LEGAL NOTES VOL 6/2021

Compiled by: Matthew Klein

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MOKO v ACTING PRINCIPAL, MALUSI SECONDARY SCHOOL AND OTHERS 2021 (3) SA 323 (CC)

Education — Right to education — Basic education — Whether encompassing matric examinations — Constitution, s 29(1)*(a)*.

First respondent acting principal had, without good reason, barred applicant, a grade 12 student, from writing a national senior certificate examination paper in November (see [7] – [8]). The decision was later reversed by the provincial education department, but applicant was given permission to write the exam only in May of the next year (see [9]). Applicant then applied on an urgent basis to be allowed to write the exam so that his paper could be marked, and his result released at the same time as the results of the students who had written in November (see [10]). The application was dismissed and here applicant applied for and was granted leave to directly access the Constitutional Court (see [11] and [23]).

Held

Applicant's right to basic education had been violated: matric examinations fell within the compass of basic education (to find otherwise could lead to adverse or absurd results). First respondent was, moreover, both negatively and positively dutied to allow applicant to write the exam (see [32] – [33] and [35].)

Leave would be granted to access the court on an urgent basis. It would be declared that first respondent's conduct had violated applicant's right to basic education. The applicant should be allowed to write the examination before release of the November examination results and his result released at the same time as those who had written in November (see [48]).

AM AND ANOTHER v MEC FOR HEALTH, WESTERN CAPE 2021 (3) SA 337 (SCA)

[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!**

Evidence — Expert evidence — Furnishing — General principles restated.

Evidence — Expert evidence — Summary under rule 36(9)*(b)* — Desirable that Rules Board reconsider rule to require experts to prepare and deliver reports in own words and to include (i) statement recognising that report furnished for assistance of court and (ii) statement of truth.

Medicine — Medical negligence — Diagnosis and treatment of child presenting with head injury — Whether examination conducted sufficient — Decision to discharge — Adequacy of discharge instructions to parent.

Medicine — Medical negligence — Pre-trial conference and judicial management — Proper use of rules 37 and 37A of Uniform Rules to clarify and narrow issues — Witness statements — Duty of parties to prepare agreed bundle of academic articles together with executive summary of their contents — Rule 37A(10)*(e)*, rule 37A(11)*(c)*.

Medicine — Medical negligence — Proof — Evidence as to normal or usual practice — If accepted, constituting strong evidence that practice followed on occasion in question.

Medicine — Medical negligence — Proof — Expert evidence — Correct approach to — Requirements for admission — Duties of expert witnesses — Direct evidence of event preferable to ex post facto reconstruction by expert, especially where basis scant.

In the afternoon of 23 August 2011 the appellants' 6-year-old son, J, suffered a head injury when he tripped and fell at home. Shortly after 18h00 his father, M, took him to the trauma unit at the Red Cross Memorial Hospital, Rondebosch, Cape Town (the hospital), which fell under the authority of the respondent MEC. A trauma nurse determined that J's vital signs were normal. At this point he was walking, alert and responsive. At about 18h15 the duty registrar, Dr H, after a routine examination and palpitation, noted that J had suffered a minor head injury, a 'bump'. Having been discharged by Dr H, J was taken home and put to bed. That night at about 03h30, M, unable to wake J, called the hospital. He was told that if J was still sleeping deeply at his normal waking time (06h30), he should be brought back to the hospital.

Shortly thereafter, J wet the bed and vomited. The appellants rushed him back to the hospital, arriving at around 08h00. A CT scan revealed that J had a linear fracture of the scalp accompanied by the rupture of an artery, resulting in an extradural haematoma (see [3]). The ensuing pressure on his brain caused J's injury. An emergency craniotomy was performed but it was too late: J was left with cerebral palsy and spastic quadriplegia.

The appellants, acting in their own capacity and on behalf of their son, instituted a medical negligence action in the Western Cape High Court. Binns-Ward J rejected the allegations of negligence levelled against Dr H and dismissed the suit.

The main issue in the present appeal to the Supreme Court of Appeal was whether Dr H had been negligent in failing to order a CT scan, which, it was agreed, she ought to have done had the bump felt 'boggy' (fluctuant). In her testimony Dr H stated that, though she had no specific recollection of how it felt, she believed it had been firm, not boggy. She relied to a large extent on her written of that evening. They stated the presence and location of the bump, that the patient was alert and awake, that his pupils were equal and reactive to light, that he had congruent eye movements, and that there was no 'other neurology'. In her testimony she relied on her normal or usual practice in such cases, which was to order a CT scan if a head

injury felt boggy (see [7]). The appellants contended that even if the evidence as to whether the swelling was boggy or firm was evenly balanced, Dr H ought on various grounds to have foreseen the possibility that J's skull was fractured and kept J for observation for another hour.
Three doctors were called as expert witnesses, two on behalf of the appellants and one on behalf of the MEC. The former expressed conclusions contrary to Dr H's diagnosis on the basis that her were not as complete as they thought desirable. They eventually argued that Dr H had negligently diagnosed J with a minor injury. (See [22] – [23]). But Binns-Ward J accepted Dr H's evidence that she had conducted a proper examination of J's injury and that the bump was not boggy.
In the SCA, the majority judgment — written by Wallis JA — addressed, in addition to the factual issue of the alleged fluctuance of the injury, the parties' failure to make proper use of rules 37 (pre-trial conference) and 37A (judicial case management) of the Uniform Rules of Court.
Along with the primary factual dispute outlined above, two alternative arguments were made on behalf of the appellants. The first was that Dr H should have suspected a skull fracture and not have discharged J when she did but kept him for further observation. Ancillary to this was the question of whether Dr H negligently departed from the hospital's guidelines for head injury assessment. The second alternative argument was that the advice Dr H gave to M in regard to the monitoring of J's condition was inadequate and that he should have been told to wake him every two hours.
Held per Wallis JA (Swain JA, Mokgohloa JA and Dlodlo JA concurring)
As to the role of expert witnesses and the expert evidence presented
If expert witnesses give evidence based on their own inferences, the inferences must be reasonably supported by the facts; they cannot be tenuous. And the facts themselves must be admitted or proven, not matters of speculation. Experts may also provide the court with general knowledge concerning their discipline to enable the court to understand the issues. (See [17], [21].)
These requirements were disregarded in various respects: there was no endeavour to clarify the facts known to Dr H or the facts about her diagnosis or treatment of J. Medical literature was used selectively to bolster arguments and not for the purpose of informing the court of the current approach to the clinical assessment of head injuries in children and the range of accepted medical views. There was no endeavour to provide proper expert summaries as required by rule 36(9)*(b)*. The original summaries — which were based on a misunderstanding of Dr H's * and thus defective — were silent on bogginess, as were the particulars of claim and the further particulars for trial. No revised summaries were filed when the error was discovered. Hence the eventual argument that Dr H had negligently diagnosed J with a minor injury proceeded on a basis that was not pleaded; was not reflected in the expert summaries; was not debated at the pre-trial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged, fully formed, in expert evidence on the fourth day of the trial. (See [22] – [23], [38] – [40].)
A proper use of rules 37 and 37A would have avoided many of these problems and enabled the trial to proceed and finish in 3 – 4 days instead of 10 days spread over three months. To narrow the issues, witness statements should have been obtained from M and Dr H, as intended in rule 37(10)*(e)*. (See [24].)
The instructions on the facts given to the experts should have been disclosed, and, where necessary, clarifications sought to enable proper instructions to be given. An agreed bundle of academic articles should have been prepared together with an

executive summary of their contents and the issues should have been clearly defined in terms of rule 37A(11)*(c)*. (See [25].)

While rule 36(9) was innovative when introduced in 1963, times have moved on and the preparation of expert summaries by lawyers, who often have only a tenuous grasp of the real issues in a case, frequently causes problems. It would be desirable for the Rules Board to reconsider the rule to require the experts to prepare and deliver their reports in their own words and to include both a statement recognising that the report was furnished for the assistance of the court and a statement of truth. (See [26].)

As to whether the bump on J's head was fluctuant

Dr H's failure to describe the bump in detail did not mean that it was boggy. On the contrary, it was evidence that it was not boggy, for otherwise she would have recorded it. (See [32].) The absence of a clear statement of opinion by the experts that when J was examined, the swelling would on palpation have been fluctuant and that a reasonably competent member of the medical profession would have ordered a CT, meant that the expert evidence — which bore all the hallmarks of an attempt to justify opinions when the initial basis for them proved untenable — had to be approached with caution (see [44]).

Dr H's evidence as to her usual practice was strong evidence that it was followed. Her evidence of the examination and diagnosis of J was, moreover, direct evidence, whereas the opinion of appellants' expert was a reconstruction of what he thought might have happened, based on speculation and conjecture. In those circumstances the trial judge's finding that he could not reject Dr H's evidence and that the onus of proof was not discharged could not be faulted. The main ground of appeal would therefore fail. (See [58] – [59].)

As to whether J should have been kept in hospital for further observation

Nothing supported the appellants' contentions that Dr H's treatment of J was deficient or that further exploration would have altered Dr H's diagnosis or her decision that J had suffered a minor injury and could safely be discharged (see [69]). A departure from hospital guidelines would not establish negligence unless what actually occurred departed from the standard of care that a reasonable and respected body of medical opinion would regard as acceptable treatment by a trauma doctor situated as was Dr H. (See [74].)

The process of assessment and examination followed generally at the hospital, and followed in this case by Dr H, complied with accepted clinical practice here and internationally. She could not be faulted for doing so. It was accordingly not necessary to deal with the separate question whether, if J had been kept at the hospital, his condition would have deteriorated, giving rise to concern resulting in further investigation. (See [82].)

The adequacy of the discharge instructions

While a haematoma first develops slowly, at some point the pressure on the brain shoots up and what had been a slow progression becomes a disaster. The sudden decline meant that it was difficult at any stage to tell whether there was an extradural haematoma. So, even had his parents awakened J during that night, they would not have known whether to take J back to hospital. Therefore, the appellants failed to prove that a warning about drowsiness or an instruction to wake him at intervals would, on a balance of probabilities, have meant that J would have been taken back to hospital, diagnosed with an extradural haematoma and undergone remedial surgery before suffering the injuries he did.

The appeal would therefore fail. While what happened to J was a tragedy and his parents deserve every sympathy for what they have suffered as a result, medical science has not advanced to the stage of diagnostic infallibility, and there will be cases where, notwithstanding the best efforts of the medical profession, a tragedy like this occurs. Sympathy was not a ground for imposing legal liability in this or any case.
Held per Molemela JA dissenting: A reasonable medical practitioner in Dr H's position would not have discharged J before further observation (see [150]). If J had been reassessed within an hour of Dr H's examination, as indicated by hospital guidelines, his condition would have triggered a referral for a CT scan, which in turn would have revealed the extent of his injuries when there was still scope for intervention (see [156] – [157], [160]). Dr H failed to apply the degree of professional skill and diligence expected of doctors when examining a child presenting at the emergency unit of a children's hospital with a head injury (see [158]). Since all the elements of a delictual claim were satisfied, the appeal should be upheld.

COOPERATIVA MURATORI & CEMENTISTI AND OTHERS v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION AND OTHERS 2021 (3) SA 393 (SCA)

Company — External company — Whether external company may avail itself of business rescue — Companies Act 71 of 2008.

First appellant was a company incorporated in Italy, and registered in this country as an external company (see [1]). It fell into financial difficulties and in Italy instituted proceedings for making an arrangement with its creditors (see [1]). An order initiating this process was obtained from an Italian court (see [1]).
The company's directors later resolved that it was financially distressed and should be placed in business rescue in this country. To this end, business rescue practitioners were appointed and they approached first respondent. It, however, informed them that as the company was an external company, it could not be placed in business rescue. The application was dismissed but leave granted to appeal to the Supreme Court of Appeal. (See [2], [4].)
Held
Business rescue was, given the wording of s 1*(a)*(i) and part B of ch 2, as compared to part C, of the Companies Act 71 of 2008, not available to external companies (see [6] – [7] and [10] – [12]).
An application to adduce additional evidence on appeal would be dismissed, as would the claim of an order recognising the Italian court's order (see [27] – [28] and [35]). This because (i) it was moot (see [28]); (ii) nothing in it could be enforced or recognised (see [29]); it was unsupported by authority proposed (see [31]); and (iii) it was brought by the wrong party, first appellant, rather than Italian judicial commissioners concerned (see [32] – [33]). The application to lead evidence on appeal would hence be dismissed and likewise the appeal (see [35]).

DEMOCRATIC ALLIANCE AND OTHERS v MKHWEBANE AND ANOTHER 2021 (3) SA 403 (SCA)

Discovery and inspection — Production of documents — Notice to produce documents — Ambit — Documents to which 'reference is made' in pleadings or affidavits — Includes documents directly or indirectly referred to in annexures — Excludes documents referred to by process of inference — Supposition not enough — Uniform Rules of Court, rule 35(12).

Discovery and inspection — Production of documents — Notice to produce documents — Ambit — Production of documents to which 'reference is made' in pleadings or affidavits — Relevance — Ambit limited by relevance — Manner of assessing relevance in relation to rule 35(12) — Uniform Rules of Court, rule 35(12).

The present judgment dealt with an appeal to the Supreme Court of Appeal against the Western Cape High Court's decision to dismiss an interlocutory application brought by the first appellant, the Democratic Alliance (the DA), and the second appellant, Ms Glynnis Breytenbach, in terms of rule 30A of the Uniform Rules of Court to compel the production of two documents sought in terms of rule 35(12). In the main application, the first respondent, Advocate Busisiwe Mkhwebane, the present Public Protector (Mkhwebane), and the second respondent, the office of the Public Protector, had sought an order directing the appellants to retract defamatory remarks concerning Mkhwebane made at a press conference called by Breytenbach in her capacity as a member of the DA to address Mkhwebane's nomination as Public Protector, and for them to apologise.

Mkhwebane, in her founding affidavit, addressed a key purportedly defamatory claim made in the press conference, the intended meaning of which, she claimed, was that, for a period prior to her nomination as Public Protector, she had operated as a spy in China under the employ of the State Security Agency (SSA). Mkhwebane, in answer to this, claimed that she was in fact deployed by *the Department of Home Affairs* in China as an immigration councillor, and was not on the payroll of the SSA. It was only later, she submitted in the affidavit, once she had returned from China, that she was appointed by the SSA as an analyst; in this regard she attached a copy of *the appointment letter* as annexure PPSA5. PPSA5, inter alia, informed Mkhwebane that 'your *application for the . . . post* has been approved', and requested her to confirm, using the attached appendix A, whether she was amenable to the offer made in the appointment letter. Premised on the above, the appellants requested the production under rule 35(12) of Mkhwebane's application for the post of analyst with the SSA, as well as her acceptance of the offer as per appendix A. When the respondents had refused the request, the appellants brought the application in the court a quo to compel production of the two items, and were unsuccessful in their claim; hence the present appeal.

The appellants made the request for production of the two documents under rule 35(12), which provided that '(a)ny party to any proceeding may at any time before the hearing thereof deliver a notice . . . to any other party in whose pleadings or affidavits *reference is made* to any document or tape recording to produce such document or tape recording for his inspection'. Whether the appellants were entitled to compel production of the two documents in question formed the focus of the appeal. Central to deciding this question was whether 'reference' had been made to the two documents for the purposes of rule 35(12). Further, whether the items were 'relevant' to the extent that relevance was a requirement for production of documents under the rule.

Held, that documents in respect of which there was a direct or indirect reference in an affidavit *or its annexures*, that were relevant, and which were not privileged, and

were in the possession of that party from which they were requested, had to be produced. Relevance was assessed in relation to rule 35(12), not on the basis of issues that had crystallised, as they would have had pleadings closed or all the affidavits filed, but rather on the basis of issues that might arise in relation to what had thus far been stated in the pleadings or affidavits and possible grounds of opposition that might be raised, and on the basis that they would better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences. What would not pass muster was where the party seeking production sought to deduce the existence of a document through a process of extended reasoning or inference. Supposition was not enough. (See [28] and [41].)
Held, that, within the meaning of the expression in rule 35(12), there was a clear 'reference' to Mkhwebane's application for appointment as an analyst in annexure PPSA5 (see [43]). Furthermore, Mkhwebane's application for appointment was also relevant (see [44]), having evidential value and being able to assist with respect to the appellants' defences, of truth in the public interest and fair comment, by providing details of the time line of Mkhwebane's employment history with the SSA (see [41], [42] and [44]). (The SCA was, however, unpersuaded that there had been a reference within the meaning of rule 35(12) to the letter of acceptance mentioned in PPSA5.)
Held, accordingly, that the appeal should be upheld, and that the respondents should produce Mkhwebane's application for the post of analyst with the SSA (see [49]).

CONOMIC FREEDOM FIGHTERS AND OTHERS v MANUEL 2021 (3) SA 425 (SCA)

Defamation — Defences — Reasonable publication — Whether available to non-media defendants.

Defamation — Damages — Whether claim may be brought in motion proceedings.

In this matter second applicant (Mr Ndlozi), the spokesperson of first applicant (the Economic Freedom Fighters (EFF)), made a statement on its behalf concerning first respondent (Mr Manuel). The statement was published on the widely subscribed Twitter accounts of both the party and its leader, the third respondent (Mr Malema) (see [2] and [5]).

Considering the statements defamatory, Mr Manuel demanded an apology and a retraction, but both were refused. Manuel then instituted motion proceedings for a declarator that the statement was false and defamatory and that its publication was unlawful. As relief he sought its removal from the Twitter accounts; a retraction and apology; an interdict of future publication; damages of R500 000; and costs on the attorney and client scale. In the alternative he sought a declarator that the respondents were jointly and severally liable for damages, and that quantification be referred to oral evidence (see [3]).

The High Court granted relief in the following terms: it declared the statements defamatory and false and that their publication was and continued to be unlawful. It ordered removal of the statements within 24 hours from all respondents' media platforms, including the EFF and Mr Malema's Twitter accounts, and that respondents within 24 hours publish on those platforms an unconditional retraction

and apology. It also interdicted the respondents making further similar statements and granted damages of R500 000. Lastly it ordered payment of costs on the attorney – client scale.

The High Court refused leave to appeal against its order, after which the applicants applied for leave directly from the Supreme Court of Appeal (see [4]). In dismissing the application in the main and upholding it in part (see [133]), the SCA pointed out the following:

- that the granting of leave to appeal depended on the merits of Mr Manuel's case and the applicants' defence (see [26]);
- that the High Court's finding that the statements were defamatory had been correct (see [35]);
- that the High Court had correctly rejected the defences of truth and public interest and fair comment (see [37] and [39]);
- that the High Court had, however, erred in extending the defence of reasonable publication to non-media defendants because this development had been insufficiently motivated, was based in misconstruction of precedent, and would have adverse consequences (see [26], [40], [62] and [65] – [66]);
- that, regardless of the nature of the defence (whether it rebutted intention or wrongfulness), it should fail because the applicants' failure to check the veracity of the statements supplied by their source was unreasonable, and, along with the applicants' later behaviour, was consistent with animus iniurandi (see [68], [81], [84] and [86]). Therefore, in this respect (the dismissal of the defence), the High Court had been correct, and, in the light of this and the findings as to truth and public interest and fair comment, leave to appeal against would be refused (see [86]);
- so, too, would leave to appeal be refused in respect of the declarator and interdict: damages would be an unsatisfactory substitute for the latter in the circumstances of the applicants' obduracy and the harm the statement was doing to an organ of state concerned (see [89]).
- However, in respect of the award of damages on motion, leave should be granted: established procedure in claims for unliquidated damages was that they be brought by action, and any development of that procedure to allow such claim to be brought on motion had been inadequately motivated (see [27], [92], [108] and [111]). The ramifications of any such development required careful consideration (see [113]).
- As for the alternative relief sought — referral of the quantum of damages to oral evidence — such was appropriate in the circumstance of the limited material in the affidavits going to quantum and the High Court's brief reasoning thereon (see [114], [116] and [119]).
- Insofar as the issue of retraction and apology was concerned, this was inextricably entwined with the question of damages, and it was only appropriate that this issue too be referred to oral evidence (see [130]).
- Lastly, the award of punitive costs was indeed justified against the backdrop of the applicants' obduracy when faced with the untruthfulness of the statement (see [82] – [84] and [131]).

The SCA ordered that the application for leave to appeal against the declarators that the statements were defamatory and their publication unlawful, and the order interdicting publication of like statements, be dismissed. It ordered in addition that the application for leave to appeal against the orders to retract the statements, apologise, and to pay damages of R500 000 be granted, and the appeals upheld, and the High Court order substituted to refer determining of the quantum of damages

to oral evidence, and in conjunction with that, the issue of whether an order of retraction and apology should be made.

GROUNDPROBE (PTY) LTD AND ANOTHER v REUTECH MINING (PTY) LTD AND OTHERS 2021 (3) SA 473 (SCA)

Intellectual property — Patent — Revocation — Lack of novelty — Inventive step — Whether taken — Mounting radar device used in mining industry on vehicle — Military having mounted radar on vehicles since World War II — No inventive step — Court reiterating that non-inventions should not be allowed to stifle trade — Patents Act 57 of 1978, s 25 and s 65(4).

Section 25 of the Patents Act 57 of 1978 provides, subject to certain limitations, that a patent may be granted 'for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture'. Under s 65(4) of the Act a defendant may in any proceedings for infringement counterclaim for the revocation of the patent and, by way of defence, rely on any ground on which a patent may be revoked.
In casu the facts were that Australian company GroundProbe had sued South African company Reutech Mining * for infringing its South African patent for a 'work area monitor' — a mobile radar system used by the mining industry to detect dangerous slope movement in open-cut mines. GroundProbe's system was called SSR and Reutech's MSR, each of which had various models.
Claim 1 of GroundProbe's patent was the product claim, which described the constituent parts of the SSR, and claim 27 was the method of deploying it. Both claims were broadly framed (see [15] – [16]). GroundProbe argued that its invention was a combination of the elements of the claims and that the court should not dissect it into its constituent elements when assessing its obviousness (see [17]).
The Commissioner of Patents dismissed GroundProbe's claim and upheld Reutech's counterclaim for revocation of the GroundProbe patent on the ground of obviousness (ie lack of an inventive step). The Commissioner found that each of the patent's claims was obvious to a person skilled in the art on the patent's priority date.
GroundProbe, while acknowledging that a slope-stability monitoring system using radar (which it referred to as an SSR) was the subject of an earlier United States patent and that such systems were in use in the mining industry before the priority date, nevertheless argued that, taken together, the claims of its patent disclosed an inventive step.
Held
The presence of an inventive step had to be found in the claims. But the method described in claim 27 was no different to that used when the MSRs and SSRs were deployed, save that it was mounted on a vehicle whereas the others were mounted on a trailer (see [18]). The only conceivable candidate for an inventive step or concept was the mounting of the radar on a motorised vehicle (see [22]). But the military have been putting radar on vehicles since at least World War II, so it was no step forward in the state of the art, and in particular not one that was inventive (see [19], [22]). The court concluded by restating the principle that non-inventions should not be allowed to hamper the trade and industry of a country even temporarily (see [22]). Appeal dismissed (see [23]).

MONTEIRO AND ANOTHER v DIEDRICKS 2021 (3) SA 482 (SCA)

Spoliation — Mandament van spolie — When available — Order requiring restoration of possession must be capable of being carried into effect.

Spoliation — Mandament van spolie — Defences — Impossibility of restoration — Property no longer in hands of spoliator — Discussion.

The present matter dealt primarily with the question whether, in an application for a *mandament van spolie*, a court could order a party to restore possession of goods of which it was not in possession. The background is as follows. The respondent, Mr Diedricks, delivered the BMW motor vehicle of which he was in possession to the second appellant, Autoglen, for a routine maintenance service. When Diedricks returned later that day to collect the vehicle, Autoglen declined to release it, on the basis of instructions received from the first appellant, Mr Monteiro, a director of the company Street Talk Trading. Street Talk Trading was the owner of the vehicle, and was at the time engaged in a vindicatory action against Mr Diedricks, claiming repossession of the vehicle on the basis of ownership. Autoglen retained possession until the following day when, in compliance with Mr Monteiro's request, it handed the vehicle to Street Talk Trading, which sold it that very same day to a third party. Mr Diedricks launched an urgent spoliation application in the High Court, citing Autoglen and Monteiro, as well as BMW SA, as respondents. Diedricks sought relief only from Autoglen, an order that it restore possession of the vehicle to him. The basis of Diedrick's claim was that Autoglen had unlawfully dispossessed him of the vehicle of which he had been in peaceful and undisturbed possession, entitling him to recourse to the *mandament van spolie*. Diedricks ultimately abandoned relief against Autoglen, seeking instead an order against Monteiro. The court granted an order, however, that possession of the vehicle be restored to the applicant immediately by Monteiro, as well as by Autoglen. The present is the appeal to the Supreme Court of Appeal against such decision.

Before the SCA, Monteiro and Autoglen opposed the relief on two grounds. Firstly, they argued that a *mandament van spolie* ought not to have been granted because Diedricks was not, as a matter of fact and law, in possession of the motor vehicle when the spoliation occurred, as he had delivered the vehicle to Autoglen thereby giving up possession of it. Secondly, they argued that neither of them was in possession of the motor vehicle and could therefore not restore it: from the perspective of Autoglen, it had passed possession to Street Talk Trading; from that of Monteiro, Street Talk Trading had in turn sold the vehicle to a third party. The majority decision disposed of the appeal on the basis of this second point.
Held, as per the majority (Goosen AJA (with Dambuza and Plasket JJA concurring)), that there were contrary views in case law as to the availability, in principle, of the *mandament* where the spoliator was no longer in possession of the spoliated property (see [19] – [20]). However, it was unnecessary for the court to enter upon the terrain of such controversy. That was so because the *mandament* by its nature may involve either mandatory elements, such as the delivery of movable property, or prohibitory elements, as in the case where a party was restrained from preventing certain steps being taken to restore possession. Where the order could not be carried into effect, it could not, competently, be granted. Whether the order could be

carried into effect was a question of fact to be determined by the court asked to grant an order. (See [21].)

Held, that it was impossible for Autoglen and Monteiro to, in law or fact, give effect to the order that was sought (see [28], [29] and [31]). Neither was in possession of the motor vehicle (see [27]) (it could be accepted that Monteiro, acting in his capacity as a director, caused Street Talk Trading to take possession of the motor vehicle from Autoglen, immediately after which Street Talk Trading sold it on to a third party (see [25])). Autoglen could not be expected to intervene in a contractual relationship to which it was not a party (see [28]). On the other hand, Monteiro could not be compelled to take steps to restore possession without Street Talk Trading, the entity which took possession of the motor vehicle and disposed of it to a third party, being compelled, by a court order, to forbear such steps or to take them itself. Street Talk Trading was not joined in the proceedings. (See [28].)

Held, accordingly, that the order against both Autoglen and Monteiro was not one that competently could be made. The appeal therefore had to succeed (see [33]). Writing for the minority, Schippers J (with Mabindla-Boqwana AJA concurring), disagreed with the majority finding in respect of Monteiro. His critical points were the following. Firstly, Monteiro had, by his own actions, despoiled Diedricks of his possession of his vehicle, and could be viewed as co-spoliator with Street Talk Trading: being the driving force behind the removal of the vehicle, having himself ordered and executed the act of spoliation from start to finish (see [53] and [56]). While it was his view that Monteiro had not exercised possession of the vehicle *on behalf of* Street Talk Trading, it would have been immaterial if he had (see [53]). Secondly, and contrary to the view of the majority, restoration of the vehicle by Monteiro was possible. Transfer of possession to a third party did not imply that restoration would always per se be impossible. Where a third party had acquired possession, a spoliation order could still be granted, unless the spoliator proved that it was impossible for him/her to give effect to the order (see [60]). Monteiro had failed to prove such impossibility (see [62]). He merely asserted, without evidence, that the vehicle had been sold to a third party (see [63]); he further failed to allege that it was impossible for him to restore possession of the vehicle; neither did he adduce any evidence of steps he had taken to do so (see [65]).

Plasket JA, who concurred with the majority, in a separate judgment set out why he disagreed with Schippers JA's reasoning. Broadly speaking, he held that Monteiro, at all times, was strictly acting in a representative capacity on behalf of Street Talk Trading (see [77]), and in such circumstances liability could be visited upon Monteiro (see [83]). He held, furthermore, that it was indeed impossible for Monteiro to restore possession of the vehicle, its having been established on the evidence that the vehicle had been sold and was no longer in possession of Street Talk Trading (see [88]).

SWATCH AG (SWATCH SA) v APPLE INC 2021 (3) SA 507 (SCA)

Intellectual property — Trademark — Registrability — Distinctiveness — SWATCH and iWATCH — Swatch opposing registration of Apple's iWATCH mark on ground of confusing similarity to its own SWATCH mark — No presumption of distinctiveness flowing from fame of Swatch and Apple brands — Two marks visually, aurally and

conceptually distinct — Conclusion reinforced by fact that both brands aimed at affluent and discerning consumers — No need for recourse to evidence that iWATCH would form part of Apple's family of i-prefixed marks — Trade Marks Act 194 of 1993, s 10(12), 10(14) and 10(17).

Swiss watchmaker Swatch AG opposed Apple Inc's intended registration of its iWATCH trademark on the ground of confusing similarity to its registered SWATCH * mark. Its opposition having been dismissed by the Pretoria High Court, Swatch appealed to the Supreme Court of Appeal. Swatch's opposition was based on the 'unregistrable' trademark provision of s 10(12) (inherent deceptiveness), s 10(14) (confusing similarity to existing mark) and s 10(17) (detriment to well-known mark) of the Trade Marks Act 194 of 1993. Swatch contended that there were obvious similarities, in that both marks consisted only of letters, employed no logos or other distinguishing matter and had the common element WATCH, preceded by a single-letter prefix. The High Court ruled against Swatch, finding that the marks were not confusingly similar.
On appeal, the Supreme Court of Appeal pointed out, before embarking on a visual, aural and conceptual comparison of the marks, that it would discard from consideration any preconceived notions associated with the Apple and Swatch brands. While their ubiquity and durability might give rise to an implicit assumption of distinctiveness, this was not the comparison enjoined by the authorities. The court had to compare the marks themselves from the perspective of the average consumer, without allowing externalities to intrude on the process (see [7]).
While the use of the word 'watch' made for some visual similarity, the use of such a commonplace descriptive word put greater emphasis on the 'i' and 'S' prefixes, which gave rise to a clear visual differentiation (see [8]). Aurally, 'i' joined to 'watch' made up a word of two syllables — 'eyewatch', which was quite different from the monosyllabic 'swatch' (see [9]). Conceptually, the SWATCH mark enjoyed no distinctiveness or identity by virtue of its incorporation of the common descriptive word 'watch' [10]). Besides, Swatch's trademark registration was endorsed to state that registration would not 'debar other persons from the bona fide descriptive use in the ordinary course of trade of the word WATCH'.
The conclusion that a visual, aural and conceptual comparison of the marks did not yield similarities of sufficient significance to make the marks confusingly or deceptively similar was reinforced by the fact that both brands were aimed at discerning and affluent consumers who would be less likely to be deceived or confused by the limited similarities between the marks (see [14]).
As to Apple's argument that the likelihood of confusion was diminished by Apple's establishment of a family of i-prefix marks, the SCA ruled that the conclusion that there was no likelihood of confusion or deception was robust even without regard to evidence that iWATCH would form part of a family of i-prefixed trademarks (see [16]).
Appeal accordingly dismissed.

ABSA BANK LTD AND ANOTHER v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2021 (3) SA 513 (GP)

Revenue — Income tax — Scheme for avoidance of — Notice of under s 80J — Refusal to withdraw — Review — Whether taxpayer entitled to seek review in High Court, bypassing internal procedure of objection, appeal and trial in special tax court

— Taxpayer may do so in exceptional circumstances — Exceptional circumstances included where, as in present case, only point of dispute was question of law — Income Tax Act 58 of 1962, s 80J.

The first applicant (Absa) had acquired preference shares in a company, in the belief that the company had a back-to-back deal with a parent company to defray debt. Unbeknownst to Absa, several intermediary transactions with other entities took place — aimed at tax advantages. Sars determined that Absa had received an impermissible tax benefit in the form of a tax-free dividend; that it was a 'party' to an 'arrangement' and that it had been 'participating' in a tax-avoidance 'scheme' as contemplated in ss 80A – L of the Income Tax Act 58 of 1962 (the ITA). Sars accordingly issued a notice to Absa under s 80J (see [3]); and subsequently, on the same factual basis, letters of assessment in terms of s 80B (which empowers Sars to impose tax liability in circumstances where a liability is impermissibly avoided).
In this case, Absa (and a subsidiary as second respondent) sought a legality review of the Commissioner's refusal to comply with Absa's request to withdraw the s 80J notices in respect of each applicant. Absa contended that Sars made substantive errors of law in its determination. Apart from issues relating to whether Absa was a 'party' to an impermissible 'arrangement' or procured a 'tax benefit', the main issue was whether a refusal to withdraw a s 80J notice was reviewable, and if so, on what jurisprudential basis.
Held
Similar non-final decisions have been held to be susceptible to review. The decisions by Sars, refusing to withdraw the s 80J notice and s 80B assessment, were decisions appropriately reviewable under the principle of legality. (See [29] and [44].)
A taxpayer was not obliged to pursue a remedy in respect of a dispute over a tax liability in terms of the procedures set out in tax legislation only. They may apply directly to a court of law for relief in exceptional circumstances. Exceptional circumstances included a dispute that turned wholly on a point of law. (See [25] and [45] – [46].)
The premise of the s 80J notice was that Absa was liable to be taxed in respect of an impermissible arrangement despite its ignorance of the arrangement. There was no plausible link demonstrated between Absa and the supposedly nefarious transactions. Sars' premise was thus irrational, and incorrect in law because the factual premise did not establish that Absa was a party to such arrangement, nor that it had an intention to escape an anticipated tax liability, nor that it received relief from a tax liability as result of acquiring the preference shares. (See [39] – [43] and [48].)
The letters of assessment were issued on the factual premise of the s 80J notice and their fate was indistinguishable from that of the s 80J notices. The decision to refuse to withdraw the s 80J notices and the issue of the letters of assessment would accordingly be reviewed and set aside.

MONTIC DAIRY (PTY) LTD (IN LIQUIDATION) AND OTHERS v MAZARS RECOVERY & RESTRUCTURING (PTY) LTD AND OTHERS 2021 (3) SA 527 (WCC)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Payments by company to business rescue practitioner to remunerate them, after commencement of winding-up of company by business rescue

practitioner — Whether amounting to void dispositions contrary to law — Consideration of preferential ranking of practitioner's claim for remuneration and expenses — Payments by company amounting to void dispositions — Companies Act 71 of 2008, ss 141(2)*(a)* and 143; Companies Act 61 of 1973, s 341(2).

Company — Business rescue — Business rescue practitioner — Remuneration of — Payments by company to business rescue practitioner, after commencement of winding-up of company by business rescue practitioner — Whether amounting to void dispositions contrary to law — Consideration of preferential ranking of practitioner's claim for remuneration and expenses — Payments by company amounting to void dispositions — Companies Act 71 of 2008, ss 141(2)*(a)* and 143; Companies Act 61 of 1973, s 341(2).

The first-applicant company, Montic Dairy (Pty) Ltd (Montic), was previously under business rescue. The second and third respondents (the BRPs) had been appointed business rescue practitioners in that regard. They were employed by the first respondent, Mazars Recovery & Restructuring (Pty) Ltd (Mazars), which dealt with the day-to-day administration of the business recue proceedings and the rendering of invoices on behalf of the BRPs in respect of their remuneration and expenses. On 16 May 2016, acting under s 141(2)*(a)* of the new Companies Act 71 of 2008, and being of the view that there was no reasonable prospect of Montic being rescued, the BRPs applied in the Pretoria High Court for the discontinuation of business rescue proceedings and the company's final winding-up. An order finally winding up Montic was granted on 14 June 2016.

The subject of the present application in the Western Cape High Court were two payments totalling R1,5 million the BRPs caused to be made to Mazars on 23 May 2016 and 2 June 2016, which amounts, the BRPs claimed, were owing to them for their disbursements and services they had rendered to Montic. In the present application Montic, joined by its liquidators, sought the repayment of such amounts. The basis for such relief was that the payments in question were self-evidently dispositions (by a company being wound up) of property *after the commencement* of the winding-up, and accordingly void in terms of s 341(2) of the old Companies Act 61 of 1973. In this regard, as per the provisions of s 348 of the old Companies Act, winding-up was deemed *to commence* at the time of the presentation to the court of the application for winding-up. Both ss 341(2) and 348 of the old Act were still applicable to the winding-up of commercially insolvent companies such as Montic, by virtue of items 9(1) and (2) of sch 5 to the new Companies Act.

The BRPs opposed the relief sought. They argued that, purposively interpreted, s 341(2) did not prohibit payments made by a company, after the commencement of liquidation proceedings against it, to a BRP to remunerate them in respect of the disbursements and fees they had incurred, both prior to their decision to discontinue business rescue proceedings, as well as thereafter in discharge of the obligation to place the distressed company under final liquidation. In justification of its argument, the BRPs submitted that the interpretation of s 341(2), and more particularly as to what would constitute a disposition by the company of its property, had to be informed by the subsequent (and therefore more recent) provisions of ch 6 of the new Companies Act relating to business rescue, and more particularly the BRPs'

preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings. The relevant provision s 143(5) of the new Act provided that '(t)o the extent that the practitioner's remuneration and expenses [were] not fully paid, the practitioner's claim for those amounts [would] rank in priority before the claims of all other secured and unsecured creditors'.
Held, that the effect of s 348 of the old Companies Act was to establish the concursus creditorum at the time that the application for winding-up was lodged. The retention of that provision from the old Act as part of the overall matrix of the law relating to the winding-up of companies meant that the legislature intended it to apply to companies wound up under the new Companies Act where business rescue proceedings had not achieved the desired result and s 141(2)*(a)*(ii) was implemented. (See [28].) It therefore followed that s 341(2) proscribed the disposition of a company's assets after the lodging of an application to wind up (whether that application was at the behest of an ordinary unpaid creditor or a BRP who concluded that the company could not be rescued). Section 143 only afforded the BRP a limited measure of priority when their claim for remuneration was considered by the liquidator in the winding-up process. (See [29].)

Held, further, that to grant the BRPs the relief that they sought in this case would require the court to find that it was implicit in s 143 that they had the right to be paid after the commencement of the winding-up process, before a final order was granted and before the liquidators had done their work to liquidate and distribute the assets in the insolvent company. To import such an interpretation into s 143 would be destructive of the whole basis of the winding-up process, which recognised defined classes of creditors and afforded them priority in respect of their claims according to such classes.

Held, in conclusion, that the payments made by the BRPs to Mazars after their application for an order of liquidation had been lodged on 16 May 2016 were hit by the provisions of s 341(2) of the old Act and fell to be repaid by Mazars.

SAYED NO v ROAD ACCIDENT FUND 2021 (3) SA 538 (GP)

Legal practitioner — Attorney — Rights and duties — Duties — Of attorney ceasing to act — Duty to formally withdraw as attorney of record by delivering notice of withdrawal — Uniform Rules of Court, rule 16(4).

Practice — Attorney of record — Withdrawal — Notice of withdrawal — When required — Uniform Rules of Court, rule 16(4).

The present judgment of the High Court, Gauteng Division, Pretoria, concerned various actions for damages against the Road Accident Fund, as defendant. In respect of each of the matters, the defendant's attorneys of record, who had previously been actively involved, had at some point prior to the hearing stopped playing any further role in proceedings, *but without withdrawing*. Their lack of involvement meant that some of the matters had proceeded on an unopposed basis; in others settlement had been reached after the plaintiffs, through their attorneys, had engaged directly with the defendant through its claims handlers. As a result of these attorneys' approach, the plaintiffs' attorneys had had difficulties in eliciting responses from the defendant directly to letters they addressed to it. Further, it had become impossible to comply with the practice directives of the court requiring a pre-

trial conference between the parties and a joint practice note to be filed. Before dealing with the merits of the various claims, the court directly addressed the defendant's attorneys' conduct. That will form the focus of this headnote.
The court stressed that an attorney, should they wish to cease to act on behalf of a party in any proceedings, had a duty to formally withdraw from proceedings by delivering a notice of withdrawal as attorney of record (see [12] and [16]). Such a duty was one an attorney owed not only to their client, but also to the court, as well as to their opponents and their clients (see [9]). The court considered the position of attorneys who ceased to involve themselves in proceedings, yet refused to withdraw in order to preserve commercial relationships with their client (see [16] – [18]). An attorney who acted in such a manner was guilty of unprofessional conduct (see [17]), the court held, further stressing that an attorney's ethical obligations always outweighed matters of financial or commercial expediency (see [17]). Whatever the reasons for remaining on record may be, if the attorneys adopted the position that they were entitled to remain as attorneys of record, then they had to continue to fulfil their obligations. They could not both approbate and reprobate.

It was established prima facie, the court held, that the defendant's attorneys, in acting in the manner they had, were guilty of gross discourtesy and a neglect of their duties as officers of the court. (The court declined to make a conclusive finding in this regard, not having before it an explanation for the attorneys' behaviour.) (See [22] and [23].) The court directed that the judgment be delivered to the officers of the Legal Practice Council for it to consider an investigation into the conduct of the defendant's attorneys of record (see [24]).

STEYN v REGISTRAR OF MEDICAL SCHEMES AND OTHERS 2021 (3) SA 551 (WCC)

Medicine — Medical aid — Medical aid scheme — Membership — Cancellation for non-disclosure of underlying condition — Exclusion of condition from prescribed minimum benefits not test for materiality — Hence, condition not listed as prescribed minimum benefit need not be disclosed if immaterial — Medical Aid Schemes Act 131 of 1998, s 29(2)*(e)*, s 29A(7).

Medicine — Medical aid — Medical aid scheme — Council for Medical Schemes — Complaints and appeals — Appeal Board — Hearing — Procedural fairness — *Audi alteram partem*.

When the applicant's membership of the Profmed Medical Aid Scheme (the fourth respondent) was cancelled because of her alleged failure to disclose underlying medical conditions during the application process, she appealed to the Registrar of Medical Schemes. The Registrar found in favour of Profmed that the non-disclosures were material and warranted cancellation.

Upon the failure of a further appeal to the Council for Medical Schemes (the second respondent), the applicant turned to the Appeal Board (the third respondent), which found that she suffered from gastritis and that its non-disclosure and that of a hip arthroscopy she underwent in 2014 were both material. The Appeal Board reasoned that because gastritis was not on the list of prescribed minimum benefits (PMBs) that medical schemes had to offer all members, its non-disclosure entitled Profmed to cancel the applicant's membership because it had prevented Profmed from applying

a condition-specific waiting period in s 29A(7) as a risk-management measure (see [45]). The Appeal Board therefore ruled that Profmed had validly terminated the applicant's membership.

The applicant then approached the Western Cape High Court for a review of the Appeal Board's decision. She contended that it should be set aside under the Promotion of Administrative Justice Act 3 of 2000 (i) because the Appeal Board had violated the *audi alteram partem* principle by not allowing her to lead evidence on the hip arthroscopy and by overriding her objection to the late introduction of evidence of her later disclosure of the procedure to the M medical aid scheme; and (ii) because the Appeal Board had ignored relevant considerations in reaching its decision.

Held

As to procedural fairness

The Appeal Board should have allowed the applicant to lead evidence in relation to the hip arthroscopy and the information disclosed to the other medical aid scheme. The Appeal Board's decision that the non-disclosure of the hip arthroscopy as reflected in the application to the M scheme as warranting a repudiation of the medical insurance contract by Profmed, infringed on the applicant's right to procedural fairness, and in particular, the *audi alteram partem* rule (see [25]). The Appeal Board effectively allowed Profmed to convert an admission into a denial without allowing the applicant to provide any context or to present countervailing evidence in respect of the hip arthroscopy (see [27]). In view of the adverse effect and the seriousness of the consequences of its decision, the Appeal Board should have adopted a more inquisitorial attitude and taken extra caution to elicit the truth (see [29], [31]). In addition, the Appeal Board ignored the outcome of the hip arthroscopy, which was readily available. The hearing before the Appeal Board would therefore be set aside under s 6(2)*(e)*(iii) and s 6(2)*(c)* of PAJA (see [36]).

As to the finding that the applicant had a duty to disclose the hip arthroscopy and the gastritis

The meaning of relevant information for the purposes of s 29(2)*(e)* was all the information that was required by a medical aid scheme to assess the risk posed by a prospective member. A scheme was not, however, entitled to cancel a member's contract if the non-disclosure was immaterial, the test being whether a reasonable person would have concluded that the risk (in casu, the hip arthroscopy) should have been disclosed (see [39] – [40]). Had the applicant been given the opportunity, she would have proved that the arthroscopy was not a treatment but a diagnostic tool, and that it had shown that she did not have a hip condition (see [40]). In addition, the arthroscopy in question was performed almost two years before her application for coverage and, in view of its immateriality and the 12-month requirement in s 29A(7), there had been no duty on the applicant to disclose it (see [41] – [42]). The Appeal Board's reliance on it in dismissing the appeal was therefore misplaced (see [42]).

The Appeal Board's ruling that the fact that gastritis was not included in the PMBs made its non-disclosure material was flawed and in conflict with s 29(2)*(e)* of the Act. That section did not make PMBs a test to be invoked regarding materiality (see [47]). The Appeal Board's conclusion in this regard was a grave misdirection and its decision had to be set aside because it was influenced by an error of law as intended in s 6(2)*(d)* of PAJA (see [47]).

The Appeal Board's ruling would therefore be set aside and Profmed ordered to honour its contractual commitments to the applicant and her dependants (see [50]).

WILSNACH NO v TM AND OTHERS 2021 (3) SA 568 (GP)

Administration of estates — Intestate succession — 'Parent' — Meaning of in ISA — Reference to 'parent' not limited to biological or natural parent — Focus on whether person having parental responsibilities and rights, and on best interest of child — Such persons being parents, not mere holders of parental responsibilities and rights — In present case, maternal grandmother and mother of deceased minor 'parents' for purposes of intestate succession, but not absentee biological father — Intestate Succession Act 81 of 1987, s 1(1)*(d)*.

Section 1(1)*(d)* of the Intestate Succession Act 81 of 1987 (the ISA) provides that if a person dies intestate and is not survived by a spouse or descendant, but is survived by both his parents, his parents shall inherit the estate in equal shares. Here the executor of M's estate, faced with competing claims to inherit intestate — by M's biological parents on the one hand and his maternal grandmother on the other — applied for declaratory orders in this regard (see [3]).

The central issue was who was to be regarded as a parent for the purposes of s 1(1)*(d)* of the ISA, in the circumstances of the case. These were that shortly before one M died intestate — aged 5 and suffering from cerebral palsy caused by medical negligence during his birth — M's maternal grandmother (the third respondent) applied for and was granted full parental responsibilities and guardianship of M, together with M's mother (the second respondent); the court also terminating M's father's parental rights under ss 18(2)*(a)*, 18(2)*(c)* and 18(3) of the Children's Act 38 of 2005. M's father was as such excluded from the definition of 'parent' in the Children's Act (see [49].) He, however, submitted that this did not preclude him, as M's natural parent, from inheriting under s 1(1)*(d)* of the ISA.

M's parents were never married to each other, nor did they cohabit at any time before or after his birth. M's father (the first respondent) never assumed any parental responsibilities or contributed to any costs involved in his upbringing, never expressing any interest in M's wellbeing or in developing any relationship with him. M and his mother (the second respondent) had lived with M's grandmother since his discharge from hospital following his birth. M's mother, who had been unemployed for M's whole life span, suffered from depression following his birth and was unable to take proper care of him and respond to his needs. Both M and she were reliant on M's grandmother for shelter and other basic needs.

Held

As to the entitlement of M's biological father to inherit

While biological parenthood may well be the starting point of parenthood in all instances, others may take over the role of being parents in situ, and this may occur either on a de facto basis or as a result of formal legal processes such as adoptions or surrogacy. In all of these, the role and place of biology were limited. The legal recognition of parent – child relationships had transitioned from 'parental authority' or 'parental power' to the idea of parental responsibilities and rights. The primary focus was the relationship that existed between the child and the parent or the person who discharged that role. (See [40] – [43].)

While he remained M's biological or natural parent, he certainly did not become M's parent in any other sense, particularly not in the sense (described in the Constitution

and the Children's Act) of the person who cared for, maintained, acted as guardian, protected against neglect and abuse, and provided the love and guidance for the child to thrive and achieve their full potential. Interpreting s 1(1)*(d)* of the ISA to mean that reference to 'parent' was limited to the biological or natural parent was simply untenable — it did not make sense on the facts of this matter, nor accorded with the understanding of what a parent was. It would be absurd to regard him as a parent for the purposes of the ISA while not being a parent for the purposes of the Children's Act; that someone who made a conscious election not to be a parent would nevertheless retain parenthood for the sole purpose of succession, notwithstanding that his conduct during the short and troubled life of his child was characterised by his total failure to appreciate and discharge his constitutional obligations and responsibilities towards his child. (See [64] – [65].)

Also, the estate of a child was a matter concerning the child as it related to the property of the child. It followed that the best interest principle remained relevant. Recognising M's father, who failed to act in his best interests, as his intestate heir would not accord with M's best interests. M's father did therefore not meet either the factual or legal requirements of parenthood, and his biological link (which was his only link with M) was simply a biological fact that carried no legal consequence. Accordingly, in the context of the particular facts of this matter, he was not a parent as contemplated in s 1(1)*(d)* of the ISA, and so was not entitled to inherit intestate from M's estate. (See [66] and [68].)

As to the entitlement of M's maternal grandmother to inherit

In fact, she was M's primary and substantial caregiver and the dominant parental figure in his life, and in law she had acquired parental responsibilities and rights, as well as guardianship, in respect of M. It was logical and sequential that if a parent was excluded from being regarded as parent upon the termination of their parental rights and responsibilities, then conversely a person who was granted parental rights and responsibilities should be regarded as a parent for the purposes of the Children's Act. When a person has done all and more that was implicit in and required of being a parent, their right to dignity must demand that they be referred to as such. Calling them 'holders of parental rights and responsibilities' was legally deficient, inept and at odds with what they do — being parents. Accordingly, she was a parent for the purposes of s 1(1)*(d)* and so was entitled to inherit from M's estate. (See [77] – [83].)

As to the entitlement of M's biological mother to inherit

As his biological mother, she acquired full parental responsibilities and rights upon M's birth. She had faltered in significant ways in discharging that responsibility. The court which confirmed her parental rights would, however, have been satisfied that its order was in M's best interest. The second respondent retained her parental responsibilities and rights. In fairness to her, regard must be had to her depression and anxiety following M's birth as possible mitigatory factors in the unacceptable and erratic manner in which she related to him and responded to his needs. She was a parent for the purpose of s 1(1)*(d)* and so would be entitled to inherit from M's estate.

ESAU AND OTHERS v MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND OTHERS 2021 (3) SA 593 (SCA)

State — Duties — Disaster management — Covid-19 lockdown — Lawfulness of National Coronavirus Command Council's establishment and its policy decisions — Consistency of level 4 regulations with ss 26 and 27 of DMA — Procedural fairness and rationality of level 4 regulations — Whether level 4 regulations reasonable and justifiable limitations of fundamental rights — Disaster Management Act 57 of 2002, ss 26 and 27.

After a national disaster has been declared — as it was on 15 March 2020 in response to the Covid-19 pandemic — the designated Minister may, in terms of s 27(2) of the Disaster Management Act 57 of 2002 (the DMA), 'make regulations or issue directions or authorise the issue of directions' concerning a range of issues. On the same day that the national disaster was declared, the National Coronavirus Command Council (the NCCC) was established. The first regulations were promulgated three days later. On 25 March 2020 regulations were promulgated to implement a 'lockdown', defined in the regulations as 'the restriction of movement of persons' (see [25]).

More amendments to the lockdown regulations followed, and on 29 April 2020 a set of regulations was promulgated to give effect to a lower level of lockdown (the level 4 regulations). These, and the lawfulness of the NCCC's establishment, and the constitutionality of its policy decision to move the country from level 5 to level 4 — allegedly given effect to by the designated Minister, the COGTA Minister, when she made the level 4 regulations — were unsuccessfully challenged in the High Court.

The applicants' complaints against the level 4 regulations were that they infringed constitutional rights to human dignity, freedom and security of the person, freedom of movement, and freedom of trade, occupation and profession; that they did not augment existing legislation (as required by s 26(2)*(b)* of the DMA) but purported to amend legislation, so that the COGTA Minister strayed beyond the purposes permitted in terms of s 27(2); and that lack of public participation (affording members of the public only a two-day period within which to make representations) rendered them procedurally unfair/and or irrational.

This case concerned their appeal to the Supreme Court of Appeal, which held as follows:

The lawfulness of the NCCC's establishment and its policy decisions

The NCCC was a Cabinet committee, and the Cabinet may function through committees. Decisions taken by Cabinet committees were binding on the entire Cabinet as much as decisions taken by the entire Cabinet in a Cabinet meeting. The NCCC's policy decision was therefore a valid decision of the Cabinet.

The mere fact that the impugned conduct involved the formulation or adoption of a policy did not necessarily mean that it was not justiciable. If the application of a policy infringed or threatened rights, it may be challenged on review. Here the decision-making process was completed when the COGTA Minister made the level 4 regulations, giving effect to the policy decision taken by the NCCC. It was those regulations that impacted on the rights of people, not the prior policy decision. And, even if the review of the policy decision were to succeed, the adverse impact on rights brought about by the subsequent regulations would continue — ie it would have no practical effect. When the NCCC took a policy decision that was given legal effect to by the COGTA Minister, it was legally entitled to do so; in any event, that

policy decision was moot and therefore not justiciable. The High Court therefore correctly dismissed these challenges. (See [46], [50] – [52], [57] and [158].)

The consistency of the level 4 regulations with ss 26 and 27 of the DMA

In motion proceedings, applicants were required to make out their case in their founding affidavit and may not make out their case in reply. This challenge was not raised in the founding affidavit, but only in the replying affidavit, with the result that the respondents had no opportunity to answer them. As the challenge was not properly raised, there was no reason to consider the merits, and it was correctly dismissed. (See [60].)

The procedural fairness of the level 4 regulations

Section 4 of the Promotion of Administrative Justice Act (PAJA) applied to the making of subordinate legislation. Whatever the procedure chosen by the administrator, in order for it to be fair, it must comply with the requirements of s 3 of PAJA. The procedure chosen must ensure that adequate notice of the intended administrative action was given to members of the public, and that they were given an adequate opportunity to be heard. Sufficient detail had been given by the COGTA Minister to enable members of the public to make meaningful representations on the content of the level 4 regulations. As to whether sufficient time had been afforded for representations, within this context, the COGTA Minister was required to assess the urgency of the matter, and to calibrate the procedure adopted by her, including the time to be allowed for the making of representations, to the degree of urgency. When the nature of the process was viewed holistically in the context of the DMA, the circumstances prevailing in respect of this particular disaster, the lockdown regulations that had been in force, and the intention to ameliorate some of the economic and social harshness of the lockdown regulations, I am of the view that the two-day period afforded to members of the public within which to make representations was reasonable. It could not therefore be said that by restricting members of the public to two days within which to make representations, the COGTA Minister acted in a procedurally unfair manner. The level 4 regulations were therefore made in a procedurally fair manner; and the COGTA Minister did apply her mind to them (See [91], [95], [97], [100], [104] and [158].)

The procedural rationality of the level 4 regulations

If wrong in aforesaid finding that regulation-making constituted administrative action, it nevertheless constituted executive action, which, while not required to be procedurally fair, must meet the standard of procedural rationality. The experience of people who endured the strict lockdown was highly relevant to the COGTA Minister's decision-making in respect of the content of the regulations. She could not rationally have taken decisions on the content of those regulations without having afforded members of the public an opportunity to make representations — as she did. For the same reasons given in relation to the procedural fairness of the regulation-making process in terms of s 4 of PAJA, the procedure was also rational. (See [101] – [103] and [158].)

The infringement of fundamental constitutional rights

The seriousness and the magnitude of the threat to life brought about by the pandemic cannot be exaggerated. The specific movement and economic-activity regulations that were challenged were, with two exceptions, reasonable and justifiable limitations of fundamental rights. The purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that had cost thousands of lives and has infected hundreds of thousands

of people. In these circumstances, the broad-based limitation of everyone's fundamental right to freedom of movement and of trade, occupation and profession was a rational response for the purposes articulated by the COGTA Minister when she provided for the initial lockdown. By ameliorating the harshness of the lockdown and moving to level 4, the COGTA Minister sought to strike a balance 'between saving lives and saving livelihoods'. For the most part the means chosen — and the limitation of rights that those choices brought about — were objectively rational. (See [132], [140] – [141] and [158].)

SA CRIMINAL LAW REPORTS JUNE 2021

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v KOUWENHOVEN 2021 (1) SACR 579 (WCC)

Extradition — Appeal — From discharge of application for extradition in terms of s 10(3) of Extradition Act 67 of 1962 — Whether state enjoyed right of appeal — State enjoying right of appeal in extradition matters in terms of s 104 of Magistrates' Courts Act 32 of 1944, subsequently incorporated in s 310 of Criminal Procedure Act 51 of 1977.
Extradition — Appeal — Stated case — Whether extraditee entitled to be heard on stated case — Process intended to be purely facilitative in nature and for benefit of court and parties in any appeal which might eventuate, and to open it to contestation could expose extradition process to further delay.
Extradition — Jurisdiction — Extraterritorial jurisdiction of requesting state — Requirement in s 3(1) of Extradition Act 67 of 1962 that offence should have been committed 'within the jurisdiction of' the requesting state, including requesting state's jurisdiction to try person in question for offence committed outside territory of requesting state.

The respondent was convicted in a Dutch court of the illegal supply of weapons to the regime of Charles Taylor in Liberia and Guinea, and of participating in war crimes in those countries. The crimes were not committed within the territory of the Netherlands, but were crimes in respect of which the Netherlands, under its law, exercised extraterritorial jurisdiction. The respondent made his way to Cape Town during the course of the trial and was there when he was convicted. In December 2017 he was arrested in Cape Town on a warrant issued by a magistrate in Pretoria in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962. The hearing in the magistrates' court got under way in November 2019 and the respondent raised various defences to his extradition, including that he was not liable to be extradited because the crimes he was alleged to have committed, and for which he had been convicted and sentenced, were not committed within the territory of the Netherlands (the jurisdiction question). The magistrate discharged the respondent in terms of s 10(3) of the Extradition Act on the jurisdiction question. The Director of Public Prosecutions (the DPP) appealed against this decision.
In a separate application the respondent (the cases having been heard together) sought to review the decision of the DPP to deliver a notice of appeal and a notice of intention to prosecute the appeal, and the decision of the magistrate to state a case. The respondent sought orders declaring that those actions were inconsistent with the Constitution and that s 310 of the Criminal Procedure Act 51 of 1977 (the CPA) had

no application to orders of discharge under s 10(3) of the Extradition Act. In the alternative he sought a declaratory order that a person discharged under s 10(3) had a right to be heard before a magistrate stated a case in terms of s 310, and that he had not been afforded this right.
At the hearing of the matter the court held that there were three issues to be decided, namely *(a)* whether s 310 of the CPA applied to an extradition discharge; *(b)* if so, whether the respondent was entitled to be heard before the magistrate stated a case; and *(c)* if the two preceding questions were decided in favour of the DPP, whether the magistrate had been right on the jurisdiction question.
Held, per Sher J (Rogers J concurring), on the question of the applicability of s 310 of the CPA to an extradition discharge, that, although extradition proceedings were sui generis, they had a number of features, processes and procedures which were analogous to those in criminal proceedings. It was inconceivable that the legislature would not have simultaneously incorporated a limited right of appeal for the state in the Extradition Act when it was passed in 1962, when it expressly provided one for a person to be extradited, had it considered that the limited right of appeal which the state enjoyed on points of law in terms of the Magistrates' Courts Act 32 of 1944 did not extend to proceedings in extradition matters. In the result the state enjoyed a right of appeal in extradition matters in terms of s 104 of the Magistrates' Courts Act which was subsequently incorporated in s 310 of the CPA. (See [113] and [115] – [116].)
Held, further, for this particular purpose, the proceedings were to be equated with criminal proceedings and the extraditee was to be treated as if he or she were in the position of an accused person at such proceedings. (See [123].)
Held, further, as to whether the respondent was entitled to be heard for a stated case, that, to allow an extraditee to have the right to make representations in regard to the request by the prosecutor for a stated case — a process which was intended to be purely facilitative in nature and for the benefit of the court and the parties in any appeal which might subsequently eventuate — would be to open it to contestation and possible abuse, and a further adjudication by the magistrate which would be impermissible, given that the magistrate would be functus officio on the point in issue and it could expose the extradition process to further delay by way of possible review or appeal. (See [138].)
Held, per Rogers J (Sher J concurring), as to whether the magistrate was right on the jurisdictional question, that the requirement in s 3(1) of the Extradition Act, that the offence should have been committed 'within the jurisdiction of' the requesting state, was a requirement that the requesting state should have jurisdiction to try the person in question for the offence, including, where applicable, the jurisdiction to try such person for an offence committed outside the territory of the requesting state. Therefore, the order of the court a quo discharging the respondent in the appeal in terms of s 10(3) of the Extradition Act had to be set aside and the matter remitted to the court to finalise in accordance with the contents of the judgment. (See [88] and [90].)

VUMA AND OTHERS v EXECUTIVE DIRECTOR, INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE AND ANOTHER 2021 (1) SACR 621 (GP)

Police — Independent Police Investigative Directorate — Evidence — Subpoena issued by IPID in terms of s 205 of Criminal Procedure Act 51 of 1977 for production of classified documents — Effect of s 5(2) of Intelligence Service Oversight Act 40 of 1994 — Provision clearly aimed at imposing secrecy prohibitions on Joint Standing Committee on Intelligence and not precluding IPID from obtaining access to such documents.

In an application to set aside subpoenas in terms of s 205 of the Criminal Procedure Act 51 of 1977 (the CPA), issued at the instance of the first respondent, the executive director of the Independent Police Investigative Directorate (IPID), the applicants (three senior police officers and the former advisor to the Minister of Police) placed reliance on s 5(2) of the Intelligence Service Oversight Act 40 of 1994 (the Oversight Act) as imposing an absolute prohibition on access to certain classified documents. The section provides that '(n)o person shall disclose any intelligence, information or document the publication of which is restricted by law and which is obtained by that person in the performance of his or her functions in terms of this Act', * subject to certain exceptions.
Held, that s 5 did not impose an absolute prohibition on access to documents and neither did it preclude IPID from obtaining access to classified documents. On the contrary, the section was clearly aimed at imposing secrecy prohibitions on the Joint Standing Committee on Intelligence itself and its members in respect of documents that they had obtained in terms of the Oversight Act. The reliance by the applicants on the section was clearly misplaced.

FREEDENDAL v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2021 (1) SACR 634 (WCC)

Extradition — Application for stay of extradition order and release pending review of order — Applicant fugitive from justice in Australia and failed to return for trial on numerous charges of sexual offences involving young children — Applicant putting up scant material in support of review and difficult to assess prospects of success — Insufficient facts set out to justify release.

The applicant, a 79-year-old man, applied for an order that an order for his extradition to Australia be stayed pending a review of the decision of the first respondent to extradite him, and that he be released from detention in the interim. The extradition request from Australia was in respect of numerous sexual offences involving young children. The applicant had been arrested and charged with the offences in Australia and had subsequently been released from custody and allowed to return to South Africa on the grounds that he was going to perform charitable work in this country. He failed to return to Australia for his trial and remained in South Africa. He complained that the conditions of his detention were inhumane and that the state of his health justified his release.
The court analysed the evidence of the conditions of the applicant's detention but found that he had been receiving proper medical treatment and that he had in fact

been housed in a single cell and been allowed to sleep in the prison clinic, but that he had declined this offer. (See [27] and [32].)
The court held, further, that the review application was one contemplated in terms of s 14*(e)*(i) of the Extradition Act 67 of 1962, but the applicant had put up scant material in support of his review and for this reason it was very difficult to assess the applicant's prospects of success in connection with his pending review application. The onus did not rest on the first respondent to justify the detention of the applicant, but even if the court were wrong on that score, insufficient facts had been set out by the applicant which would justify his release from detention in the circumstances. Accordingly, the interests of justice did not favour his release from detention, particularly where there was a strong likelihood that the applicant, if he were so released, would attempt to evade his trial in Australia, as he had previously done. (See [41] – [43].)
Held, further, that, on a proper construction of the provisions of s 13, read with s 14, of the Extradition Act, the applicant fell to remain in custody pending his extradition, alternatively pending the court's judgment in the review application. This was so because it was not the decision of the magistrate which was subject to the review process, but rather the decision by the first respondent.

SPECIAL INVESTIGATION UNIT v MEC FOR HEALTH, EASTERN CAPE AND ANOTHER 2021 (1) SACR 645 (ECM)

Special investigating units — Powers of — Application to be joined as party in completed civil proceedings in claim for medical negligence.

The applicant, the Special Investigating Unit established in terms of the Special Investigating Units and Tribunals Act 75 of 1996, applied to be joined as a party in proceedings in the High Court which had resulted in an award of damages for medical negligence to the second respondent. The respondents had agreed to the settlement of the claim in an amount of R9 million and the court had made an order that the first respondent pay the second respondent the remainder of the amount owing, namely an amount of R6,4 million. The applicant was not a party to those proceedings. It relied for its locus standi on the proclamation dated 12 July 2019 relating to the investigation of maladministration in connection with the affairs of the office of the State Attorney and any unlawful act or irregularity committed by employees or officials of that office or any other person or entity. It alleged that the state attorney had mishandled the trial action on both the issue of liability and quantum, which entitled the applicant to seek rescission of the judgment. The maladministration referred to related to the failure to call an expert witness who would have been an essential witness for the case. The applicant therefore wanted an order which would effectively reopen the case for purposes of leading further evidence.
Held, that the state attorney was not involved in the conduct of the trial and therefore any maladministration alleged on the part of the state attorney could not be attributed to the conduct of the trial. Given the indubitable scourge of corruption and the hue and cry of society to stamp it out in all spheres of government, it could not be denied that the work of entities like the applicant was laudable. There might be merit in the suspicion of corruption in the handling of medical-negligence cases, especially in the

Eastern Cape; however, cases were decided on fact and not on suspicion, and the court was not persuaded that the proclamation authorised the applicant to endeavour to reopen cases already concluded. If it did so, it was ultra vires the powers of the President. (See [20] – [21].)

IN RE DETENTION OF CANDIDATE ATTORNEY IN COURT CELLS 2021 (1) SACR 655 (ECG)

Contempt of court — What constitutes — Refusal by candidate attorney employed by Legal Aid South Africa to represent accused for whom she had no instructions and had specific instructions from her manager not to represent accused — Magistrate regarding her conduct as disrespectful and ordering that she be detained in court cells — Serious invasion of candidate attorney's right to liberty and dignity not countenanced by provisions of s 108 of Magistrates' Courts Act 32 of 1944 or s 178(2) of Criminal Procedure Act 51 of 1977.

This matter was sent on review by a senior magistrate because of a potential miscarriage of justice by another magistrate who had demanded that a candidate attorney, employed by Legal Aid South Africa, represent an accused for whom she had no instructions and who felt obliged to obey the instruction of her manager that she was not to deal with the matter because she was at court only to represent an accused in her own part-heard matter. The magistrate refused her permission to withdraw from the case and, when the candidate attorney refused to represent the accused, the magistrate requested that the court orderly take her to the cells for her disrespect of the court.
Held, that it appeared that the magistrate was annoyed and frustrated that the trial could not be concluded and wrongly regarded the candidate attorney's conduct as disrespectful. However, if the magistrate had the provisions of s 108 of the Magistrates' Courts Act 32 of 1944 or s 178(2) of the Criminal Procedure Act 51 of 1977 in mind at the time she made her order, with proper consideration she would have realised that the candidate attorney's conduct was not what was envisaged in either of those provisions and she was in any event required to warn her of her intention to proceed in terms of the statutory provision she had in mind, in order to give the candidate attorney an opportunity to address her with specific reference to such provision, but had not done so. This was a serious invasion of the candidate attorney's right to liberty and dignity, and the experience must have been frightening, shocking and humiliating for her. The proceedings were accordingly set aside.

The proceedings on 29 October 2020 in the Magistrates' Court, Port Alfred, during the matter of *S v Ndiyana*, whereby the magistrate decided that Ms N December was disrespectful to the court, and the order for the detention of Ms December in the court cells, are reviewed and set aside.

S v MPILO 2021 (1) SACR 661 (WCC)

Evidence — Identification — Witness not mentioning particular features of perpetrator's face — Such not significant, seldom that face presented itself with one remarkable feature, let alone two or more.

In an appeal against a conviction and sentence for robbery with aggravating circumstances, counsel for the appellant criticised the evidence of identification of the driver of a motor vehicle because the witnesses had not mentioned the features of the driver's face which had caused them to identify him as the appellant.
Held, that such points, although often raised in criminal trials, were not impressive. It was not often that a face presented itself with one, let alone two or more, remarkable features. Nevertheless, human beings were highly adept at recognising faces and voices. A constellation of multiple minor variations in standard facial features combined to make up a facial appearance which, in its own way, was as unique as a fingerprint. The laborious processes followed by Identikit artists, in teasing out from a witness the facial features of a perpetrator, showed that people could readily match a face to a perpetrator without being able to verbalise a description. (See [23].) The court held that there was sufficiently cogent evidence on which the conviction had been based, and the appeal had to be dismissed.

TSOBO v TSOBO 2021 (1) SACR 668 (FB)

Domestic violence — Acts of — What constitutes — Pattern of repeated conduct required.
Domestic violence — Acts of — What constitutes — Parties living far apart — Acts of domestic violence could be committed from afar by means of telephonic and digital communication.

The appellant appealed against the dismissal by a magistrate of his application for a protection order in terms of s 4(1) of the Domestic Violence Act 116 of 1998. The parties were married and had a 2-year-old child, but were in the process of a hostile divorce action. The respondent had left the matrimonial home in Pretoria and returned to her parents' home in Bloemfontein. The appellant complained of insults sent by the respondent by SMS and that she was refusing him contact with his son. The magistrate dismissed the application partly on the basis of the applicant residing in Pretoria, whereas the respondent resided in Bloemfontein. Unfortunately, the magistrate's reasons provided by her did not shed any light on the facts found to be proved or the evidence on which the findings were based.
Held, that the record had a nuance of laxness which should be guarded against, particularly in the environment where there was an outcry for greater diligence in the combating of domestic violence. (See [8].)
Held, further, that it stood to reason that, in appropriate circumstances, the fact that the parties were far removed from each other did not per se exclude the possibility of emotional, verbal and psychological abuse, because it could be committed via telephonic and digital communication. This applied equally to harassment. The magistrate's poor choice of words, on the face of it, led one to conclude that she had misdirected herself in this respect. (See [16].)
Held, further, that the intention of the Act was to prevent the pernicious and repetitive character of domestic violence. The erratic occurrence of the communications in the present case, without the requisite pattern of repeated conduct, did not constitute domestic violence. The evidence on the aspect of the appellant's denial of contact rights was insufficient for the court to determine a pattern of repeated acts, and the alleged deprivation of contact rights accordingly did not constitute emotional abuse. The appeal was accordingly dismissed.

S v KD 2021 (1) SACR 675 (WCC)

Child — Sentence — Committal to child and youth care centre — When appropriate — Inadequate probation officer's report before court — Magistrate ought to have called probation officer to give oral evidence — Sentence of committal to child and youth care centre for 12 months shockingly inappropriate for 15-year-old boy convicted of possession of firearm — Alternative sentencing options ought to have been considered — Child Justice Act 75 of 2008, ss 69(1)*(a)*, 69(3), 72 and 75; Children's Act 38 of 2005, s 191(2)*(j)*.

The accused was a child offender who was 14 years old at the time of the commission of the offence and 15 years old at the time of sentencing. He was convicted on the charge of possession of a firearm in contravention of s 3 read with sch 4 and s 151 of the Firearms Control Act 60 of 2000 (the FCA), and was sentenced to 12 months' compulsory residence in a child and youthcare centre referred to in s 191(2)*(j)* of the Children's Act 38 of 2005. The firearm in question was a revolver which he said he received from a friend and took it for safekeeping. He was a first offender who lived with his mother, but had dropped out of school in grade 9. The probation officer recommended that the court sentence him to compulsory residence. Following these recommendations, the court sentenced the accused and made an order in terms of s 103(2) of the FCA, that the accused was unfit to possess a firearm.

The court on review noted that, in his report, the probation officer only considered two sentencing options, namely a suspended sentence and a sentence of committal to a child and youth care centre. In his view, a suspended sentence was not a suitable sentence for the accused. The magistrate went along with the insufficient recommendations of the probation officer without conducting an enquiry in terms of s 69(1)*(a)* and 69(3) of the Child Justice Act 75 of 2008 (the CJA). (See [8] – [9].) The court also questioned why the accused was not a suitable candidate for a community-based sentence or for correctional supervision in terms of s 72 or s 75, respectively, of the CJA, or why a fine or an alternative to a fine was not a suitable sentence. Those options could have been clarified if the court had

conducted the necessary enquiry. The magistrate ought to have called the probation officer to present oral evidence and to engage in the suitability of the accused in respect of the other sentencing options. The committal of the accused to 12 months' compulsory residence in a child and youth care centre was startlingly inappropriate and invoked a sense of shock. The accused was still young and vulnerable, and deserved individualised protection (See [[12] – [13].) The sentence imposed by the magistrate was not in accordance with justice and had to be set aside. (See [15].)

In respect of the ancillary order made by the trial court, the court held that the order was legally incompetent and that the relevant section of the Firearms Control Act 60 of 2000 applicable in the present matter was s 103(1) and not 103(2). The enquiry carried out was cursory and without real interest. The order made, accordingly, had to be set aside. (See [16] and [19].)

The court set aside the sentence and replaced it with a sentence of six months' imprisonment which was wholly suspended for a period of three years, on condition that the accused was not found guilty of the possession of an unlicensed firearm committed during the period of suspension. (See [22].)

ALL SA LAW REPORTS JUNE 2021

Commissioner for the South African Revenue Service v Levi Strauss South Africa (Pty) Ltd [2021] 2 All SA 645 (SCA)

Trade (Customs and Excise) – Import duty – Calculation of customs duty – Valuation of goods – Payments by importer which were not buying commissions that fell to be excluded under section 67(1)(a)(i) of the Customs and Excise Act 91 of 1964, and royalties paid by importer, required to be included in transaction value of goods.

Trade (Customs and Excise) – Import duty – Importation from SADC countries – Appeal against ruling that certificates of origin issued in respect of imports from countries in the South African Development Community were invalid, disentitling importer from benefiting from 0% duty under the Protocol on Trade in the SADC Region – Protocol offering favourable duty in respect of the physical transport of the goods from one member State to another and not in respect of the underlying commercial transactions giving rise thereto.

The respondent ("Levi SA") was locked in a dispute with the appellant ("SARS") over the import duties and value-added tax ("VAT") payable by it in respect of clothing imports. On 25 March 2014, SARS ruled that the place of origin certificates issued in respect of imports from countries in the South African Development Community ("SADC") and used to clear imports emanating from such countries were invalid, and therefore disentitled Levi SA from benefiting from a favourable rate of 0% duty under the Protocol on Trade in the SADC Region (the "Protocol"). Other disputes between the parties related to the determination of the transaction value of the imported goods on which duty was payable. SARS determined that certain commissions and royalties paid by Levi SA to other companies in the Levi Strauss group fell to be included in determining the transaction value.

Levi SA launched the present application proceedings by way of an appeal under section 49(7)(b) of the Customs and Excise Act 91 of 1964 (the "Act") against the origin determination and an appeal under section 65(6) of the Act against the transaction value determinations. The court below upheld the appeals in their entirety, set aside the determinations and substituted them in terms proposed by Levi SA. The present appeal was with the court's leave.

The clothing in question was imported from Mauritius and Madagascar, both members of the SADC. In 2005, the Asia Pacific division ("Levi APD") and Levi SA concluded an agreement (the "BAA") which provided that Levi APD was to be paid a percentage of the purchase price of the goods for its services as a buying commission. From 2011, instead of purchasing directly from the above producers, Levi SA began purchasing from a Hong Kong company ("Levi GTC"), which would purchase the clothing from the same contracted suppliers in SADC countries as before, and sell them to Levi SA at a mark-up of 12%. Levi SA's case was that the goods were produced in SADC countries and were consigned directly to it in South Africa, also an SADC country, and were therefore originating goods that, in terms of the Protocol, qualified for the favourable 0% duty. However, SARS ruled that the SADC certificates of origin used to enter goods were invalid, because GTC was not an exporter to South Africa from within SADC, but an exporter from outside the SADC.

Held – SARS' argument on the origin issue was misconceived. The Protocol simply offered the favourable duty in respect of the physical transport of the goods from one member State to another and not in respect of the underlying commercial transactions giving rise thereto. The Court refused to entertain a belated contention by SARS that the certificates of origin emanating from the producers in Mauritius and Madagascar were tainted by misrepresentation and based on fictitious invoices, as that did not form part of the determination by SARS. The determination by SARS against Levi SA was correctly set aside by the High Court, and SARS' appeal in that regard was dismissed.

The next issue was whether the amount Levi SA paid to Levi APD under the BAA was a buying commission that fell to be excluded under section 67(1)(a)(i) of the Act in determining the transaction value of the imported goods. SARS disputed Levi SA's contention that Levi APD was appointed under the BAA as its agent in order to represent it abroad in the purchase of the imported apparel and that the fee paid to it for those services was therefore a buying commission. The Court found that Levi APD was not acting as a buying agent on behalf of Levi SA, which accordingly did not discharge the onus of showing that the payments were buying commissions that fell to be excluded from the determination of transaction value.

Regarding the royalties paid by Levi SA, the question was whether an amount in respect of royalties was to be included in the transaction value. That depended upon whether, in terms of section 67(1)(c) of the Act, they became due by Levi SA as a condition of sale of the goods for export to South Africa. As the royalties were part of the transaction under which the goods were imported, they had to be included in the transaction value of such goods.

SARS' appeal was thus upheld in respect of the issues of buying commission and royalties.

FirstRand Bank Limited v Spar Group Limited [2021] 2 All SA 680 (SCA)

Banking and Finance – Duties of bank – Third party's money in account of bank customer – Legal duty of bank – Bank having duty to third party, to take steps to ensure that third party's money is not misappropriated by bank customer, where bank aware that such money did not belong to its customer.

Banking and Finance – Duties of bank – Third party's money in account of bank customer – Where bank has knowledge that its customer had no entitlement to the funds paid into accounts held with the bank, it may not set off money against debt owed by customer to bank.

The respondent ("Spar") fell into a dispute with one of its franchisees ("Umtshingo"). Umtshingo kept bank accounts with the appellant ("FNB") for each of its outlets. Spar held a notarial bond over the assets of Umtshingo. When Umtshingo defaulted on its obligations under the franchise agreement, Spar obtained a provisional order perfecting its security. The terms of the notarial bond permitted Spar to take over the Umtshingo businesses and run them for its own account. Umtshingo's controlling mind ("Mr Paolo") agreed to that arrangement but refused to de-link the speedpoint credit card devices of the stores from the bank accounts of Umtshingo. Spar ran the

outlets and credited the stock on hand to Umtshingo and brought in new stock. Cash receipts were deposited into a Spar account. However, the speedpoint credit card devices in use, which facilitated electronic deposits of revenue directly into Umtshingo's designated accounts, remained in use. That allowed Mr Paolo to retain control over the accounts, and he effected substantial disbursements out of two of the accounts. The debit balances (in respect of Umtshingo's overdraft liability, its debts to FNB in respect of a loan and a guarantee paid by FNB to Spar) in two of the accounts were purportedly extinguished by FNB applying set off against the credits derived from revenue generated by Spar and deposited into the accounts.

Spar contended that FNB ought not to have allowed disbursements to be made at Mr Paolo's behest because Umtshingo had no rightful interest or claim to the funds, and that FNB, furthermore, was not entitled to set off Umtshingo's debts in respect of which Spar had a quasi-vindicatory claim. It sued FNB and Mr Paolo to recover the relevant amounts. The dismissal of the claims led to the present appeal.

Held – In respect of the set-off issue, that when the customer of a bank deposits money into their account, the money becomes the property of the bank, which enjoys a real right of ownership. The deposit usually gives rise to a credit balance in the customer's account and a personal obligation owed by the bank to its customer to pay the credit balance. The personal obligation of the bank to pay the balance standing to the credit of the customer may be discharged by payment to the customer, payment to persons designated by the customer, or set off. Set off comes about when two parties are mutually indebted to one another, and both debts are liquidated, due and payable. Set off extinguishes a debt, but does so reciprocally – one debt extinguishes another. Umtshingo had no entitlement to the funds paid into the accounts held with FNB. Those funds were the proceeds of the business conducted by Spar for its own benefit. FNB was aware of that. Umtshingo thus enjoyed no personal right against FNB to the funds credited to its accounts that derived from Spar's deposits. Consequently, FNB could not contend that Umtshingo's indebtedness to it was set off against FNB's indebtedness to Umtshingo because FNB owed no such debt to Umtshingo. FNB's defence of set off accordingly failed.

FNB was also found to have allowed Mr Paolo to wrongly withdraw money from the accounts, knowing that such funds did not belong to Umtshingo. That amounted to breach of a legal duty by the bank. The court held that the bank was a joint wrongdoer owing a legal duty to Spar.

The appeal was thus dismissed.

Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd [2021] 2 All SA 700 (SCA)

Constitutional and Administrative Law – Procurement by Organ of State – Irregularities in process – Self-review – Delay in seeking review – Self-review applications by Organs of State are governed by the principle of legality which does not prescribe a time limit for seeking review – Where delay was significant and unreasonable, municipality seeking review not allowed to benefit from its own conduct.

The appellant was a municipality which had contracted with the respondent ("NICS") in September 2015, for the provision of debt management services by the latter. The municipality did not conduct its own tender process in securing NIC's services, but acted in terms of regulation 32 of the Municipal Supply Chain Management Regulations to procure the services already procured by another municipality (the "Newcastle municipality"). Regulation 32 provides that a Supply Chain Management Policy may allow an accounting officer to procure goods or services for a municipality or municipal entity under a contract secured by another Organ of State.

In contracting with NICS, the appellant municipality essentially adopted the Newcastle municipality's contract regime. The remuneration for the provision of the debt management services set out in the agreement between the appellant and NICS was in identical terms to the agreement between the Newcastle municipality and NICS. It was subsequently pointed out that the variation of the Newcastle municipality agreement, regarding NIC's commission, was procedurally flawed.

On becoming aware thereof, the appellant purported to terminate its agreement with NICS. It relied firstly on section 217 of the Constitution, which requires tender processes by Organs of State to be fair, equitable, transparent, competitive and cost-effective. Secondly, it argued that the commission claimed by NICS was not subjected to a competitive bidding process referred to and provided for in regulation 32(1)(a). Finally, it was stated that NICS had failed to fulfil its contractual obligations.

NICS approached the High Court to interdict the appellant from cancelling the agreement, and the parties then agreed to refer the dispute to arbitration, where a finding was made in NIC's favour.

In June 2017, the appellant instituted action in the court below, seeking a declarator that the entire agreement between it and NICS be declared unconstitutional, invalid, unlawful and void *ab initio*, alternatively, that the part of the agreement relating to the variation of the fee paid be reviewed, declared unconstitutional and set aside because it had not been subject to a competitive bidding process and there were no demonstrable discounts or benefits in respect thereof.

As the matter was brought 22 months after the effective date, NICS took issue with the delay. The Court held that the appellant only became aware of the illegality in the Newcastle municipality's contract at a late stage, and therefore, there was no undue delay. Only a part of the agreement was declared invalid, unconstitutional and void *ab initio*.

On appeal, the municipality sought to have the entire agreement declared invalid, whilst NICS in a cross-appeal, contended that the entire agreement was valid and enforceable.

Held – Self-review by Organs of State are not reviews in terms of the Promotion of Administrative Justice Act 3 of 2000, but are legality reviews. In such reviews, no time limit is prescribed for seeking review.

The Court held that the appellant ought reasonably to have known or have been aware from inception, and certainly at the time of the conclusion of the agreement in September 2015 that the agreement was of questionable validity. The fact that there

were serious irregularities around the contract, meant that there were no reasons to overlook the significant delay in seeking review.

It remained to decide on a just and equitable order, in terms of section 172(1)(b) of the Constitution. The order granted prevented the appellant from unduly benefitting from its own unreasonable delay.

Helen Suzman Foundation v McBride and others [2021] 2 All SA 727 (SCA)

Civil Procedure – Appeal by amicus curiae – Role of amicus – Court highlighting importance of amici playing their rightful role while their participation is kept within appropriate bounds – Where amicus departed from the basis on which it had sought to be admitted and attempted to broaden the scope of the challenge, court ruling such attempt impermissible.

Safety and Security – Renewal of contract of executive director of Independent Police Investigative Directorate – Interpretation of section 6(3)(b) of Independent Police Investigative Directorate Act 1 of 2011 – Appointment of executive director of Independent Police Investigative Directorate not renewable by incumbent but by the Parliamentary Committee on Policing.

The first respondent ("Mr McBride") was the executive director of the Independent Police Investigative Directorate ("IPID"), appointed to that position on 1 March 2014, in terms of section 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the "Act"). That section provides for the appointment of the executive director of IPID, and for the renewal of the incumbent's tenure after the expiry of the first five years in office. Shortly before Mr McBride's five-year term of office ended, he engaged the Minister about its renewal and was informed that his contract would not be renewed. He challenged the Minister's right to unilaterally make such a decision, and demanded that the matter be referred to the Parliamentary Committee on Policing (the "PCP") for its decision.

After discussions appeared to be futile, Mr McBride approached the High Court for relief. In his founding affidavit, he accepted that he had no right to be re-appointed, but wished to ensure that the proper process in relation to his possible re-appointment or rejection thereof, be followed. Before the matter was heard, the appellant (the "HSF") successfully applied to the court below to be admitted as an *amicus*. It stated that its aim was to show that neither of the parties' interpretation of section 6(3)(b) of the Act was correct. It sought to advance an alternative interpretation to the effect that the appointment of the Executive Director of IPID was renewable at his instance and not at the instance of either of the respondents.

After the admission of the *amici*, the main parties settled the matter and the settlement agreement was made an order of court. The HSF obtained leave to appeal from the present Court.

Held – The central issue in the appeal was whether section 6(3) of the Act could be construed in the way that the HSF contended.

The interpretation eventually agreed upon by Mr McBride, the PCP and the Minister was that the power to extend the incumbent's tenure for a second term was vested in the PCP. However, the HSF contended that the incumbent had an unfettered option to continue in office for a second term. The foundation of the HSF's interpretation of section 6(3) was that because the PCP having the power to renew undermined IPID's independence, it was necessary to interpret the section in a different way that was purportedly constitutionally compatible. The court referred to a series of cases which served to refute that premise. It held that there was no need for the HSF's type of interpretation in order to save section 6(3) from constitutional invalidity because the PCP's powers were not in conflict with IPID's independence. In any event, the said interpretation was untenable and could lead to absurd results.

Commenting on the role of an *amicus*, the court highlighted the importance of *amici* playing their rightful role while their participation is kept within appropriate bounds. In this case, the HSF departed from the basis on which it had sought to be admitted and attempted to broaden the scope of the challenge to include the lack of guidelines in the processes of the PCP. That was impermissible.

The appeal was dismissed.

National Credit Regulator v Getbucks (Pty) Ltd and another [2021] 2 All SA 747 (SCA)

Consumer – Fees charged by credit providers – National Credit Act 34 of 2005, Regulation 44 – Validity of Regulation 44 which prescribes maximum monthly service fees which a credit provider may charge a consumer – Requirements for promulgation of Regulation – Non-compliance with requirements of National Credit Act 34 of 2005 rendering Regulation invalid and National Credit Regulator thus not entitled to rely thereon in proceedings for deregistration of credit provider.

The appellant, the National Credit Regulator (the "NCR") claimed that the first respondent ("Getbucks") had overcharged fees and was thus non-compliant with regulation 44 (the "regulation") promulgated under the National Credit Act 34 of 2005. The regulation prescribes maximum monthly service fees which a credit provider may charge a consumer.

Upon the NCR approaching the National Credit Tribunal to cancel the registration of Getbucks, the latter applied to the High Court for a declaration that the regulation was *ultra vires* and/or void and that the NCR could not prosecute Getbucks in the Tribunal for an alleged contravention of the regulation. The court declared that the NCR was barred from prosecuting Getbucks or seeking any relief against it before the National Consumer Tribunal in respect of any alleged contravention of regulation 44 prior to its subsequent review and amendment.

Although the regulation was reviewed and amended prior to the date of judgment, the unamended regulation was operative when the application was brought, and it therefore remained relevant as to whether Getbucks was subject to deregistration for non-compliance or not.

Held – The first question was whether the regulation was promulgated pursuant to section 171 of the National Credit Act or under section 11 of Schedule 3 to the Act. The NCR contended that it was promulgated under section 171, while Getbucks

contended that it was promulgated under section 11. If under section 171, the proposed regulation had to be published and comment from interested and affected parties called for, with no period specified for the submission of comments. If under section 11, a period of 30 business days had to be allowed for comments to be submitted. It was common cause that the advertised closing date for submissions was 27 business days after publication – which was short of the minimum period of 30 business days specified in section 11.

The regulation came into effect on 1 June 2006, on the same day as the Act. The NCR came into being at the same time as the regulation came into effect. The regulation dealt with matters regulated by section 105(1) of the Act, which requires that the regulation be made after consultation with the NCR. Factually, it was clear that prior to 1 June 2006, the Minister could not have consulted the NCR in order to satisfy the requirements of section 105(1). The procedural requirement of prior consultation in section 105(1) was thus breached, and section 171 could not have been the basis on which the regulation was promulgated.

The regulation could also not have been promulgated under section 11, which required a period of at least 30 business days for the submission of comments. That requirement was not complied with.

The promulgation of the regulation was thus *ultra vires* the power of the Minister and was not validly promulgated.

The appeal was dismissed with costs.

African Transformation Movement v Speaker of the National Assembly and others [2021] 2 All SA 757 (WCC)

Constitutional and Administrative law – Speaker of National Assembly – Vote in motion of no confidence against President – Refusal by Speaker of the National Assembly to hold vote by secret ballot – Review application – Whether decision falling within exclusive jurisdiction of Constitutional Court in terms of section 167(4)(e) of the Constitution – Where cause of complaint related to procedural path to the vote and did not involve constitutional obligations, matter not falling within exclusive jurisdiction provision.

The applicant sought to review and set aside a decision of the first respondent, the Speaker of the National Assembly, in declining the applicant's request to hold voting by secret ballot in a motion of no confidence against the South African President.

Raising a preliminary point, the Speaker contended that the present Court lacked jurisdiction to hear the application. It was argued that the Speaker's mandate is constitutional, and that the decision not to hold a vote by secret ballot involved a constitutional obligation to allow members of Parliament to vote in a certain way. The contention therefore, was that it was the Constitutional Court which had exclusive jurisdiction in the matter in terms of section 167(4)(e) of the Constitution.

Held – Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The pleadings contain the legal basis under which the applicant has chosen to invoke the court's competence. A determination of whether the present Court had jurisdiction to consider the matter lay in a proper interpretation

of sections 102(2) and 167(4)(e) of the Constitution. Section 102 deals with a vote of no confidence in the President by the National Assembly.

It is incumbent upon a party invoking the jurisdictional exclusivity in terms of section 167(4)(e) to establish that there was a failure by parliament to fulfil a constitutional obligation. The applicant's cause of complaint related to the procedural path to the vote and did not involve the President's constitutional obligations.

Similarly, section 102(2) does not clothe a member of Parliament with a constitutional obligation envisaged in section 167(4)(e) to perform a specific act or function which would trigger the Constitutional Court's exclusive jurisdiction. Instead, it confers power on the assembly to pass a motion of no confidence in the President if the majority of members support the motion.

It was concluded that the present Court had jurisdiction to grant orders in terms of section 102(2).

The Court then turned to consider whether the Speaker's decision was unlawful and fell to be reviewed and set aside.

The decision whether to vote by open or secret ballot lay with the Speaker. The courts can only interfere if the Speaker did not apply her mind to her decision. The Court found the Speaker's decision to have been based on sound reasons. She also provided the applicant with the reasons for her decision.

Finding the decision to have been unimpeachable, the court dismissed the application for review.

Clementz v Millbo Paper CC and others [2021] 2 All SA 774 (GJ)

Personal Injury/Delict – Occupational injury – Exception to claim – Whether incident pursuant to which plaintiff suffered personal injuries at his workplace arose out of his employment, within the meaning of "accident" in section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 – Section 35 of Act substituting compensation under other legal remedies with compensation under the Act in the case of occupational injuries – Accident needing to arise out of and in the course of an employee's employment to qualify as occupational injury – Injury arising from intoxication of senior managers – Whether this falling within plaintiff's employment to be decided by trial court and not by exception.

The plaintiff claimed that he suffered severe injuries at work while performing his duties on machinery when hot molten adhesive blew up onto his face, hands and abdomen. He alleged that the incident was caused by the sole negligence of three of his former employer's senior management.

The Court was required to decide the narrow issue of whether the incident pursuant to which the plaintiff suffered personal injuries at his workplace arose out of his employment, within the meaning of "accident" in section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the "Act"). If it did, then the plaintiff would not be able to pursue his common law claim for damages against his erstwhile employer and the senior management because of the exclusionary provisions of section 35 of the Act, which substitutes that common law civil claim with a statutory administrative claim for compensation.

Held – The issue was to be decided on exception in this case. The first, fourth and fifth defendants raised the exception that the particulars of claim lacked averments which were necessary to sustain an action.

The Act seeks to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases. Where, as pleaded in this case, negligence is present, the employee needs to "meet with an accident", defined in section 1 as meaning "an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee". Section 35 substitutes compensation under other legal remedies with compensation under the Act in the case of occupational injuries. The fourth and fifth defendants fell within the extended deeming definition of an "employer", as provided for in section 56(1)(b) and (c) as read with section 35(2) of the Act.

The only issue that had to be decided before the plaintiff's claim would be excluded under section 35 of the Act, and so whether the exceptions should succeed, was whether the accident, in addition to arising in the course of the employment, also arose "out of" that employment. The requirement that the accident arose out of the employment is distinct from the accident arising in the course of the employment, and both requirements must be satisfied for there to be an accident.

The plaintiff pleaded that his injuries were caused by his intoxicated senior managers. The question was whether that could take the incident outside that which arose out of the plaintiff's employment, and so enable the plaintiff to avoid the exclusionary ambit of section 35 of the Act. On the facts, there was no indication that the defendant employees intentionally sought to cause the plaintiff any harm. As the plaintiff had pleaded that his injuries were caused by his intoxicated senior managers, a finding on exception that an employee takes upon himself the special risk that he would be caused injury by intoxicated senior management could send the wrong message to employees and employers. On the pleaded facts, it could not be found that the plaintiff's claim was hopeless. The Court highlighted various questions which arose in that context, which should be answered by a trial court after considering the evidence adduced.

The exceptions were dismissed.

Cotty and others v Registrar of the Council for Medical Schemes and others [2021] 2 All SA 793 (GP)

Pharmaceutical and Health – Council for Medical Schemes – Appeal Committee – Effect of lodging of appeal – Whether the lodging of an appeal in terms of section 50(3) of the Medical Schemes Act 131 of 1998 suspends the decision which is the subject of that appeal, pending a decision by the Appeals Board – Ordinary common law principle that administrative appeal in terms of section 50(3), timeously taken, suspends the decision which is the subject of the appeal.

The third respondent ("Discovery") and fourth respondent ("Medshield") refused to approve applications by the relevant applicants for the funding of treatment of certain conditions. Complaints to the first respondent (the "Registrar") were dismissed, and the applicants appealed against such dismissals to the Appeal Committee of the

Council for Medical Schemes (the “Council”) in terms of section 48 of the Medical Schemes Act 131 of 1998. The Appeal Committee’s finding in favour of the applicants, led to Discovery and Medshield invoking section 50 of the Act and appealing against such rulings to the Appeal Board of the Council. The schemes then contended that the decisions of the Appeal Committee had been suspended by their appeals and they accordingly did not comply with the rulings made by the Appeal Committee.

In the present application, the question raised was whether the lodging of an appeal in terms of section 50(3) of the Act suspends the decision which is the subject of that appeal, pending a decision by the Appeals Board.

Held – The dispute turned on the correct interpretation, effect and application of section 50 of the Act. The Court referred to case law setting out the correct approach to statutory interpretation.

In terms of the Act, where a member is not entitled to payment in terms of its rules, the medical scheme is precluded from effecting payment to that member. That remains so notwithstanding a decision by the Council in terms of section 48(8). It is only following an order by the Appeal Board in terms of section 50(16)(b) that the decision be implemented, that the medical scheme may give effect to such decision. Section 50 establishes and sets out the powers of the Appeal Board. In terms of section 50(3), any person aggrieved by a decision of either the Registrar acting with the concurrence of the Council or by a decision of the Council may within 60 days of such decision and upon payment of a prescribed fee, appeal against such decision to the Appeal Board.

Section 50 does not expressly state whether the lodging of an appeal in terms of section 50(3) does, or does not, suspend the decision which is the subject of the appeal. In the case of court orders, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. The issue in this case was whether the common law principle applies to administrative decisions. The Court concluded that there was nothing in the Act that displaced the common law principle that the administrative appeal (timeously taken) suspends the decision which is the subject of the appeal. The ordinary common law principle was thus applicable and an appeal in terms of section 50(3) suspends a decision by the Council in terms of section 48(8).

The application was dismissed.

Democratic Alliance v Brummer [2021] 2 All SA 818 (WCC)

Civil Procedure – Special defence – Defence of res judicata applicable where a matter has already been decided, is available where a dispute was between the same parties, for the same relief or on the same cause – Where the relief and cause of action is not absolutely identified, the defence of issue estoppel may be raised – Unjust and inequitable to uphold defence of issue estoppel where litigant was prevented from litigating his cause of action to finality.

The respondent ("Brummer") joined the appellant political party (the "DA") in 2000. He subsequently served as a councillor for more than a decade. On 13 August 2012, the DA confirmed termination of Brummer's membership of the party, alleging that he had failed to pay his dues to the party. The termination of membership was based on a clause in the DA's Federal Constitution, which provided for membership to cease when a member was in default with the payment of any compulsory public representative contribution for a period of 2 months after having been notified in writing that he is in arrears, and still fails to make good on the arrears.

Upon Brummer's position becoming vacant, the Independent Electoral Commission (the "IEC") was statutorily required to advertise that vacancy. Following such advertisement, Brummer applied to interdict the IEC from filling the post and to procure the reinstatement of his membership. By the time the matter came before court, the vacancy had already been filled by the IEC. Brummer attempted to challenge the constitutionality of the relevant clause in the DA constitution, but the court refused to entertain the belatedly raised point. The application was dismissed in September 2012.

In 2014, Brummer commenced action proceedings against the DA for damages founded in contract, alternatively delict and in the further alternative, for constitutional damages. The basis of Brummer's claims in the action was that the DA had unlawfully terminated his membership.

Just a week before the trial was due to commence, the DA sought to introduce for the first time a special plea of issue estoppel and then insisted upon that issue being determined separately and *in limine* at the trial. The dismissal of the special plea led to the present appeal.

Held – Defence of issue estoppel has taken root in our law as a subsidiary of the principle of *res judicata*. *The* plea of *res judicata* – that the matter has already been decided – was available where the dispute was between the same parties, for the same relief or on the same cause. The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel.

A party seeking to rely on the defence of *res judicata* must allege and prove all the elements underlying the defence. The DA relied on the September 2012 judgment as constituting *res judicata* in respect of the claims for damages subsequently launched by Brummer. The present Court stated that the factual issue, which arose in this matter, was the termination of Brummer's membership through the application by the DA of the clause in its constitution. That termination afforded Brummer various causes of action. However, he was denied the opportunity to place his case before the court. His having been prevented from litigating his cause of action in relation to damages to finality meant that it would be unjust and inequitable to uphold the special plea of issue estoppel. The majority of the court dismissed the appeal.

PAE v Dr Beyers Naude Local Municipality and another [2021] 2 All SA 839 (ECG)

Personal Injury/Delict – Sexual assault at workplace – Claim for damages – Refusal of employer's offer of retrospective reinstatement following resignation – Reasonableness of refusal – Where an employment relationship has broken down, a

court will not order reinstatement, and employee unable to continue working in workplace where she was assaulted entitled to refuse employer's reinstatement offer.

The first defendant municipality was the successor in law to the municipality in which the plaintiff had been employed prior to her resignation. The second defendant ("Jack") was her immediate superior. In November 2009, the plaintiff was sexually assaulted by Jack. The assault, and the manner in which it was subsequently addressed internally by the municipality, culminated in the plaintiff resigning with effect from November 2010. The municipality made her an offer of retrospective reinstatement and to place her into the position she would have been had she not resigned from her employment.

Held – The Court had to decide whether the municipality had discharged the onus of proving that it was unreasonable for the plaintiff to have refused the offer made. In so doing, the court had to consider the conduct of the municipality towards the plaintiff after the assault and before her resignation. It was evident that the municipality was ill-equipped to manage the situation, and relied heavily on the advice of its legal advisor as to how to address the incident. Despite the trauma experienced by the plaintiff, the municipality required her to communicate with Jack and to inform him that she would be absent from work for 2 days when she was placed on special leave. Jack was afforded the opportunity to respond to the complaint but declined, yet was not suspended. He was charged three months later, with an inaccurate description of the incident. The disciplinary hearing was only held another six months after the assault. The presiding officer found that a suitable sanction would be for Jack to be suspended without pay for a two week period. As an Organ of State, the municipality was not only entitled, but obliged, given the obligations on it in terms of section 195 of the Constitution, to have challenged the disciplinary finding which, on the face of it, was indefensible.

The Court found that the municipality failed to provide the plaintiff with a safe working environment, and took no steps to support or assist her. That had catastrophic consequences for her emotional and psychological well-being and her employment became unendurable. After her resignation, the conduct of the municipality showed a lack of appreciation of its duties to the plaintiff.

Regarding the offer rejected by the plaintiff, the court emphasised the unreasonableness of the employer in expecting the plaintiff to continue to work in the same environment in which she had been assaulted. In labour law, there is the trite principle that where an employment relationship, which is based on trust and confidence, has broken down, as the current relationship clearly had, a court will not order reinstatement pursuant to an unfair dismissal claim. Therefore, if the plaintiff had pursued an unfair dismissal dispute then she would have been entitled to have refused the offer on the basis that the employment relationship has broken down. She was consequently entitled to have rejected the offer out of hand. In any event, the court was of the view that the offer was unlawful as it amounted to an impermissible circumvention of the recruitment procedures applicable within the municipality.

The parties were able to reach agreement on a number of material aspects relating to quantum. The Court was required only to determine the applicable contingency deductions to be made in respect of the agreed amounts. Taking into account the

peculiar facts of the case, the Court decided on the contingency deductions to apply under each head of damages claimed. The plaintiff was awarded an amount of R3,998,955,02.

Road Accident Fund v Legal Practice Council and others (Pretoria Attorneys Association and another as *amici curiae*) [2021] 2 All SA 886 (GP)

Civil Procedure – Execution against Road Accident Fund – Application by Fund for suspension of all writs of execution and attachments based on court orders already granted against it or settlements already reached with successful claimants entitled to payment of compensation for damages flowing from road accidents for limited period – Court finding that exceptional circumstances existed, taking into account the interests of justice, for the exercise of its inherent common law and constitutional power to order a temporary suspension for a limited period of 180 days.

Civil Procedure – Jurisdiction – Causae continentia principle allows a court to assume jurisdiction in respect of a defendant who is otherwise not amenable to that jurisdiction on any of the recognised grounds of jurisdiction – Section 21(2) of the Superior Courts Act 10 of 2013 encompassing causae continentia principle.

The applicant, the Road Accident Fund ("RAF"), is constitutionally enjoined to pay reasonable compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle. Section 21(1) and (2)(a) of the Road Accident Fund Act 56 of 1996 provides that no claim for compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against the employer of the driver, unless the RAF or an agent is unable to pay any compensation.

In an attempt to stabilise its precarious financial position and imminent implosion and to prevent a constitutional crisis, the fund sought an order – either in terms of rule 45A of the Uniform Rules of Court or the common law or section 173 of the Constitution of the Republic of South Africa, 1996 – suspending all writs of execution and attachments based on court orders already granted against it or settlements already reached with claimants entitled to the payment of compensation for damages resulting from bodily injury or death caused by road accidents that are regulated by the RAF Act in terms of a court order or settlement reached with the RAF (successful claimants) for a period of 180 days. That would enable it to make payment of the oldest claims first by date of court order or date of settlement agreement *a priore tempore*.

Held – A preliminary issue raised was that of non-joinder of other interested parties. However, the court found that the steps taken by the RAF to notify as many parties of its application as possible were adequate.

A second preliminary point related to the present Court's jurisdiction. The RAF instituted its application in Pretoria since most of the warrants of execution were issued out of the offices of the registrars in Gauteng and most of the attachments of the RAF's movable property occurred in Gauteng. The RAF contended that the *causae continentia* principle (the doctrine of cohesion of a cause of action) and section 21(2) of the Superior Courts Act 10 of 2013 applied, which

principle extends the jurisdiction of a particular division of the High Court. The *causae continentia* principle, which allows a court to assume jurisdiction in respect of a defendant who is otherwise not amenable to that jurisdiction on any of the recognised grounds of jurisdiction, is now enshrined in section 21(2) of the Superior Courts Act. The Court thus confirmed its jurisdiction in the matter.

Acknowledging the precarious financial position of the RAF and the administrative problems besetting it, the Court found that exceptional circumstances existed, taking into account the interests of justice, for the exercise of the court's inherent common law and constitutional power to order a temporary suspension for a limited period of 180 days of all writs of execution and attachments against the RAF based on court orders already granted or settlements already reached in terms of the RAF Act, which are not older than 180 days as from the date of the court order or date of the settlement reached.

S v Makayi [2021] 2 All SA 907 (ECB)

Criminal law and procedure – Rape – Evidence – Role of indictment – Section 144(3)(a) of the Criminal Procedure Act 51 of 1977 stating that an indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Director of Public Prosecutions, are necessary to inform the accused of the allegations against him – Nature of summary of substantial facts – Where evidence which the State intends to lead is vastly different from that reflected in the summary of substantial facts, prosecution should either supplement the summary, and/or present an opening address.

Criminal law and procedure – Rape – Intention in the form of dolus eventualis – Could not be expected that accused's actions as described by the complainant would result in penetration necessary to found offence of rape.

The accused was charged with having raped a 6-year old girl, and pleaded not guilty. The indictment referred to his having intentionally committed an act of sexual penetration with the complainant by inserting his penis into her vagina and anus without her consent.

The complainant's testimony did not include an allegation of penetration or sexual intercourse. The accused flatly denied the allegations against him. After their evidence had been adduced, the court invited argument on the question of intent. The prosecution pressed for a conviction on the main count, contending that the complainant's honest and reliable description of the manner in which the accused had placed her on top of him and the manner in which he had moved, was sufficient to prove that the accused had the requisite intent to rape, and the evidence was sufficient for a conviction of rape on the basis of *dolus eventualis*.

Held – Section 144(3)(a) of the Criminal Procedure Act 51 of 1977 states that an indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Director of Public Prosecutions (the "DPP"), are necessary to inform the accused of the allegations against him. The purpose of the summary is to fill out the picture presented by the indictment. While the prosecution is not bound by the summary of substantial facts, where the evidence which the State intends to

lead is so vastly different from that reflected in the summary of substantial facts, it is expected from the prosecution to either supplement the summary, and/or present an opening address. Prosecutors should decide upon, and draw up charges based on available evidence which will *inter alia* adequately reflect the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction, provide the court with an appropriate basis for the sentence requested, and enable the case to be presented in a clear and simple way. The Prosecution Policy of the National Director of Public Prosecutions, in Item 7, states that prosecutors should fairly present the facts of a case to a court, disclosing information favourable to the defence even though it may be adverse to the prosecution case. The summary of substantial facts in this case was misleading in its particularity. An opening outline by the prosecutor, indicating that the State's case would be that the accused made movements up against the complainant's body while the two of them remained fully clothed, would have solved that problem.

The Court also rejected the prosecutor's attempt to rely on intention to rape in the form of *dolus eventualis*.

The final issue was that of the competent verdict of sexual assault. The testimony of the complainant, who was a single witness, was less than satisfactory. The medical evidence also did not corroborate her version.

Finding that the prosecution had failed to prove its case beyond a reasonable doubt, the court acquitted the accused.

END-FOR NOW