LEGAL NOTES VOL 7/2021

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Will — Execution — Freedom of testation — Power of court to interfere with — Discriminatory bequest — Public policy and development of common law — Fideicommissum providing that property shall pass only to male descendants declared unconstitutional and unlawful — Constitution, ss 9 and 39(2); Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, ss 1, 8 and 14.

In 1902 certain testators executed a will in which they included a fideicommissum (see [3]). Under the fideicommissum, immovable property would devolve to their children, thereafter only to their male grandchildren, and thereafter from the male grandchildren only to male great grandchildren (see [111]). In an instance where a child did not produce a male grandchild, the property would pass to the other male grandchildren (see [111]).

Here, a grandson (Mr Kalvyn de Jager) had died. He had only granddaughters, and in his will he bequeathed the property concerned to his daughters (see [109] and [113]). Kalvyn, however, had a brother, Mr John de Jager, and he had produced great-grandsons (see [112]).

The executor of Kalvyn's estate (Mr King) received three claims on the property: in the first instance by Kalvyn's daughters under Kalvyn's will; in the second by John's sons under the fideicommissum in the testators' will; and in the third, by the daughters' sons (the testators' great-great grandsons) (see [113] – [114] and [116]).

Confronted with these claims, Mr King applied to the High Court for a declarator of the appropriate heirs (see [115]). His view was that the clause of the testators' will creating the fideicommissum (clause 7) was unfairly discriminatory, and on public policy grounds should not be enforced (see [115]). He was joined in this view by the daughters, who

[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!**

added that the clause violated their right to equality and should be altered in inclusive terms (see [117]).
Neither contention though was accepted, with the court finding no clash with public policy and that the discrimination concerned was reasonable and justifiable (see [119]).
Later appeal to the Supreme Court of Appeal was unsuccessful.
Here, applicants sought leave to appeal to the Constitutional Court which upheld the appeal and declared clause 7 inconsistent with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and unenforceable (see [163]).
In coming to this conclusion, the majority (per Jafta J) considered the following:

- Under the common law freedom of testation was subject to the condition that its exercise not be contrary to public policy or unlawful, which included inconsistency with the Constitution (see [123]). Indeed a court was obliged to declare such a will or relevant part thereof unenforceable (see [127] – [128]).
- Here, as the discrimination clause 7 created was based on the listed ground of gender (s 9(3)) it was presumptively unfair (s 9(4)), and indeed its unfairness was admitted (see [130] – [131] and [133]). This rendered clause 7 inconsistent with the Constitution (see [133]). It was moreover in breach of the prohibition on unfair discrimination in s 8 of PEPUDA and this too rendered it unlawful and unenforceable (see [134] and [137]).
- As for the proposition that the discrimination was reasonable and justifiable under s 36 of the Constitution, this was misconceived: s 36 could apply only where a law of general application was involved, and even if that were the case, it was doubtful that such discrimination could be a justifiable limitation of the s 9(4) right (see [139] – [141]). Moreover, under PEPUDA, when a court was satisfied unfair discrimination had occurred the claim would succeed: no justification analysis was involved (see [143]).
- As to the fact of the will's execution in 1902, plainly long before the Constitution and PEPUDA's promulgation, this was immaterial: both were applicable by virtue of the attempt to enforce clause 7 now (see [145]).
- As for the split in the case law between the degree of scrutiny afforded public trust deeds and private deeds and wills when it came to discriminatory provisions, such split was untenable: the sphere of violation of the equality right could not determine whether such violation was lawful or unlawful, and freedom of testation did not encompass a testator unfairly discriminating between beneficiaries (see [148] and [150] – [153]). But it did allow for differentiation, so long as it was not unfair (see [155]).
- So far as remedy went in cases of unfairly discriminatory provisions, this was to be informed by the Constitution, which enabled the making of just and equitable orders (see [157]).
- Here then, clause 7 was contrary to public policy and invalid, the offending condition regarded as never being written, and the property bequeathed unconditionally to applicants' father (see [158] – [160]). That being so, its further bequeathal was regulated by his will (see [158]).

Mhlantla J, writing for the minority, would have declared clause 7 contrary to public policy as informed by constitutional values, invalid, and unenforceable; and that the applicants should be beneficiaries in equal shares, of the property (see [7], [19] and [88]). She considered that it ought to be tested against the public policy standard rather than directly against the Constitution, and that application of the standard to the novel set of facts here would comprise a development of the common law per s 39(2) of the Constitution (see [36] – [37], [39] – [40], [48] – [49] and [63]).
Weighing whether such development was justified, she noted the centrality of freedom of testation and its protection by a trio of constitutional rights (privacy, dignity, property), but also its patriarchal expression, the countervailing value of equality, and the nature of the discrimination here on a listed ground (see [50], [52] – [53], [55], [69], [76] and [82] – [84]). The clause was accordingly repugnant to public policy (see [84]).
Victor AJ, concurring, considered that direct horizontal application of the Constitution by means of the Equality Act was appropriate, there being no need to develop the common law when this statute gave effect to the right to equality, and where direct application

would favour the right's aims (see [178], [180], [187], [190] and [204]). Application of the Act rather than s 9 itself was also indicated by both case law and the principle of subsidiarity (see [187] and [190]).
Acting Judge Victor also noted that freedom of testation required recalibration toward egalitarian and ubuntu-based ends, and how if unfettered, the principle sustained gender and economic inequality (see [202] and [206] – [207]).
As for interpretation of the Act, clause 7 effected 'discrimination' in that it withheld a 'benefit, opportunity or advantage' (the right to benefit from the deceased's estate), where such discrimination was unfair.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v LEVI STRAUSS SOUTH AFRICA (PTY) LTD 2021 (4) SA 76 (SCA)

Revenue — Customs and excise — Protocol on Trade in Southern African Development Community — Importation of goods from SADC countries — Originating goods — What constitutes — Where goods produced in member state and sold to purchaser in non-member state, then sold on to end user in member state but dispatched by producer directly to end user — Movement of goods relevant, not commercial dealings giving rise thereto.

Revenue — Customs and excise — Valuation of goods for purpose of calculating customs duty — Determination of transaction value — Inclusion of commissions other than buyer's commission — What constitutes buyer's commission — Whether commission on purchases imported through related company constituting buyer's commission — Customs and Excise Act 91 of 1964, ss 67(1)*(a)*(i).

Revenue — Customs and excise — Valuation of goods for purpose of calculating customs duty — Determination of transaction value — Inclusion of royalties — Meaning of 'directly or indirectly, as a condition of sale of the goods for export' — Whether including royalties on purchases imported through related company — Customs and Excise Act 91 of 1964, ss 67(1)*(c)*.

Levi Strauss SA (Levi SA), a wholly-owned subsidiary of Levi Strauss & Co (LS & Co), imported clothing goods produced and shipped in from Mauritius and Madagascar, both countries in the Southern African Development Community (SADC).
Until 2011 the clothing was purchased directly from producers by Levi Strauss Asia Pacific Division Pte Ltd (Levi APD), a company incorporated in Singapore, for which they charged a 'buying agent commission' equal to a percentage of the purchase price of the goods for its services. From 2011 the arrangement was altered so that instead of purchasing directly from SADC producers, Levi SA would purchase from Levi Strauss Global Trading Company Ltd (Levi GTC), incorporated in Hong Kong. In turn Levi GTC 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% of the purchase price of the goods for its services; the clothing goods being dispatched directly from the SADC producers to Levi SA. Levi SA paid royalties to LS & Co by agreement.
Under the Protocol on Trade in the SADC Region (the Protocol) Levi SA was entitled to enter goods emanating from SADC countries at a 0% rate. Article 2 of the Protocol provides that 'originating goods' would qualify for this favourable treatment in accordance with the provisions of annexure I to the Protocol. Rule 2.1 in annexure I, applicable for the purpose of identifying originating goods, provides that goods shall be accepted as originating in a member state if they 'are consigned directly from a Member State to a consignee in another Member State'. Sars took the view that when Levi SA started purchasing directly from Levi GTC post-2011, the commercial relationship changed, undermining the purpose of the Protocol, which according to Sars was that the commercial relationship giving rise to the goods being imported into South Africa needed to be between parties both based in SADC countries. Sars further argued that the SADC certificates of origin used to enter goods were invalid because Levi GTC was not an exporter to South Africa from within the SADC but an exporter from outside the SADC. Sars accordingly issued a determination that the place-of-origin certificates issued in respect of such imports were invalid, so that Levi SA was disentitled from entering these goods at a favourable rate of 0% duty under the Protocol.

Sars also determined that certain 'buying commissions' and royalties paid by Levi SA to other companies in the Levi Strauss group fell to be included in determining the transaction value, ie the value at which goods must be entered for customs duty purposes. Section 66(1) provides that this is 'the price actually paid or payable for the goods when sold for export to the Republic, adjusted in terms of section 67'. Subsection 67(1)*(a)*(i) provides that 'any commission other than a buying commission' is to be added to the price actually paid or payable for the goods to the extent that it was incurred by the buyer and not included in that price. A 'buying commission' is defined in s 65(9) of the Act as 'any fee paid by an importer to the importer's agent for the service of representing the importer abroad in the purchase of goods being valued'. As for royalties, ss 67(1)*(c)* provides that in determining the transaction value 'of any imported goods . . . there shall be added to the price actually paid or payable for the goods royalties and licence fees in respect of the imported goods . . . directly or indirectly, as a condition of sale of the goods for export to the Republic'.

This case concerned Sars' appeal to the Supreme Court of Appeal, following the High Court's setting-aside of these determinations. At issue were —

- what qualified as originating in a member state for the purpose of relying on the Protocol; and
- whether, in determining the transaction value of the goods, (1) the amount Levi SA paid as buying commission fell to be excluded under ss 67(1)*(a)*(i) of the Act; and (2) under ss 67(1)*(c)* royalties paid to LS & Co fell to be included.

Held as to the origin issue

Rule 2.1 says that 'goods shall be accepted as originating in a Member State if they are consigned directly from that state to another Member State'. That was what happened in the present case: they were produced or sufficiently worked in Mauritius and Madagascar and were sent either by air or sea directly from there to South Africa. This was consistent with the structure of the Act, which was concerned with the movement of goods in and out of South Africa, rather than the commercial transactions underlying such movements. Customs duty was defined as a duty leviable on goods imported into the Republic; it was the movement of goods that attracted duty. The duty was leviable irrespective of the commercial basis, if any, upon which the goods came into the country. The focus was on the physical situation and transport of the goods, not the commercial dealings giving rise to them. (See [12] – [14].)

The producers in Mauritius and Madagascar were the manufacturers, suppliers and shippers of the goods. In accordance with the definition of 'exporter' in s 1 of the Act, they were the exporters of those goods. There was nothing in the evidence to show that any portion of the economic benefit which the SADC manufacturers could commercially have expected to receive for their input was diverted. The 12% 'buying commission' in the Levi APD regime and the 12% mark-up in the Levi GTC regime was compensation for services unrelated to anything done by the SADC manufacturers. Sars' conclusion, that the certificates of origin presented by Levi SA in support of its entry of goods from Mauritius and Madagascar were invalid, was therefore incorrect, and its determination correctly set aside by the High Court. (See [15], [20] and [23].)

Held as to the transaction value issues

As to (1)

The notion of representation necessarily implied that the agent acted at the behest of the importer. Where the importer had little or no freedom of action in regard to the actions of the intermediary, the intermediary was not an agent in any realistic sense. The primary question was whether the intermediary was not only acting on behalf of the importer, but also in accordance with the wishes and directions of the latter. The overall picture that emerged — from a close examination of both the agreement between Levi SA and Levi APD and the totality of the circumstances, including the manner in which the Levi Strauss group dealt with procurement and the role of Levi APD in relation to purchases of imported apparel by Levi SA — was one of extremely strict central control by LS & Co of the use to which the marks and names were put. Levi SA did not exercise control over Levi APD in regard to the matters entrusted to Levi APD under their agreement. It followed that Levi APD was not acting as a buying agent on behalf of Levi

SA, and that Levi SA did not discharge the onus of showing that these payments were buying commissions that fell to be excluded from the determination of transaction value. (See [37], [40], [42] and [57].)

As to (2)

The answer depended upon whether in terms of ss 67(1)*(c)* of the Act royalties became due by Levi SA, directly or indirectly, as a condition of sale of the goods for export to South Africa. While it was clear that the liability for duty must arise as a condition of those sales, it was not clear what was meant by a 'condition of sale' or the effect of the qualification 'directly or indirectly'.

The words 'directly or indirectly' operated to extend the situations in which the obligation to pay the royalty became due. Properly interpreted ss 67(1)*(c)* was concerned with the contract in terms of which the goods were imported into South Africa, not a condition in the contract of sale. It was not a requirement of the section that the obligation to pay royalties should be embodied, either expressly or tacitly, in that contract by way of a contractual term. 'Condition of sale' meant that the royalties must become due as a prerequisite or requirement of the export of the goods, and that may arise under a contract other than the export contract. A convenient practical test was to ask whether the goods would have been exported in the absence of the obligation to pay the royalty. It may become due indirectly where the nature of the relationships between exporter, importer and licensor, viewed as a whole, was such that the sale would not have occurred without an obligation to pay a royalty becoming due. In accordance with this approach, if products could not be imported without incurring the liability to pay royalties, that made the payment of royalties a condition of the sale to it of the products. (See [60], [65] – [67], [71] and [77].)

That was the case here, where under both the Levi APD and Levi GTC regimes the process of production and sale between Levi SA and the supplier was entirely managed and controlled by the licensor, LS & Co. Sars was accordingly correct in saying that the royalty needed to be included in determining the transaction value of the imported goods.

FIRSTRAND BANK LTD v MASTER OF THE HIGH COURT, PRETORIA AND OTHERS 2021 (4) SA 115 (SCA)

Insolvency — Creditors — Secured creditors — Liability for contribution to costs of liquidation where free residue insufficient to cover — Where relying solely on their security and petitioning creditor not proving claim — Insolvency Act 24 of 1936, ss 14(3), 89(2) and 106*(a)*.

Insolvency — Creditors — Petitioning creditor — Liability for contribution to costs of liquidation where free residue insufficient to cover — Where secured creditors relying solely on security and petitioning creditor not proving claim — Insolvency Act 24 of 1936, ss 14(3), 89(2) and 106*(a)*.

The second respondent, a body corporate, was the petitioning creditor (for arrear levies) in the sequestration of the owner of a sectional title unit within the scheme it administered. No concurrent creditors proved any claims. The free residue in the estate having been insufficient to cover the estate's administration costs, the third and fourth respondents, trustees of the insolvent estate, levied a contribution for the shortfall against two secured creditors — who relied solely on the proceeds of the property which constituted their security. One of these was the appellant bank (FRB), the other the fifth respondent, Nedbank. The body corporate did not prove a claim. Instead, to collect the arrear levies, it relied on the statutory obligation to settle arrear levies as prerequisite for the registration of transfer, after the properties constituting FRB and Nedbank's security were sold in execution (see [6]).

When the first respondent, the Master, would not entertain FRB's objection to the contribution raised, it took the Master's decision to include such contribution in the estate accounts on review in the High Court. The present case concerned FRB's appeal (to the Supreme Court of Appeal) against the High Court's order, which had held FRB (and Nedbank) pro rata liable for the contribution together with the petitioning creditor.

In determining the liability for a contribution when the petitioning creditor has not proved a claim and the secured creditors have relied solely on their security, the correct interpretation of the following sections of the Act were at issue —

- s 89(2) of the Insolvency Act 24 of 1936 (the Act), that where creditors rely for the satisfaction of their claim solely on the proceeds of the property which constitutes their security, they shall not be liable for any costs of sequestration other than the costs specified in s 89(1), and other than costs for which they may be liable under paras *(a)* and *(b)* of the proviso to s 106;
- s 106*(a)*, that, if *all* the creditors *who have proved claims* against the estate are secured creditors, who would not have ranked upon the surplus of the free residue if there were any, they shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim; and
- s 14(3), that, in the event of a contribution by creditors under [s 106], the petitioning creditor, '*whether or not he has proved a claim against the* estate . . . shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition'.

Held

The proviso in s 106*(a)* meant that only if all creditors relied solely on their security — ie there were no concurrent portions to their claims — would they be liable for the whole deficiency, each in proportion to their claim. (See [37] and [38].)

Section 14(3) sought to avoid a situation where a creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors 'to pick up the costs'. In terms of s 14(3) the petitioning creditor would always have to contribute; the section contained no exceptions. The petitioning creditor was placed in the same position as it would have been had it proved its claim. Section 106, while not deeming the petitioning creditor to have proved a claim, read together with ss 14(3) and 89(2), properly construed, meant that the provisions of s 106 applied to the petitioning creditor 'whether or not [it] has proved a claim'. It should be treated in the same manner as a creditor who had proved its claim. (See [38], [40] and [43].)

When there was no free residue, or it was insufficient, the first port of call would therefore be to look to the petitioning creditor to contribute, along with concurrent creditors who have proved their claims, and secured creditors who would have ranked upon the surplus of the free residue. Only if there were no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors who relied solely upon their security be called upon to pay (s 106*(a)* read with s 89(2)). It was clear that in this case the body corporate, as the petitioning creditor, was solely liable to pay the costs of sequestration as the other two creditors (FRB and Nedbank) were secured creditors who relied solely on their security. The appeal would accordingly succeed.

MEC, DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS v MAPHANGA 2021 (4) SA 131 (SCA)

Court — Abuse of process — Vexatious proceedings — Common law and Act — Requirements for order prohibiting institution of proceedings under Act — Court's inherent common-law power to stop proceedings constituting abuse of its process — Legal proceedings vexatious and abuse of process if obviously unsustainable as certainty — Stringent onus on applicant seeking such relief — Vexatious Proceedings Act 3 of 1956, s 2(1)*(b)*.

The appellant MEC's application for an order that the respondent, Mr Maphanga, not be permitted to institute proceedings against her, her department or any past or present member of the public service (except with leave of the court), was dismissed in the Pietermaritzburg High Court. The MEC argued that s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956 * or, alternatively, the common law, entitled her to the relief claimed. She also sought declaratory relief stating that all Mr Maphanga's claims arising from his employment in the public service had been finally determined and had prescribed.

It appeared that Mr Maphanga had brought two sets of legal proceedings against the applicant arising from his broad dissatisfaction with the MEC's department and its predecessors. These included review and appeal proceedings launched in the Labour Courts; a delictual action in the High Court for damages relating to the sale in execution of his property (in which he alleged that the Department was involved); and a complaint in the General Public Service Sectoral Bargaining Council concerning severance pay from the Department. The High Court ruled that the MEC had failed to establish vexatious conduct on the part of Mr Maphanga, either under the Act or the common law. It also refused to grant the declaratory order.

In an appeal to the Supreme Court of Appeal, the MEC argued that the High Court (i) had overlooked, for the purposes of s 2(1)*(b)*, that Mr Maphanga had instituted five different legal proceedings, including the disputes referred to the Bargaining Council, against her; and (ii) had misconstrued the powers and discretion conferred on courts by the common law (as codified in s 173 of the Constitution) to address abuses of court process. During the hearing of the appeal reliance on s 2(1)*(b)* was, however, abandoned, with the matter proceeding on the court's common-law jurisdiction.

Held

While it was true that the MEC could not rely on s 2(1)*(b)* (see below), this did not entitle her to directly invoke the Constitution to enforce her rights without first relying on the Act (see [10]). Section 2(1)*(b)* was enacted to end persistent and ungrounded litigation in the *courts*, so that the first question was whether the procedures employed by Mr Maphanga were instituted in courts (see [12] – [13]). While the Bargaining Council was not a court for the purposes of the Act, the Labour Courts and High Court were, so the issue became whether the proceedings there were persistent and without reasonable cause (see [18] – [19]). The Labour Court proceedings multiplied merely because Mr Maphanga failed to correctly identify the correct forum in which to vindicate his claim while the High Court proceedings were based on an entirely different cause of action, so that it could not be said that there was a persistent or repetitive institution of proceedings by Mr Maphanga (see [21]). Nor could it be said that the High Court or Labour Court proceedings were instituted without reasonable grounds (see [22] – [23]). The MEC therefore failed to establish a right to relief under s 2(1)*(b)*.

To succeed in an application under the court's inherent power to stop frivolous and vexatious proceedings it had to be shown that the respondent had habitually and persistently instituted vexatious legal proceedings without reasonable grounds. Proceedings were vexatious and an abuse of process if they were obviously unsustainable as a certainty and not merely on a preponderance of probability, and this requirement applied to all litigation that amounted to an abuse of process (see [25]). Courts had to proceed cautiously and could only in clear cases make orders prohibiting proceedings between the same parties on the same cause of action and on the same subject-matter. Orders had to be crafted to meet only the immediate requirements of the particular case and there was no power to impose a general prohibition that would curtail plaintiff's right to litigate. The MEC's contention, that there were no limits on the kinds of order that could be granted in terms of the court's common-law powers, was wrong (see [27]).

Since it could not be said that Mr Maphanga had habitually and persistently instituted legal proceedings against the MEC or that any of his claims were obviously unsustainable, no case had been made out under the common law either (see [28]). The declaratory relief was correctly refused by the High Court. It was impossible to say that Mr Maphanga's claims had all prescribed or to decide whether they had been resolved (see [30]). Appeal dismissed.

NUMSA AND OTHERS v DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD AND OTHERS 2021 (4) SA 144 (SCA)

Labour law — Strike — Pickets — Whether 'picket' under Labour Relations Act was 'gathering' under Regulation of Gatherings Act — Regulation of Gatherings Act 205 of 1993, s 11; Labour Relations Act 66 of 1995, s 69.

Appellant union, pursuant to the Labour Relations Act 66 of 1995, had organised a protected strike as part of which its members conducted a picket outside their employers' (respondents') premises (see [2] – [3]). This came to be violent and eventuated in damage being caused to respondents' property. Respondents later claimed compensation, asserting that the damage was 'riot damage' and that appellant was deemed liable therefor under s 11(3) of the Regulation of Gatherings Act 205 of 1993 (see [4]). Appellant met this claim with the contention that s 68(1)*(b)* of the Labour Relations Act 66 of 1995 governed the matter to the exclusion of s 11 (see [4] and [27]).
This issue was separated and the following question posed: was a picket under the Labour Relations Act a 'gathering' under the Gatherings Act (see [5]).
The High Court answered in the affirmative, and appellants, with leave, appealed to the Supreme Court of Appeal (see [6]).

- The Gatherings Act comprised a general regulation of gatherings while the Labour Relations Act governed a subset thereof — pickets, and in accordance with the canon of construction, a specialised provision should in such circumstances control, rather than the general one (see [31], [41], [46]).
- Where two enactments covered the same area, the later (here the Labour Relations Act) should govern the area it covered (see [32], [45]).
- The phrasing of s 69(2) ('Despite any law regulating the right of assembly, a picket . . . may be held in any place to which the public has access'), which suggested the Labour Relations Act exclusively regulated pickets (see [43]).

Appeal upheld, the order of the High Court set aside, and replaced with an order that a picket under s 69(1) of the Labour Relations Act was not a gathering to which s 11 of the Regulation of Gatherings Act applies

SOUTH AFRICAN LEGAL PRACTICE COUNCIL v ALVES AND OTHERS 2021 (4) SA 158 (SCA)

Legal practitioner — Attorney — Enrolment as advocate — While Legal Practice Council may convert enrolment without recourse to High Court, this not detracting from High Court's jurisdiction to order Council to enrol practitioner as advocate if properly qualified as such — Council may not set higher standard than that set for admission by High Court — Legal Practice Act 28 of 2014, s 32, s 115.

Section 115 of the Legal Practice Act 28 of 2014 (the LPA) provides that 'any person who, immediately before [the coming into operation of the LPA on 1 November 2018] was entitled to be admitted or enrolled as an advocate . . . [may], after that date, be admitted and enrolled as such in terms of [the LPA]'. Section 32 empowers the Legal Practice Council (LPC) to convert an enrolment from one form of practice to another without recourse to the High Court (attorney to advocate or vice versa).
The issue here was whether the first respondent, an admitted attorney, was entitled to rely on s 115 of the LPA for enrolment as advocate. The LPC refused her application for conversion under s 32 because she did not complete a trial advocacy programme as required by the LPC's rules. She was one of a group of attorneys who had obtained a conversion order against the LPC in the Cape High Court. In an appeal to the Supreme Court of Appeal the LPC argued that the LPA had placed the conversion of enrolment in its hands and that the High Court accordingly lacked jurisdiction to make the order it did.
Held
Section 115 preserved the rights of those who qualified for admission and enrolment prior to the LPA to be admitted and enrolled under the LPA, and s 115 may be relied on ad infinitum by any person who qualified prior to the commencement of the LPA (see [17] – [18]).
While s 32 of the LPA empowered the LPC to convert an enrolment from one form of practice to another without recourse to the High Court, the High Court was not precluded

from admitting and authorising the enrolment as advocate of a practitioner who previously practised as an attorney, provided that he or she was properly qualified, in which case there was no basis for the exercise of powers by the LPC under s 32: the conversion was in effect done by the High Court under the preservation provision. The LPC may not demand that an attorney seeking to convert his or her enrolment to advocate first attain a greater qualification than that set by the LPA for admission by the High Court (see [23]). Appeal dismissed.

BESTER NO AND OTHERS v CTS TRAILERS (PTY) LTD AND ANOTHER 2021 (4) SA 167 (WCC)

Insolvency — The Master — Decisions — Decision to approve request to disregard set-off — Effect — Not mere formality — Binding until set aside — Insolvency Act 24 of 1936, s 46.

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Master's decision to approve not mere formality and binding until set aside — Insolvency Act 24 of 1936, s 46.

Company — Winding-up — Liquidator — Debt recovery — Disregard of set-off occurring within six months of liquidation — Master's certificate — Effect — Not mere formality — Binding until set aside — Insolvency Act 24 of 1936, s 46.

Section 46 of the Insolvency Act 24 of 1936 provides that the Master may approve a decision by a trustee (or liquidator in the case of a company) to disregard a set-off that occurred within six months before the sequestration and which did not take place in the ordinary course of business.
In the present case before the Cape Town High Court the liquidators (the first to third applicants) claimed from the first respondent an amount representing the latter's indebtedness to the fourth applicant (the company in liquidation). A dispute arose as to the effect of a previous purported set-off of a debt of R1,9 million owed by the fourth applicant to the first respondent. The liquidators submitted that they had requested the Master to disregard the set-off because it did not take place in the ordinary course of business; and that such request had been approved, such that there had been no discharge of the first respondent's debt to the amount of R1,9 million. Counsel for the first respondent argued, however, that set-off had indeed occurred in the ordinary course of business and that the Master's decision disregarding the set-off therefore had no legal effect.
The court ruled that even if first respondent's argument that set-off had occurred, had merit, it faced a fatal obstacle: the liquidators were entitled to disregard set-off because of the effect of s 46, which applied as a consequence of the Master's decision, and this position would obtain until and unless a successful review was brought (see [27]). In arriving at this conclusion, the court rejected the first respondent's argument that there was no need to take the Master's decision on review given that it was merely a part of the liquidators' cause of action and had no legal effect: it was no mere formality and had a clear and profound legal effect in that a set-off could be invalidated (see [23] – [25]). Therefore, the first respondent would be directed to pay the applicants the R1,9 million (see [48]).
The first respondent was granted leave to appeal — see *Bester NO and Others v CTS Trailers (Pty) Ltd and Another (Leave to Appeal)* 2021 (4) SA 180 (WCC).

BESTER NO AND OTHERS v CTS TRAILERS (PTY) LTD AND ANOTHER (LEAVE TO APPEAL) 2021 (4) SA 180 (WCC)

Insolvency — The Master — Decisions — Decision to approve request to disregard set-off — Effect — Proper construction of s 46 of Insolvency Act 24 of 1936 — Supreme Court of Appeal to provide guidance — Leave to appeal to *SCA* granted.

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Construction of enabling provision — Supreme Court of Appeal to provide guidance — Insolvency Act 24 of 1936, s 46.

Company — Winding-up — Liquidator — Debt recovery — Disregard of set-off occurring within six months of liquidation — Master's certificate — Effect — Proper construction of s 46 of Insolvency Act 24 of 1936 — Supreme Court of Appeal to provide guidance — Leave to appeal to SCA granted.

Section 46 of the Insolvency Act 24 of 1936 provides that the Master may approve a decision by a trustee (liquidator in the case of a company) to disregard a set-off that occurred within six months before the sequestration and which did not take place in the ordinary course of business. The issue in the present application for leave to appeal was whether s 46 contained three distinct requirements: (i) set-off within six months before sequestration; (ii) not in the ordinary course of business; and (iii) the Master's approval (certificate).
Counsel for the first respondent argued that the court had in the main judgment misconstrued s 46 by disregarding the first two requirements and conflating all three into the decision of the Master. He contended that the authority of the Master's certificate applied only once the first two requirements had been independently established. The court, he said, should have considered whether the six-month period was met (which was common cause) and then whether the set-off had taken place in the ordinary course of business (which was hotly disputed), at which point it could have turned to the effect of the Master's certificate. (See [17] – [18], [24].) The court's own view was that it had to start the evaluation from what was required for s 46 to be invoked, namely the Master's certificate, and then follow up by asking what its effect was (see [14]).
The court, observing, however, that there was a dearth of authority on the proper interpretation of rule 46 and that counsel's interpretation was not implausible, ruled that guidance on this from the Supreme Court of Appeal was required and granted leave to appeal (see [29]).

CLEMENTZ v MILLBO PAPER CC AND OTHERS 2021 (4) SA 186 (GJ)

Delict — Exclusion of liability — Statutory barring of claim by employee against employer for occupational injury — Whether injury arose out of employment — While possible to decide question on exception without benefit of evidence at trial, court declining to do so where unable to find on pleaded averments that plaintiff would not be able to prove that accident did not arise out of employment — Role of policy considerations in preclusion of delictual claim — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35.

Labour law — Workmen's compensation — Compensation under COIDA — Exclusion of common-law damages claim against employer — Whether injury arose out of employment — Whether desirable to decide matter on exception — Court declining to do so where unable to find on pleaded averments that plaintiff would not be able to prove that accident did not arise out of employment — Role of policy considerations in preclusion of delictual claim — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35.

The court had to decide whether to uphold defendants' exceptions to plaintiff Mr Clementz' delictual claim against them on the ground that it disclosed no cause of action because it arose out of his employment and was thus replaced, under s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, with an administrative claim for compensation. The pleaded averments — which had to be accepted as correct for the purposes of deciding the exception — were that Mr Clementz was at work cleaning equipment when intoxicated senior managers caused an incident that resulted in injuries to his face, hands and abdomen. *
Compensation under the Act was payable for 'accidents', which had to arise 'in the course of' as well as 'out of' the employee's employment (s 1 sv 'employee'). These were viewed as two distinct requirements. Since it was clear that the excipients fell within the Act's extended definition of 'employer'; that Mr Clementz suffered an occupational injury; and that the accident arose in the course of his employment, the only outstanding issue that needed to be decided before his delictual claim would be excluded (and the exceptions succeed), was whether the accident also *arose out of* that

employment (see [47] – [50]). The intoxication of the managers potentially removed the incident from that ambit (see [58]).
The court, after pointing out the limits that (i) the lack of a bright-line test and (ii) the need to decide each case on a close consideration of its own facts, imposed on answering the issue by way of exception, analysed precedent on the matter. To decide whether the accident arose 'out of employment', some cases asked whether the employment brought the workman within the range or zone of the hazard that resulted in the injury, others whether the accident was an eventuation of a 'special risk' assumed by the employee (ie that it 'went with the job') (see [65] – [66], [70]). The court cited with approval recent cases that cautioned against an approach that found serious criminal conduct such as rape and robbery to be a risk inherent in employment in South Africa (see [81] – [88]).
The court, after pointing out that policy considerations clearly came into play in excluding certain incidents from the definition of an accident, observed that a finding on exception that an employee took upon himself the special risk that he would be injured by intoxicated senior management, would be sending the wrong message to employers and employees (see [89] – [90]). A trial court's need to be fully informed about the policy elements of the enquiry militated against the decision being taken without evidence (see [91]). The court could not, on the pleaded facts, find that Mr Clementz' claim was bad in law, that it was legally hopeless or that no injustice would be done in upholding the exception that the pleadings lacked the averment needed to sustain an action (see [95]). Exceptions accordingly dismissed

DIVINE INSPIRATION TRADING 205 (PTY) LTD AND ANOTHER v GORDON AND OTHERS 2021 (4) SA 206 (WCC)

Medicine — Confidential medical information — Prohibition on disclosure of information — Prohibition on disclosure, unless 'a court or any law requires that disclosure' — Whether Uniform Rule 38(1), in which provision made for subpoena duces tecum of documents in possession of witnesses, constituting 'any law' — Uniform Rules of Court, rule 38(1); National Health Act 61 of 2003, s 14(2)*(b)*.

Medicine — Confidential medical information — Prohibition on disclosure of information — Issuing of subpoena duces tecum under Uniform Rule 38 for medical records of patient in possession of medical practitioner witnesses — Whether permissible under s 11(1)*(c)* of Protection of Personal Information Act, which providing for processing of personal information if in compliance with obligation imposed by law on responsible party — Uniform Rules of Court, rule 38(1); Protection of Personal Information Act 4 of 2013, s 11(1).

Protection of personal information — Confidential medical information — Issuing of subpoena duces tecum under Uniform Rule 38 for medical records of patient in possession of medical practitioner witnesses — Whether permissible under s 11(1)*(c)* of Protection of Personal Information Act, which providing for processing of personal information if in compliance with obligation imposed by law on responsible party — Uniform Rules of Court, rule 38(1); Protection of Personal Information Act 4 of 2013, s 11(1).

The applicants were defendants in an action for damages instituted against them by the first respondent in respect of injuries the latter had sustained when visiting their premises. At a point after the merits in the action had been settled leaving only the question of quantum outstanding, the applicants requested the attorneys of the first respondent to provide them with the latter's complete medical records held by the second and third respondents, being, respectively, a general practitioner and a psychiatrist, who had treated the first respondent. The first respondent refused the request. So, acting under Uniform Rule of Court 38(1), the applicants caused subpoenas duces tecum to be served on the second and third respondents, calling for the documents in question. The medical practitioners, however, declined to comply with the subpoenas, on the basis that the legislation and rules governing their profession forbade them from doing so. The applicants hence in the present matter applied to the Western Cape High Court for an order directing the second and third respondents to provide the

requested medical records. Only the first respondent opposed the application. She based her opposition on, inter alia, the following grounds.
(a) Section 14 of the National Health Act 61 of 2003 (the NHA) prohibited the disclosure of the documents in question. That section provided, as per ss (1), that the medical information of a patient was 'confidential', and that, as per ss (2), no person may disclose such information, unless the patient had consented to such disclosure, or '*a court order or any law requires* that disclosure'. Further, various ethical rules relevant to the medical professions similarly, with a view to protecting the privacy and dignity of patients, prohibited disclosure of medical records, except in limited circumstances, including if the law demanded it. Uniform Rule of Court 38 could not be considered as 'any law' for these purposes.
(b) The disclosure of the medical records in question would also fall foul of s 11(1) of the Protection of Personal Information Act 4 of 2013 (Popi), which allowed the processing of personal information only in limited circumstances. The relevant exceptions under ss *(c)*, that '(p)ersonal information can only be processed if . . . *(c)* processing complies with an obligation imposed by law on the responsible party'; and under ss *(f)*, that processing is necessary for 'pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied', were not applicable. As to *(c)*, the applicants were not 'responsible parties' required to process the first respondent's personal information. As to *(f)*, the medical records were not relevant to the first respondent's claim for loss of earning capacity, and were not necessary to pursue the applicants' defence in the main action.
(c) The medical records, pertaining as they did to medical conditions suffered prior to the accident in question, were not relevant to the first respondent's claim for loss of earning capacity, and were not necessary to pursue the applicants' defence in the main action.
As to *(a)*, held that contrary to the assertions of the first respondent, the reference to 'any law' in s 14(2)*(b)* of the NHA *included* the Uniform Rules, and in particular rule 38 for present purposes. Section 14(2)*(b)* of the NHA demonstrated a clear show of deference to the rules, and health practitioners, whose patients refused to consent to the disclosure of their medical records, could not therefore rely on s 14, without more, to refuse to comply when served with a subpoena duces tecum under rule 38. It went without saying that the ethical rules were subject to the same principle. (See [29].)
As to *(b)*, held that in terms of s 11 of Popi, the second and third respondents were bound to process the medical records of the first respondent, given that Uniform Rule 38(1) constituted a 'law' imposing the duty to do so, on them, as 'responsible persons' for the purposes of these provisions. (See [32] – [37].) Further, there was no basis for the first respondent as 'data subject' to object to the processing of such information under s 11(3) of Popi (see [33] – [34] and [36]).
As to *(c)*, held that the issue of concern in the present matter was whether the injuries sustained by the first respondent and the consequences thereof impacted her earning capacity (see [40]). The records in question were relevant to this enquiry, in that the applicants could not be expected to bear the financial burden of pre-morbid medical conditions of the first respondent which could, and likely would, impact on the first respondent's earning capacity. (See [53].)
Held, accordingly, that the second and third respondents be ordered to file with the registrar the records sought by the applicants (see [66]).

HOLTZHAUSEN v CENPROP REAL ESTATE (PTY) LTD AND ANOTHER 2021 (4) SA 221 (WCC)

Delict — Elements — Negligence — What constitutes — Member of public while at shopping mall slipping on floor owing to presence of rainwater — Defect in make-up or composition of floors rendering them inherently unsafe when becoming wet — Owner and entity in charge of shopping mall negligent in failing to take steps to prevent incident from occurring.

Delict — Elements — Negligence — What constitutes — Shop customer slipping on spillages on floor — 'Spillage cases' — Distinction between 'spillage cases' and those where defect in make-up or composition of floors rendering them inherently unsafe when wet.

Delict — Elements — Unlawfulness or wrongfulness — Legal duty — Of owner or entity in control of shopping mall — To take reasonable steps to ensure that mall, and floors in it, reasonably safe for those who entered mall.

Delict — Liability — For damages in respect of injuries sustained by member of public while frequenting mall when slipping on floor due to presence of rainwater — Defect in make-up or composition of floors rendering them inherently unsafe when becoming wet — Liability of owner in circumstances in which appointed independent contractor to clean spillages.

Delict — Liability — Liability of employer for negligence of subcontractor — Principles discussed.

The present matter concerned the question whether a shop owner and manager could be held liable for damages in respect of the injuries sustained by a shopper when slipping on the floor, slippery due to rainwater having been brought into the shopping centre, in circumstances in which an independent cleaning contractor had been employed to clear up 'spillages'. The background to the present matter heard before the full bench of the Cape High Court follows. On a rainy winter's day the appellant visited the Goodwood Mall in Cape Town. Accompanied by her daughter and nephew, and carrying her 11-month-old baby, she entered through one of the mall's two main entrances, which were located on the complex's southwestern side, being the predominant direction from which winter rain came. She noted that the tiled floors inside were wet and slippery. After walking a short distance, she slipped and fell, injuring herself. The appellant sued for damages in the court a quo. She cited as defendants the second respondent, Naheel Investments (Pty) Ltd (Naheel), which owned the mall, and the first respondent, Cenprop Real Estate (Pty) Ltd (Cenprop), which had been appointed to manage the mall. The appellant pleaded that the respondents had acted wrongfully and had been negligent in that they knew, or ought to have known, that the 'surface area' of the floor was slippery when it became wet and posed a danger to members of the public who were required to walk across it, but despite this they had failed, (1) to prevent members of the public from accessing the area when it was wet; and/or (2) to ensure that the area did not become slippery when wet; and/or

(3) to take adequate steps to prevent the appellant from slipping and falling, when they could and should have done so. The respondents in their plea denied that they had been negligent or that they had breached any legal duty which they may have owed the appellant. In amplification they averred that Naheel had appointed Cenprop, a professional property-management company, to assist in the maintenance of the premises, including the surface area of the floors; and that Cenprop in turn had discharged its duties by appointing the independent cleaning contractors JKL Cleaning Solutions CC, which was charged with spot-cleaning daily any spillages in walkways, and Gabriel Protection Services (Pty) Ltd, which was responsible for calling cleaning staff, if none were available, to deal with spillages.

The court a quo took account of the fact, one admitted by both the appellant and respondents, that the floor tiles used in the mall had a propensity for being slippery when wet. In light of this, inclement conditions resulting in shoppers transporting quantities of water into the mall *presented a potential hazard* to shoppers. The court held, applying legal principles derived from the so-called 'spillage' cases, that the respondents, in such circumstances, had a duty to ensure that there was in place a cleaning system that would 'minimise the risk' which such 'residual' water might pose to shoppers. The court went on to exempt Naheel from liability because it had appointed a duly qualified management company in the form of Cenprop to attend to the 'daily running' and maintenance of the mall. By a similar process of reasoning, the court found that Cenprop had done all that it could reasonably be expected to do, by, inter alia, appointing a competent cleaning contractor to keep the premises clean and free of spillages and by engaging the security company to look out for 'potential harm'. The party, the court held, that bore ultimate responsibility to ensure that it was safe for the

plaintiff to venture into the mall, was in fact JKL, which was directly responsible for cleaning the floors of the mall. The court a quo accordingly found the action had to fail, given the appellant had not cited JKL. The appellant was granted leave to appeal to the full court, whose findings follow below.
The full court held that the court a quo had erred fundamentally in characterising the matter as a 'spillage' case, and applying to it the principles which were applicable in such cases, which principles demanded one assess the adequacy of the cleaning system that had been put in place by JKL. However, spillage cases could be distinguished from cases such as the present one, which involved floors of a shop whose composition or make-up was such that they were *inherently unsafe or dangerous* when wet. (See [62] and [64].) For such defects, JKL, as an independent contractor only contracted to clean the floors of the mall and keep them free of 'spillages' (see [59] – [61]), could not be held responsible (see [61]); the fault, if any, could only lie with the owner and managers of the mall (see [69]).
The full court went on to hold that Naheel as owner, and Cenprop as the manager of the mall, had a legal duty to take reasonable steps to ensure that the mall, and the floors in it, were reasonably safe for those who entered the mall (see [70]).
The full court held that the mall manager, employed by Cenprop, had at the relevant time been aware that, when it rained, there was a 'global risk' of danger in, inter alia, the corridors leading off from the entrance doors referred to above; that it would be difficult to safeguard persons using such corridors from the risk of slipping and falling; and that it would not be possible for cleaners to keep the entire floor areas in this section dry, given the foot traffic there (see [71] and [72]).
The full court, turning to the question of negligence, went on to find that in such circumstances the reasonable, hypothetical owner and manager of a mall would clearly have foreseen the risk of danger or harm occurring, ie persons slipping and falling in those areas of the mall, and would have taken steps to prevent this from happening. In this case neither of the respondents took any such steps. They failed even to try to ensure that, at the very least, the risk of a slip and fall was 'minimised', by contracting JKL to employ a sufficient cohort of cleaners to dry those sections of the floors that became wet when it rained, at the entrances on the south/southwestern side of the mall. (See [73].) In failing to take any such steps (see [74] – [76] for steps that could have been taken), both respondents were negligent (see [77]).
Finally, the court held that, if there were disclaimer notices displayed at the entrances of the mall, they did not operate to exclude Naheel from liability. Such notices would have been obscured by a signboard and rolls of material on a stall which had been set up at the entrance, and, consequently, in such circumstances, no reasonable visitor to the mall could have been expected to have seen the notice. (See [81].)
The court, in conclusion, upheld the appeal, and ruled the respondents to be jointly liable for such damages as may be proved by the appellant

JACKSON v ROAD ACCIDENT FUND 2021 (4) SA 244 (GP)

Delict — Defences — Volenti non fit injuria — What risk stuntwoman had consented to.

Ms Jackson, plaintiff in this matter, was a stuntwoman (see [1.8]). In the course of filming '*Resident Evil 6*' her job was to drive a motorbike, bareheaded, at an oncoming vehicle with a camera attached to it which extended from a boom arm (see [2.3]). For the scene the boom arm would hold the camera at a level close to the road surface and then, just before Jackson reached it, it would be raised and she would be filmed passing under it. On the day in question the boom was lifted too late and the camera struck Jackson on the head and shoulder (see [2.5]). She was severely injured (see [1.1]). She sued the Road Accident Fund (the RAF) for damages. The issues were whether the driver of the boom-arm vehicle was negligent, whether Jackson had been contributorily negligent, and whether Jackson had voluntarily assumed the risk of injury (see [1.8]).
Held, that the driver was negligent: he had failed to start from the position where he should have (see [3.9] and [4.5]). Jackson had not been negligent (see [3.10]).

As to assumption of risk, this would only be the case if Jackson knew the risk she consented to (see [4.8]). Here she had consented to the risks involved in her doing the job (driving a motorbike in a straight line at a constant speed) and the driver his (starting from where he should have, driving in a straight line at constant speed, and lifting the boom at a safe margin from her) (see [4.2] and [4.5]).
Instead, the driver had failed to start from the correct position and had — on the director's instructions — decreased the safety margin (see [3.9] and [4.5]). Jackson had no knowledge of these risks and had not assented thereto (see [4.5] and [4.8] – [4.9]).
Declared, that the RAF was 100% liable for Jackson's damages

MINISTER OF WATER AND SANITATION v AMATHOLE DISTRICT MUNICIPALITY 2021 (4) SA 252 (ECG)

Constitutional law — Duties of state — Constitutional obligation of municipality to pay statutory water use charges — Extinctive prescription — Whether amounting to 'debt' prescribing after three years — Prescription Act 68 of 1969, s 11*(d)*.

Prescription — Extinctive prescription — Constitutional obligation of municipality to pay statutory water use charges — Whether amounting to 'debt' prescribing after three years — Prescription Act 68 of 1969, s 11*(d)*.

The Minister, in an action against the defendant municipality for structural and other relief, had sought a declaratory order that the municipality's failure to pay off arrear statutory water use charges, dating back to 2003, threatened constitutionally protected rights to water (s 27(1)) and was otherwise inconsistent with the Constitution.
An exception to the Minister's particulars of claim, that it was barred by the principle of subsidiarity from relying directly on the Constitution, was dismissed by Stretch J in a separate written judgment. The present judgment concerned the Minister's opposed exception against the municipality's special plea and its plea. These raised issues of whether water use charges constituted a debt for the purposes of the Prescription Act 68 of 1969; and if not, whether the constitutional obligations of the municipality as pleaded by the Minister were, nonetheless, subject to the Prescription Act, so that those obligations which arose more than three years before the issue of summons had thus prescribed.
Held
Stretch J, in dismissing the exception, held that the claim was not based on a statutorily enforceable series of debts owed by the defendant to the plaintiff, but that the plaintiff's cause of action amounted to an enforcement of the defendant's constitutional obligations. The first issue was therefore res judicata (see [13]).
The municipality's role, powers, responsibilities and duties to give effect to the right to water as set forth in the Constitution and the subordinate water legislation promulgated in terms of the Constitution, could not amount to 'debts' for the purposes of the Prescription Act, as this would lead to an undermining of the very purpose of such a right created under the Constitution. Were a state entity such as the defendant able to claim that its obligations in this regard prescribe after a period of three years, the progressive realisation of rights could never be achieved. And, even if the debts arising from the subordinate legislation have prescribed, the court could still consider prescribed debts in fashioning just and equitable relief under s 172(1)*(b)*. It followed that exception to the special plea, and to those parts of the plea raising the question of prescription, would be upheld.

MINERAL SANDS RESOURCES (PTY) LTD AND ANOTHER v REDELL AND OTHERS AND TWO RELATED CASES 2021 (4) SA 268 (WCC)

Defamation — Defences — Strategic litigation against public participation (SLAPP) defence — May in principle be raised where suit not genuine and brought to intimidate or silence opponent.

Court — Abuse of process — Strategic litigation against public participation (SLAPP) — Suit aimed at intimidation and silencing of opponents in public- interest issue — Clear abuse of process —

Absence of anti-SLAPP legislation in South Africa should not be permitted to defeat interests of justice — Exception to SLAPP-type defence dismissed.

This was an interlocutory judgment on exceptions to two special pleas. The defendants, three journalists and three environmental attorneys, raised the special pleas to a series of defamation suits by Australian mining company Mineral Commodities Ltd and its local subsidiary (collectively, MCL).
MCL's case was that public statements by the defendants criticising the environmental impact of its mining and excavating operations on the Eastern Cape Wild Coast were defamatory. In total the damages sought from the defendants amounted to R14,25 million. In the alternative MCL sought a public apology.
In the remaining special plea the defendants argued that the suits were an abuse of process and violated the constitutional right to freedom of expression. They alleged that they were brought for the ulterior purposes of (i) discouraging, censoring, intimidating and silencing the defendants; and (ii) intimidating and silencing members of civil society, the public and the media in relation to public criticism of MCL.
The plea introduced a novel (for South Africa) 'strategic litigation against public participation' (SLAPP) defence (see [1]). The term SLAPP, coined by academics in the United States, referred to typically meritless or exaggerated lawsuits brought by powerful companies to intimidate civil- society advocates, human rights activists, journalists, academics, and the like, acting in the public interest. The aim was to litigate them into silence and drain their resources (see [39]). In the US anti-SLAPP statutes were enacted to provide a quick, effective and inexpensive mechanism to discourage such suits (see [45]).
In South Africa statutory protection against abuse of process is limited to the Vexatious Proceedings Act 3 of 1956, on which the present defendants did not rely because its protection could not be obtained by filing a plea of abuse of process (it required an application) (see [11]). For their SLAPP defences they relied instead on the court's inherent and common-law power to strike out abusive claims (see [12]).
MCL argued as follows (see [10]): The defendants were impermissibly relying only on its motives in bringing the actions. Doing so to the exclusion of the merits of its claims was legally unsound. The defendants' arguments amounted to a request that the court shut its doors on it without having regard to the merits of its claims. Since the special plea — being focused on motive — lacked the averments required to sustain the defence, it was excipiable.
Held
The signature elements of SLAPP suits were the use of the legal system, usually disguised as an ordinary civil claim, but designed to discourage others from speaking out on issues of public importance, and exploiting the inequality of finances and human resources available to large corporations, as compared to their targets. They were designed to turn the justice system into a weapon to intimidate people who were exercising their constitutional rights, to restrain public interest in advocacy and activism, and to convert matters of public interest into technical private-law disputes. The main purpose was to punish or retaliate against citizens who spoke out against the plaintiffs (see [39] – [40]). And they did not have to be successful to have their intended effect: prolonging the proceedings and shifting the debate out of the public domain to the courts could fulfil the intended objective (see [43]).
Here, MCL was claiming inexplicably exorbitant amounts for damages, which the defendants could ill afford. It had instituted the proceedings while aware that there was no realistic prospect of recovering the sums. The suit was initiated against the defendants because they spoke out and assumed a specific position in respect of the plaintiffs' mining operations (see [62]). It matched the DNA of a SLAPP suit, which were an abuse of process and inconsistent with our constitutional values. Corporations should not be allowed to weaponise our legal system against the ordinary citizens and activists in order to intimidate and silence them.
In the absence of specific legislative mechanisms to deal with SLAPP suits, courts had limited powers to cure the symptoms of SLAPP. However, the interests of justice should

not be compromised due to a lacuna or the lack of legislative framework (see [65]). Exception accordingly dismissed

MUKANDA v SOUTH AFRICAN LEGAL PRACTICE COUNCIL 2021 (4) SA 292 (GP)

Appeal — Leave to appeal — Against costs order — Whether granted — While court not precluded from considering appeal directed only at costs, it will not grant leave unless applicant able to satisfy court of existence of exceptional circumstances such as court's improper exercise of discretion in granting costs order — Superior Courts Act 10 of 2013, s 16(2)*(a)*(ii), s 17(1)*(a)* and s 17(1)*(b)*.

Though rarely granted, courts are not precluded from considering appeals directed exclusively at costs orders. But a court may do so only if the applicant can satisfy the court that an appeal court would reasonably find that exceptional circumstances, such as improper exercise of the court's discretion in granting the costs order, existed. This is apparent from applicable precedent and ss 16(2)*(a)*(ii) (exceptional circumstances), 17(1)*(a)* (reasonable prospect of success or other compelling reason) and 17(1)*(b)* (exclusion of decisions falling in ambit of s 16(2)*(a)*) of the Superior Courts Act 10 of 2013.

NEDBANK LTD v MZIZI AND RELATED CASES 2021 (4) SA 297 (GJ)

Mortgage — Foreclosure — Judicial execution — Sale in execution — Residential property — Reserve price — Determination by court — Independent verification required — Bank valuation not sufficient — Uniform Rules of Court, rule 46A.

An internal bank valuation is not, in absence of independent verification, sufficient to establish the appropriate reserve value in an application for sale in execution of residential property under Uniform Rule of Court 46A(9). To satisfy the court as to the appropriate reserve value, independent valuations should be obtained or further information as to value be used in addition to the bank's valuation. In all instances, the valuation should be proven by an affidavit of a person who has actually conducted the valuation him- or herself and who is properly qualified in this respect.

VALLARO OBO BR v ROAD ACCIDENT FUND 2021 (4) SA 302 (GJ)

Curator — Curator ad litem — Powers of — Ratification of contract entered into by ward — Ward lacking contractual capacity due to mental disability — Contract void and incapable of ratification.

Contract — Consensus — Contractual capacity — Contract entered into by person lacking contractual capacity due to mental disability — Void and incapable of ratification by curator ad litem.

A severely mentally disabled person lacks mental capacity to perform juristic acts and cannot participate in reaching contractual consensus. It follows that a contract entered into by such a person is void ab initio and incapable of ratification by a *curator ad litem* (See [8].)
In the present case the claimant in a Road Accident Fund claim, who had been left severely mentally disabled by the accident, signed a contingency fee agreement while not represented by a curator. (Counsel submitted that it was standard practice for courts to accept the ratification of such contingency fee agreements.) When a *curatrix ad litem* was subsequently appointed by the court, she ratified the agreement in terms of her stated power to 'ratify any steps, if any, which have already been taken in respect of prosecuting the claim'. The court, applying the abovementioned legal principle, declared the agreement invalid, pointing out that the practice alluded to by counsel likely referred to cases in which curators ratified contingency fee agreements entered into by unauthorised persons purporting to act on behalf of the mentally disabled person (the so-called *falsus procurator*).

VOICE OF THE UNBORN BABY NPC AND ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER 2021 (4) SA 307 (GP)

Births and deaths — Death — Burial — Distinction in burial treatment of remains of stillbirth and those of loss of pregnancy other than stillbirth — BADRA and reg 1 inconsistent with Constitution and invalid to extent of excluding issuance of stillbirth notice required for burial in case of pregnancy loss other than stillbirth — Declaration of invalidity not applying in case of pregnancy loss due to inducement — Births and Deaths Registration Act 51 of 1992, s 20(1) read with ss 18(1) – (3).

Constitutional law — Legislation — Validity — Births and Deaths Registration Act 51 of 1992, s 20(1) read with ss 18(1) – (3) — Inconsistent with Constitution and invalid to extent of excluding issuance of stillbirth notice required for burial in case of pregnancy loss other than stillbirth — Declaration of invalidity not applying in case of pregnancy loss due to inducement.

In terms of s 20(1) of the Births and Deaths Registration Act 51 of 1992 (BADRA) no burial may take place in the absence of a burial order. Section 18(1) – (3) of BADRA and reg 1 issued under it provide for the issuance of a burial order only in the event of a stillbirth certificate or declaration. 'Still birth' is defined in s 1 of BADRA as 'at least 26 weeks of intra-uterine existence but show[ing] no sign of life after complete birth'.
The effect of these provisions is that the foetal remains of a pregnancy loss due to natural causes which occurs before 26 weeks of gestation, or the foetal remains of a voluntarily induced termination under CTOPA, * were excluded from burial. These are treated as pathological or anatomical waste and disposed of through incineration with other medical waste, denying the prospective parent(s) the opportunity of burial.
The applicants sought a declaratory order that these provisions were inconsistent with the constitutional rights to dignity, privacy, religion and equality of such prospective parents.

Held

No rational reason existed why there should be a differentiation in the burial consequences of a stillbirth and those of a pregnancy loss other than a stillbirth. It was about the emotional loss and the pain felt by the expectant parent(s). The intensity of the pain felt by both types of parent who have suffered a loss must be the same; in both instances no child was born alive. (See [47].)
No reason existed why the impugned provisions should not be adapted to cater for a loss of pregnancy other than a stillbirth, for those who wish to perform the last rites for the prospective baby and conduct a burial. Allowing them to bury the foetal remains would ameliorate the pain caused by the loss and assist in the process of healing; the dignity of the parents who have suffered loss would be restored. (See [49].)

The impugned provisions were inconsistent with the Constitution, invalid to the extent of excluding the issuance of a stillbirth notice in the case of a pregnancy loss other than a still-birth. The declaration of invalidity would not, however, apply in the case of a pregnancy loss due to an inducement (given concerns raised on the effect of such relief on the rights of pregnant women who chose to terminate their pregnancies in terms of the provisions of CTOPA).

SA CRIMINAL LAW REPORTS JULY 2021

FIDELITY SECURITY SERVICES (PTY) LTD v MINISTER OF POLICE AND OTHERS 2021 (2) SACR 1 (SCA)

Arms and ammunition — Licensing — Termination of by operation of law — Whether licence could be renewed or new application for licence be made — Firearms Control Act 60 of 2000, s 28.

The appellant, a company providing security services, owned approximately 8500 firearms and had a dedicated employee responsible for maintaining the licences for all these firearms. When that employee left the service of the appellant in February 2016, the appellant discovered that the licences of some 700 firearms had not been renewed and they consequently were terminated by operation of law as contemplated by s 28 of the Firearms Control Act 60 of 2000 (the Act). On 18 April 2016 the appellant belatedly attempted to renew the licences but the designated firearms officer at the local police station refused to accept the late applications for renewal in compliance with a directive issued by the Commissioner of the South African Police Service. The appellant's attorneys wrote to the Minister of Police and the Commissioner explaining why they were applying late for the renewal of the firearm licences and offering to submit application forms for new licences. The appellant did not receive a reply to these communications and then launched an application for an order, inter alia, directing the Commissioner as Registrar of Firearms to accept late renewal applications, alternatively, new firearm licence applications in respect of those firearms the licences of which had terminated. The respondents opposed the application which was dismissed by the High Court. The appellants then filed the present appeal seeking an order declaring that it be entitled to obtain new licences for those licences that had terminated by operation of law. The respondents opposed the appeal and contended that a party whose licence had terminated by the operation of law was precluded from applying under the Act for a new licence to possess a firearm. They contended that the so-called new applications sought to be submitted by the appellant were in truth applications for 'renewal' of the expired licences and not new applications. On appeal,
Held, that there was nothing in the Act nor the regulations that even remotely suggested that someone whose licence had terminated by the operation of law was, as a result, forever precluded from applying for a new licence. An interpretation of the Act in terms of which such firearm owners were prevented from applying for a new licence and were required to buy new firearms only for the same application to be considered, was neither sensible nor business-like. (See [33] – [34].) The appeal was accordingly upheld, and the appellant was declared entitled to apply afresh for new licences to possess the firearms.

S v RAUTENBACH 2021 (2) SACR 18 (GJ)

Evidence — Admissibility — Hearsay evidence — Admissibility in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Reliability — Distinct from determining weight such evidence would ultimately be given — Evidence of deceased's depression and suicidal statements meeting requirements of reliability in case where deceased found with firearm used in his shooting.

The appellant appealed to the full court against his convictions in the High Court on a count of having murdered his father, a single count of theft, as well as counts of unlawful possession of drugs and the unlawful possession of a firearm and ammunition. His defence to the main charge of murder was that his father had killed himself by shooting himself in the mouth with a rifle. The appellant contended, inter alia, that the trial court had incorrectly rejected hearsay evidence, to the effect that the deceased was depressed and had intended to take his own life, as inadmissible hearsay. The contested evidence

was that of attending doctors that the deceased was suffering from depression and that he told one of them that he felt suicidal; a statement made to a witness approximately nine months before the deceased's death that he would never kill the appellant but was able to take his own life and was depressed about the children of his late wife threatening to take his house; and evidence by another witness who stated that the deceased had told her that he refused to see a psychiatrist and that if his car was damaged, 'I might as well blow my brains out'. The court drew a line with respect to the reception of hearsay evidence by reference to whether its probative value was such that the 'quality of the hearsay evidence and the extraneous reliability guarantors make it imperative that it be admitted'.
Held, that admissibility of a hearsay statement based on reliability was distinct from determining the weight, or relative value, it would ultimately be given.
To conflate the two would result in the exclusion of hearsay statements which had probative value that might explain conduct or put events that unfolded into perspective. In the present case there was a gunshot wound which must have been fired after the muzzle of the rifle had been placed in the deceased's mouth in an upward direction, which evidence was not inconsistent with suicide. Accordingly, evidence of the deceased suffering from severe depression in the past or that he had actually contemplated or expressed the possibility of taking his own life, whenever that might have been, was relevant, since events at the time of his death might be capable of triggering the same emotional response — and that could not be excluded because it indicated a certain premorbid disposition. (See [25] – [28].)
Held, further, that the evidence tendered met the requirements of reliability and therefore all evidence in that regard should be admissible. The question of relevance only reared its head at the weighing-of-evidence stage in order to make a factual finding as to whether the deceased had taken his own life or not. (See [30].) The court ultimately rejected the appellant's version of the events based on other evidence and dismissed the appeal.

BOBROFF AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2021 (2) SACR 53 (SCA)

Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Over what property — Extraterritorial application of order — Jurisdiction of South African court over property situated outside of country but proceeds of crime committed within South Africa, and owner of property similarly outside country — High Court's jurisdiction not determined solely by s 21 of Superior Courts Act 10 of 2013 — In terms of s 50(1)*(b)* of POCA, read with provisions of s 19 of International Co-operation in Criminal Matters Act 75 of 1996, High Court having jurisdiction over such property.
Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Whether property proceeds of crime — Overreaching by attorneys of clients whose Road Accident Fund damages claims it attended to, often acting on contingency — Investigation revealing allegations of significant financial impropriety by attorneys — National Director of Public Prosecutions contending that credit balances in accounts representing proceeds of unlawful activities in South Africa, in particular theft, fraud, money-laundering, and transgressions of South African tax legislation — Court holding that property proceeds of crime.

The appellants appealed against an order made in the High Court under s 50(1)*(b)* of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of property situated outside the territory of South Africa and belonging to persons currently resident in Australia. They challenged furthermore whether the respondent (the NDPP) had established that the property forfeited was the 'proceeds of unlawful activities' as defined in POCA. The properties were credit balances and interest accrued and held in two accounts in Israel in the names of the first appellant and the second appellant. The two appellants had practised in a partnership predominantly in the field of personal-injury litigation, often acting on contingency. The Law Society commenced a disciplinary

enquiry in 2012 into inflated fees exceeding the maximum permitted in terms of the Contingency Fees Act 66 of 1997 (the CFA). A bookkeeper employed by the firm made serious allegations of significant financial impropriety by the appellants, which prompted an investigation by the South African Police Service (the SAPS). An application which eventually led to the disbarment of the appellants was heard on 14 March 2016, the same day that SAPS issued warrants for their arrest. Before the warrants could be executed, the appellants fled to Australia and neither had returned since. The SAPS caused a red notice to be circulated through Interpol. The NDPP contended that the credit balances in those accounts represented the proceeds of unlawful activities in South Africa, in particular theft, fraud, money-laundering and transgressions of the South African tax legislation. Counsel for the appellants contended that neither of the requirements for jurisdiction had been established, in that it was not established in terms of s 21 of the Superior Courts Act 10 of 2013, or by the common law, which required that the subject-matter of the action had to be situated within the jurisdiction of the court. Counsel for the respondent contended that POCA itself provided for extraterritorial jurisdiction in forfeiture proceedings.
Held, that jurisdiction of South African courts was not determined solely by s 21 of the Superior Courts Act, but had three sources: statutory, common law and inherent jurisdiction. The historic principle of public international law, that the jurisdictional competence of a state was primarily territorial, appeared to be losing ground, and it was now being recognised that there were exceptions to the territorial rule in respect of transnational crimes, where more than one state may have an interest in holding the offender liable for the crime. (See [11] – [12].)
Held, further, that it was against this background that POCA was promulgated and the definition of 'proceeds of unlawful activities' struck at any property 'derived, received or retained, directly or indirectly, in the Republic or elsewhere'. The purpose of s 50(1) of POCA, as read with the definition of 'proceeds of unlawful activities' in the context of the known developments worldwide in relation to transnational crime, was to strip offenders of the proceeds of their crimes wherever they might retain them. The court was fortified in this conclusion by the provisions of the International Co-operation in Criminal Matters Act 75 of 1996 (the ICCM Act), which, when read with the definition of 'proceeds of unlawful activities' and s 50, led to the ineluctable conclusion that they were directed at enlisting international assistance in the enforcement of a forfeiture order made under POCA in respect of property held in another country. (See [17].)
Held, further, that, although execution could not be achieved within the jurisdiction of the court, the present was not a case where there was no reasonable possibility of execution, as s 19 of the ICCM Act had been specifically enacted to achieve the effectiveness of a forfeiture order made in respect of assets abroad. Whilst it did not guarantee the satisfaction of the forfeiture order, it did provide a mechanism for the achievement thereof which had a reasonable prospect of success. Accordingly, the effectiveness requirement for jurisdiction had been met. (See [20].)
Held, further, that the former bookkeeper had made telling allegations against both appellants amounting to evidence of fraud and theft. Whilst the precise extent of the theft may not be demonstrable on the papers, it could safely be said to exceed the amount (apart from two credits in the account of the first appellant) in the two accounts in Israel. Very substantial sums thereof were moved into accounts of the appellants in 2009 – 2010, upon which interest had accrued in the interim. The origin of the money was a matter exclusively within the knowledge of the appellants, and they had made no attempt to explain it. The conclusion was therefore that the forfeiture order which the court proposed making was not disproportionate to the proceeds received from the unlawful activity proved.

WP v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2021 (2) SACR 76 (GJ)

Prisoner — Rights — Right to use of cellphone — Demand for cellphone usage unsustainable, given security risks posed thereby.

Prisoner — Rights — Right to contact — Conjugal visits by spouse — No express right to such visits and denial thereof not in conflict with prisoners' rights to contact as envisaged by s 35 of Constitution.

The applicant was a prisoner in a high-security prison, serving a sentence of 25 years' imprisonment for high treason and related crimes. He had been given permission to marry whilst serving his sentence and, through a process of artificial insemination with the permission of the prison authorities, his wife had given birth to a child. He brought an application to have conjugal visits with his wife for three hours at a time every month, and sought an order declaring that he was entitled to the use of a cellphone whilst in prison as the public telephones were insufficient and frequently inoperative. The respondents opposed the application and contended that when the applicant was intending to get married, the social worker of the Department of Correctional Services explained the applicable policy to him, including the limitations on conjugal visits, and that both the applicant and his then fiancée accepted that, when they decided to get married, those would be the circumstances the marriage relationship would be subjected to. As a Group A offender, the applicant was entitled to a maximum of three contact visits per month and, on such visits, he could be visited by two adults and any number of children under the age of 16. Those visits took place during weekends and public holidays. Group B and C offenders were not allowed contact visits at all.
Held, that, given the applicant's opportunities for visits, telephonic contact and contact with a doctor, religious counsellor and legal representative, sufficient opportunity was provided for the right to communicate, and the demand for a cellphone could not be sustained, both in terms of any entitlement to such as a prisoner may have, and in regard to the security risk posed by cellphones in general in a penal context. The monitoring of cellphone usage by prisoners would in any event be a full-time duty, further stretching the human resources at correctional facilities. (See [63].)
Held, further, that, while both international human-rights law and South Africa's own human-rights framework and commitment provided for the right of prisoners to have contact with a spouse, partner or next of kin, there appeared to be no express self-standing right of prisoners to conjugal visits. Sexual relations between two people may well at the physical level constitute contact, but it could hardly be said to be contact in the context described in the Constitution, which was not about physical contact, but rather the process by which two or more people interacted with each other. In many instances, the absence of any physical contact did not render or undermine the right to contact that was given effect to. (See [68] and [70].)
Held, further, that to suggest that contact with a spouse or partner entailed sexual relations was to give to s 35 of the Constitution a meaning that was not consistent with the ordinary meaning of the word or the context within which it was used. It would have clearly been open to the drafters of the Constitution, if they so intended, to include under contact the right to a conjugal visit, and the fact that they elected not to do so was instructive. (See [71].) The application was dismissed.

S v WOELF AND ANOTHER 2021 (2) SACR 97 (WCC)

Trial — Record — Lost, destroyed or incomplete — Mechanical recording incomplete — Magistrate's handwritten notes available — Status of when proceedings ostensibly mechanically recorded.

In a review of a matter from the magistrates' court, it appeared that the entire proceedings had not been mechanically recorded, although all parties were of the belief that they were being so recorded. The magistrate kept a complete handwritten record. The court remarked that, although there was nothing wrong with a handwritten record — the record might be kept as a handwritten or an electronic recording — it was difficult to fathom why certain presiding officers still preferred to do so. (See [14].) The question, however, arose whether the handwritten notes of the magistrate were a record or her notes. (See [16].) It appeared that the magistrate had not labelled the handwritten proceedings as her notes and, in the circumstances, they could not constitute a record of the proceedings. By virtue of her labouring under the impression that the Digital Court Recording System was operating, oblivious to the fault with it, she had clearly chosen to record the proceedings mechanically. (See [19].) The situation would have been different had the magistrate chosen to only keep a handwritten record and not also simultaneously mechanically record. (See [20].) Without a reconstruction taking place with both the accused, the handwritten notes could not constitute a transcript of the plea proceedings. It was accordingly not a complete record, and the court was not in a position to determine the review of those proceedings. (See [21].) The record was remitted to the magistrate for reconstruction.

S v PEDRO 2021 (2) SACR 102 (WCC)

Traffic offences — Driving with excessive concentration of alcohol in blood — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Sentence — Suspension of driver's licence — Effect of introduction of s 35(3) into Act 93 — Section not limiting discretion of court to factors relating only to offence when considering order in terms of provision — Contrary interpretation incorrect in conflict with plain reading of Act, in particular, s 35(4).

The appellant was convicted in a magistrates' court of driving while the concentration of alcohol in his blood was 0,19 grams per 100 millilitres, in excess of the limit of 0,05 grams per 100 millilitres as prescribed by s 65(2)*(a)* of the National Road Traffic Act 93 of 1996 (the NRTA). The accused had a previous conviction for a contravention of s 65(1)*(a)* of the NRTA committed in 2015. He testified in mitigation that he required his licence for work and needed to travel from Belhar, Cape Town, to Dysselsdorp where he worked, and to Port Elizabeth. Quite often he had to work after hours when there was no public transport available. The magistrate sentenced him to a fine of R12 000 or 18 months' imprisonment, of which R6000 or nine months was suspended, and suspended his driver's licence for a period of five years. He appealed against that part of the sentence relating to the suspension of his licence.
Held, that the suggestion that the introduction of s 35(3) was aimed at limiting, the unfettered discretion of the court to the factors relating to the offence when considering an order in terms of s 35(3), was incorrect, and in conflict with the plain reading of the Act, in particular the provisions of s 35(4). (See [34].)
Held, further, that the court a quo overemphasised the fact that the appellant was a second offender and that he had not learnt from his previous indiscretions. This was borne out by the interaction between the appellant and the court during the s 35(3) enquiry. On a conspectus of all the evidence, a suspension of the appellant's driving licence for a period of five years under these circumstances was grossly disproportionate to what could be considered fair and reasonable in the circumstances of this case. A suspension order for a shorter period, namely 18 months, should have been made.

ALL SA LAW REPORTS JULY 2021

Bobroff and another v National Director of Public Prosecutions [2021] 3 All SA 1 (SCA)

Criminal law and procedure – Organised crime – Forfeiture order – Proceeds of unlawful activity – Court finding on balance of probabilities that funds deposited into foreign bank accounts were proceeds of unlawful activities and that such funds were liable to forfeiture.

Criminal law and procedure – Organised crime – Theft, fraud and money laundering – Forfeiture order – Jurisdiction where money located in foreign country – Court must establish whether a recognised jurisdictional ground is present, and if such ground is established, it must be decided whether an effective judgment can be given.

On 28 July 2017 the High Court granted an *ex parte* application for a preservation order, in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998, in respect of credit balances and interest accrued and held in two accounts in Israel in the name of the first appellant ("Ronald Bobroff") at the Bank Discount ("BD"), and the second appellant ("Darren Bobroff") at the Bank Mizrahi Tefahot ("BMT"), respectively. The National Director of Public Prosecutions ("NDPP") contended that the credits held in those Israeli bank accounts were proceeds of unlawful activities as defined in the Act. The Bobroffs, who were temporarily resident in Australia, opposed the granting of a forfeiture order, arguing that the NDPP had failed to establish that the credit balances constituted proceeds of unlawful activities. The High Court granted an order declaring the credit balances and interest forfeit to the State, in terms of section 50 of the Act, leading to the present appeal.

The Bobroffs were prominent attorneys practising as directors of the firm Ronald Bobroff and Partners Incorporated in Johannesburg. The firm practiced predominantly in the field of personal injury litigation, often acting on contingency. In 2010, allegations began to surface that the firm had charged clients inflated fees exceeding the maximum permitted in terms of the Contingency Fees Act 66 of 1997. Further allegations of impropriety led to a police investigation culminating in warrants of arrest being issued against the Bobroffs. Before the warrants could be executed, the Bobroffs departed for Australia. The South African Police Service ("SAPS") caused a Red Notice to be circulated through Interpol.

The South African authorities were alerted to the bank accounts referred to above when the Israeli police requested assistance in their investigation into suspected crimes of money laundering, which had allegedly been committed by the Bobroffs in Israel.

Held – The first issue was whether the High Court had jurisdiction to grant a forfeiture order in terms of the Prevention of Organised Crime Act in respect of property held in Israel by the Bobroffs, who were currently resident in Australia. The determination of jurisdiction involves a two stage inquiry: it must first be established whether the court is competent to take cognisance of the particular case (that is, whether a recognised jurisdictional ground is present). Second, if a jurisdictional ground is established, it must be decided whether an effective judgment can be given. Taking into account the forfeiture provisions in the Act and the provisions of the International Co-operation in Criminal Matters Act 75 of 1996, the court held that enlisting international assistance

in the enforcement of a forfeiture order in respect of property held in another country was catered for. Therefore, the first leg of the jurisdictional enquiry was determined in favour of the NDPP.

As the mechanism for the enforcement of a forfeiture order in respect of property in a foreign State is provided for in section 19 of the International Co-operation in Criminal Matters Act, the second leg was also fulfilled.

On the merits, the Court was satisfied, on a balance of probabilities, that the offences alleged to have been committed by the Bobroffs, were established. Extensive evidence was adduced regarding the channelling of large sums of money from the Bobroffs' firm to accounts in Israel. The source of that money was not explained. On a balance of probabilities, the funds deposited into the bank accounts were proceeds of the unlawful activities and the money had been laundered to disguise its origin and identity prior to their deposit in the Israeli bank accounts. Of the credits in the BD account, USD 256 217,84 and AUSD 284 785,32 were not shown to be proceeds of unlawful activity and were excluded from the ambit of the forfeiture order. Other than that, the appeal was dismissed.

Director of Public Prosecutions, Gauteng Division, Pretoria v RP [2021] 3 All SA 23 (SCA)

Criminal law and procedure – Application for leave to appeal against refusal to reserve questions of law – Section 319 of Criminal Procedure Act 51 of 1977 – If any question of law arises in the trial in a superior court, that court may on its own or at the request of the prosecutor or the accused, reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

Criminal law and procedure – Reservation of questions of law – Requirements for reservation of questions of law – Question must be framed accurately leaving no doubt what the legal point is; the facts upon which the point hinges must be clear; and they should be set out fully in the record together with the question of law.

The respondent was 16 years old when he was charged in the trial court on counts of murder, robbery with aggravating circumstances, kidnapping, unlawful possession of a firearm and the unlawful possession of ammunition. The trial court found him not guilty on all counts.

An application by the State for the trial court to reserve four questions of law in terms of section 319 of the Criminal Procedure Act 51 of 1977 for consideration by the present Court was refused.

The present application by the State, referred for oral argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013, was for leave to appeal, and if successful, the determination of the appeal itself.

Held – Section 319 of the Criminal Procedure Act provides that if any question of law arises on the trial in a superior court, that court may on its own or at the request of the prosecutor or the accused, reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and

shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

The section does not permit the framing of questions of fact as questions of law. The Court referred to case law which states that before a question of law may be reserved under section 319, three requisites must be met. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law. In terms of section 319, the duty is placed upon the court to state the question of law it has decided to reserve. It must also direct that the question be specially entered into the record and a copy thereof be dispatched to the registrar. Those requirements are to ensure that the court of appeal can establish with certainty what the conclusions on the legal point are. In the majority opinion, it was decided that the non-compliance with the requirements be condoned.

The Court then went on to consider the merits.

Only two of the four reserved questions were held to be worth considering. The first was whether the trial court erred in law by focusing solely on the question of prior agreement as an element of common purpose to the exclusion of other elements, and in the process purposely excluding other evidence. The second was whether the trial court's failure to assess and make a finding that the respondent's version was reasonably possibly true, and fell within the scope of the defence of necessity, amounted to an error of law. While the trial court misdirected itself by focusing solely on prior agreement, which need not be shown to prove common purpose, the court proceeded to make a factual finding that the respondent acted out of necessity. The present Court was not at liberty to interfere with such enquiry involving the judicial process of evaluating evidence.

The application for leave to appeal was dismissed.

In a separate judgment, it was agreed that the application should fail, but on grounds of non-compliance with section 319(1).

Eksteen v Road Accident Fund [2021] 3 All SA 46 (SCA)

Civil Procedure – Road Accident Fund (Transitional Provisions) Act 15 of 2012, section 2(1)(e)(ii) – A third party who has, prior to the Act coming into operation, instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter provided that no special plea in respect of prescription may be raised during that period – Institution of action in High Court without withdrawing earlier action in Magistrate's Court – Special plea of prescription should not have been upheld in court a quo as the 60-day period would only begin to run once the first action had actually been withdrawn.

Civil Procedure – Road Accident Fund (Transitional Provisions) Act 15 of 2012, section 2(1)(e)(ii) – Interpretation of – Principle of statutory interpretation that effect must be given to the object or purpose of the legislation being interpreted – Social legislation must be interpreted in a manner that would afford the widest possible protection and compensation to third parties against loss and damages arising out of

the negligent driving of motor vehicles to the extent that the language used in the provision could reasonably bear.

The Road Accident Fund (Transitional Provisions) Act 15 of 2012 came into effect as a result of a Constitutional Court decision which declared sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996 inconsistent with the Constitution and invalid. Those provisions capped to R25 000 various claims of certain categories of claimants.

The appellant instituted an action in the Free State Division of the High Court, Bloemfontein, for damages arising out of a collision that had occurred on 18 June 2003. This action was instituted pursuant to the provisions of section 2(1)(e)(ii) of the Road Accident Fund (Transitional Provisions) Act 15 of 2012. Without withdrawing that action, and on 19 October 2016, he instituted another action against the RAF, in the Free State Division of the High Court for damages he suffered as a result of a motor vehicle collision.

The fund defended the action and delivered two special pleas and a main plea disputing liability. The first special plea was one of *lis alibi pendens*. It was pleaded that the appellant had instituted an action in the Bloemfontein Magistrate's Court based on the same cause of action which was still pending. The second special plea was that the appellant's claim had prescribed, as the action was instituted five years after the collision, contrary to the provisions of the Road Accident Fund Act.

The Court expressed a *prima facie* view that a plaintiff who elects to prosecute and institute an action in the High Court, to enjoy the protection of the section against prescription, must first withdraw the Magistrate's Court action and institute an action in the High Court within 60 days. However, the court did not decide the dispute, as its *prima facie* view differed with an earlier decision of that division on the same issue and with other divisions. It referred the matter to the Full Bench for a final decision. The Full Bench found in favour of the RAF and upheld the special pleas. That led to the present appeal.

Held – In the majority judgment that the special plea of *lis alibi pendens* was correctly upheld, and the appeal in that regard was dismissed.

The remaining question turned on the interpretation of section 2(1)(e)(ii) of the Road Accident Fund (Transitional Provisions) Act. It is a well-established principle of statutory interpretation that effect must be given to the object or purpose of the legislation being interpreted. As the legislation under consideration here was what has been described as "social legislation", the court had to interpret such legislation in a manner that would afford the widest possible protection and compensation to third parties against loss and damages arising out of the negligent driving of motor vehicles to the extent that the language used in the provision could reasonably bear.

Section (2)(1)(e)(ii) states that "A third party who has prior to this Act coming into operation- (ii) instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period".

Since the Road Accident Fund (Transitional Provisions) Act took effect, a third party, who wishes to claim damages for non-pecuniary loss in excess of R25 000 – which is the amount to which the claim is as a general rule limited - may do so provided two prerequisites have been met. First, the third party must submit a serious injury assessment report as contemplated in regulation 3(1)(a) of the Road Accident Fund Regulations. Second, the fund must determine in accordance with regulation 3(3)(c) and (d) that the third party suffered serious injury. Once those two prerequisites have been met, the provisions of section 2(1)(e)(ii) would be triggered. Accordingly, a third party who had, prior to the Act coming into effect, already instituted an action in a Magistrate's Court, had an election, to withdraw such action and, within 60 days of such withdrawal, institute an action in a division of the High Court with appropriate jurisdiction over the matter.

As the appellant instituted his High Court action without having first withdrawn the action pending in the Magistrate's Court, the question was whether the High Court action had, in light thereof, truly become prescribed. The 60-day period would begin to run once the first action had actually been withdrawn. As the facts in an agreed statement by the parties were inadequately stated, the Full Bench should have declined to decide the special plea of prescription. The appeal was thus upheld in part.

Fidelity Security Services (Pty) Limited v Minister of Police and others
[2021] 3 All SA 67 (SCA)

Safety and Security – Firearms – Firearm licences – Expiry of licences – Application to renew – Section 24 of the Firearms Control Act 60 of 2000 requires the holder of a licence who wishes to renew the licence, to at least 90 days before the date of expiry of the licence, apply to the Registrar for its renewal – Whether licence holder was entitled to submit a new application for a licence to possess a firearm where licence that it previously held terminated by the operation of law – Interpretation of the Act in terms of which firearm owners whose licences have expired are prevented from applying for a new licence, and are required to buy new firearms only for the same application to be considered held to be not sensible.

The Firearms Control Act 60 of 2000 regulates gun ownership in South Africa.

The appellant ("Fidelity") was a security service provider, registered with the Private Security Industry Regulatory Authority. Given the nature of its core business, possession of firearms was indispensable in order for it to operate effectively. Thus, it was licenced to possess some 8500 firearms. Section 7 of the Act provides that if a juristic person like Fidelity wished to apply for a licence, permit or authorisation in terms of the Act, it must nominate a natural person to apply on its behalf. Sections 24 and 28, which dealt with renewal of firearm licences and their termination, were central to the present appeal.

In 2016, Fidelity discovered that the licences of some 700 firearms had not been renewed and consequently terminated by the operation of law as contemplated in section 28 of the Act. Fidelity belatedly attempted to renew the licences that had already terminated, but the police refused to accept the late applications for renewal.

Fidelity instituted legal proceedings against the respondents. It sought a declaration that sections 24 and 28 were constitutionally invalid; that the police be compelled to accept late renewal applications; an order directing the police to issue it with temporary

authorisations under section 21 of the Act; an interdict restraining the police from seizing the firearms whose licences had terminated pending the finalisation of its renewal application; and in the alternative, a *mandamus* directing the police to accept new applications for firearm licences. The High Court dismissed the application and the present appeal was noted.

Held – Section 24 requires the holder of a licence who wishes to renew the licence, to at least 90 days before the date of expiry of the licence, apply to the Registrar for its renewal. In terms of section 28, a licence terminates upon the expiry of the relevant period contemplated in section 27, unless renewed in terms of section 24.

On appeal, the only issue was whether Fidelity was entitled to submit a new application for a licence to possess a firearm in light of the fact that the licence that it previously held terminated by the operation of the law. The Court rejected the respondents' submission that to grant Fidelity the relief sought would be to allow it to do that which was unlawful. Anyone wishing to own a firearm must apply for and obtain a licence in order to lawfully possess such firearm. That was precisely what Fidelity attempted to do when the respondents refused to accept its applications. Thus, first-time applicants and repeat applicants alike are eligible to apply for a firearm licence. An interpretation of the Act in terms of which firearm owners whose licences have expired are prevented from applying for a new licence, and are required to buy new firearms only for the same application to be considered – for a new licence was neither sensible or business-like.

Remaining to be considered was an application for condonation of the late filing of the record and, if granted, the reinstatement of the appeal. Having regard to the degree of non-compliance, the explanation proffered therefor and the prospects of success in the envisaged appeal, the Court held that condonation ought to be granted and the appeal reinstated. The appeal was upheld and the court confirmed that Fidelity was entitled to apply afresh for new licences to possess the firearms in question.

Impact Financial Consultants CC and another v Bam NO and others
[2021] 3 All SA 83 (SCA)

Financial Planning and Investments – Advice by financial services provider – Complaints to Ombud for Financial Services – Alleged negligence – Jurisdiction of Ombud – Failure by Ombud to address defence that the financial product in respect of which financial services provider had furnished advice was not a financial product as defined by the Financial Advisory and Intermediary Services Act 37 of 2002, rendering the advice furnished not regulated by the Act and depriving the Ombud of jurisdiction to determine complaints– Failure to determine nature of financial product which was the subject of the advice furnished constituting a fundamental error on the part of the Ombud in that her jurisdiction had not been established.

The first applicant ("Impact Consultants") was a registered financial services provider in which the second applicant ("Mr Calitz") held a 90% membership interest. Mr Calitz was a duly registered financial services provider who rendered such services as a member of Impact Consultants.

The first respondent was the Ombud for Financial Services.

The third to twentieth respondents (the “respondents”) each lodged a complaint with the Ombud in relation to advice furnished to them by Mr Calitz to them regarding investments which each had made. Mr Calitz had furnished the respondents with advice regarding an investment in a trust (the “RVAF Trust”) described as a hedge fund and managed by Abante Capital. Each of the respondents invested funds as advised. The collapse and resulting liquidation of Abante Capital and the RVAF Trust saw the respondents suffering capital losses on their investments. Complaints were lodged against Mr Calitz and Impact Consultants with the Ombud, alleging that Mr Calitz had negligently failed to comply with his obligations as a financial services provider, as set out in the General Code of Conduct for Authorised Financial Service Providers and Representatives (the “Code”).

Mr Calitz denied that he was negligent in any respect or that any negligence that was established, had caused the losses suffered by the respondents. He raised a further defence that the financial product in respect of which he had furnished advice was not a financial product as defined by the Financial Advisory and Intermediary Services Act 37 of 2002 (the “FAIS Act”), and accordingly that the advice he had furnished was not regulated by the Act. The Ombud, so he contended, accordingly lacked jurisdiction to determine the complaints against him and Impact Consultants.

The Ombud found that Mr Calitz, acting on behalf of Impact Consultants, had negligently breached the statutory duties owed to his clients, leading to the losses complained of. Impact Consultants and Mr Calitz were held jointly and severally liable for the losses incurred. Applications for leave to appeal against each of the determinations were made to the Ombud but were refused. An application for leave to appeal was directed to the second respondent as chairperson of the appeal board of the Financial Services Board, but was unsuccessful. That led to a review application in the High Court, in which the applicants sought an order reviewing and setting aside the second respondent’s decision. The present appeal was against the dismissal of the review application.

Held – The Ombud did not deal with the challenge to her jurisdiction, namely that the financial product in which the investment was promoted, was not a financial product as defined by the FAIS Act. Although the product was described as a hedge fund, the true nature of the investment product and whether it was an investment product at all, remained unknown. It was thus not possible to ascertain whether the investment that was the subject of the compliant was a financial product as defined in the Act. The failure to determine the nature of the financial product which was the subject of the advice furnished by Mr Calitz, constituted a fundamental error on the part of the Ombud in that her jurisdiction had not been established.

Leave to appeal was granted and the appeal was upheld. The second respondent’s refusal of leave to appeal and the Ombud’s determinations were set aside. The respondents’ complaints were remitted to the first respondent for determination in accordance with the provisions of the FAIS Act.

Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and another v Wentzel [2021] 3 All SA 98 (SCA)

Consumer – Purchase of vehicle – Defects in vehicle – Claim for refund of purchase price – Entitlement to refund in terms of section 56(3) of the Consumer Protection

Act 68 of 2008 – To obtain refund remedy, consumer having to show that seller repaired defective parts; and that within three months after the repairs, the defects had not been remedied or that a further failure was discovered – Where requirements of section 56(3) not met, consumer not entitled to refund.

In the High Court, the respondent ("Ms Wentzel") claimed to be entitled to cancel a credit agreement between herself and the first appellant ("Renault") from whom she had purchased a vehicle. She tendered the return of the vehicle against the refund of the purchase price on the ground that Renault had, in breach of sections 49(1)(b), 55(2)(b) and (c), 56(2)(a) and (b) and 56(3) of the Consumer Protection Act 68 of 2008 (the "Act"), sold her a brand new vehicle that was woefully defective.

Ms Wentzel had obtained finance for the vehicle from a finance company ("MFC"), which settled her indebtedness to Renault. MFC was then the owner of the vehicle and was entitled to retain ownership of the vehicle until all obligations and repayments to MFC were fulfilled by Ms Wentzel. In terms of an instalment sale agreement, Ms Wentzel was obliged to collect the vehicle from Renault and to confirm acknowledgement of delivery on MFC's behalf. She was also required to inspect the vehicle for any defects before collecting it, and, if any defect was found, to decline delivery of the vehicle and inform MFC immediately of that fact.

According to Ms Wentzel, defects in the vehicle were in evidence from the outset. As the number of faults began multiplying, she contacted the Motor Vehicle Ombudsman of South Africa ("MIOSA") for assistance.

MIOSA's delay in investigating the complaints against Renault, led to Ms Wentzel approaching the court *a quo*, which dismissed Renault's defences and found in Ms Wentzel's favour. The present appeal ensued.

Renault submitted that Ms Wentzel's application to the High Court was premature, because she had not exhausted her remedies in terms of section 69(d) of the Act, more particularly because MIOSA, to which she had referred her complaints on 21 February 2018, had not yet rendered a decision, when she commenced the present proceedings.

Held – The issue was whether Ms Wentzel had made out a case in terms of sections 56(2) and (3) of the Act for the refund of the purchase consideration paid to Renault in respect of the vehicle. The related issues were whether the vehicle had defects; whether such defects were resolved by Renault; and whether there were any further complaints received by Renault from Ms Wentzel, subsequent to the repairs undertaken by Renault.

The court did not need to address Renault's submission regarding section 69(d) as the point was abandoned in argument. However, the court did state that section 69(d), against the backdrop of section 34 of the Constitution and the guarantee of the right of access to courts, should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress.

Turning to the substance of the dispute, the court noted that the parties offered mutually destructive factual versions. On Ms Wentzel's version, the defects were never resolved by Renault. Renault's version was that all of the complaints raised by Ms

Wentzel on the specified dates were resolved and no further complaints regarding the vehicle were thereafter brought to its attention. There was no basis upon which that evidence could be rejected on the papers, and significantly, disputes of fact cannot be resolved on the papers in motion proceedings.

In any event, Ms Wentzel was not entitled to claim a refund of the purchase price before all events stipulated in section 56(3) had taken place. To obtain the refund remedy she had to show, first, that Renault repaired the defective parts; secondly, that within three months after the repairs, the defects had not been remedied or that a further failure was discovered. She failed to show that the requirements of section 56(3) were satisfied and that she was entitled to a refund of the purchase price.

The appeal was upheld.

MT "Pretty Scene": Galsworthy Limited v Pretty Scene Shipping SA and another [2021] 3 All SA 115 (SCA)

Shipping – Arbitration awards – Enforcement of awards – Arrest of ship – Application to set aside arrest on ground that the summons following the warrant of arrest was defective – There is no link between the arrest and the summons, and a deficiency in the latter does not affect the validity of the former – A summons that is defective for non-compliance with Admiralty Rule 2(1)(b) in that the claim is not sufficiently specified is not a nullity.

Shipping – Arrest of ship to enforce arbitration awards – Associated vessel – Interpretation of section 3(6) and (8) of Admiralty Jurisdiction Regulation Act 105 of 1983 – In terms of section 3(7)(c), charterer of ship deemed to be owner of that vessel when maritime claims arose, and where charterer was also the sole shareholder of the company owning the arrested ship, the two vessels were associated ships.

In two arbitrations arising from a repudiated charter party agreement, the appellant ("Galsworthy") was awarded two amounts for the charterer's breach of contract. To enforce the awards, Galsworthy instituted an action *in rem* against the second respondent ("MT Pretty Scene") as an associated ship in relation to the chartered ship ("Jin Kang"). The first respondent ("PSS") as owner of the Pretty Scene, successfully applied to set the arrest aside. The present Court granted leave to appeal to the Full Court. In anticipation of an unfavourable judgment, Galsworthy had already effected a second arrest of the Pretty Scene. An application by PSS to set aside that arrest, and a counter-application for security for a claim for wrongful arrest under section 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the "Act"), were dismissed. The present Court again granted leave to appeal to the Full Court.

The two appeals were heard in a consolidated hearing and the appeal against the setting aside of the arrest was dismissed while PSS' appeal against the refusal to set aside the second arrest was upheld. Thus, both arrests were set aside and a counter-application by PSS for security for costs was granted. The matter came before the present Court on appeal.

Held – In PPS' application to set aside the first arrest, it raised an objection that the summons following the warrant of arrest was defective. For the procedural objection to have effect, the defect in the summons had to invalidate both the order that the warrant of arrest be issued and the warrant itself. The court pointed out that there is

no link between the arrest and the summons, and a deficiency in the latter does not affect the validity of the former. A summons that is defective for non-compliance with Admiralty Rule 2(1)(b), which was the complaint here, is nonetheless a summons. It is not a nullity, merely because the claim is insufficiently specified. In any event, Galsworthy was found to have provided sufficient detail in support of its assertion that the MT Pretty Scene was an associated ship, to comply with rule 2(1)(b) which requires only a concise statement of the nature of the claim. Practice Directive 27 issued by the KwaZulu-Natal Division of the High Court was held to misconstrue Admiralty Rule 2(1)(b) and impose requirements on the contents of a summons that are inconsistent with the general structure of the Admiralty Rules, unnecessary and unduly burdensome. Thus, the summons was not defective and the warrant of arrest under which the MT Pretty Scene was arrested was valid.

PSS also contended that the Pretty Scene was not in fact an associated ship in relation to the Jin Kang. The arguments raised in that regard required an interpretation of section 3(6) and (8) of the Act. It was held that in terms of section 3(7)(c), the charterer of the Jin Kang was deemed to be the owner of that vessel when the maritime claims arose. As the charterer was also the sole shareholder of the company owning the MT Pretty Scene, the two vessels were associated ships.

The appeal was upheld with costs.

Zuma v Democratic Alliance and a related matter [2021] 3 All SA 149 (SCA)

This is the appeal from the Gauteng Division, Pretoria, against the finding of Meyer J (Ledwaba DJP and Kubushi J concurring) (sitting as a court of first instance) in the case of Democratic Alliance v President of the Republic of South Africa and others and a related matter reported at [2019] 1 All SA 681 (GP) – Ed.

Constitutional and Administrative Law – Payment of legal fees of former President – Review of decision taken by State Attorney in the exercise of her discretion under section 3(3) of the State Attorney Act 56 of 1957 to fund former President's legal costs – Alleged delay in seeking review – No delay where funding was ongoing and relief claimed was directed not only at the setting aside of a single past act, but also the ongoing conduct.

Constitutional and Administrative Law – Payment of legal fees of former President – State Attorney's services – Whether State Attorney was authorised by either section 3(1) or 3(3) of the Act to appoint and pay private attorneys to represent former President – Section 3(1) and 3(3) provides only for the provision of services by the State Attorney, and do not authorise the State Attorney to outsource its functions to a private attorney at State expense.

In June 2005, the National Director of Public Prosecutions ("NDPP") indicted Mr Zuma on two counts of corruption (the "2005 indictment"). In August 2006, a firm of attorneys ("Hulley Incorporated") submitted a request on behalf of Mr Zuma to the State Attorney (the "2006 request") for legal assistance at the State's expense in the criminal case. The criminal trial was subsequently struck from the roll.

On 27 December 2007, the then acting NDPP announced that Mr Zuma would be indicted on two counts of corruption, twelve of fraud and one each of racketeering, money laundering and tax evasion (the "2007 indictment"). Mr Zuma brought an

application to review the decision to indict him, which application succeeded. However, that decision was later overturned. On 26 September 2008, Hulley Incorporated submitted yet a further request on behalf of Mr Zuma to the State Attorney (the "2008 request") for legal assistance at State expense. A decision was then taken in 2009, to discontinue Mr Zuma's prosecution (the discontinuation decision). The Democratic Alliance (the "DA"), the official opposition in the National Parliament, brought proceedings to review and set aside the discontinuation decision. Mr Zuma and the NDPP, having made common cause in the proceedings, initiated a range of procedural challenges. In the meanwhile, on 9 May 2009, Mr Zuma was inaugurated as President of the country. On 29 April 2016, the High Court set aside the discontinuation decision, and in October 2017, the present Court dismissed an appeal by Mr Zuma and the NDPP against the order of the High Court. The 2007 indictment was thus revived, and in March 2018, the NDPP announced that the charges against Mr Zuma would be reinstated.

Since the 2017 decision, the DA had sought to obtain clarity from the Presidency as to the extent of the payments made by the State toward Mr Zuma's legal costs, as also, the basis for those payments. The requests were initially ignored by the Presidency. In March 2018, the Economic Freedom Fighters political party (the "EFF") was informed that the State had spent R15,3 million on Mr Zuma's legal costs, pursuant to a decision taken by the State Attorney in the exercise of her discretion under section 3(3) of the State Attorney Act 56 of 1957 (the "Act").

Both the DA and the EFF successfully applied to the High Court for the review and setting aside of the decision to pay Mr Zuma's legal fees and each of the related payments; and for an order directing Mr Zuma to pay back the money.

On appeal, Mr Zuma contended that the court was wrong to hold that the DA and EFF had brought their applications within a reasonable time; that section 3 of the Act did not authorise the State Attorney to fund private legal costs at all, including for Mr Zuma; and that it was just and equitable to require Mr Zuma to pay back the money.

Held – DA and EFF had no idea what the scale and extent of the funding of Mr Zuma's legal costs were until after March 2018. Moreover, such funding was ongoing. As the relief claimed was directed not only at the setting aside of a single past act, but also the ongoing conduct, it could not be said that there was any delay.

Mr Zuma argued that the State Attorney was authorised by either section 3(1) or 3(3) of the Act to appoint and pay private attorneys to represent him. However, neither section authorises the State to cover private legal costs. They provide only for the provision of services by the State Attorney, and do not authorise the State Attorney to outsource its functions to a private attorney, at State expense as occurred in Mr Zuma's case.

Finally, it was held that no grounds existed for interfering with the High Court's ruling that it was just and equitable to require Mr Zuma to
Appeal was dismissed.

Department of Environmental Affairs, Forestry and Fisheries v Xulu and Partners Incorporated and others; *In re*: Department of Agriculture, Forestry and Fisheries and others [2021] 3 All SA 166 (WCC)

Civil Procedure – Court orders – Non-compliance – Contempt of court application – Standard of proof must be applied in accordance with the consequences of the remedies sought.

Civil Procedure – Court orders – Non-compliance – Contempt of court application – The requirements for contempt are the existence of an order; service of the order on the contemnor or bringing it to his notice; non-compliance with the order; and that the non-compliance is wilful or mala fide.

On 6 June 2019, the first respondent ("BXI"), a firm of attorneys, obtained an order by consent for payment of its invoices for legal services rendered in favour of the Department of Agriculture, Forestry and Fisheries ("DAFF"). BXI subsequently levied execution when the DAFF failed to pay in terms of a settlement agreement which was made an order of court, and writs of execution were issued. In August 2019, the DAFF applied to have the writs of execution and attachment of money suspended pending the determination of relief in the second part of the application. The service level agreement purportedly concluded between the DAFF and BXI, the settlement agreement, the order of 6 June 2019 and the writs were set aside, declared invalid and reviewed. Most of the DAFF's functions were transferred to the second applicant (the "DEA"), and the latter was joined to the proceedings without objection.

In the present application, the DEA sought to hold BXI and the fifth respondent ("Mr Xulu"), its principal member and director, in contempt of six court orders granted by the Western Cape High Court.

Held – Civil contempt, which lay at the heart of this matter, is the crime of disrespect to the court and the rule of law. Section 165(5) of the Constitution makes orders of court binding on all persons and Organs of State to whom it applies.

The standard of proof must be applied in accordance with the consequences of the remedies sought. If the relief applied for is a declaratory order, *mandamus*, structural interdict or similar civil remedy where the contemnor's right to freedom and security is not deprived, then the civil standard of proof on a balance of probabilities applies. Where the civil contempt remedies of committal to prison or the imposition of a fine are sought, which impact on the contemnor's freedom and security of person, then the criminal standard of proof beyond reasonable doubt applies.

The requirements for contempt are the existence of an order; service of the order on the contemnor or bringing it to his notice; non-compliance with the order; and that the non-compliance is wilful or *mala fide*.

It was undisputed that the six orders had been granted and brought to the attention of BXI and Mr Xulu. Considering each order, the court found that either BXI or Mr Xulu was in contempt of each one, and that such contempt was wilful and *mala fide*. They were ordered to pay a fine of R30 000 jointly and severally, the one paying the other to be absolved. Failing compliance, Mr Xulu was to be sentenced to 30 days' imprisonment.

Nelson and another v Samuels and others [2021] 3 All SA 190 (WCC)

Property – Unlawful occupation – Eviction application – Application to stay eviction proceedings pending final determination of a trial action grounded in Sharia law – A litigating party may not rely on Islamic law principles in relation to property rights and succession, where there has been no constitutional challenge to the operative statutes or the common law in that field of the law.

Property – Unlawful occupation – Eviction application – Occupiers' advancing no valid justification for depriving owners of property of quid pro quo for their occupation – Defence found to be groundless and in bad faith and eviction was ordered.

The first to ninth respondents, referred to collectively as the "respondents", were relatives of the original owner of a certain property. In July 1983 the property was donated to the late Jalodien Williams ("Mr Williams") and registered in the latter's name on 15 February 1984. During his lifetime, Mr Williams granted some or all the respondents the right to occupy the property on condition that they bore the municipal services, water and electricity costs associated with the property. When he died, his wife was the sole heir in his estate and the executor of his deceased estate gave the respondents notice to vacate the property. The respondents did not comply. In the interim, in November 2016, the property was sold out of the deceased estate to the applicants (the "Nelsons").

Since they acquired the property (with the knowledge of the respondents), the Nelsons permitted the respondents to occupy the property at their expense. They now wished to move into the property and commenced eviction proceedings to obtain vacant occupation.

The respondents lodged their own application seeking, firstly, to stay the eviction proceedings pending the final determination of a trial action grounded in Sharia law ("Islamic law"). The essence of their claim was that, notwithstanding the registration of ownership of the property in the name of Mr Williams and despite the express terms of his will, the property ought to have accrued to the respondents under one or more principles of Islamic law in order that they could live permanently (and indefinitely) thereon.

Held – It is not open to a litigating party to rely on Islamic law principles in relation to property rights and succession, where there has been no constitutional challenge to the operative statutes or the common law in this field of the law. The court therefore exercised its discretion to refuse to grant the stay of proceedings.

In the eviction application, the court pointed out that the Nelsons had paid for their new home and had been precluded from occupying same (an act tantamount to expropriation by the respondents). The respondents attempted to advance some form of entitlement to the property under Islamic law and demand cancellation of the sale to the Nelsons by the executor without any consideration or *quid pro quo* being offered to the owners for the current value of the property. Their defence to the eviction application (and the lodging of the accompanying stay application) was groundless and in bad faith. In the circumstances, it was held that it would be just and equitable to evict the occupiers.

Royal Square Investments 330 (Pty) Ltd v Premier, Western Cape and another [2021] 3 All SA 205 (WCC)

Local Government – Proclamation of land as public road – Provisions of Regulation 38 of the Land Use Planning Ordinance 15 of 1985 (W. Cape) regarding purchase of land required by any authority – Regulation 38 to be interpreted in a manner that would not bring it in conflict with other higher order legislation such as the Roads Ordinance 19 of 1976 which provided that the road authority was not obliged to take the land over which a public road has been declared, but that it could do so at a time of its choosing if and when a road needed to be constructed there – The mere designation of land as a declared public road does not amount to a requirement that the land be taken for such purpose.

In April 1973, a stretch of land 22kms in length, traversing the then existing Cape and Stellenbosch Divisions and the Bellville, Kuils River and Brackenfell municipalities, was declared as a main road in terms of section 120 of the Divisional Councils Ordinance 15 of 1952. In terms of section 1A of the Trunk Roads Ordinance 28 of 1960, the said main road was declared a trunk road. The net effect was that the road (the "R300") qualified as a "*public road*" within the meaning of that term in the Divisional Councils Ordinance.

The land (the "R300 erven'") that featured in the current litigation was situated on a part of the declared route of the R300 on which nothing had as yet been constructed.

The appellant ("Royal Square") sought to be declared the owner of the two R300 erven. It also sought an order directing the first respondent (the "Premier") or the second respondent (the "MEC") to purchase from it, the two erven for a purchase price of R96 570 500. The claim for the declaratory order sought in respect of the ownership of the R300 erven was made because, according to Royal Square, the respondents contended that the R300 land vested in them as the road authority by virtue of Proclamation 137 of 1973 and in terms of section 145 of the Divisional Councils Ordinance of 1952.

The respondents raised a number of exceptions to the particulars of claim. The court below dismissed two of the exceptions and upheld another two. That led to an appeal by Royal Square against the upholding of the two exceptions and a cross-appeal by the respondents for the dismissal of the other exceptions.

Held – There was no merit in the first and second grounds of objection raised by the respondents, and their cross-appeal therefore fell to be dismissed.

Turning then to the appeal against the upholding by the court *a quo* of the respondents' exceptions, the court pointed out that the third to fifth grounds of objection related to the applicability of regulation 38 of the Land Use Planning Ordinance 15 of 1985 (W. Cape) ("LUPO") regulations. Regulation 38 provided for the purchase of land required by any authority. It was held that any construction of regulation 38 of the LUPO regulations that would in any way contradict the scheme or effect of the Roads Ordinance would be incorrect. The scheme of the Roads Ordinance was that the road authority was not obliged to take the land over which a public road has been declared, but that it could do so at a time of its choosing if and when a road needed to be constructed there. The court demonstrated how the regulation was capable of being interpreted in a manner that would not bring it in conflict with other higher order legislation. Such an interpretation was to be preferred

in principle to the one contended for by Royal Square, which would have the opposite effect.

The court also pointed out that the mere designation of land as a declared public road does not amount to a requirement that the land be taken for such purpose. It indicates only that the land may possibly, not necessarily, be needed, dependent on a decision yet to be made. Royal Square did not make out a case that either it or the local authority could consider the land to be "required" by the respondents within the meaning of regulation 38. The Court also held that the declaration of the R300 did not result in a taking of the affected land in the sense of an expropriation within the meaning of section 25 of the Constitution.

Royal Square's appeal was thus dismissed.

South African Fruit and Vegetable Canners Association and another v Impumelelo Agri Business Solutions (Pty) Ltd and others (Perishable Products Export Control Board as *amicus curiae*) [2021] 3 All SA 242 (GP)

Agriculture and Animals – Agricultural products – Control over sale, export and import – Inspection fees of assignee appointed in terms of Agricultural Product Standards Act 19 of 1990 – Determination of fees – Failure by assignee to provide owner of agricultural products with sufficient information to enable them to submit meaningful comments rendering determination of fees reviewable.

Constitutional and Administrative Law – Judicial review – Duty on applicant, in terms of section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000, to first exhaust internal remedies – The internal remedy must in fact, be available, effective and adequate for duty to arise.

The applicants took issue with the inspection fees determined by the first respondent in terms of the Agricultural Product Standards Act 19 of 1990 which provides for control over the sale, export and import of certain agricultural and other related products, and for matters connected therewith. It was contended by the applicants that the determination of the inspection fees was done in a manner that offended the prescript of the Promotion of Administrative Justice Act 3 of 2000, and stood to be reviewed and set aside. The applicants further argued that it should not be permissible for the first respondent to be able to unilaterally determine, publish and impose the inspection fees payable to it in terms of the Agricultural Product Standards Act.

On 16 January 2018, the applicants obtained an interdict restraining the respondents from imposing the final inspection fees until finalisation of the present review proceedings – or the date on which the first respondent demonstrated that it had adhered to the principle of just administrative action, and that it had sufficiently consulted with the relevant stakeholders. The first respondent's publishing of the inspection fees after the interdict was issued led to the applicants' contention that such publication was in violation of the court order of 16 January 2018 and contrary to the provisions of just administrative action. In Part A of their application, the applicants sought an interim interdict to restrain and prevent the first respondent from, *inter alia*, levying any inspection fees pending the determination of Part B of the review application.

Held – The respondents' preliminary point that the applicants had failed to exhaust internal remedies prior to proceeding with the review application was based on section

7(2)(a) of the Promotion of Administrative Justice Act which states that no court shall review an administrative action unless internal remedies provided for in any other law had first been exhausted. In order for the respondents to rely on section 7(2)(a), the appeal in section 10(1) of the Agricultural Product Standards Act must in fact, be available, effective and adequate in order to count as an existing internal remedy. The appeal procedure prescribed at the time of launching the present proceedings did not present an effective remedy to afford redress to the applicants, and accordingly did not constitute an internal remedy that the applicants had to exhaust. The point was thus dismissed.

In terms of the Agricultural Product Standards Act, the Minister can designate any person, undertaking, body, institution, association or board having particular knowledge of the product concerned as an assignee in terms of that product. The first respondent was appointed as an assignee with effect from 9 December 2016 in respect of regulated agricultural products destined for sale in the local market. The Act does not make inspections mandatory, and must in fact be requested. The assignee has no recourse against the State for any of the services it renders or expenses it incurs in terms of the Act, and its fees are the responsibility of the owner of the regulated product. The applicants in this case challenged the manner in which the first respondent's fees were determined.

The first respondent had published two notices calling for comments on the proposed inspection fees. The court upheld the applicants' contentions that they had not received sufficient information to enable them to submit meaningful comments, and that the first respondent had not considered the comments which it did receive. The determination of the final inspection fees therefore fell to be reviewed and set aside. Further arguments by the applicant, alleging violations of several constitutional provisions were rejected by the court.

Tilayi v S [2021] 3 All SA 261 (ECM)

Criminal law and procedure – Attempted robbery with aggravating circumstances – Appeal against conviction – Where the activities of a person who intends to commit a crime is interrupted, the test is whether the accused unlawfully engaged in conduct that was not merely preparatory, but had reached at least the stage of the commencement of the execution of the intended crime – Where no steps were taken towards satisfying any of the definitional elements of the crime of robbery at the point of interruption, the offence of attempted robbery could not be said to have taken place.

Criminal law and procedure – Doctrine of common purpose – Doctrine finds application in group based criminal activity where it dispenses with the need to provide proof that the conduct of each participant contributed causally to the ultimate unlawful consequence – In the absence of an agreement, express or implied, a common purpose may arise from an act of association if the requirements constituting an active association have been individually satisfied.

The appellant was convicted of murder, attempted murder, attempted robbery with aggravating circumstances, and the unlawful possession of firearms and ammunition in contravention of the provisions of the Firearms Control Act 60 of 2000.

According to the State, the appellant was a participant in a conspiracy to commit an armed robbery of a cash-in-transit vehicle. While the armed conspirators were lying in wait for the arrival of the vehicle, they were warned that the vehicle was accompanied by the police. They therefore decided not to carry out their plan. In making their escape from the area, they were spotted by the police, who pursued the getaway car. Gunshots were fired at police officials, and a police official was shot and died of his injuries.

The trial court found that the appellant was a participant in the planning of the robbery; that he was part of the group who were lying in wait for the arrival of the money van; that he was armed with a firearm; and that he was in one of the vehicles that fled from the scene, and from which gunshots were fired at police officials. The court found that the actions of the appellant and his co-conspirators, before they had left the area where they were to intercept the money van, went beyond mere preparation, and that the appellant acted together with his co-accused in the furtherance of a common purpose.

In the appellant's appeal, the questions raised were whether or not the decision not to proceed with the plan exonerated him from liability on the charge of attempted robbery, and if so, whether it followed that he was not liable for any of the charges founded on the acts of violence perpetrated subsequently by members of the group who fired gunshots at the police. The third issue was whether on the evidence, the appellant could be said to have been in possession of a firearm and ammunition.

Held – That attempt to commit a common law or a statutory offence is punishable at law. Where the activities of a person who intends to commit a crime is interrupted, the test is whether the accused unlawfully engaged in conduct that was not merely preparatory, but had reached at least the stage of the commencement of the execution of the intended crime. On the facts of this matter, all the preparations necessary to execute the robbery were completed. The question was whether by the time they were interrupted, the actions of the appellant and his co-conspirators went beyond that preparation, to the commencement of the execution of the robbery. It could not be said that they had taken any steps towards satisfying any of the definitional elements of the crime of robbery. There was no act which went towards the *actus reus* required for the crime of robbery. Therefore, at the time of interruption, the conduct of the appellant and the group did not amount to anything more than preparation. The conviction on the charge of attempted robbery could accordingly not stand, and the accompanying sentence was set aside.

The appellant was convicted of murder and attempted murder on the basis of the doctrine of common purpose. The essence of the common purpose doctrine is that the conduct of persons who act in concert, is as a matter of law imputed to one another, regardless of their actual degree of participation or causal contributions. It finds application in group based criminal activity where it dispenses with the need to provide proof that the conduct of each participant contributed causally to the ultimate unlawful consequence. In the absence of an agreement, express or implied, a common purpose may arise from an act of association if the requirements constituting an active association have been individually satisfied. Those requirements are presence at the scene where the ultimate unlawful consequence was being committed; awareness of the ultimate unlawful consequence; intention to make common cause with those who were actually perpetrating the ultimate unlawful consequence; manifestation of a sharing of a common purpose with the perpetrators of the ultimate unlawful

consequence by performing some act of association with the conduct of the others; and the requisite fault. Based on the facts, the appellant was clearly a participant in the common purpose and would consequently be liable for any act committed by him or any of his co-conspirators which fell within the scope of the common purpose. His conduct was consistent with the plan to use violence, and showed that he did foresee the possibility of a shootout. Accordingly, the appellant's convictions and the sentence imposed on the counts of murder, attempted murder and unlawful possession of a firearm and ammunition were confirmed.

Van der Merwe NO and others v Drenched Boxing (Pty) Ltd and others [2021] 3 All SA 281 (WCC)

Civil Procedure – Final interdict – Requirements – Applicants must establish a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.

Civil Procedure – Final interdict – Requirement that the injury be a continuing one – Factual dispute around efficacy of noise abatement measures taken by neighbour resulting in applicants not establishing entitlement to final relief.

Civil Procedure – Motion proceedings – Disputes of fact – Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order – A final interdict may be granted on application if no bona fide dispute of fact exists.

Property – Neighbours – Common law on neighbours' nuisance – Complaint of noise emanating from neighbouring premises – Applicants' right to use and enjoyment of their property to be balanced against respondents' right to conduct their business – No general or absolute right to prevent respondents from amplifying sound or voices, it having to be proved that the amplification sought to be prevented constituted a nuisance.

The first and second applicants were a married couple who lived on the second floor of a building in Cape Town. The second applicant ("Ms Broekmann") also ran a law firm on the same premises.

In August 2020, the second respondent, took occupation of premises in the same building, approximately one metre from the premises occupied by the first two applicants, and operated a gym on those premises. The noise emanating from the gym was a source of disturbance to the applicants who alleged that they were woken up by the noise emanating from the gym on about 6 days a week. Ms Broekmann stated that the noise emanating from the gym classes also affected the running of her practice, as well as her times of study.

When complaints to the respondents yielded no results, the applicants obtaining an interim order which was to operate as a rule *nisi*, preventing the first and second respondents from amplifying any music, undertaking any noise amplification at the gym, and in any other manner creating or causing any noise nuisance at their

premises. In the present proceedings, the applicants sought confirmation of the interim interdict.

Held – For a final interdict, the applicants had to establish a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.

The Court confirmed that motion proceedings cannot be used to resolve factual issues, and that it is generally undesirable to try to decide an application upon affidavit where the material facts are in dispute. Thus, a final interdict may be granted on application if no *bona fide* dispute of fact exists. Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. The court bears a duty to examine alleged disputes of fact and determine whether in truth there is a real issue of fact that cannot be satisfactorily resolved without the aid of oral evidence.

To establish their clear right to an interdict, the applicants relied on the common law on neighbours' nuisance, and in the alternative, the Noise Control Regulations. The question was whether the gym was being operated in a way which resulted in an unreasonable interference with the right of the applicants to use their premises. The applicants' right to use and enjoyment of their property had to be balanced against the respondents' right to conduct their business. There was no general or absolute right to prevent the respondents from amplifying sound or voices, and it had to be proved that the amplification sought to be prevented constituted a nuisance.

A court will not grant an interdict restraining an act that has already been committed – the injury must be a continuing one. There was a dispute of fact on the question of whether the noise still constituted a nuisance. The respondents stated that they took measures, on the advice of acoustic engineers, to alleviate the nuisance. The applicants disputed the efficacy of those measures. The dispute was material to whether the applicants continued to suffer injury, and whether or not they were entitled to final relief. The court was not satisfied that the applicants had established the element of a continuing injury.

Finally, the applicants' failure to comply with the mechanisms contained in the Noise Control Regulations for dealing with complaints meant that an available alternative remedy had not been utilised.

As the requirements for a final interdict had not been satisfied, the application was dismissed, and the rule *nisi* discharged.

END-FOR NOW