [48], [76] and [79].)

As to notification
Section 16(7)*(a)* of RICA expressly prohibited disclosure of any kind to the subject of the surveillance. Individuals whose privacy had been violated, accordingly would never become aware of this and were thus denied an opportunity to seek legal redress for the violation their rights to privacy. Accordingly, the right guaranteed by s 38 of the Constitution to approach a court to seek appropriate relief for the infringement of the right to privacy was rendered illusory. The infringement was such as to implicate the rights of access to courts (s 34) and to an appropriate remedy (s 38). Post-surveillance notification should be the default position, only to be departed from where, on the facts of that case, the state organ persuaded the designated judge that such departure was justified. RICA was thus unconstitutional to the extent that it failed to provide for it. (See [41] and [44] – [48].)

As to independence
Section 16(7)*(a)* of RICA provided that '(a)n application must be considered and an interception direction issued without any notice to the person or customer to whom the application applies and without hearing such person or customer', ie ex parte. The result was that an application for an interception direction — that severely and irreparably infringed the privacy rights of the subject — could be granted on the basis of information provided only by the state agency requesting the direction. RICA was accordingly unconstitutional to the extent that it lacked sufficient safeguards to address the fact that interception directions were sought and obtained ex parte. (See [95] – [100].)

RICA's framework for surveillance had as its centrepiece a 'designated judge' who authorised surveillance. Safeguards on the appointment, term and function of a designated judge were accordingly pivotal in assessing whether RICA met the s 36 threshold. At present, the designated judge was appointed by the Minister of Justice — a member of the Executive — without the involvement of any other person or entity. The designation by a member of the Executive in ill-defined circumstances, or circumstances that completely lacked description, did not conduce to a reasonable perception of independence. The lack of specificity on the manner of appointment and extensions of terms raised independence concerns. The requirement of independence being a constitutional imperative, RICA would thus be declared unconstitutional to the extent that it failed to ensure adequate safeguards for an independent judicial authorisation of interception. (See [55], [92] and [94].)

As to management of information
RICA gave no clarity or detail on what must be stored; how and where it must be stored; the security of such storage; precautions around access to the stored data

(who may have access and who may not); the purposes for accessing the data; and how and at what point the data may or must be destroyed. It simply could not be so that whatever information was prescribed to be kept was left to the unbounded discretion of the director; there needed to be clear parameters on the exercise of discretion. Thus there was a real risk of the private information of individuals landing in wrong hands and that it may be used for purposes other than those envisaged in RICA. There was no relation between the purpose of state surveillance and the absence of procedures to safeguard private intercepted communications. RICA was, therefore, unconstitutional to the extent that it failed adequately to prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed for examining,copying, sharing, sorting through, using, storing or destroying the data. (See [103] and [107].)

As to practising lawyers and journalists
The confidentiality of journalists' sources — crucial for the performance by the media of their obligations — was protected by s 16(1)*(a)*; and the legal professional privilege was an essential part of the rights to a fair trial and fair hearing (ss 34 and 35*(e)*). The proper functioning of our legal system relied on the confidentiality of communications between lawyer and client. That in turn promoted the rule of law. Thus the wholesale interception of lawyer – client communications without any recognition of this legal, constitutional, reality was at odds with the rule of law. The confidentiality of lawyer – client communications and journalists' sources was particularly significant in our constitutional dispensation. There was accordingly a need that special consideration be given to this fact when interception directions were sought and granted. RICA was thus unconstitutional to the extent that, when the intended subject of surveillance was a practising lawyer or a journalist, it failed to provide for additional safeguards calculated to minimise the risk of infringement of the confidentiality of lawyer – client communications and journalists' sources. (See [115] – [117] and [119].)

SA CRIMINAL LAW REPORTS MAY 2021

NATIONAL MINISTER OF TRANSPORT v BRACKENFELL TRAILER HIRE (PTY) LTD AND OTHERS 2021 (1) SACR 463 (SCA)

Traffic offences — Moving violations in contravention of National Road Traffic Act 93 of 1996 — Proof of — Presumption in s 73(1) of Act that owner driver of vehicle — Application of to owner of trailer hired out to customer.

The applicants, the owners of a business that hired out trailers, had experienced problems with the application by the authorities nationally of the presumption in s 73 of the National Road Traffic Act 93 of 1996 (the Act). This was because they, as the owners of the trailers, were presumed in terms of s 73(1) and (2), respectively, to have driven or parked the trailers in a manner that contravened the provisions of the Act, whereas the trailers in question had been driven or parked by their customers. Their frustrations caused them to launch the present application in which they applied for an order declaring that, on a proper construction of ss 73(1), (2) and (3) of the Act, the presumptions for which they provided were not applicable to trailers.

The difficulties encountered by the traffic-enforcement agencies in this regard stemmed from their inability in most instances to establish the owner of the motor vehicle, their cameras only being able to pick up the registration number of the trailer which obscured the rear registration plate of the vehicle being driven. Hence their prosecutions targeting the applicants by virtue of being the owners of the trailers involved.
The High Court upheld their arguments and found that on a proper interpretation of the word 'drive' in the Act one did not drive a trailer, and it was quite irrelevant to the task of a prosecutor attempting to prove the commission of a moving violation that a trailer was being driven at the time. Therefore, the words 'such vehicle' in s 73(1) related to the vehicle that was being driven and not any other vehicle. A purposive construction of s 73(1) that required accepting that the presumption applied against the owner of the trailer, because that was the only party that could be identified, meant that violence had to be done to the plain language of the provision and was fallacious. Engaging in that sort of legislative embroidery would be to add to the legislation, not to construe what the legislature had put there. If the lacuna were problematic it was for the legislature to remedy the position by amending the legislation. On appeal,
Held, that the word 'drive' was defined in the Act with reference to the meaning of the word 'driver' as defined, and 'driver' meant someone who drove or attempted to drive any vehicle, and included someone who rode or attempted to ride a pedal cycle or lead any draught, pack or saddle animal or herd or flock of animals. Thus, the element of 'driving' in relation to a trailer in tow was lacking. It was illogical to speak of such when in actual fact what happened was that it was the towing vehicle that was being driven when it was propelled by manipulating its controls with the trailer in tow. Accordingly, a trailer — not being self-propelled — had no engine or controls to manipulate its speed and direction independently of the towing vehicle. On the contrary, the speed and direction of a trailer in tow was entirely reliant on the speed and direction of the towing vehicle. In these circumstances it was difficult to conceive of a situation where one could truly speak of a trailer being driven on a public road. (See [44] – [46].)
Held, further, that when one had regard to the text of s 73(1) in its contextual setting, it did not support or favour the construction of the section for which the appellant contended. The construction preferred by the High Court was also reinforced by the linguistic analysis of the word 'drive' as set out above. In these circumstances the reasoning of the High Court could not be faulted, and the appeal had to be dismissed. (See [45].)

SMIT v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2021 (1) SACR 482 (CC)

Constitutional law — Legislation — Validity — Drugs and Drug Trafficking Act 140 of 1992, s 63 — Power of Minister to amend schs 1 and 2 to Act — Improper delegation of original legislative power — Breach of separation-of-powers doctrine — Section invalid to extent it delegates such power to Minister.

Constitutional law — Legislation — Validity — Extradition Act 67 of 1962, s 5(1)*(a)* — Issue of warrant of arrest by magistrate upon notification by Minister — Unjustified and unreasonable limitation of right not to be deprived of freedom

arbitrarily or without just cause — Impossible for magistrate to exercise kind of oversight that guaranteed procedural safeguards and amounting to breach separation-of-powers doctrine — Provision invalid and unconstitutional — Constitution, ss 12 and 36.

In an application to confirm the declaration by the High Court of the invalidity of the provisions of s 63 of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act), the applicant also sought leave to appeal directly to the Constitutional Court against the order of the High Court that not all the schedules to the Drugs Act effected in terms of s 63 were invalid; and the refusal by the High Court to declare the provisions of s 5(1)*(a)* of the Extradition Act 67 of 1962 inconsistent with the Constitution. He also contended that following the Constitutional Court's judgment in *Prince*, * the offence for which he was charged in the United Kingdom was no longer an offence in South Africa in terms of the Drugs Act, and that the double-criminality requirement envisaged in the Extradition Act had therefore not been satisfied.
The application to the High Court arose from a request, made in terms of s 4 of the Extradition Act, from the United Kingdom to the Minister of Justice and Correctional Services, for the arrest and subsequent extradition of the applicant. This on the grounds that the applicant had committed various criminal offences relating to the production, supply and possession of cannabis under its Misuse of Drugs Act of 1971, and that the charges against him were still pending.

The Minister issued a notification in terms of s 5(1)*(a)* of the Extradition Act to the effect that a request for the surrender of the applicant had been received, and a warrant for his arrest was duly issued. He was arrested and appeared before a magistrate where proceedings were adjourned *sine die* and he was released on bail. The High Court held that, as the extradition proceedings and the possible threat to the applicant's freedom hinged on the content of a schedule to the Drugs Act, it was that Act and the schedule that the applicant sought to impugn, and this constituted his cause of action. It also held that, because he was not only challenging the cannabis prohibition, but also the Drugs Act and its schedules, he had standing on the basis of the rule of law and the principle of legality. It held further that the possible usurping by the executive of plenary legislative powers, alleged by the applicant, was a matter of public interest and impacted on broader concerns of accountability and responsiveness, and the applicant had sufficient interest on this basis in the subject-matter of the dispute. It held that s 63 constituted an impermissible delegation of plenary legislative power to a member of the executive and, when the Minister took the decision to include or delete a substance in a schedule to the Drugs Act, he was in fact amending plenary legislation. It held furthermore that only those amendments to the schedules effected in terms of s 63 fell to be declared invalid and, since cannabis was not included in the schedules to the Drugs Act as a result of the exercise of the powers granted to the Minister by s 63, the original schedule proscribing cannabis could not be impugned. As to the challenge to the validity of the warrant issued in terms of s 5(1)*(a)* of the Extradition Act, the High Court accepted that the magistrate was not required to exercise a discretion after receipt of the notification from the Minister, and the issue of a warrant in terms of the section did not necessarily entail a substantive exercise of any discretion by the magistrate.

It held therefore that there was no merit in the argument that the magistrate had to be satisfied independently that the person concerned was indeed liable to be surrendered before issuing a warrant, and that s 5(1)*(a)* did not infringe the constitutionally protected right to freedom and security of the person. The warrant was accordingly validly issued under the Extradition Act. On appeal,
Held, as to s 63 of the Drugs Act, per Tshiqi J (Jafta J, Mhlantla J and Victor AJ concurring), that the provision conferred on the Minister plenary legislative power to amend the schedules which were essentially part and parcel of the Act, and it delegated original power to amend the Act itself. It was a complete delegation of original legislative power to the executive without any clear and binding framework for the exercise of the powers, and this was constitutionally impermissible. (See [36].)

Held, further, that s 63 also undermined the doctrine of separation of powers which the court had repeatedly affirmed as an important constitutional principle. The application for confirmation of the order of the High Court, that s 63 was inconsistent with the Constitution, accordingly had to succeed. (See [39].)
Held, per Madlanga J (Mogoeng CJ, Khampepe J, Majiedt J, Mathopo AJ and Theron J concurring), agreeing with the first judgment on everything, except the issue of s 5(1)*(a)* of the Extradition Act. There, on the plain wording of the section, not much was required of the magistrate to exercise his or her mind, and the magistrate was required to act on the mere say-so of the Minister. That did not in the least afford the procedural safeguards that were necessary under s 12(1)*(a)* of the Constitution. A lawyer's mind balked at the idea that the section could possibly require a magistrate to issue a warrant purely on the basis that she or he has received a notification from the Minister, that the Minister has received a request from a foreign state for the surrender of the person sought to be arrested (See [114].)

Held, further, no serious attempt had been made by the Minister to justify the limitation in the section, of the right not to be deprived of freedom arbitrarily or without just cause. The limitation was not reasonable and justifiable in terms of s 36(1) of the Constitution and therefore s 5(1)*(a)* was unconstitutional on this basis. (See [142] – [143].)

Held, further, that the unintended consequence of the section's involvement of a magistrate under those circumstances was that a judicial officer was required to lend judicial legitimacy to what, in essence, was an executive act. That constituted a breach of the separation-of-powers principle, rendering the section unconstitutional on this basis as well. (See [151].)

S v SOLOMON AND OTHERS 2021 (1) SACR 533 (WCC)

Sentence — Prescribed sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — What constitutes — Period spent in detention awaiting trial — Pre-sentencing detention could possibly, on own, constitute substantial and compelling circumstance justifying departure from prescribed minimum sentence — Application of to sentences of life imprisonment.

In the sentencing of six accused convicted of a myriad of serious crimes involving gang-related activities, including convictions of murder in respect of four of the six accused, the court was required to consider the effect of pre-sentencing detention in imposing sentence. The court noted that the general trend of deducting an equivalent period of the pre-sentencing detention from what would otherwise have been an appropriate sentence presented conceptual difficulty when life imprisonment was the prescribed sentence and there were no other circumstances justifying a departure from the statutorily ordained sentence.
Held, that pre-sentencing detention could possibly, on its own, in such circumstances, be a substantial and compelling circumstance justifying departure from a prescribed minimum sentence. But the reason why it should not ordinarily be regarded as such was because the court had to determine an appropriate sentence without regard to the parole exclusion period, and the period actually imposed was what mattered. In the present case the length of the pre-sentencing detention was not so gross, however, as to warrant a departure from the mandated life sentence. (See [24] – [28].)

KHUMALO v MINISTER OF POLICE AND ANOTHER 2021 (1) SACR 551 (WCC)

Prosecution — Malicious prosecution — Proof of — Decision to enrol matter in regional court and keep plaintiff in custody not based upon evidence reasonably believed to be reliable — Prosecutors acting reckless as to possible consequences of their conduct — Animus iniuriandi proved.

The plaintiff instituted action against the first defendant and the second defendant, the Director of Public Prosecutions (the DPP), for unlawful arrest, subsequent detention and malicious prosecution. Although the circumstances of the arrest and initial detention did show a prima facie case established by the plaintiff against the first defendant, the evidence showed that the criminal prosecution was enrolled in the regional-magistrate's court for trial before there was reliable and credible evidence to support the identification of the plaintiff as the perpetrator of the crime. On 17 July 2014, when the matter was postponed for trial in the regional court, the decision was also not well founded upon evidence reasonably believed to be reliable as regards the identity of the plaintiff and the decision to enrol the matter in the regional court had not been taken with care. Its profound consequences for the plaintiff were not considered. (See [37].) The court held that the authority to decide to institute criminal proceedings in the regional court envisaged drastic action which carried the invasion of rights and liberties. The decision taken to enrol the matter in that court was arbitrary. The plaintiff had accordingly proved animus iniuriandi on the part of the DPP, the continued detention of the plaintiff not being justified by any reliable evidence of his identity as the perpetrator and there being no continued investigation done in regard thereto, infringed his liberty. The prosecutors had acted reckless as to the possible consequences of their conduct. The claim for malicious prosecution accordingly had to be upheld. (See [38] – 40].)

S v GABANI 2021 (1) SACR 562 (ECB)
Court — Proper function of — Administrative support staff — Judicial call for efficiency and effectiveness of administrative support staff to be addressed.

In an appeal against a conviction for rape in a magistrates' court and against a sentence imposed in November 2011, the matter only came before the court in June 2020 because of the failure of the court support staff to ensure that the record was properly placed before the court. In remarking on the manner in which the respective members of said support staff had approached their task, the court accepted that communication by way of electronic mail had by and large become the order of the day in our justice system. It remarked, however, that this did not mean that all caution should be thrown to the wind when it came to form, and support staff should use a uniform formal form of address in all written correspondence placed on court files. The court then supplied an example of a proper business-letter format. (See [20].) The court remarked further that it had experienced, over at least the past seven years, an accelerating decline in the loyalty of civil servants to perform their functions optimally, particularly those who had clerical job descriptions, and without whose executive and administrative output judges had literally been constrained to become registrars of obligation instead of paying attention to the rule of law and the application of the law and relevant legal principles to the cases at hand. (See [28].) The inordinate delays were not systemic. They had been caused by nothing less than dereliction of duty, and almost nine years had passed since the appellant's application for leave to appeal had been refused. (See [33].) The case at hand was but one of many where the administrative support for the judiciary had floundered, and the situation did not seem to be improving. In the view of the court, the time was ripe for the efficiency and effectiveness of the administrative support structure to be addressed in a manner which was designed to uplift, empower and educate the administrative arm to the level of a foundation upon which the norms and standards of judicial officers could safely rely in a symbiotic relationship designed to enhance judicial service delivery. (See [41].)
In the circumstances the conviction and sentence of the appellant had to be set aside.

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Churchill v Premier of Mpumalanga and another [2021] 2 All SA 323 (SCA)

Personal Injury/Delict – Injury and assault of employee during protest action – Claim for damages – Special plea that claim constituted occupational injury for which appellant was entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 or 1993 (“COIDA”) and was therefore excluded by section 35(1) of Act – Requirements for qualification as occupational injury are an accident; arising out of and in the course of an employee’s employment; and resulting in personal injury, illness or the death of the employee.

During protest action at the premises and in the building where the appellant worked, she was assaulted and mistreated by the protestors and was eventually evicted from the premises in a manner that was humiliating and degrading. Apart from physical

injuries, the appellant was left with Post-Traumatic Stress Disorder. She was compelled to resign from work just two months later as a result.

Having been employed at the offices of the first respondent, the Premier of Mpumalanga (the "Premier"), the appellant sued the Premier and the Director-General in the office of the premier (the "D-G"), alleging that her it was due to their negligence that she experienced the ill-treatment by the protestors. She contended that they took no steps, or alternatively inadequate steps, to ensure the safety of their employees in the workplace. Had they taken reasonable or adequate steps to do so she claimed that the assault on her would have been avoided. Her claim amounted to nearly R7,5 million for past and future medical treatment, general damages and past and future loss of income.

The Premier and the DG raised a special plea, contending that the claim constituted an occupational injury for which the appellant was entitled to compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 or 1993 ("COIDA") and was therefore excluded by section 35(1) of COIDA. On the merits, they denied the existence of any legal duty and the fact of negligence, or that they were vicariously liable for the behaviour of the protestors.

The upholding of the special plea in the court below led to the present appeal.

Held – The ambit of the appeal was the cause of some confusion because the High Court judgment did not deal in any detail with the issues of negligence and vicarious liability arising if the special plea was dismissed. Explaining the effect of the order, the present Court ruled that the appeal would proceed on the basis that, if the appeal regarding the special plea succeeded, a declaration should be made in regard to the liability of the Premier to compensate the appellant for her damages and remitting the matter to the High Court for the determination of quantum of damages.

The court turned to the question of whether the appellant's injuries were sustained in an accident as defined in COIDA. The three requirements are an accident; arising out of and in the course of an employee's employment; and resulting in personal injury, illness or the death of the employee.

While the appellant's injuries were sustained in the course of her employment, the question was whether they arose out of her employment. There was no link between her duties as an employee and the issue in regard to which the protest action had been called, and the incident was unrelated to the subject matter of the protest. Instead, the appellant had been turned against because a protestor had heard her swear at being locked out of her office, and had assumed that the expletive was directed at him and other protestors. The only connection between the incident and appellant's employment was that she was at work at the time. Finding that her injuries did not arise out of her employment, the court upheld the appeal and dismissed the special plea. The Premier was declared liable to compensate the appellant for such damages as might be agreed or proved arising out of the injuries suffered by her in the course of the protest.

Democratic Alliance and others v Mkhwebane and another [2021] 2 All SA 337 (SCA)

Discovery of documents – Notice for production of documents – Failure to comply – Rule 35(12) of the Uniform Rules of Court provides for a party to proceedings to deliver a notice to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such for inspection and to permit the making of a copy or transcription thereof – Court must consider whether reference is made to document in papers (including annexures) and that such document is relevant.

The second and third appellants were members of the first appellant (the "DA"), a political party.

In September 2016, the second appellant ("Ms Breytenbach") conducted a press conference where she published a media statement by the DA on the subject of the nomination of the first respondent ("Ms Mkhwebane") for the position of Public Protector. The DA made it clear that the party would not support the nomination, on grounds of the fitness of Ms Mkhwebane for the position. It was speculated that Ms Mkhwebane was on the payroll of the State Security Agency ("SSA"), and her explanation for accepting that role, amounting to a demotion, was suspicious. At the same press conference, the third appellant ("Mr Horn"), also made a statement about the possibility of Ms Mkhwebane having been on the payroll of the SSA whilst working as an immigration officer in China.

The second respondent was the office of the Public Protector. The respondents' complaint was that the statements made about Ms Mkhwebane by the appellants were defamatory. Ms Mkhwebane denied that she had ever been on the payroll of the SSA. The respondents approached the High Court an order directing the appellants to retract the allegedly defamatory remarks concerning Ms Mkhwebane and to apologise publicly for their utterances.

Prior to filing their answering affidavit, the appellants filed a notice in terms of Uniform Rule 35(12), seeking the production by the respondents of seven documents to which they considered they were entitled. Five of the documents were furnished and the failure to furnish the remaining two led to the appellants bringing an interlocutory application in the court below in terms of rule 30A. That application was dismissed, and the court ordered the appellants to file an answering affidavit in the main case within 15 days of the order. It was held that Ms Mkhwebane did not refer to the requested documents in her founding affidavit, and that the documents were in any event irrelevant to the proceedings at that stage. The present appeal lay against the two orders referred to.

Held – Rule 35(12) provides for a party to proceedings to deliver a notice to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such for inspection and to permit the making of a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding. The first step in the adjudication process is to consider whether reference is made to a document or tape recording. Direct or indirect reference to a document will suffice, subject to relevance. Reliance on a document by the party from whom the document

or tape recording is sought is a primary indicator of relevance. The High Court wrongly implied that the appellants, in defending the main case, were limited to the evidence at their disposal when the impugned publication was made. A person defending a defamation claim on the grounds of truth and public benefit or fair comment is entitled, after the launching of proceedings, to gather further evidence to support those defences and to use the rules relating to the discovery and production of documents for that purpose. Documents not specifically mentioned in affidavits, but referred to in annexures to the affidavits also fall within the scope of the rule.

The Court found that one of the two documents requested was referred to by Ms Mkhwebane and was relevant, and therefore had to be produced. In the premises, the appeal was upheld.

Esau and others v Minister of Co-Operative Governance and Traditional Affairs and others [2021] 2 All SA 357 (SCA)

Constitutional and Administrative Law – National State of Disaster – Regulations to control pandemic – Lawful validity – Policy decisions taken by National Coronavirus Command Council confirmed as legally competent, and were properly given effect to by the Minister of Co-operative Governance and Traditional Affairs in issuing Regulations in a procedurally fair manner and in terms of a rational decision-making process.

Since the declaration of a national State of Disaster in March 2020, South Africa has been subjected to regulations and directions aimed at preventing and containing the spread of the Coronavirus Disease 2019 (“Covid-19”) and regulating the State’s response to the pandemic. The regulations and directions issued by the national executive in terms of the Disaster Management Act 57 of 2002 have limited the rights of the populace. The present appeal concerned the constitutional validity of certain decisions taken by members of the executive and of regulations made in order to deal with the pandemic.

The applicants approached the High Court to challenge the lawfulness of the establishment and functioning of the National Coronavirus Command Council (the “NCCC”), the body which played a central role in the response to the Covid-19 pandemic. A further four issues arose for determination by the court below. The first was whether the Disaster Regulations of 29 April 2020 were consistent with sections 26 and 27 of the Disaster Management Act. The second issue was whether the Minister of Co-operative Governance and Traditional Affairs (the “COGTA Minister”) acted in a procedurally fair and rational manner when she made those regulations. Thirdly, the Court had to decide whether certain of the regulations were unreasonable and unjustifiable infringements of fundamental rights and were invalid on that account. The final question was whether directions issued by the Minister of Trade, Industry and Competition were invalid for want of legality and rationality.

All the questions were decided in the respondents’ favour, leading to the present appeal.

Held – The role of the courts in such circumstances, in line with the doctrine of the separation of powers, is to vet the challenged decisions and regulations made in terms of the Disaster Management Act for their regularity and not their wisdom. Section 26 of the Act allocates responsibilities in respect of national

disasters. It provides that the cabinet, in the national sphere of government, is primarily responsible for the coordination and management of national disasters irrespective of whether a national State of Disaster has been declared. After a national disaster has been declared, the designated Minister may, in terms of section 27(2), make regulations or issue directions. Two express curbs are placed on the regulation-making powers of the Minister. He is required to consult with the responsible Cabinet member before making regulations that bear on that Minister's portfolio, and his regulation-making power may only be exercised to the extent necessary to achieve certain stated purposes.

Part of the measures put in place by government was a national lockdown, implemented within the framework of five alert levels. On 29 April 2020, the COGTA Minister promulgated regulations (the "level 4 regulations") to give effect to the move to level 4. The appellants challenged certain policy decisions that, they alleged, were taken by the NCCC, and that were then given effect to by the COGTA Minister when she made the level 4 regulations.

The Court found that, when the NCCC took a policy decision that was given legal effect by the COGTA Minister, it was legally entitled to do so, and that, in any event, that policy decision was moot and therefore not justiciable as the country had since moved to a lower alert level. The level 4 regulations were made in a procedurally fair manner, or in terms of a rational decision-making process. The Court upheld the appeal only to the limited extent that the regulations relating to restricting exercise in public and to the sale of hot food were found to be unsustainable.

Monteiro and another v Diedricks [2021] 2 All SA 405 (SCA)

Spoliation – Application for return of property – Mandament van spolie – Requirements – Party seeking remedy must, at the time of the dispossession, have been in possession of the property, and dispossessor must have wrongfully deprived him of possession without their consent – Order must be capable of being executed, and where property was no longer in possession of dispossessor, restoration not possible.

The respondent ("Diedricks") was in possession of a car, which he took to the second respondent ("Autoglen") for a routine maintenance service. The registered owner of the car ("Street Talk Trading") persuaded Autoglen not to hand the vehicle back to Diedricks, and to instead hand it to Street Talk Trading. Diedricks was a party to a vindicatory action in which Street Talk Trading claimed repossession of the vehicle on the basis of ownership. That action was pending before the High Court. He had given no instruction to nor authorised the release of the motor vehicle to Street Talk Trading or to its director ("Monteiro").

Alleging that Autoglen had unlawfully dispossessed him of the vehicle, Diedricks launched an urgent spoliation application.

Monteiro and Autoglen resisted the application, arguing that a *mandament van spolie* ought not to have been granted because Diedricks was not in possession of the motor vehicle when the spoliation occurred. It was submitted that he had, by delivering the vehicle to Autoglen for repairs, given up possession thereof. In relation to Autoglen, he was said to have consented to its possession. Autoglen could therefore not be said to have spoliated the property. In relation to Monteiro it was

submitted that inasmuch as the vehicle was taken into the possession of Street Talk Trading, Diedricks was not deprived of possession since it was then in the possession of Autoglen. On that basis, it was contended that Diedricks did not establish the first requisite for an order restoring possession, namely that he was deprived of possession.

The second point relied upon was that neither Autoglen nor Monteiro were in possession of the vehicle. Autoglen had passed possession on to Street Talk Trading and could therefore not restore it to the possession of Diedricks. As for Monteiro, he asserted that the vehicle had been sold by Street Talk to a third party.

Held – *Mandament van spolie* is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties. Two requirements must be met in order to obtain the remedy. Firstly the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent. In order to be an effective order, the order must be capable of being carried into effect by the party subject to the order.

The High Court order required Autoglen and/or Monteiro to restore possession of the vehicle to Diedricks. However, neither was in possession of the vehicle. On that basis, the appeal was upheld by the majority of the court.

In a dissenting judgment, a contrary view was expressed regarding the outcome of the appeal in relation to Monteiro. The view was that the High Court was correct to hold that Monteiro had unlawfully despoiled Diedricks of his possession of the vehicle, and to grant a spoliation order. The dissenting judge rejected as untenable, the defence that restoration was not possible as the vehicle was in the possession of a third party.

Dawson v Sidney on Vaal CPA and another [2021] 2 All SA 429 (NCK)

Property – Communal property association – Application to place association under administration in terms of section 13(1) of the Communal Property Associations Act 28 of 1996 – An association may be placed under the administration of the Director-General if the association because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or when it would otherwise be just and equitable in the circumstances – Application refused where requirements of section 13(1) not met.

As a member of the first respondent, Sidney on Vaal Communal Property Association (the “CPA”), the applicant (“Dawson”) sought an order placing the CPA under the administration of the Director-General: Land Affairs, in terms of section 13(1) of the Communal Property Associations Act 28 of 1996. The stated aim of the application was to stop the continued maladministration of the CPA’s affairs by the executive committee, it being contended that it would be just and equitable that the association be placed under administration. Various examples of such alleged maladministration were advanced.

The CPA disputed that there was any basis upon which the CPA could be placed under administration. It also contended that the application was premature in that Dawson had failed to exhaust the internal remedy contained in section 10(2) of the Communal Property Association Act before proceeding with his application. The CPA also alleged that Dawson was *mala fide* and that his application was an abuse of process, because of ulterior motives.

Held – From the express wording of section 13(1) of the Act, an association may be placed under the administration of the Director-General if the association because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or when it would otherwise be just and equitable in the circumstances. In this matter, the association was able to not only pay its debts and meet its obligations, but was also in a position to pay dividends to the members of the association.

It then had to be considered whether it would be just and equitable to place the CPA under administration, and if so, what powers should be granted in such an order.

Taking into account the relevant provisions of the Companies Act 71 of 2008 and the Companies Act 61 of 1973, the court held that the principles relating to companies, in respect of the test for it being just and equitable to place a company under liquidation or business rescue, can be applied equally to communal property associations. The court has a wide discretion in deciding the issue.

In casu, the Court had to decide whether it would be just and equitable to place the association under the administration of the Director General: Land Affairs in terms of section 13(1) of the Communal Property Associations Act.

As a different executive committee was currently in place, complaints levelled against the previous executive committees could not be relied upon as a basis to place the CPA under administration. The Court also found no merit in the allegations underpinning the complaint of maladministration. Consequently, the applicant failed to establish that it would be just and equitable for the CPA to be placed under the administration of the Director General: Land Affairs, as envisaged in section 13(1).

The application was dismissed with costs.

Holtzhausen v Cenprop Real Estate (Pty) Ltd and another [2021] 2 All SA 457 (WCC)

This is the appeal from the Western Cape Division, Cape Town, against the finding of Gamble J (sitting as a court of first instance) in the case of Holtzhauzen v Cenprop Real Estate (Pty) Ltd and another [2020] 1 All SA 767 (WCC)

Personal Injury/Delict – Injury at shopping centre – Duty on centre owner and management – Owner or other person or entity in control of a shopping mall has a legal duty to take reasonable steps to ensure that its premises are reasonably safe for those members of the public who might frequent them – Legal duty to take reasonable steps to safeguard members of public from harm not falling on independent contractor responsible for cleaning floors of mall, but primarily on owner of the mall and secondly on management company of mall.

In June 2013, while on her way to draw money at a shopping centre, the appellant slipped and fell on the tiled floor inside the centre and suffered a fracture to her elbow. It had been raining at the time, and the floor was wet as a result of rainwater carried in via the rain jackets, umbrellas and shoes of persons entering the mall.

The appellant sought to recover damages arising from her injuries from both the management company in charge of the mall and its owner. The first respondent ("Cenprop") managed the shopping centre on behalf of its owner, the second respondent ("Naheel") at the time. According to the appellant, the respondents had acted wrongfully and had been negligent in that they knew, or ought to have known, that the surface of the floor was slippery when it became wet and posed a danger to members of the public who were required to walk across it, but despite that they had failed to take steps to avoid accidents.

The respondents denied that they had been negligent, or that they had acted in breach of any legal duty which they might have owed the appellant. They averred that they had appointed competent and professional contractors to maintain, clean and check the premises and the surface of the floors at the mall, in order to ensure that they remained clean and would not be dangerous to members of the public.

It was common cause that at the time when the appellant fell and until she left the mall to get medical attention, no cleaners were in attendance in the corridor where the incident occurred.

Held – It is established in our law that the owner or other person or entity in control of a shopping mall has a legal duty to take reasonable steps to ensure that its premises are reasonably safe for those members of the public who might frequent them. A failure to take such steps will constitute wrongful conduct, but that in itself will not suffice to impose delictual liability without the necessary fault element ie *culpa*. Whether that is present is determined by asking whether a reasonable man in the position of the owner or other person in control of the premises would have foreseen the risk of danger or harm occurring were such steps not taken and would have taken such steps and whether the defendant failed to take them. Whether the steps that were taken in a particular case are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances, and merely because harm which was foreseeable did eventuate does not mean that the steps which were taken to avoid it were necessarily unreasonable. Ultimately the inquiry involves a value judgement on the part of the court.

The trial court was found to have erred in holding that the legal duty to take reasonable steps to safeguard the appellant from harm fell on the independent contractor which was directly responsible for cleaning the floors of the mall. The present Court held that the duty fell primarily and squarely on Naheel as owner of the mall, and in the second place on Cenprop, the management company which it had contracted to manage the mall on its behalf.

The respondents pleaded that in the event that Naheel was held to have been negligent it was excused from liability by virtue of a disclaimer notice which had been prominently displayed at all of the entrances to the mall. The Court found that such notice was not clearly visible to persons entering the premises and could not be relied upon.

Upholding the appeal, the Court held the respondents jointly and severally liable for appellant's proven damages.

KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors [2021] 2 All SA 478 (KZP)

Lease agreement – Termination of lease – Application for eviction of occupant – All an applicant has to prove to obtain an eviction order is that it is the lawful owner of the premises and that the respondent is in occupation of the premises against its will – In absence of continued right of occupation, eviction of occupant ordered.

In July 2001, the respondent ("Nelta") and an oil company ("Caltex") entered into a franchise and lease agreement allowing Nelta to operate a retail petrol station on certain premises. Caltex subsequently changed its name to Chevron South Africa (Pty) Ltd and then to Zastron. In 2011, the applicant ("KZN Oils") and Chevron concluded a branded marketer agreement and a sale agreement for the purchase of the service station and the immovable property on which the premises were situated. In terms of the sale agreement, KZN Oils became owner of the premises. Nelta was informed in 2016, that KZN Oils did not intend to renew the lease, and in July 2016, the lease and franchise agreements terminated through the effluxion of time.

Although Nelta was invited by KZN Oils to make commercial proposals if it wished to secure a new agreement and to continue with the business, its proposals were rejected.

As Nelta continued to occupy the premises after termination of the lease, KZN Oils applied to court for the ejectment of the respondent from the premises.

A counter-application was brought by Nelta, for relief in the event of the court declining to dismiss the main application or to stay the eviction application pending arbitration in terms of section 12B of the Petroleum Products Act 120 of 1977, and arbitration in terms of the original franchise agreement. It was contended that once Nelta had elected to refer a matter for arbitration in terms of section 12B, the High Court's jurisdiction was ousted.

Held – The first issue for determination was whether KZN Oils was entitled to the eviction order. In terms of the common law, all an applicant has to prove to obtain an eviction order is that it is the lawful owner of the premises and that the respondent is in occupation of the premises against its will. Nelta conceded that its original right to occupy had terminated through the effluxion of time, and that the agreement concluded between the parties provided for it to vacate the premises on termination of the agreement. Nelta was unable to prove a continued right to occupy the premises on any of the bases advanced, confirming KZN Oil's right to seek eviction.

Nelta averred that the eviction application ought to be stayed pending either arbitration in terms of the franchise agreement or pending the arbitration already referred in terms of section 12B of the Petroleum Products Act. It argued further that it need not have instituted an application to stay in terms of section 6 of the Arbitration Act 42 of 1965 as the provisions of such Act did not apply because a section 12B referral automatically stayed the proceedings and ousted the jurisdiction of the High Court. The court however, ruled that the Arbitration Act did apply to the

proceedings, and that Nelta was required to bring an application for the stay of the proceedings in terms of section 6 of the Arbitration Act, pending the finalisation of the section 12B arbitration. Nelta was thus not entitled to a stay of proceedings.

The eviction order was granted and Nelta's counter-application dismissed.

Nyhonyha and others v Venter NO and others [2021] 2 All SA 507 (GJ)

Insolvency – Provisional winding-up order – Application to set aside on ground that company was factually solvent and that it had experienced a temporary liquidity difficulty which resulted in its inability to timeously satisfy the claim of the creditor which had applied for its liquidation – Companies Act 61 of 1973, section 354 gives a court wide powers to stay or set aside a winding up at any time after commencement thereof – Interest of creditors a weighty factor to be considered in exercise of court's discretion – Winding up order set aside on basis that where all creditors could be paid, there was no advantage to keeping company wound up.

In September 2020, the court placed a company ("Regiments") under final winding-up.

The applicants applied for the winding-up order to be set aside. The applicants' case was that Regiments was factually solvent and that it had experienced a temporary liquidity difficulty which resulted in its inability to timeously satisfy the claim of the creditor which had applied for its liquidation. It was alleged that as soon as the winding-up was set aside, it would be able to release sufficient funds to meet the claim of all its creditors in the amount of 100 cents in the rand. According to the applicants, Regiments had various assets residing in its subsidiary companies which could be liquidated to meet all its liabilities. Some of the subsidiaries were the sixth to eleventh applicants. The sixth applicant ("Coral") was the most important of the subsidiaries.

Regiments had concluded a restructuring or unbundling transaction with the sixth to eighth applicants, the key element of which involved liquidating the assets held in Coral. Coral held shares in an entity ("Capitec") which were of substantial value. It was intended that those will be sold and the proceeds paid to Regiments and two other stakeholders. In consequence of the unbundling transaction, Regiments would, according to the applicants, be able to meet all its debts.

Held – Section 354 of the Companies Act 61 of 1973 allows a court to stay or set aside a winding up at any time after commencement thereof. The powers conferred on the court are wide. It is bound to scrutinise the facts very carefully and to exercise its discretion in a manner that at the very least does not disadvantage any creditor. The interests of the creditors weigh heavily with the court.

In casu, it was undeniable that if all the creditors could be paid then there was no advantage to keeping Regiments wound up. The winding-up order was accordingly set aside.

OB v LBDS [2021] 2 All SA 527 (WCC)

Divorce action – Jurisdiction – Section 2(1) of the Divorce Act 70 of 1979 – A court shall have jurisdiction in a divorce action if either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or is ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in the country for a period of not less than one year immediately prior to that date – Facts supporting averment in particulars of claim that at the time divorce action was instituted, appellant was domiciled within the court's area of jurisdiction.

In 2017, the parties in this matter, both foreign nationals, entered into a civil union in terms of the Civil Union Act 17 of 2006, in which they married out of community of property by antenuptial contract with the incorporation of the accrual system.

Towards the end of 2018, the appellant sued for divorce, and sought to have a settlement agreement entered into by the parties to be incorporated in the divorce decree. The matter was enrolled on an unopposed basis in the motion court. The Court was not satisfied that it had jurisdiction to entertain the matter. It dismissed the appellant's divorce action on the ground that the jurisdictional requirements contained in section 2(1) of the Divorce Act 70 of 1979 had not been met.

Based on the appellant's submissions, she and the respondent had lived in Caledon after their marriage. After the breakdown of the marriage, the respondent relocated and was currently living in Namibia. The appellant averred that she was permanently resident in Caledon from April 2018 until December 2018, and relocated back to Moscow, Russia (her country of origin) in December 2018.

The present appeal lay against the jurisdictional finding.

Held – Section 2(1) of the Divorce Act 70 of 1979 states that a court shall have jurisdiction in a divorce action if either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or is ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in the country for a period of not less than one year immediately prior to that date.

In addressing the issue of jurisdiction, the court below focused on the meaning of "ordinarily resident" and ignored the issue of domicile. On appeal the court raised the issue of domicile as section 1(2) of the Divorce Act contains a deeming provision to the effect that a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court.

The facts advanced by the appellant supported the averment in her particulars of claim that at the time the action was instituted on 7 November 2018 she was domiciled within the court's area of jurisdiction. The court *a quo* thus had the requisite jurisdiction to grant the decree of divorce. The appeal was upheld and the order appealed against was replaced with one granting the decree of divorce.

In a dissenting judgment, the view expressed was that the appellant had failed to establish as a matter of fact that she had adopted a domicile of choice in this country on the date on which the proceedings were instituted, and that the court *a quo* had the necessary jurisdiction to grant an order of divorce.

Rinaldo Investments (Pty) Ltd v Minister of Public Works [2021] 2 All SA 541 (KZD)

Constitutional and Administrative Law – Sale of municipal land to private entity by municipality – Municipality's inability to honour contractual obligation due to State department refusing to comply with special condition in title deed – Application by purchaser for declaratory relief aimed at facilitating transfer – Locus standi of purchaser – Generous approach should be adopted to standing in constitutional litigation – Court finding that a sufficiently broad factual and legal basis was established for the assertion of the right to a declaratory.

A decision by the eThekwini Municipality, represented in these proceedings by the fourth respondent as the present municipal manager, to sell a property known as the Natal Command Property to the applicant ("Rinaldo") was at the heart of the present matter. The property was prime property on the Durban beachfront. The bulk of it housed the headquarters of the Natal Command of the South African National Defence Force ("SANDF"), as well as including certain adjoining municipal land. The former Corporation of the City of Durban (the "Corporation"), now the municipality, acquired the SANDF portion in 1855, but it donated the land to the central government for military purposes, subject to an express condition that the government was to use the property for defence purposes only, and in the event of it not being used or required for such purposes, the land would revert to the Corporation.

When the SANDF vacated the property in 2003, Rinaldo approached the municipality with a view to purchasing the property to develop it into a film studio. The sale of the property to Rinaldo was subject to a suspensive condition that the municipality first acquire the property from the Department of Defence. However, the Department of Defence, through the Director-General of Public Works, indicated that it still required the property for defence purposes at some point in the future. Consequently, the municipality was unable to take transfer of the property and unable to honour its contractual obligations to Rinaldo in terms of the contract of sale.

The present application was aimed at facilitating the transfer of the property to Rinaldo. The prejudice suffered by Rinaldo as a result of the delay in obtaining transfer of the property was described in detail. It was contended that as the transfer of the property was authorised by the Minister of Public Works in 2015, the Minister of Defence was bound thereby until that decision was set aside by a competent court.

Held – The first point to be addressed was the Minister of Defence's challenge to Rinaldo's *locus standi* to bring the proceedings in which it sought a declaration of rights. The Minister's argument was that Rinaldo was not a party to the original contract of donation of the land, and that the application should have been brought by the municipality. Rinaldo contended that, in addition to approaching the court in order to assert its private law contractual interest in terms of its plans to develop a film studio on the property, its challenge was also based on public law constitutional and administrative law grounds. The Court pointed to the generous approach which should be adopted to standing in constitutional litigation. Rinaldo based the right to the relief sought on the Department of Defence's obligation to give effect to the principles of reliance, accountability and rationality. The Court agreed that a

sufficiently broad factual and legal basis was established for the assertion of the right to a declaratory.

The Department of Defence's assertion that it needed the property for later use was found to ring hollow when the property had stood vacant and unused for over a decade. Following case authority, the Court held that if the property was not being used for the designated purpose, it was irrelevant if the Department intended to use the property at some time in the future. It still had to be shown that the Department of Defence actually required the property. That interpretation satisfied the special condition in the title deed, for the return of the property.

In the premises, the relief sought was granted.

Savoi and others v National Prosecuting Authority and another [2021] 2 All SA 578 (KZP)

Criminal proceedings – Section 32 of the Superior Courts Act 10 of 2013 – General rule is that except where a court may in special cases otherwise direct, all proceedings in any Superior Court must be carried on in open court – Whether a case is special or not will be determined by the interests of justice and weighing up all the competing rights.

Criminal Law and Procedure – Criminal proceedings – Seized documents – Right to legal professional privilege – Legal professional privilege dictates that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.

Facing criminal prosecution, the applicants brought an application for a permanent stay of prosecution. They then brought a series of applications including the present interlocutory application. Placing reliance on legal professional privilege, they sought to have a portion of the permanent stay of prosecution held *in camera* and not in open court. They averred that 69 documents were unlawfully seized from them in three separate operations and that the search and seizures of the documents were in violation of their right to legal professional privilege. An order was also sought directing the State's representatives to sign a confidentiality undertaking before viewing the relevant documents. The respondents opposed the interlocutory application *inter alia* on the ground that the applicants had failed to make out a special case that warranted the order sought.

Held – The Constitutional Court has stated that a stay of prosecution cannot be granted in the absence of trial-related prejudice or extraordinary circumstances. Furthermore, section 32 of the Superior Courts Act 10 of 2013 states that "Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court". A special case in terms of the relevant *dicta* would be a case where the administration of justice would be hindered by the presence of the public. Whether a case is special or not will be determined by the interests of justice and weighing up all the competing rights.

As referred to above, the general rule is that justice should be administered in an open court. This rule may be restricted if the administration of justice would be hampered by the presence of the public in court.

Legal professional privilege dictates that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The legal adviser had to act in a professional capacity at the time; must have consulted in confidence; the communications had to be made for the purpose of obtaining legal advice; and the advice ought not to have been for the facilitation of a crime or fraud.

The applicants bore the onus to place relevant facts before the court, justifying their claim to legal professional privilege. It was found that they had failed to lay a factual foundation that would qualify their case as a special case. The application was accordingly dismissed with costs.

Sayed NO v Road Accident Fund and related matters [2021] 2 All SA 613 (GP)

Legal Practice – Attorneys of record – Withdrawal – Rule 16 of the Uniform Rules of Court providing that an attorney, when acting for a litigant, must place himself on record in accordance with the rule, and where the attorney ceases to act in the matter, he is duty-bound to deliver a notice of withdrawal as attorney of record – Where attorney remains as attorney of record, he must continue to fulfil his obligations.

In the various actions dealt with in the present judgment, various plaintiffs sued the Road Accident Fund ("RAF"), and a common feature in all of the matters was that the defendant's attorneys of record, who had previously been actively involved in the matter had at some point prior to the hearing of the matter, ceased playing any further role in the proceedings. Despite that, they failed to withdraw as attorney of record. At the hearing of each of the matters therefore, the defendant's attorneys were still formally on record but had failed to appear at the hearing and had played no active part in the proceedings for an extended period of time.

Held – In the handling of any matter which comes before any court, an attorney must at all times act with proper respect for that court so as not in any way to impair its authority and dignity. An attorney of record in litigation plays a pivotal role in the progress of litigation, the functioning of courts and the administration of justice. Setting out the duties incumbent on the attorney of record, the court held that such duties cannot be fulfilled where the attorney has washed his hands of the matter and is present in name only. The attorney owes duties, not only to his client, but to the court and, to his opponents and their clients.

Rule 16 of the Uniform Rules of Court provides that an attorney, when acting for a litigant, must place himself on record in accordance with the rule. Where that attorney ceases to act in the matter, he is similarly duty-bound to deliver a notice of withdrawal as attorney of record. Whatever the reasons for remaining on record may be, if the attorney adopts the position that he is entitled to remain as attorney of record, then he must continue to fulfil his obligations. On the facts of the present matters, the attorneys were either required to withdraw timeously or to continue to act in the matter (perhaps, at their own financial risk). They did neither.

The Court held the view that the defendant's attorneys of record in these matters were guilty of gross discourtesy and a neglect of their duties as officers of the court. It directed that this judgment be delivered to the offices of the Legal Practice Council, for it to consider an investigation into the conduct of the defendant's attorneys of

record in all of the matters. It then addressed the merits in each case and made appropriate orders.

WP v Minister of Justice and Correctional Services [2021] 2 All SA 626 (GP)

Constitutional and Administrative Law – Correctional services – Rights of prisoners as guaranteed by section 35 of the Constitution – Whether right to contact with spouse includes the right to conjugal visits – Section 35 not capable of interpretation that contact with a spouse or a partner entails sexual relations – Right to contact or the right to marry or to found a family in the context of the penal system does not entail the right to conjugal visits.

The applicant was 41 years old and was being incarcerated at a correctional facility since 9 July 2014 after being convicted of high treason and other related crimes. He was serving a 25-year prison sentence. He was granted permission to marry in 2017, and subsequently obtained permission to have access to the technology of artificial insemination to enable him and his wife to have a child. Through that process, the applicant's wife gave birth to a child.

The present application related to the conditions of his incarceration and in particular to matters relating to contact and non-contact visits, including conjugal visits with his spouse. In addition, he sought to have the use of a mobile telephone to enable him to communicate with his spouse and relatives. The request to be allowed to have a conjugal visit with his wife, once per month for three hours in duration, was based on various national and international human rights instruments which proclaimed the importance of family life. He also relied on the marriage policy of the Department of Correctional Services which recognised the right of prisoners to make decisions regarding reproduction as part of family life. The applicant took issue with the fact that such a right was limited to adoption and artificial insemination, arguing that the policy unreasonably and unjustifiably limited the right to make decisions concerning reproduction in exercising the right to family life by not making provision for conjugal visits in prison facilities.

Held – While imprisonment does not strip the individual of all the rights and entitlements he would ordinarily have, the context of imprisonment means that those rights are given effect to differently where it is possible to do so, while others necessarily inconsistent with imprisonment do not enjoy recognition. The question was whether the kind of contact rights the applicant sought were necessarily inconsistent with his incarceration and whether the rights that he was entitled to assert in terms of section 35(2) of the Constitution had been infringed.

It was common cause that the applicant was able to enjoy three contact visits per month with his family, including his wife, as well as other contact visits with his doctor, religious counsellor and legal representatives. Taking into account the operational issues within the facility at which the applicant was incarcerated, the court deemed it unwise to make any further order in that regard. The relief sought in respect of extended contact visits as well as non-contact visits accordingly failed.

The demand for a cellphone was also refused as the applicant was afforded sufficient opportunity for contact.

Finally, the Court held that to suggest that contact with a spouse or a partner entails sexual relations, is to give to section 35 a meaning that is not consistent with

the ordinary meaning of the word or the context within which it is used. Therefore, the right to contact or indeed the right to marry or to found a family in the context of the penal system does not entail the right to conjugal visits.

The application was dismissed.

END-FOR NOW