LEGAL NOTES VOL 8/2021

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WILKINSON AND ANOTHER v CRAWFORD NO AND OTHERS 2021 (4) SA 323 (CC)

Trust — Trust deed — Interpretation — Private testamentary trust — Beneficiaries described as 'children', 'descendants', 'legal descendants' and 'issue' — These categories encompassing biological children and excluding adopted children — Whether exclusion contrary to public policy.

In the early 1950s Mr Druiff, father of Ms Harper, executed a trust deed in which he bequeathed, on his children's deaths, certain property to his children's 'children', 'descendants', 'legal descendants' and 'issue' (see [5], [8] and [10]). Later Ms Harper adopted children and many years thereafter, when she was old, applied along with them for a declarator that they were included in those quoted categories (see [3] and [12] – [13]). This application was prompted by the position that the words of a testamentary instrument are given the meaning they possess at the time the instrument is made; and where at the time the deed was executed, there existed legislation excluding adopted children from benefiting under a testamentary instrument unless such instrument evinced a clear intention that they be so included (see [35], [39] and [48]).

Ms Harper and her children were however, unsuccessful, with the High Court finding no such clear intention, and that in a balancing of freedom of testation against the right to equality, there was no unfair discrimination (see [14] – [15]).

The applicants then applied to the Supreme Court of Appeal, where Ms Harper, who had died shortly before the hearing, was substituted by her estate's executor (see

[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!**

[16]). Again, the applicants met with no success, the SCA holding, following authority, that the word 'children' encompassed only blood relations; that no clear intention had been expressed to benefit adoptees; and that this was not a case where intervention on grounds of public policy was justified (see [17] – [19]). Applicants then instituted an appeal to the Constitutional Court where days before the hearing Ms Harper's son, the first applicant, died, and was substituted by his estate's executors (see [3] and [22]).

The court (per Mhlantla J; Khampepe J, Madlanga J, Theron J and Victor AJ concurring) granted leave to appeal and upheld the appeal, holding inter alia that the words 'children', 'descendants', 'legal descendants' and 'issue' excluded adopted children; and that this exclusion was unfairly discriminatory and so contrary to public policy and unenforceable (see [101]).

In reaching this conclusion it considered the following.

- The terms 'descendants' and 'children' referred to descendants or children by blood: there was common law authority to this effect (see [50]). As for the term 'legal descendants', while it could encompass adopted children, the term alone, taken in light of the whole instrument, did not convey a clear intention to include such children (see [54], [59] and [74]).
- Any proposal that the deed be interpreted under the legal regime at the time of dies venit (Ms Harper's death) was unsustainable: interpretation was required as at the time of the document's execution (see [65]).
- While freedom of testation was central to testate succession, it was limited to the extent that any clause of a testamentary instrument that was contrary to public policy was unenforceable (see [69]). This where public policy was to be measured as at the time the instrument was sought to be enforced (see [71]).
- Though a private trust was subject to lesser scrutiny than a public one, and the private nature of a trust had to be given 'due consideration' in the public policy analysis, private trusts were nonetheless subject to the limitation that any clauses thereof which were contrary to public policy were unenforceable (see [73]). Here a clause would be contrary to public policy and unenforceable if it were unfairly discriminatory (see [75]).
- Given as the implicated words of the deed incorporated only biological children and not adopted ones, they created a differentiation on the basis of birth or the analogous ground of adoptive status (see [78]). Birth, given as the discrimination would arise simply by not being born of the adoptive parents and where a finding that 'birth' encompassed adopted children was supported by academic writing as well as foreign and international law (see [78] and [81] – [82]). As such, given as birth was a listed ground under s 9(3) of the Constitution, the present discrimination was presumptively unfair, a conclusion supported by the impact of discrimination on this basis (see [78] and [90]).
- The same went for discrimination by virtue of adoptive status: it was unfair owing to past societal and legislative discrimination against adoptees, which had rendered them a vulnerable group and which had impacted their dignity (see [97]).

Accordingly, the exclusion from 'children', 'issue', 'descendants' and 'legal descendants' of adopted children constituted unfair discrimination, was contrary to public policy, unenforceable, and should be treated *pro non scripto*. This would have the result that first and second applicants, as adopted children, would be encompassed by the cited words and entitled to their share of the trust property (see [100]).

Majiedt J (Mathopo AJ concurring) wrote a dissenting judgment in which he stated that he would have granted leave to appeal but have dismissed the appeal (see [163]). He took account of the following.

- Interpreting the trust deed, it evinced a deliberate exclusion of adopted children (see [108] – [109] and [112]).
- Our law placed a 'high premium' on freedom of testation, and courts should be slow to limit the right (see [119]).
- While there were compelling reasons to closely scrutinise public charitable trusts, there was no equivalent justification in respect of private testamentary instruments (see [131]).
- Foreign systems, common law and civil, placed freedom of testation centrally in the law of succession (see [143]).
- A challenge such as the present to provisions of a private testamentary trust had never been upheld by our courts (see [143]).
- The listed ground of birth could not encompass adoption: birth encompassed circumstances at the time of birth, while adoption was temporally an event thereafter (see [146]).
- Discrimination against children by virtue of their birth outside marriage (which had been found to be unfair) was dissimilar to the present situation, and the authority which established that proposition could accordingly not be used to support an extension of the law. So too, the United Nations Convention on the Rights of the Child could not be relied upon (see [147]).
- The historical circumstances of disadvantage which the majority had cited to justify developing the ground of birth had not been elaborated (see [148] and [153]).
- Precedent from the European Court of Human Rights which had again been relied on to support development of our law was distinguishable (see [160]).

Jafta J (Mogoeng CJ concurring) would have found that clause 6 of the deed, which concerned capital beneficiaries, would have included Ms Harper's adopted children (see [208]):

- The clause of application was clause 6 rather than clause 5, and the change from clause 5's use of 'descendants' to clause 6's 'legal descendants' signalled a change of intention to widen the scope of potential beneficiaries (see [173], [179], [187] – [188] and [190]).
- The SCA had erroneously found that 'legal descendants' included only descendants through the bloodline: authority relied on for the proposition was unsupportive of it (see [192] and [195]).
- The proviso to s 71(2) that an adopted child was not 'entitled to any property devolving on any child of his adoptive parent' was inapplicable (see [196] and [207]). 'Child' referred to biological children and given as Ms Harper had had none this precondition for the proviso's operation was unsatisfied (see [199] – [200] and [202]). (The majority had concluded that 'child' or 'children' included both biological and adopted children such that even where the parent had only adopted children they still would not benefit unless a clear intention was demonstrated that they should (see [48].))

CLICKS RETAILERS (PTY) LTD v COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE 2021 (4) SA 390 (CC)

Revenue — Income tax — Deductions — Allowance in respect of future expenditure on contracts — Claim for allowance in respect of cost of honouring terms of loyalty-

card programme — Same contract requirement — Whether two contracts so inextricably linked as to satisfy sameness requirement — What constitutes sameness — Income Tax Act 58 of 1962, s 24C(2).

Section 24C of the Income Tax Act 58 of 1962 allows a taxpayer to defer paying tax on income if that income accrues in terms of a contract and will be used to finance future expenditure incurred in a subsequent tax year, which it is obliged to incur in terms of such contract.

The appellant, Clicks, ran a loyalty programme (the ClubCard programme) in terms of which participating customers received loyalty points which could be translated into vouchers, not redeemable for cash but which may be offset against the cost of Clicks merchandise, provided that the customer accumulated the requisite number of loyalty points within a qualification period. A contract between Clicks and the customer came into existence when the customer completed and submitted the enrolment form (ClubCard contract). Redemption of the vouchers took place when the member entered into a further contract of sale and received discounted merchandise purchased in terms of that further contract (redemption contract).

In its income tax return for the 2009 tax year Clicks claimed an allowance for such future expenditure in terms of s 24C, ie the cost of the merchandise to be provided to customers on redemption of their vouchers. The Commissioner disallowed the claim, maintaining that s 24C only permitted an allowance when the income and the obligation to finance future expenditure arose under the same contract, and that in Clicks' case the income and the obligation to finance future expenditure arose from different contracts.

The Tax Court however found in favour of Clicks, concluding that the contract that gave rise to both the income and the obligation to finance expenditure was the redemption contract. In the Commissioner's appeal to the Supreme Court of Appeal (the SCA), that court applied the 'same contract requirement', that the obligation producing contract and the income earning contract must be the same. It rejected the notion that a taxpayer could claim a s 24C allowance if the income-earning contract and the contract giving rise to the obligation to finance future expenditure were 'inextricably linked'. It concluded that the expenditure incurred by Clicks in honouring the vouchers did not arise in terms of the same contract, ie the income earning contracts of sale, but in terms of the separate and distinct ClubCard contract, and accordingly upheld the Commissioner's appeal and set aside the order of the Tax Court.

However, subsequently the Constitutional Court in *Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service* (cited below) held that while the contract in terms of which the income that was to finance future expenditure must be the same contract under which the obligation to finance future expenditure arose, two or more contracts may be so inextricably linked that they may satisfy this requirement of 'sameness'. At issue in the present case, Clicks' appeal against the SCA's judgment, was whether the contracts satisfied this requirement.

Held

While the obligation to honour a redemption of points and the earning of income may occur simultaneously, the obligation was sourced in the ClubCard contract and the income accrued in terms of the sale contract. Clicks could therefore not claim a s 24C allowance on a same-contract basis. However, the import of *Big G* was that a taxpayer may now claim a s 24C allowance even if the income and the paired obligation to finance future expenditure were generated by different interlinked

contracts, as long as the taxpayer could show that the inextricable link between two contracts was such that they met the s 24C(2) *sameness* requirement. (See [38] – [39].)
Here there was an inextricable link between the sale contract and the ClubCard contract to the extent that both operated together to give effect to Clicks' loyalty programme. [See 46.] However, whatever the outer limits of the concept of sameness in this context may be, at a minimum both the earning of income and the obligation to finance future expenditure must depend on the existence of both contracts. If either contract can be entered into and exist without the other, they can hardly achieve sameness. That was the case here: the contracts were too independent of each other to meet the requirement of contractual sameness, their inextricable link falling short of the sameness that is required by s 24C. Clicks therefore cannot claim a s 24C allowance on either a same-contract basis or on a sameness basis. Its appeal would fail. (See [44], [46] and [49] – [50].)

COMPETITION COMMISSION v BEEFCOR (PTY) LTD AND ANOTHER 2021 (4) SA 408 (CC)

Competition — Prohibited practice — Complaint — Reinstatement of complaint withdrawn before Competition Tribunal — Prohibition on reinstatement of completed proceedings — Whether withdrawal amounted to completed proceedings — Whether Competition Tribunal exercised discretion not to reinstate withdrawn complaint improperly — Competition Act 89 of 1998, s 67(2).

The Competition Commission (the Commission) had decided to withdraw a complaint before the Competition Tribunal (the Tribunal) against the respondents pending settlement negotiations. When the negotiations did not occur, the Commission filed an application for reinstatement at the Tribunal. The application, opposed by the respondents, was denied by the Tribunal on the basis that no case had been made out for reinstatement and that reinstatement would be unfair and prejudicial to the respondents.
In the Commission's appeal against the Tribunal's finding to the Competition Appeal Court (the CAC), the Commission contended that the Tribunal had not exercised its discretion judicially and requested that court to intervene. The CAC did not deal with this issue but it disposed of the appeal on the basis that the withdrawal of the complaint by the Commission amounted to 'completed proceedings' under s 67(2) of the Competition Act 89 of 1998, so that the Commission was precluded from reinstating or referring the same complaint to the Tribunal. (Section 67(2) provides that '(a) complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in *completed proceedings* before the Tribunal . . . relating substantially to the same conduct'.)
This case, the Commission's further appeal to the Constitutional Court, concerned whether, properly interpreted, 'completed proceedings' in s 67(2) extended to withdrawn complaints; and whether the Tribunal had exercised its discretion improperly when it declined to reinstate the present complaint.
Held
The purpose of the section was to protect firms from harassment in the form of repeat referrals arising out of one and the same conduct. The provision did not insulate firms against all repeat referrals but restricted protection to completed proceedings only. For proceedings to be completed, they must have some element

of finality. Proceedings could not be complete if no decision was rendered on any of the issues arising from the complaint. Therefore, the words 'completed proceedings' were employed in s 67(2) in the sense of finalised proceedings in respect of which the Tribunal had disposed of issues relating to the merits of the complaint. It followed that the CAC erred in concluding that the withdrawn complaint constituted completed proceedings. (See [29] and [30], [32] – [33].)
While the rules of the Tribunal do not grant it the power to reinstate withdrawn complaints, the Act did, albeit impliedly. The Tribunal reasoned that fairness was at the heart of an application for reinstatement, and concluded that fairness and the interests of justice did not support reinstatement. It applied the right test and exercised its discretion against granting reinstatement. No misdirection relating to the facts was established. Consequently, there was no basis for interfering with the exercise of the Tribunal's discretion. The CAC's order would therefore be reversed, with the effect that the Tribunal's order was revived.

CHURCHILL v PREMIER, MPUMALANGA AND ANOTHER 2021 (4) SA 422 (SCA)

Delict — Exclusion of liability — Statutory barring of claim by employee against employer for occupational injury — Whether injury arose out of employment — Employee injured during labour protest at employer's offices — Whether injury 'occupational injury' — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35(1).

Labour law — Workmen's compensation — Compensation under *COIDA* — Exclusion of common-law damages claim against employer — Whether injury arose out of employment — Employee injured during labour protest at employer's offices — Whether injury 'occupational injury' — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35(1).

In the course of a protest by members of a trade union at the offices of the Premier of Mpumalanga where Ms Churchill worked, Ms Churchill returned to her office, which she found to be locked (see [21] – [22]). This caused her to utter in frustration an expletive which was overheard by nearby protestors, who misconstrued it to be directed at them (see [22]). They later returned with other protestors who subjected Ms Churchill to violence resulting in physical and psychiatric injuries (see [1], [22] – [23] and [25]).
She sued the Premier for her damages, asserting that he had negligently failed to ensure her safety. The Premier met her claim, in the first instance, with a plea that what she had suffered was an occupational injury and that her claim against him was precluded by s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) (see [3]).
The plea was upheld by the High Court and with its leave Ms Churchill appealed to the Supreme Court of Appeal, where the appeal was approached on the footing that delictual liability had been established and the only issue was the COIDA defence (see [3] and [6] – [7]).
In this respect s 35 bars an employee from acting against his or her employer for damages when what the employee has suffered is an 'occupational injury' (see s 35(1)). Such an injury is further defined as an injury as a result of an 'accident',

where an 'accident' is defined as an accident 'arising out of and in the course of' the employee's employment (see [10] – [11]).
It was agreed that the incident had arisen 'in the course of' Ms Churchill's employment but the question in dispute was whether it had arisen 'out of' her employment (see [20] and [26]). This imported the question of whether the incident was sufficiently closely connected to the employee's employment to be regarded as arising from it (see s [26]).
The Supreme Court of Appeal concluded that it was not, on the basis that the only link between the incident and Ms Churchill's job was that she was at work at the time; and that the incident had no relation to her duties, her position or the reason for the protest, but was due to a misunderstanding (see [36]).
Appeal upheld, order of the High Court set aside and substituted with an order dismissing the special plea and declaring the Premier liable to compensate Ms Churchill for her agreed or proven damages. The matter was remitted to the High Court for determining of the nature of the injuries and the quantum of damages (see [37]).

GOVAN MBEKI MUNICIPALITY v NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD 2021 (4) SA 436 (SCA)

Review — Grounds — Legality — Self-review — Concern expressed about frequency of late self-review applications by organs of state where contract periods have run their course and no sanctions for aberrant officials.

The present matter heard in the Supreme Court of Appeal was an appeal and cross-appeal against a self-review action instituted on 21 June 2017 in the Middelburg High Court by the Govan Mbeki Municipality (the GMM) in respect of a contract it had concluded 22 months earlier, on 12 September 2015, with the company New Integrated Credit Solutions (Pty) Ltd (NICS) to provide the GMM with debt management services for a period of three years, from the effective date 1 September 2015 to 31 August 2018. In procuring such services, the GMM relied on an agreement another municipality, the Newcastle Municipality, had secured with NICS after the latter's tender was accepted in terms of the process initiated by the municipality seeking bids for the provision of debt management services. Regulation 32 of the Municipal Supply Chain Management Regulations entitled the GMM to procure services in such a manner, as long as, inter alia, 'the contract has been secured by that [other] organ of state by means of a competitive bidding process . . .' and there 'are demonstrable discounts or benefits . . .' for the municipality to do so. That Newcastle contract, concluded on 30 April 2015 — whose regime the GMM essentially adopted — provided that NICS would collect municipal debts and pay them to Newcastle Municipality, in respect of which services NICS would earn a commission of 16,5% of collected debts exceeding 60 days *and 2,5% of collected debts younger than 60 days.* Critically, the tender notice had *only* called for bids, and NICS and the other tenderers had only bidded, in respect of the *management of debts older than 60 days*; the 2,5% was added subsequent to Newcastle Municipality's decision to appoint NICS. The High Court held that the clause granting NICS the 2,5% commission had not been preceded by a competitive bidding process. Further, it held that permitting the GMM such commission was not cost-effective, because persons in that category included those who would have paid

anyway, without the need for debt collectors, and that if other bidders had been allowed to bid for both, the percentage commission on either category might have been lower. The court concluded that the inclusion of the additional 2,5% commission had breached reg 32, as well as s 217 of the Constitution, which required that, when an organ of state in the national, provincial or local sphere of government procured goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. *The court set aside the additional clause, but left the rest of the contract in place*.

The Supreme Court of Appeal confirmed that action brought by the GMM, as a self-review by an organ of state, was in nature a legality review raising constitutional issues (see [33] – [34] and [58]). And, as such, the applicant had to bring the review without unreasonable delay, the clock starting to run from when it had first become aware, or reasonably ought to have become aware, of the action, subject to the proviso that if the delay was unreasonable, it could be overlooked, should the interests of justice so demand. (See [34] – [35].)

As to the question of delay, the SCA, taking into account that state officials were expected to adhere to a higher standard of conduct, inviting scrutiny of the conduct of the officials concerned, concluded that the GMM ought to have known or have been aware, *at the time (August 2015) it received all the bid documents it had requested from Newcastle Municipality, and certainly at the time of the conclusion of the agreement (September 2015)*, that the agreement was of questionable validity. (See [48].) The SCA, in conclusion, characterised the delay in respect of the initiation and finalisation of proceedings, for which the GMM had offered no explanation, as being unreasonable. (See [50] – [52].)

The SCA went on to consider whether the delay could be overlooked. It held that it could not (see [58]), having regard to the following factors:

- The merits of the matter, including the degree of non-compliance with statutory prescripts. The SCA held that there was no doubt that there was egregious non-compliance by the Newcastle Municipality with reg 32 (see [53]): there had been no competitive bidding process in relation to the 2,5% add-on; and there were no demonstrable discounts or benefits for the Newcastle Municipality (considering, with respect to the 2,5% commission, that a substantial, if not the greater, percentage of consumers would pay their accounts within the first 60-day period without the need for debt collectors; and, regarding the contract in its entirety, commission owing to NICS was calculated with respect to *all amounts* paid into the municipal accounts regardless of whether they were connected to NICS' efforts to recover debt). Further, in breach of reg 51, there was no cap placed on the commission to be earned. (See [53], [54] and [61].)
- The conduct of the GMM itself. The SCA held that there had been a most serious and egregious breach by officials of the GMM of their constitutional duties. There had been no concern shown for good governance, or what was in the best interests of its customer base; no scrutiny to see whether any of the material prescripts of the applicable regulations were met; and no consideration given to the constitutional imperatives of fair, equitable, transparent, competitive and cost-effective procurement of services. (See [55].)
- Potential prejudice to affected parties. The SCA held that there was prejudice to the public purse when remuneration was agreed without regard to efficiencies and costs savings and when it was open-ended and there were no means of measuring effort against results. There was also prejudice to a service provider when it had performed apparently extensive services without remuneration. (See [57].)

Nevertheless, the SCA held that, despite the delay that could not be overlooked, the agreement in question was clearly unlawful, and, in accordance with the dictates of s 172(1)*(a)* of the Constitution and as was clarified in recent constitutional jurisprudence, it had a duty to declare it so (see [41] and [58]). The SCA, however, in line with the wide powers granted it by s 172, which were bounded only by considerations of justice and equity (see [59]), ordered that NICS not be deprived of the benefits that had accrued under the agreement in relation to commission earned on debts older than 60 days (see [60] – [63]). The SCA, however, declined to come to NICS' aid in respect of debts younger that 60 days: In relation to the 2,5% add-on commission, which it described an 'unwarranted benefit' (see [53] and [61]), the SCA held that NICS must have known it was in an unjustifiably advantaged position to other bidders, having not been asked, as a *qui pro quo*, to revisit the commission on which it had put in a bid; the SCA concluded that NICS had been complicit in the unlawful conduct of the GMM (see [62]).
In the course of its judgment, the SCA noted the controversy that surrounded the stance adopted by the Constitutional Court in *Gijima*, to the effect that s 172 of the Constitution obliged a court to declare invalid conduct that was indisputably and clearly inconsistent with the Constitution, despite the existence of an unreasonable delay on the part of the municipality concerned in bringing such a review that could not be overlooked. The SCA expressed itself bound to follow such approach set by the Constitutional Court. It nevertheless expressed concern at the phenomenon of self-reviews, which it described as a burgeoning and troubling one. It stressed that corruption and maladministration were inconsistent with the rule of law and were the antithesis of open, accountable and democratic government. The functionaries involved, it noted, were almost never subject to scrutiny and sanctions and in some cases falsely assumed the moral high ground. The problem, the court held, was that corrective action, by way of self-review, was usually sought a considerable time after an impugned decision was made and disciplinary steps against those concerned might face time problems. However, if the maladministration or corruption were discovered late by conscientious officials seeking to take corrective and appropriate action, the SCA added, courts might insist in the future that public authorities seeking time indulgences set out the steps they had taken in relation to the misconduct by errant officials that resulted in the need for corrective action, including, but not limited to, disciplinary action, and, where appropriate, criminal proceedings; all the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. Further, the SCA stated, if a service provider was complicit, then questions might be asked about what steps were taken by the public authority in relation to such complicity. Beyond the courts, these aspects might even be catered for by legislation. The SCA cautioned that 'all of us', in every branch of the state and civil society, had to make every effort to protect public moneys and ensure that South Africa's necessary developmental goals as envisaged by the Constitution, in the interest of all our people, were met.

COTTY AND OTHERS v REGISTRAR, COUNCIL FOR MEDICAL SCHEMES AND OTHERS 2021 (4) SA 466 (GP)

Medicine — Medical aid — Medical aid scheme — Complaints — Appeal — Appeal against ruling of Appeal Committee of Council for Medical Schemes to Appeal Board — Whether lodging of appeal to Appeal Board suspending decision of Council —

Nothing in Act displacing common-law principle that administrative appeal suspending decision which is subject of appeal — Appeal in terms of s 50(3) suspending decision by Council in terms of s 48(8) — Medical Schemes Act 131 of 1998, ss 48, 49 and 50(3).

Administrative law — Decision of functionary — Appeals — Common-law principle of automatic suspension pending determination of appeal — Application to administrative appeals — Discussion.

The first to third applicants were members of the third-respondent medical aid scheme, Discovery (Discovery), and the fourth applicant a member of the fourth respondent medical aid scheme, Medshield (Medshield). The applicants had applied to their medical schemes for funding in respect of certain medical treatments of which they were in need. They were unsuccessful in their applications. So, in terms of s 47 of the Medical Schemes Act 131 of 1998 (the Act), they raised complaints with the Registrar of Medical Schemes. After the Registrar found against them, the applicants, in terms of s 48 of the Act, appealed, successfully, to the appeal committee of the Council for Medical Schemes. Subsequently, Discovery and Medshied in terms of s 50 of the Act appealed to the Appeal Board against the Council's decision under s 48(8). In the meantime, the medical schemes declined to act upon the decision of the Council. This prompted the applicants to address a letter to the Council asking that it urgently enforce the appeal committee's ruling in terms of s 48(8), notwithstanding the appeal proceedings under way. The Council's answer by way of an email — that it was not in a position to accede to such a request — gave rise to the present application, heard before the High Court of South Africa, Gauteng Division, Pretoria.

The applicants sought the review and setting-aside of the Council's decision as encapsulated in the email. In terms of s 50(3), '(a)ny person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may . . . appeal against such decision to the Appeal Board'. Section 50, *dealing with appeals to the Appeal Board*, did not expressly state whether or not the lodging of an appeal in terms of s 50(3) suspended the decision which was the subject of the appeal; this was in contrast to ss 48 and 49, dealing with appeals to the Council and appeals against decisions of the Registrar, respectively, which explicitly stated it did. The failure of the legislature to employ express language in respect of s 50 led the applicants to argue that the lodging of an appeal to the Appeal Board in terms of s 50(3) *did not suspend the decisions of the appeal committee*. The Council, they argued, in failing to interpret the Act in such a manner, had committed a material error of law, and the decision in question should accordingly be set aside.

Held, that there was in existence a common-law principle to the effect that the lodging of an administrative appeal suspended the decision that was the subject of the appeal. Such a principle would apply in respect of administrative decisions, unless the statute in question provided otherwise. (See [64].)

Held, that there was nothing in the Act that displaced such common-law principle (see [84]).

- The legislature's decision to use express language in respect of ss 48 and 49 could be explained by the fact that there existed doubt as to whether the procedures provided for by ss 48 and 49 constituted appeals in the ordinary sense, and the legislature accordingly deemed it prudent to provide expressly that such procedures

suspended decisions. In contrast, s 50 clearly constituted an administrative appeal, to which the common-law presumption applied. (See [67] – [68].)

- The entire structure of ch 10 of the Act was that decisions should not be implemented prior to the final decision by the Appeal Board (see [72]). Only the Appeal Board, by virtue of s 50(16)*(b)*, was granted the power to give effect to a decision on appeal. (See [6], [30] and [73].) There was no provision in the Act providing for the enforcement of s 48 or 49 decisions pending appeal in terms of s 50 or any penalty in this regard (see [74]).
- The interpretation of the Act favoured by the applicants, entailing as it did the need to reverse decisions that were immediately implemented, should the appeal be successful, would in fact undermine the objectives of the Act, namely to provide a quick, cost-effective and efficient remedy to medical schemes and their members (see [75] – [79]).

Held, accordingly, that the ordinary common-law principle was applicable and that an appeal in terms of s 50(3) suspended a decision by the Council in terms of s 48(8) (see [84]).

Held, in conclusion, that the applicants' review, being premised on an incorrect interpretation of the Act, had to fail (see [86].)

DE JONGH ONTWIKKELINGS (PTY) LTD AND ANOTHER v KILOTECH INVESTMENTS (PTY) LTD AND OTHERS 2021 (4) SA 492 (GP)

Insolvency — Unlawful alienations and preferences — Disposition without value — Concepts of 'illusory' and 'adequate' value discussed — Abandoning right to part payment of purchase price in favour of related company — Impeachable transaction under s 26(1) and s 31(1) of Insolvency Act 24 of 1936.

Insolvency — Unlawful alienations and preferences — Collusive disposition — Collusive disposition of property to related company leaving insolvent company with less value on its books at time of liquidation — Prejudicial to creditors — Disposition impeachable under s 31(1) of Insolvency Act 24 of 1936.

The applicant company, DJO, was in the process of being finally wound up. Its liquidator claimed that a series of property transactions concluded by the company before its winding-up amounted to an unlawful alienation or preference liable to be set aside under various provisions of the Insolvency Act 24 of 1936. DJO was controlled by one Mr D, who also controlled the first defendant, Kilotech. These entities and Mr D made use of the same banker (the bank).

The court held that the impugned transactions resulted in DJO being 'dispossessed' of R1,9 million of a R5,5 million claim. In simplified terms, DJO had disposed of a claim of R5,5 million to Kilotech and contrived to receive R3,6 million in return, thanks to an arrangement with the bank. In effect Mr D had used the sale of the property as an instrument to transfer that which should have gone to DJO, to Kilotech. This clearly amounted to a 'disposition' for the purposes of s 26 of the Act. (See [6.1.2].) But counsel for the defendants, relying on precedent, argued that s 26 was aimed at dispositions for *no value*, not dispositions for *inadequate value* like the present. The court proceeded to investigate, in the context of s 26(1), the concepts of 'value', 'adequate value' and 'illusory' (or 'nominal') value, and extracted the following principles from the authorities (see [6.3.9]):

- where the disposition consisted in the furnishing of a guarantee or suretyship, the value given might be intangible, indeterminate, but would not for that reason necessarily amount to no value;
- if some value was given, it would constitute no value if it was illusory or nominal;
- if reliance was placed on illusory or nominal value, or the entire absence of it, then the facts had to be pleaded if s 26 was being relied on;
- in all cases the relevant facts had to be taken into consideration.

The court found that in the present case the disposition of R1,9 million was sufficiently pleaded (see [6.13.11]). DJO had disposed of a claim of R5,5 million and the discharge of its obligations in the amount of R3,6 million was supposed to create the illusion that the claim of R5,5 million had been satisfied thereby. Since the disposition was illusory to the extent of constituting 'no value' for the balance, the liquidator was entitled to the recovery of this amount under s 26(1) (see [6.3.12] – [6.3.13]).

The court then had to decide whether the disposition in addition offended s 29 (gave preference to a creditor), s 30 (was made with the intention of giving preference to a creditor), or s 31 (constituted collusion to the detriment of a creditor). It found that the effect of the transactions was not only to limit the bank's exposure to Mr D's companies but also to decrease DJO's indebtedness to the bank without a similar pro rata decrease of its indebtedness to its other creditors, thereby preferring the bank, which under the arrangement received alternate security from a company other than the insolvent company. But this preference was a mere ancillary effect of the disposition in favour of Kilotech, which was not to a creditor of DJO, and was therefore not impeachable under s 29(1) of the Act (see [6.4.1]). Nor was it impeachable under s 30(1): there had been no intention to favour the bank as creditor (see [6.4.2]).

The court pointed out that the disposition was, however, impeachable under s 31: DJO had before its liquidation, in collusion with Kilotech and Mr D, 'disposed of property' (the R5,5 million claim or at least the net amount of R1,9 million) in a manner which had the effect of prejudicing DJO's creditors. The fact that there was R1,9 million less in DJO's kitty at the time of the liquidation was clearly to the prejudice of its creditors (see [6.4.3]).

The court accordingly set aside the disposition of R1,9 million by DJO in favour of Kilotech and ordered the latter to pay the said amount to the second respondent in her capacity as the liquidator of DJO (see [7.1] and [8]).

EX PARTE CHILOWORE AND SIMILAR MATTERS 2021 (4) SA 510 (GJ)

Harassment — Order — Ex parte application under Protection from Harassment Act (PHA) — Review of magistrates' court summary dismissal of — Magistrate failing to request additional information — Inconsistent with general purport and relevant provisions of PHA and offended audi alteram partem principle — Amounting to gross irregularity — Order set aside — Protection from Harassment Act 17 of 2011, ss 3, 5(4).

This case concerned applications referred to the High Court on review by a senior magistrate, who had concerns whether six ex parte applications under the Protection from Harassment Act 17 of 2011 (the Act) were properly dealt with by an acting magistrate. The matters were decided on papers in chambers by using provided

forms in such applications, and dismissed summarily — without granting an interim order (s 3(2)), issuing a notice of cause (s 3(4)), or calling for additional evidence (ss 3(1) and 5(4)).

Held

The acting magistrate's failure to use the powers he was enjoined to exercise in terms of the Act, to call for additional evidence where necessary, was grossly irregular in that the summary dismissals were not consistent with the general purport and the relevant provisions of the Act. The discretion by the magistrate was exercised injudiciously in that the applications were all dismissed without adherence to the *audi alteram partem* principle. The acting magistrate's orders in all six matters would therefore be set aside. (See [11] and [14] – [15]).

FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS v CAPITAL APPRECIATION LTD AND ANOTHER 2021 (4) SA 516 (GJ)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Consideration of share buy-back proposal under s 48(8)*(b)* of Companies Act (company acquiring more than 5% of its own issued shares or any particular class thereof) — Whether transaction, which made subject to requirements of ss 114 and 115 by s 48(8)*(b)*, triggering appraisal rights of dissenting shareholders under s 164 — In terms of s 164(2)*(b)*, transactions contemplated in s 114 triggering appraisal rights — Consideration of distinction between 'scheme of arrangement' under s 114 whereby company acquires own shares and share acquisition under s 48 — Effect of s 48(8)*(b)* not to deem transaction involving reacquisition of shares in excess of 5% to be arrangement if by nature transaction not arrangement — However, legislature intending for all procedural conditions and rights set out in s 114 to apply, and this included condition set out in s 115(8) entitling shareholders to exercise appraisal rights in terms of s 164 — Companies Act 71 of 2008, ss 48(8)*(b)*, 114 and 164(2)*(b)*.

The present matter concerned the question whether the decision of a company board under s 48(2)*(a)* of the Companies Act 71 of 2008, that the company purchase its own shares, triggered the dissenting shareholders' appraisal rights under s 164, in circumstances in which such decision was one falling under s 48(8)*(b)*, involving as it did the acquisition by the company of more than 5% of the issued shares of a class of the company's shares. The facts giving rise to the present matter are as follows. The first respondent, Capital Appreciation Ltd (Capprec), was a public company listed on the main board of the Johannesburg Stock Exchange. The first respondent, First National Nominees (Pty) Ltd (Nominees), was a registered holder of shares in Capprec. On 29 July 2019 Capprec issued a circular to its shareholders, advising them that it would be repurchasing 245 000 000 of its shares held by specific shareholders, and that their approval in such regard would be sought in a forthcoming general meeting in the form of a special resolution in terms of s 115. The decision in question was one provided for under s 48(2)*(a)* of the Act. It was also one to which s 48(8)*(b)* applied, which accordingly made it 'subject to the requirements of sections 114 and 115' of the Act. Section 114, headed 'Proposals for scheme of arrangement', in ss (1) empowered a board to propose and implement 'any arrangement between the company and holders of any class of its securities by way of, among other things, . . . a re-acquisition by the company of its securities'. Section

114 set out various procedural requirements for such types of transactions and provided special rights and remedies to shareholders affected by such transactions. The circular in question specifically advised shareholders that the proposed 'buy-back' was subject to these ss 48 and 114, as well as s 164 of the Companies Act. Section 164 accorded a number of 'appraisal rights' to dissenting shareholders. Such rights were triggered where a company decided to meet to consider adopting a resolution to perform the acts set out in s 164(2)*(a)* and *(b)*. *Paragraph (b) referred to, inter, alia a transaction contemplated in, inter alia, s 114*. In the present case Nominees decided to avail itself of such rights. It objected to the adoption of the special resolution; and then attended the meeting and voted against the resolution. The buy-back transaction was nevertheless approved. So, acting in terms of ss 164(5) and (7) of the Act, Nominees issued a demand to Capprec that it pay the fair value of its shares. Capprec made an offer in terms of s 164(11) to acquire the shares. This Nominees rejected. Consequently, acting in terms of 164(15)*(c)*(iii)*(aa)*, Nominees brought an application in the High Court of South Africa, Gauteng Local Division, Johannesburg, asking for a determination by the court of the fair value of the shares it held in Capprec.

Capprec now opposed Nominees' exercise of its appraisal rights. It argued that there were present none of the circumstances set out in in s 164(2)*(a)* and *(b)* that triggered such rights. It argued, more specifically, that the proposed buy-back of shares was not a transaction 'contemplated under s 114'. Section 114 envisioned 'a scheme of arrangement' between the company and the holders of any class of its shares in a manner contemplated in paras 114(1)*(a)* – *(f)*, in all of which instances there had to be the requirement of coercion; not consensual agreements between the company and the seller of shares such as in the present case. (See [9] – [10] and [18].) It added that, to the extent that s 48(8)*(b)* required that the transaction was subject to the requirements of ss 114 and 115, it was only a reference to the procedural requirements of ss 114 and 115. It did not deem a transaction which was not a scheme into a scheme. (See [19].)
Whether or not Nominees, in the circumstances pertaining to the transaction in question, was entitled to exercise the appraisal rights afforded to it in terms of s 164 of the Act, formed the focus of the court's attention (see [12]).
Held, that the objective of an arrangement in terms of s 114 was to affect the respective rights and obligations inter se of the company and its holders of securities in a manner which could not otherwise be conveniently achieved by independent agreement between the company and each holder of securities. The repurchase by agreement from a shareholder (such as in this case) was not such an arrangement. It did not legally bind any holder of securities whose agreement had not been obtained. (See [25].)
Held, further, that the effect of s 48(8)*(b) was not to deem* a transaction involving a reacquisition of securities in excess of 5% to be an arrangement, if, by nature, the transaction was not an arrangement as this term was interpreted in terms of the common law (see [27]). What s 48(8)*(b)* did was to impose on transactions falling within s 48(8)*(b) 'the requirements'* of ss 114 and 115 (see [29]). Nevertheless, by making reference to ss 114 and 115 as a whole, the legislature intended for all the procedural conditions and rights set out in ss 114 and 115 to apply, and this included the condition set out in s 115(8) of the Act entitling shareholders to exercise appraisal rights in terms of s 164 of the Act (see [30]). To hold otherwise would lead to an anomaly: minority shareholders would be entitled to appraisal rights protection

if the board decided to effect a (substantial) reacquisition of the company's shares in terms of a scheme of arrangement, but not if it decided to do so in terms of s 48. This would not make any sense, especially given the rationale underpinning the additional requirements for share repurchases exceeding 5%, namely that such transactions merit additional protection because they potentially affected minority shareholders more radically, as they may amount to a restructuring of the shares of the company.
Held, in conclusion, that, regardless of whether (as a fact) the transaction which Capprec had sought to implement was a scheme of arrangement or not, it was a transaction which crossed the 5% share repurchase threshold contemplated in s 48(8)*(b)* of the Act, thereby invoking the requirements of the provisions of ss 114 and 115 of the Act, which in turn vested the applicants in this application with the right to obtain the judicial determination of fair value for their shares as contemplated in s 164 of the Act. (See [32].) Accordingly, order at [33] granted.

MDLEKEZA v GALLIE 2021 (4) SA 531 (WCC)

Defamation — What constitutes — Twitter posting alleging sexual assault — Plainly defamatory — Posting containing exaggerated version of events, and contrary to respondent's own evidence — Defence of justification based on pursuit of social justice untenable — Publication unlawful and defamatory.

Defamation — Damages — Assessment — Twitter posting making false accusation of sexual assault by university lecturer — Widely retweeted and reported in mainstream media — Effect on reputation of applicant considered — R65 000 awarded and respondent ordered to publish apology on Twitter account.

Media — Social media — Defamation — Twitter posting — False accusation of sexual assault — Damages of R65 000 awarded and respondent ordered to publish apology on Twitter account.

Prescription — Extinctive prescription — When it commences — Claim based on alleged sexual offence — Provision that prescription shall not run while creditor unable to institute proceedings because of mental or intellectual disability or disorder, or other factor court deems appropriate — Semble: Claimant to rely on provision to give explanation as to why claim instituted late — Amendment of s 12(4) of Prescription Act 68 of 1969 by Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020.

In June 2020 the respondent, Ms Gallie — having seen a social media post recognising the contribution of the applicant, Mr Mdlekeza, to the University of Cape Town's actuarial science department — accused him on Twitter of having in 2012 (later amended to 2014) tried to force himself on her after locking her in a room at his home. She said she was able to escape and summon help. Ms Gallie tagged UCT in her tweet. The allegations were widely shared on social media and also picked up by the mainstream media. Ms Gallie did not press criminal charges against Mr Mdlekeza before she was contacted by UCT regarding her accusations, after which she laid a charge of sexual assault against him. UCT reacted by removing the posting praising Mr Mdlekeza and summoning him to discuss the allegations. His students were offered counselling and some no longer wished to be lectured by him. His consulting business was also negatively affected by the furore.

The matter was referred for oral evidence and both parties testified on the truth of Ms Gallie's statements. In her answering affidavit and oral evidence Ms Gallie stated that Mr Mdlekeza lacked the good character and reputation that would qualify him for the protection under the law of defamation. She justified her publication of tweets on the basis that she wanted to achieve social justice, make people aware that she was sexually assaulted and what Mr Mdlekeza was capable of, and wanted an apology. Mr Mdlekeza, having failed to extract an apology from Ms Gallie, instituted motion proceedings against her in October 2020. He sought an apology and R200 000 damages. Ms Gallie instituted a counterclaim for R250 000 for pain and suffering caused by the alleged assault. When Mr Mdlekeza pleaded that the counterclaim had prescribed because more than three years had passed since the alleged incident, Ms Gallie sought to avail herself of s 12(4) of the Prescription Act 68 of 1969, which had in December 2020 been amended, by the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020, to provide that prescription in claims based on an alleged sexual offence do not run while the claimant is unable to institute proceedings due to mental or intellectual disability or disorder, or for any other factor the court deems appropriate. *

In its judgment the court pointed out, in respect of the prescription defence, that under the rule of law the amendment effected by Act 15 of 2020 would apply only to future matters, not retrospectively. But even if the amended s 12(4) was applicable to the counterclaim, it would not have prevented its prescription since Ms Gallie offered no explanation why she did not pursue her claim sooner. Therefore, Mr Mdlekeza's challenge to the counterclaim on the basis of prescription would be upheld. (See [11] – [13].)

On the issue of defamation, the court pointed out that the message conveyed by the plain wording of the tweets, namely that Mr Mdlekeza was guilty of sexual assault and was a sexual predator, was plainly defamatory, particularly in view of the fact that she took no steps against him for six years. The manner in which she elected to publish her tweets served to accuse and convict the applicant in the realm of social media without affording him an opportunity of defending himself or of challenging the allegations against him. (See [17] – [19].) On her own testimony, what she had presented in the tweets did not accurately reflect what transpired. She elected to exaggerate and embellish events, implying that Mr Mdlekeza had attempted to rape her, not kiss her as stated in her evidence, and that she had to fight her way out of the house instead of just unlocking the door and leaving. (See [23] – [27].) She was unable to explain how she would achieve social justice by tweeting six years after the incident, especially since she had not taken any steps to hold Mr Mdlekeza accountable in that period (see [28]). Ms Gallie failed to discharge the onus of establishing a defence rendering the publication lawful. The tweets were wrongful, intentional and of a defamatory character (see [30], [32]).

The court proceeded to the issue of the appropriate damages to be awarded. It emphasised that Ms Gallie had accused Mr Mdlekeza of sexual assault at a time of increased awareness of gender-based violence. In addition, the harm was ongoing since the accusations remained on her Twitter feed (see [34] – [35]). Taking into account the seriousness of the defamation, the nature and extent of the publication, the reputation, character and conduct of Mr Mdlekeza and the motives and conduct of Ms Gallie, the court awarded him damages of R65 000 (see [38]). It also ordered Ms Gallie to publish an apology on Twitter (see [46]).

MGG PRODUCTIONS (PTY) LTD v RAMODIKE NO AND OTHERS 2021 (4) SA 543 (GJ)

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Ambit of enabling provision — Meaning of proviso that set-off was not 'in the ordinary course of business' — Interpretation of Insolvency Act 24 of 1936, s 46.

The court was called on to review a decision by the Master to allow the liquidators of a company to disregard a set-off under s 46 of the Insolvency Act 24 of 1936 (the Act). Section 46, which had rarely been dealt with in reported cases, 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. The principal issue before court was whether the impugned set-off was 'not effected in the ordinary course of business'.
At the outset the court pointed out that it is unclear when s 46 is applicable or what mischief it is aimed at, especially since the original transactions were not impugnable dispositions (see [2] – [3]). It was, moreover, prejudicial to 10-cents-in-the-rand creditors, who would be left out of pocket due to interference by the state (the Master) in a set-off that had already taken place. It seemed to allow a potentially arbitrary and unconstitutional deprivation of property that could also be procedurally unfair (see [4]).
After dealing with the concept of set-off in the common law (see [11] – [15]) and comparing s 46 to provisions of the Act dealing with impeachable transactions (ss 26, 29, 30 and 31 — see [16] – [19]), the court addressed the question of the meaning to be assigned to the words 'ordinary course of business' in s 46 (see [25] – [32]). It held that it was worth investigating the use of those words in s 29 of the Act (dealing with voidable preferences). In the (more plentiful) reported cases concerning s 29, relevant factors were said to include whether the transaction was unique, unusual or anomalous; whether it resulted in a substantial disturbance in the distribution of the insolvent's assets; whether there had been any similar transactions between the parties; whether the size of the transaction was extraordinary; whether the debt was disputed; whether the debt was paid off in a roundabout way; and whether consideration was given for the reciprocal debt (see [32]). The court pointed out that, unlike s 29, s 46 does not mention either the intent to prefer one creditor over the other or prevailing insolvency as relevant factors (see [32.1] and [32.3]).
The court then dealt with the matter before it, in which set-off was invoked by agreement when the insolvent's trading terms changed from 90-day credit to cash on delivery, wiping the slate clean in the process. The court ruled that the set-off was effected in the ordinary course of business, remarking that to invoke s 46, more was required than to show that the creditor would, as a result of the set-off, not stand in the queue for payment. The agreements to stop doing business on credit and to set off debts were perfectly normal transactions. Other factors supporting the court's conclusion were that set-off was a normal form of payment in business dealings; that there had been an earlier set-off of debts between the parties; that there was no evidence that the set-off results in a substantial disturbance of the distribution of the assets of the insolvent; that there was no evidence of collusion to defraud creditors; that the set-off was effected in a roundabout way; and that there had been no sign of

insolvency (and imminent liquidation) of the insolvent, only slow payment, a common occurrence in business. (See [15], [40].)
The court accordingly set aside the Master's decision to grant authority to the liquidators to disregard the set-off (see [42]).

NP v LP 2021 (4) SA 559 (ECE)

Judge — Retired judge — Actions against — Consent of head of court not required unless intended proceedings arising from execution of functions during post-retirement stint as acting judge or from finalisation of matters allocated during active service — Superior Courts Act 10 of 2013, s 47(1).

Judge — Actions against — Consent to — Aims of consent requirement being to protect judges against unmeritorious claims arising from execution of their judicial functions and prevention of improper interruptions of their courts' functioning — Consent requirement not applying to retired judges unless intended proceedings arising from post-retirement stint as acting judge or finalisation of matters allocated to them during active service — Superior Courts Act 10 of 2013, s 47(1).

Does s 47(1) of the Superior Courts Act 10 of 2013, which requires consent of the head of the court before civil proceedings may be instituted against any judge of that court, apply also to retired judges?
In answering this question the court ruled that s 47(1) seeks to protect judges against unmeritorious claims arising from the execution of their judicial functions and improper interruptions of the functioning of their courts. This meant that the qualified immunity bestowed by s 47(1) does not extend to retired judges, except where the intended proceedings arose from (i) the execution of their judicial functions as acting judges; or (ii) the finalisation of matters allocated to them during active service. (See [48] – [49].)

NUMSA AND ANOTHER v SOUTH AFRICAN AIRWAYS SOC LTD AND OTHERS 2021 (4) SA 575 (LC)

Company — Business rescue — Moratorium on legal proceedings against company — Employment-related claims against company in business rescue — Whether Labour Court having jurisdiction — Companies Act 71 of 2008, s 133.

Labour law — Labour Court — Jurisdiction — Labour Court not having jurisdiction in employment-related claim against company in business rescue — Companies Act 71 of 2008, ch 6.

South African Airways (SOC) Ltd (SAA) was placed in business rescue in December 2019 and its operations mostly suspended at the end of September 2020. Most of its employees had not been paid since June 2020. A settlement agreement between the employer and employee representatives settled the wage dispute, 3599 employees out of a total of 4597 either individually or through their trade unions accepting the settlement offer. In this Labour Court application, those that did not (with their representative trade union, Numsa) demanded that the settlement payments also be made to them, without the compromising or waiving of any claim to the balance of

their remuneration. They claimed a number of grounds upon which not doing so was unlawful (see [5].)
The main issue was whether the Labour Court had jurisdiction to entertain a claim to set aside allegedly preferential treatment of other employees by a company in business rescue.
Held
Given the Labour Court's limited statutory jurisdictional footprint, any claim that the business rescue practitioners had acted unlawfully as alleged, was not for the Labour Court to determine. Chapter 6 of the Companies Act 71 of 2008 made it clear that the supervision of business rescue proceedings fell within the jurisdiction of the High Court. The demarcation established by ch 6 recognised that business rescue proceedings affected the rights of a number of parties beyond the employment relationship, and in particular shareholders and other creditors. The High Court was best placed to balance the rights and interest of all the relevant parties in any application for leave to commence legal proceedings or enforcement action against a company in business rescue. Had the legislature intended that in an employment-related matter involving a company in business rescue the Labour Court was empowered to lift the moratorium by granting leave for the institution of proceedings, it would have been so empowered. (See [16] – [17].)

DE KLERK v MINISTER OF POLICE 2021 (4) SA 585 (CC)

Delict — Unlawful arrest and detention — Liability of police for court-ordered detention after unlawful arrest — Magistrate at first appearance unlawfully remanding plaintiff in custody without conducting bail hearing — Arresting officer subjectively foresaw that accused would not be released on bail at first appearance — Police minister liable for entire period of detention.

Delict — Elements — Causation and unlawfulness — Interplay of elements in unlawful detention suit where detention wrongfully extended at first court appearance after wrongful arrest — Liability of arresting officer and magistrate — Foreseeability and wrongful deprivation of liberty.

Mr De Klerk instituted action in the Pretoria High Court against the respondent (the police minister) for damages for unlawful arrest and detention arising from his arrest and subsequent seven-day imprisonment. After the complainant had laid a charge of assault with intent with the police, Mr De Klerk at police request reported to the local police station, where he was immediately arrested without warrant and detained in the police cells. Later that morning he was taken to the local magistrates' court and placed in the holding cells. His case docket was handed to the prosecutor. In it was a recommendation by the arresting officer that he be granted bail of R1000. But when he appeared in court, still on the morning of his arrest, there was no mention of bail. Instead, the magistrate summarily postponed the case and remanded Mr De Klerk in custody, where he remained until the complaint against him was withdrawn seven days later.
Citing the initial wrongful arrest as the cause of the entirety of his detention, Mr De Klerk sought to hold the police minister solely liable, and did not sue the magistrate's employer, the justice minister. The police minister argued that Mr De Klerk's unlawful detention had ceased when the magistrate ordered further detention.

The High Court ruled the arrest and subsequent detention to have been lawful and dismissed the claim. In an appeal, the Supreme Court of Appeal unanimously ruled the arrest unlawful but was split on whether the police minister could be held liable for the unlawful detention after the magistrates' court appearance. The majority found that an unlawfully arrested claimant could not hold the police liable for his continued detention after a magistrate had ordered a remand in custody. Hence, they awarded only modest damages for the initial few hours' police detention. The dissent, discerning a sufficient causal link (factual and legal) between the arrest and the port-remand detention, held the police responsible for the entire period.

In application for leave to appeal to the Constitutional Court, the only issue was whether the police minister was liable for Mr De Klerk's post-remand detention. The unlawfulness of the arrest was not contested, nor was fault in issue. Hence the application, according to the majority, concerned causation (but see the dissenting judgments of Froneman J and Mogoeng CJ). Mr De Klerk argued that legal causation was established by the arresting officer's advance knowledge that the magistrate would remand him in custody (the standard procedure in what was a very busy remand court).

The majority (Theron J, Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ agreeing) held that there were strong policy reasons for finding fully for Mr De Klerk. The arresting officer subjectively foresaw the exact consequence of her unlawful arrest — extended imprisonment — and reconciled herself thereto. The court was entitled to take into account the circumstances known to the arresting officer and they implied that it would be reasonable, fair and just to hold the police minister liable. The court appearance and the magistrate's remand order did not amount to a fresh causative event breaking the causal chain. (See [75].) But to hold the police minister liable did not mean that magistrates should not be held accountable for dereliction of their constitutional duty to apply their minds to the question of bail, which should in the ordinary course have consequences for the magistrate involved, not the police. The magistrate should not be exclusively liable for the later detention, given the original delict by the arresting officer and her subjective foresight of the subsequent harm. (See [88].)

In a concurring judgment Cameron J invoked the established principle that police liability for wrongful arrest was not truncated where the remand court failed to undertake a proper judicial evaluation on the further detention of the arrestee (see [105] – [106]). The SCA correctly concluded that the arresting officer foresaw what would happen in court, making her responsible for the wrong done by the further detention (see [112]).

In a dissent Froneman J (Goliath J and Mhlantla J agreeing) saw the issue as one of wrongfulness in the form of deprivation of liberty, not legal causation (see [115]). This meant assessing the wrongfulness of the arresting officer's conduct in relation to the further detention. But having brought Mr De Klerk to court, she had no further authority in respect of his release or further detention, and there was no reason in equity or good conscience to hold her liable for something that was not in her authority to determine. In these circumstances, the foreseeability of further unlawful detention did not make *her* liable for the harm. To ascribe liability to her merely on the basis of foreseeability would, moreover, blur the distinction between unlawful and malicious deprivation of liberty (which requires the interposition of a judicial act). The harm of Mr De Klerk's further detention was a discrete harm caused by the magistrate's failure to uphold her constitutional duties. The appeal ought to be dismissed. (See [126], [133] – [136], [139] – [140], [145] – [148], [151].)

In a further dissent Mogoeng CJ held that the constitutional obligations imposed on the magistrates' court were an automatic *novus actus interveniens*. Considerations of public policy — particularly the value of accountability for one's own constitutional obligations, justice (which could never depend on what an individual who caused the initial harm knew), the separation of powers and the supremacy of the Constitution, together — rendered it unreasonable to impute the liability due to the conduct of the judiciary to the police minister as well. (See [185].)

SA CRIMINAL LAW REPORTS AUGUST 2021

S v POOE 2021 (2) SACR 115 (SCA)

Appeal — Reservation of question of law — In terms of s 319 of Criminal Procedure Act 51 of 1977 — Refusal by trial judge in High Court — Application for leave to appeal against — Proper procedure to be followed.
Appeal — Reservation of questions of law — In terms of s 319 of Criminal Procedure Act 51 of 1977 — Requirements — Factual basis to be set out in record — Majority of court holding that all questions raised by state were questions of fact, but to extent there were inadequacies in setting-out of facts in trial court's main judgment, in judgment refusing reservation of point of law, facts set out in such a way that non-compliance with requirements to be condoned.

The state lodged an application for leave to appeal from the refusal by the High Court to reserve questions of law for decision by the Supreme Court of Appeal in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA), following the acquittal of the respondent at the conclusion of his trial on a charge of murder. The state made the application utilising the procedure of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The court per Saldulker JA, Dlodlo JA concurring, held that the proper procedure in such a case was that prescribed by s 319 of the CPA, but in the circumstances of the matter there was no prejudice to the respondent and the defective procedure was condoned. (See [6].) The two judges also held that all of the questions raised by the state were questions of fact and not of law, and, in view of that, the state's application in terms of s 319 of the CPA fell short of what was required and therefore had to be dismissed. (See [40].)
Held, per Mabindla-Boqwana AJA, Mbha JA and Ledwaba AJA concurring, that, while agreeing with the decision of the minority that the application for leave to appeal should fail, that failure should not be on the grounds of non-compliance with s 319(1), but rather on the merits of the application. (See [43].)

Held, further, that to the extent that there were any inadequacies in setting out the facts in the trial court's main judgment, in its judgment refusing the reservation of the point of law, the trial court set out the facts in such a way that non-compliance with the requirements should be condoned. (See [54].)
Held, further, that, while the court misdirected itself by focusing solely on a prior agreement, which need not be shown to prove common purpose, the trial court proceeded to make a finding that the respondent 'feared for his life and that of his family'. A factual finding, albeit scant, had been made that the respondent acted out

of necessity, which was the reason the trial court attributed to the respondent's failure to disassociate himself from the commission of the crime. (See [63].)
Held, further, that, while one may be critical of the trial court's clear failure to assess the evidence of the respondent as against the requirements of necessity (particularly the fact that the respondent accepted that his life was not threatened at any stage by his accomplice during the commission of the crime), that issue remained a question of fact which the court was not at liberty to interfere with. It was an enquiry that involved judicial process of evaluating evidence and, in the end, the fact that the trial court erred, by confining itself to the question of prior agreement, became academic. (See [64].) The application accordingly had to be dismissed.

RAVES v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND ANOTHER 2021 (2) SACR 140 (WCC)

Prevention of crime — Offences — Contraventions of s 2(1) of Prevention of Organised Crime Act 121 of 1998 — Racketeering in contravention of s 2(1)(e) — Proof of — Person's involvement in affairs of POCA enterprise can take place in number of ways — Not essential that two accused charged together know each other, as long as each associates himself with enterprise.

The appellant appealed against the dismissal by the High Court of his application for a permanent stay of the prosecution against him, alternatively that in terms of s 157(2) of the Criminal Procedure Act 51 of 1977 (the CPA) his trial be separated from that of the first accused and continued in either a regional court or the High Court in Pretoria. The appellant was facing charges of racketeering in contravention of s 2(1)*(e)* of the Prevention of Organised Crime Act 121 of 1998 (POCA), in that he and the first accused had allegedly participated in the affairs of an illegal enterprise. Each accused also faced eight separate charge of corruption under the Prevention and Combating of Corrupt Activities Act 12 of 2004 and individual charges of money-laundering under POCA. The state relied on a series of subsidiary offences committed by each accused, which were intended to constitute the predicate offences for a conviction of racketeering. The predicate offences contemplated the theft of a sizeable number of firearms by each accused (on the basis that the theft thereof by two senior police officers were continuing offences) and a number of contraventions of the Firearms Control Act 60 of 2000 (the FCA).
It was contended for the appellant on appeal that the fact that the two accused did not know each other or were unaware of the other's involvement in procuring stolen firearms from the police officers, led to the conclusion that they were not part of the same enterprise, and the pattern of racketeering activity contemplated under POCA required all of the participants to be 'in the know'. Counsel's complaint was that, given the common-cause facts already established by the further particulars furnished by the state, the appellant would be subjected to an impermissible misjoinder which would cause irreparable prejudice to him because he had to sit through a trial in which the evidence could never sustain a conviction against him under POCA.
Held, that a person's involvement in the affairs of a POCA enterprise may take place in a number of ways: on the one hand, members of a street gang act may in concert with a common purpose, but on the other hand, there may be any number of persons

liable for conviction by virtue of their individual acts of association with the enterprise, where the modus operandi of the criminal syndicate was similar, but there are a number of participants performing differing functions in the advancement of the activities of the enterprise. (See [46] – [47].)
Held, further, that, for present purposes, it was sufficient for the state to allege that the appellant committed any number of predicate offences (such as the possession of firearms originally stolen by the police officers, as also the unlawful possession thereof under the FCA); that the business of the enterprise was the theft of such firearms by the police officers; and that the appellant associated himself with the enterprise through a pattern of racketeering by continuously buying stolen arms from them. In such circumstances his joinder as an accused in the case was manifestly warranted and thus permissible. (See [52].)
Held, further, that, while there could be no doubt that the appellant had been inconvenienced by the death of the first accused's counsel of choice, the delays occasioned by the appointment of a new legal representative, and the discovery dispute between him and the state, and while any unnecessary delay in the prosecution of a criminal matter was a cause for concern, experience told one that the wheels of justice grind slowly on occasion, but they do grind nevertheless. A careful consideration of the reasoning of the court a quo was unable to reveal any indication that the exercise of discretion by that court in refusing the stay of the prosecution was improper, and there was therefore no basis for the court to interfere with that decision. (See [55] and [57].)
Held, further, in respect of the complaint as to the separation of trials, that the court a quo was effectively being asked to interfere with a prosecutorial prerogative, but the prosecution had a wide prerogative as to how and where it chose to charge an accused person in a POCA matter. The court a quo had properly weighed up all the arguments for and against a separation and it ultimately exercised its discretion judicially in refusing a separation of trials, and there was no basis to interfere with the order of court in that regard. (See [59] – [60].)

S v NGUBANE AND ANOTHER 2021 (2) SACR 158 (GJ)

Evidence — Adequacy of proof — Resolving questions of fact — Methods for — Most appropriate was reasoning by abduction.
Evidence — Adequacy of proof — Resolving questions of fact — Methods for — Standard approach criticised for being conceptually flawed.

The two accused were indicted to stand trial in the High Court on three counts of murder; one count of attempted murder; robbery with aggravating circumstances; and the unlawful possession of firearms and ammunition. The state alleged that the accused, acting in a group of five, and in the execution of a common purpose to murder the security guard at a store and to rob him and then to rob the store, murdered and robbed the security guard. When they then encountered resistance from the owner of the store, they exchanged gunfire with him and, in the process, two of the gang of five were killed and another was wounded and subsequently died in hospital. The owner of the store was also wounded. The two accused surrendered and were taken into custody. The state alleged that each of the five members of the

gang was in the unlawful possession of a firearm and ammunition at the time of the attack.
Before the court began its assessment of the evidence, it considered the method of reasoning by which a court could operate and whether a deductive or an inductive model of reasoning was inappropriate, and it also considered the role of intuition. It came to the conclusion that the most appropriate method for resolving questions of fact was a model of reasoning known as abduction. (See [23] – [44].)
The court was critical of the reasoning of the court in *R v Blom* 1939 AD 188 and remarked that it was erroneous, in that it was circular and based on a 'reasonable possibility', or even a mere possibility, for an issue which was of ultimate significance, and ought to have been determined on the normal standard of beyond reasonable doubt. The approach appeared to be conceptually flawed and also at odds with what our courts did, namely to require that the entire conspectus of all the evidence was accounted for and that the court permitted itself to consider evidence as a 'mosaic' or as a cable or rope, made of strands, instead of demanding that every fact to be proved had to be proved beyond a reasonable doubt, following the analogy of a rope or cable, rather than as the links in a chain. (See [68] – [85].)
The court then considered the evidence, applying reasoning by abduction, and convicted the accused, on the basis of a common purpose, of three counts of murder; one count of attempted murder; and robbery with aggravating circumstances. The court also convicted each of the accused of the possession of an unlicensed firearm and ammunition.

S v MAKAYI 2021 (2) SACR 197 (ECB)

Indictment and charge — Summary of substantial facts — Sufficiency of — Use of opening statement in terms of s 150 of Criminal Procedure Act 51 of 1977 — Failure to make use of opening outline for clarification of misleading information and omitting relevant facts favourable to defence in summary, potentially depriving accused of constitutional right to fair trial.

The accused was indicted to stand trial in the High Court on a charge of the rape of a 6-year-old girl. The summary of substantial facts accompanying the indictment was a terse six-sentence account, but which stated the necessary facts. It was alleged that he had penetrated the complainant vaginally and anally. The trial was hampered by the difficulty in extracting information from the complainant who was 9 years old when she testified. She testified through an intermediary. She was asked to demonstrate by means of using dolls what the accused had done to her. It was the state's case that both accused and complainant remained fully clothed throughout. Evidence was led that the complainant had been examined under general anaesthetic by a forensic nurse, even though a gynaecologist was present at the time. The nurse's evidence was also problematic, in that she insisted that the penetration had been caused by a 'blunt force', but the witness was taken aback when told that the accused had been wearing trousers at the time. The accused testified and denied any assault of a sexual nature. The prosecution conceded that he was a good witness, but contended that his crime had been well planned and he had carefully rehearsed his story.

In respect of the summary of substantial facts, the court held that it was very clear: it did not call out for elucidation. (See [66].) It was, however, misleading in its particularity. An opening outline, as intended by s 150 of the Criminal Procedure Act 51 of 1977, explaining from the outset that the high-water mark of the state's case would be that the accused made movements up against the complainant's body, while the two of them remained fully clothed, would have served the purposes of the provision. Not disclosing this in the summary of substantial facts, or at least in an opening address, had not only deprived the court of an explanation that the evidence which the state intended adducing was at odds with that which was set out in the summary of substantial facts, but might very well also have the effect of depriving the accused of his constitutional right to a fair trial. (See [72] – [74].)
Held, that, to suggest that, in the light of human experience it could be expected that such actions as described by the complainant would result in the actor's penis penetrating the vagina and the anus of the victim, was absurd and deserved to be rejected outright. (See [79].) It was clear that, even without invoking the cautionary rules, the complainant's evidence had failed to pass muster as being satisfactory in a number of respects, and the difference between the evidence for the prosecution and that of the accused was like night and day. The accused impressed as a humble, unsophisticated and naive witness who readily conceded what he had to. He gave his evidence in a clear, straightforward manner, often illustrating with physical demonstrations as if he were testifying from genuine recollection. (See [84] and [86].) In the circumstances the accused had to be acquitted.

S v MODISE 2021 (2) SACR 218 (FB)

Bail — Application for — Effect of s 60(11) of Criminal Procedure Act 51 of 1977 — Nature of onus — Whether offence one under sch 5 or sch 6, to be determined at outset of bail application after engagement with both parties.

The appellant appealed against the refusal of bail by a magistrate. That application was the second application the appellant had brought, but, since then, further, more serious, charges had been added to the indictment, which resulted in the onus on the accused having shifted from that applicable in sch 5 to sch 6 of the Criminal Procedure Act 51 of 1977. The appellant delayed for seven months before bringing his appeal. The court held that, because of the lengthy delay and the subsequent developments in the nature of the charges, the appeal had been rendered moot, but that in any event the magistrate had reached the correct decision on the facts, whatever the onus was that the appellant had to rebut. (See [8].) The court noted the importance of the nature of the onus being determined at the outset of the bail application. The court had to rule on the applicable onus after engaging both parties. (See [12].) In the event, the appeal had to be dismissed.

Commissioner for the South African Revenue Services v Toneleria Nacional RSA (Pty) Ltd [2021] 3 All SA 299 (SCA)

Trade (Customs and Excise) – Customs duty – Tariff classification – Interpretation of tariff headings involves interpretation; consideration of nature and characteristics of goods; and selection of heading most appropriate to such goods.

The respondent ("Toneleria") was the South African subsidiary of a Chilean company ("TN") which manufactured traditional wooden barrels for use in the wine industry. TN also manufactured planks or slats made of the same treated oak as barrels and cut to different sizes (the disputed items), which Toneleria imported into South Africa and sold to wine producers as a cheaper alternative to traditional wooden barrels for imparting the qualities of wood to the wine.

Toneleria and the appellant, the Commissioner of the South African Revenue Service (the "Commissioner" or "SARS") were at odds over the classification of the disputed items for customs purposes in terms of Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964. Toneleria contended that the disputed items should, like wine barrels, be classified under tariff heading 44.16, which attracted no duty, while SARS maintained that the disputed items should be classified under tariff heading 4409.29.90. An appeal by Toneleria succeeded, resulting in the present appeal to the Supreme Court of Appeal.

Held – Classification as between headings is a three-stage process. The first involves interpretation – the ascertainment of the meaning of the words used in the headings (and relative section and chapter) which may be relevant to the classification of the goods concerned. The second step involves consideration of the nature and characteristics of those goods, and third involves the selection of the heading most appropriate to such goods.

In the present case, there were no relevant section or chapter , but the explanatory note to tariff heading 44.16 referred to "Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves". The disputed items were not casks, barrels, vats or tubs, and the question was whether they were "other coopers' products". The Court stated that casks, barrels, vats and tubs are by their very nature coopers' products, and the word "other" refers to further products of a similar nature made by coopers. Having regard to the nature of the cooper's craft, the court ruled it preferable to adopt a more limited construction of "other coopers" products'. It was found that the term applied to wooden products, manufactured by coopers and requiring the use of the traditional skills, techniques and expertise of a qualified cooper. The Court concluded that the disputed items did not fall into the category of containers manufactured using the skill and techniques of a trained cooper. Toneleria's reliance on functional similarities between the disputed items and traditional oak barrels arising from the selection of wood, the seasoning and toasting,and the role they play in the maturation of wine was insufficient to bring the disputed items within the category of "other coopers' products" as described in tariff heading 44.16.

The appeal was accordingly upheld.

Ingosstrakh v Global Aviation Investments (Pty) Ltd and others [2021] 3 All SA 316 (SCA)

Civil Procedure – Appeal – Whether order is appealable – Appealability of an order is determined by, amongst other considerations, whether it is final in effect – Where order places position of parties in limbo, interests of justice require court's intervention, making order appealable.

Civil Procedure – Failure to file plea –Notice of bar – Defaulting party having no right to file plea until upliftment of bar.

Civil Procedure – Jurisdiction – Foreign peregrinus – Submission to jurisdiction – Requirements for jurisdiction – Submission of local peregrinus defendant does not suffice, without more, to establish jurisdiction at the suit of a foreign peregrinus plaintiff, and what is required is a ground of jurisdiction that establishes a link between the court and the subject matter of the litigation.

In terms of an insurance policy concluded between the appellant ("Ingosstrakh") and the respondents ("Global"), Ingosstrakh undertook to indemnify Global against all risks of loss or damage occasioned to certain specified aircraft. Shortly afterwards, one of Global's aircraft was seriously damaged. It had been agreed that in the event the cost of repair to damage caused to the aircraft exceeded 75% of the insured value, Global would be entitled to regard the aircraft as a constructive total loss ("CTL"), and Ingosstrakh would be obliged to pay Global the full insured value of US$2 500 000. Global declared the aircraft to be a CTL, and claimed payment from Ingosstrakh of US $2 500 000. Ingosstrakh refused to pay on the basis that the aircraft was not a total loss.

On 9 September 2015, Global issued summons against Ingosstrakh, with service effected on the agreed local address. Ingosstrakh served its notice of intention to defend the action. However, Ingosstrakh failed to deliver its plea, and on 4 November 2015 Global served a notice of bar in terms of rule 26 of the Uniform Rules of Court, in terms of which Ingosstrakh was afforded five days to deliver its plea. Instead of filing its plea, Ingosstrakh filed an application seeking the setting aside of the order authorising service of the summons and upliftment of the notice of bar.

No plea having been filed, Global applied for summary judgment, and Ingosstrakh brought a counter-application raising the question of whether there was an obvious omission in failing to deal with its prayer for the uplifting the notice of bar. Both applications were dismissed, leading to appeals by each party.

Held – The first question was whether the order refusing Global's application for default judgment was appealable. Appealability of an order is determined by, amongst other considerations, whether it is final in effect. The practical effect of the court *a quo*'s order was that the parties' respective applications were in limbo, and the interests of justice required the court's intervention to resolve the impasse. On that basis, the matter was appealable.

Ingosstrakh, having failed to file its plea within the stipulated five days, had no right to deliver its plea until the bar was uplifted. It did not appeal against the dismissal of its application for upliftment of the bar and so remained barred from pleading.

Despite that being the end of the matter, the court also considered whether Ingosstrakh would be entitled to condonation for its failure to file a plea. In terms of rule 27(3) of the Uniform Rules of Court, the court may, on good cause shown, condone any non-compliance with the rules. Thus, in order to succeed, Ingosstrakh had to show good cause why condonation should be granted for its failure to deliver its plea. One of the issues considered by the court in determining the existence of good cause was whether Ingosstrakh's special plea of jurisdiction constituted a valid defence to Global's claim. Both parties were foreign *peregrini* and the insurance policy stated that the parties agreed to submit to the exclusive jurisdiction of the courts of the insured's country of domicile in any dispute arising from the policy. Case law establishes that the submission of a local *peregrinus* defendant does not suffice, without more, to establish jurisdiction at the suit of a foreign *peregrinus* plaintiff. What is required is a ground of jurisdiction that establishes a link between the court and the subject matter of the litigation. Where Ingosstrakh submitted to the jurisdiction of the court *a quo*, that court enjoyed jurisdiction because, in addition to submission, the contract of insurance was concluded within its area of jurisdiction.

Addressing Global's claim, the court confirmed that the damage to the insured craft was such that the CTL threshold was breached.

The appeal was dismissed with costs.

Ingquza Hill Local Municipality and another v Mdingi [2021] 3 All SA 332 (SCA)

Local Government – Municipal council – Decision of council to remove member of executive committee, holding position of mayor, from office – Requirements of section 53(1) of the Local Government: Municipal Structures Act 117 of 1998 – Section 53 requires prior notice to all members of council of intention to move a motion for removal of a member – Failure to provide notice rendering decision of council reviewable.

The respondent was a member of the executive committee of the first appellant (the "municipality") and was elected as mayor on 3 August 2016. On 23 January 2019, he was removed from his position following a resolution taken by the municipal council ostensibly acting in terms of section 53(1) of the Local Government: Municipal Structures Act 117 of 1998 (the "Act"). The respondent took the municipality's decision on review to the High Court, which set aside the council's decision on the ground of non-compliance with section 53 of the Act.

Held – A member of the executive committee vacates office, in terms of section 47 of the Act, if, *inter alia*, removed from office as a member of the executive committee in terms of section 53. Section 53 requires prior notice of an intention to move a motion for the removal of a member. A mayor is elected from members of the executive committee and vacates office when he resigns; is removed from office as a member of the executive committee in terms of section 53; or ceases to be a member of the executive committee. The Court stated that on a proper reading of section 53, prior

notice is to be given to all members of the municipal council. The purpose is to afford the affected member an opportunity to be aware and to consider the motion before it is tabled for discussion. Additionally, it is to provide council members similarly with an opportunity to engage meaningfully in the ensuing debate before a resolution is taken.

The respondent's removal from office was preceded by alleged acts of misconduct involving maladministration by the municipal manager. At a council meeting on 23 January 2019, a motion for his removal was brought by a council member. A resolution to remove the respondent from the position of mayor was taken by a majority vote. The issue of the motion regarding the respondent's intended removal was not on the agenda for that meeting. Nobody, including those councillors who voted in favour of the motion against the respondent had the benefit of prior notice.

The High Court was correct in making the order it did, and the appeal was accordingly dismissed.

Samancor Holdings (Pty) Ltd and others v Samancor Chrome Holdings (Pty) Ltd and another [2021] 3 All SA 342 (SCA)

Arbitration – Initiation of arbitration proceedings – Time limits – Extension of period – Section 8 of the Arbitration Act 42 of 1965 allows for extension of period in which to initiate arbitration proceedings where a court is of the opinion that in the circumstances of the case, undue hardship would otherwise be caused – Undue hardship refers to that which is unwarranted or inappropriate because it is excessive or disproportionate.

In terms of a sale of shares agreement the first respondent ("SCH") acquired a chrome business from the second respondent ("Samancor Chrome") by buying the shares in Samancor Chrome from the first appellant ("Samancor Holdings"). The second and third appellants ("BHP" and "ASAC") were Samancor Holdings' shareholders.

The defined effective date of the agreement was 1 June 2005. In terms of the agreement, that was the date on which the parties implemented their agreement economically. It was not possible, however, for the restructuring and transfer of shares to SCH to be completed by that date. The agreement contained an indemnity clause in respect of Samancor Chrome's income tax up to a stipulated date. In terms of a time-bar clause, proceedings in respect of the income tax indemnity had to be issued before the sixth anniversary of the effective date of 1 June 2005. The six-year time-bar expired on 1 June 2011. On 16 August 2011, SARS began an investigation into Samancor Chrome's tax affairs, including its 2005 tax year. That resulted in an additional assessment which increased the original assessment of taxable income. SCH and Samancor Chrome (the "claimants") initiated arbitration proceedings against Samancor Holdings, to recover the amount paid as additional tax.

The effect of the arbitration ruling (on appeal) was that the claimants were required to have the period for initiating the arbitration proceedings extended in terms of section 8 of the Arbitration Act 42 of 1965. The claimants' application to the High Court for such extension was granted, leading to the present appeal.

Held – Section 8 allows for the extension sought by the claimants where a court is of the opinion that in the circumstances of the case, undue hardship would otherwise be caused. The hardship which the section contemplates is hardship to the claimant

because its claim is time-barred. To be regarded as undue, the hardship must be unwarranted or inappropriate because it is excessive or disproportionate.

It could not be found that the High Court was guilty of any legal or factual misdirection in assessing the claimants' delay in launching their section 8 application. In exercising its discretion, that court took into account factors which had a material bearing on the question of the claimants' delay.

The appeal was dismissed with costs.

Soni v S [2021] 3 All SA 362 (SCA)

Criminal law and procedure – Murder – Doctrine of common purpose – Appeal against conviction – An agreement between three persons to commit a crime does not exclude the possibility that one of them is acting on the instructions of a fourth party, who will be party to the agreement whether or not the others in the group are aware of his identity.

Criminal law and procedure – Conspiracy to commit murder – In absence of definite agreement between accused and perpetrator, offence not established.

Criminal law and procedure – Evidence – Cross-examination of witness – Where State witness could not testify and cross-examination could not be completed, court having duty to ensure that the trial remains fair – Only such evidence as was not subjected to cross-examination was held to be inadmissible.

On being convicted in the High Court of the murder of a doctor, defeating or obstructing the course of justice, assault with intent to cause grievous bodily harm, and contravening section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 (conspiracy to commit murder), the appellant was sentenced to an effective 30 years' imprisonment. With the leave of the High Court, he appealed against the conviction and sentence.

The background facts revealed that the appellant and the deceased had been friends until January 2012 when the appellant formed a suspicion that the deceased was engaged in an extra-marital affair with the appellant's wife. Although the appellant denied any involvement in the murder or in any of the offences with which he had been charged, the State's principal witness recounted how the appellant had paid him to launch a series of offensives against the deceased, in order to harm him. The State led several witnesses to corroborate those allegations. That included the assassins who were eventually hired to execute the deceased.

In light of the appellant's denial of involvement in the above events, the question was whether the appellant had orchestrated those actions against the deceased, or whether there was an alternative explanation that was reasonably possibly true.

Held – Regarding the count of murder, that the trial court found that the appellant had acted in furtherance of a common purpose with the three perpetrators of the assassination, to kill the deceased. The State had relied on the appellant having acted in concert with and in the furtherance of a common purpose with the trio who had carried out the assassination. However, the present Court pointed out that if the evidence established beyond a reasonable doubt that one of the trio was mandated by the appellant to find persons to murder the deceased, and the murder was then

carried out in accordance with that mandate, then reliance on the doctrine of common purpose to convict the appellant on the charge of murder would be superfluous. The appellant would be guilty of murder on the basis that his mandate was discharged. In any event, the doctrine of common purpose permits of the attribution of criminal liability to those persons who jointly undertake the commission of a crime. And an agreement between A, B and C to commit a crime does not exclude the possibility that A is acting on the instructions of D. In those circumstances, D is a party to the agreement to carry out the crime, even though his identity is not disclosed to B or C. The Court found that there was proof beyond reasonable doubt that the appellant issued an instruction to one of the trio to have the deceased murdered. The appeal against the conviction on the count of murder was dismissed.

The crime of conspiracy to commit murder required that the appellant and one of the perpetrators reached an agreement to kill the deceased. One of the witnesses who had testified in this regard died before he could be fully cross-examined. Difficulties arise when a witness who has given evidence cannot complete their cross-examination. An accused has the right to cross-examine those witnesses whose evidence is relied upon by the prosecution. Where that right cannot be exercised, or cannot be exercised in full, the court has a duty to ensure that the trial remains fair. The Court ruled inadmissible only that evidence on which the witness had not been cross-examined. The remaining evidence showed that no definite agreement had been reached, with the result that the conviction for conspiracy to commit murder could not stand. However, the actions of the appellant supported the alternative count of incitement to commit murder.

On the issue of sentence, the Court confirmed the appropriateness of the sentence of 25 years' imprisonment on the count of murder. To the limited extent that the appeal succeeded, the effective sentence was reduced to one of 23 years and 7 month's imprisonment, which would run from the date of the further imprisonment of the appellant pursuant to the present order.

Van Zyl v Auto Commodities (Pty) Ltd [2021] 3 All SA 395 (SCA)

Corporate and Commercial – Company law – Business rescue – Effect of termination on surety's obligations – Section 154(2) of the Companies Act 71 of 2008 does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented – The liability of a surety for a debt is not extinguished.

As a prerequisite for its supplying a company ("BCM") with petroleum products on credit, the respondent ("Auto Commodities") required the appellant ("Mr Van Zyl") to bind himself as surety for BCM's resulting liabilities, which he did in July 2014. In December 2014, BCM was placed under business rescue. After adoption of a business rescue plan, Auto Commodities received two dividends. The business rescue terminated on 31 January 2017 as a result of its substantial implementation. On 21 July 2017, Auto Commodities issued summons against Mr Van Zyl for an amount in excess of R6 million, representing the shortfall regarding BCM's original indebtedness. Its claim, based upon the deed of suretyship, was upheld in the High Court.

On appeal, the only issue remaining in dispute between the parties was whether Mr Van Zyl was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. His contention was that, when BCM's business rescue was terminated, section 154(2) of the Companies Act 71 of 2008 (the "Act") released BCM from any further indebtedness to Auto Commodities. He submitted that that in turn released him from liability because suretyship is an accessory obligation.

Held – The business rescue plan contemplated a compromise between the debtor and one or more of its creditors, in which case there would be an unpaid balance for which the surety would remain liable. A liquidation would be one instance of such circumstances. Even if BCM as principal debtor was released from its obligations, Auto Commodities' rights under the suretyship were unaffected and, whether or not it supported the business rescue plan, it did not operate as an abandonment of its claim against Mr Van Zyl.

The Court then addressed Mr Van Zyl's legal point as leave to appeal had been granted based on that point. The starting point for Mr Van Zyl's argument was section 154 of the Act, which is directed at the consequences of approval and implementation of the business rescue plan for the enforcement by creditors of any debt that existed prior to the business rescue process. It provides that the creditor will not be able to enforce the debt except to the extent provided for in the business rescue plan. The section did not support Mr Van Zyl's arguments that Auto Commodities could no longer enforce any debt which was owing to the creditor by BCM prior to the business rescue; that as a result of the approval and implementation of the business rescue plan, BCM did not owe anything to the creditor; and that the accessory suretyship obligation was discharged. An inability to enforce a debt is not necessarily an indication that the debt has been discharged. If the whole or a part of the debts of a company become unenforceable as a result of the adoption and implementation of a business rescue plan, the fact that some creditors may pursue the balance of their claims against sureties, who will have a right of recourse against the company, does not negate the purpose of business rescue. Section 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt.

The appeal was dismissed with costs.

Watson NO v Ngonyama and another [2021] 3 All SA 412 (SCA)

Corporate and Commercial – Donation of shares to achieve Broad-based Black Economic Empowerment objectives – Application for restoration of shares based on alleged misrepresentation as to Broad-based Black Economic Empowerment shareholding of entity to whom shares were donated – Where entity receiving donated shares was liquidated and liquidators were not joined in the proceedings, order for restoration of shares not capable of execution.

A dispute concerning shares in a company ("Ntsimbintle") landed up in the High Court, where an order was issued ordering one of the respondents ("Watson") in the High Court proceedings to restore to the second respondent in the present proceedings ("Thundercat") certain shares in Ntsimbintle together with all dividends earned and interest thereon. Watson had since died, and the appellant was the executor of his estate.

Watson, the first respondent (“Ngonyama”) and a third party (“Macingwane”) had entered into an agreement in terms of which they would each take up an equal shareholding in an investment company (“Nkonjane”). It was agreed that, to meet black and female empowerment objectives, a portion of their equity in Nkonjane would be transferred, in equal shares, to historically disadvantaged women and youth. The company through which the Broad-based Black Economic Empowerment (“BBBEE”) objectives were to be achieved, “Bosasa Youth”, would hold 25% of Nkonjane and would have at least 250 persons with BBBEE credentials, whom Watson had undertaken to identify as shareholders.

When the relationship between Watson, Macingwane and Ngonyama broke down completely, Watson indicated a desire to exit their Nkonjane arrangement. An offer to purchase the shares in Ntsimbintle was received, and although Ngonyama and Macingwane refused to sell, Bosasa Youth wanted the opposite. Bosasa Youth obtained an order for the winding-up of Nkonjane to facilitate the sale. Ngonyama alleged that it was only during the liquidation process that he discovered that there were in fact no BBBEE shareholders in Bosasa Youth. He insisted that the donation of the shares by him and Macingwane was premised on historically disadvantaged individuals benefiting from an investment opportunity. He stated that they were induced to make the donation on the strength of Watson’s assurances concerning BBBEE shareholders and, had they known that in reality he intended to benefit himself and his family as it emerged, they would not have made the donation. Ngonyama considered himself entitled to cancel the donation and demand the return of the shares donated. That led to the High Court proceedings.

Held – A preliminary issue requiring attention was the liquidation of Bosasa Youth and the non-joinder of its liquidators in the present proceedings. The fact that Ngonyama’s case had the potential to dilute Bosasa Youth’s shareholding in Ntsimbintle meant that the liquidators had a direct and substantial interest in the proceedings. Their non-joinder was on its own, reason to set aside the High Court order and remit the matter for reconsideration.

Assessing the correctness of the High Court’s conclusions, the present Court disagreed that there was a misrepresentation that induced the donation of the shares. Material doubt existed as to whether, at the time of the donation, Watson had made any fraudulent misrepresentation. Ngonyama’s own version of the agreement in relation to BBBEE shareholding, and the verification thereof, was inconsistent and vague.

The High Court was however, correct in ruling that an agreement (the “Fluxmans agreement”) relied upon by Bosasa Youth was not a compromise but a share substitution agreement. A compromise or *transactio* is a contract whose purpose is to prevent or to put an end to existing litigation, while the Fluxmans agreement was concluded to deal with the deadlock between the shareholders concerning the sale of their shares and was unconnected to the dispute about the BBBEE shareholding.

Most importantly, as argued by the appellant, the High Court order was not executable. The Court agreed that the withdrawing of the case against Bosasa Youth and then not joining the liquidators meant that the order would not be binding on them.

The appeal was upheld.

Council for the Advancement of the South African Constitution and others v Ingonyama Trust and others [2021] 3 All SA 437 (KZP)

Property – Section 25(1) of the Constitution provides that no-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property – Section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 provides protection against the deprivation of existing informal rights to land – Conversion of informal land rights into leases where security of tenure was reduced constituting arbitrary deprivation of rights in land, and was therefore unlawful and unconstitutional.

Under section 3(1) of the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994, the first respondent (the "Ingonyama Trust") held 2,8 million hectares of land in KwaZulu-Natal in trust for and on behalf of the Zulu nation. The second respondent (the "Board") was established to administer the affairs of the Trust, and the Trust-held land.

The first applicant ("CASAC") was established to promote, develop, and affirm the rights and principles set out in the Constitution. The second applicant ("RWM") was a non-profit organisation aiming to give a voice to rural women in KwaZulu-Natal, and to address the social problems that rural women faced, including access to land and land ownership. The third to ninth applicants were residents and occupiers of land in KwaZulu-Natal, held by the first respondent (the "Trust"). They alleged that they had been compelled by the Trust and traditional councils to sign lease agreements, in many cases which they could not afford, on the basis of false or incomplete information.

The applicants averred that the Trust and its Board were undermining the security of tenure of residents and occupiers of the Trust-held land in KwaZulu-Natal, extracting money from them by unlawfully compelling them to conclude lease agreements, and to pay rental to the Trust in order to continue living on the land. It was contended that in doing so, the Trust and the Board had violated the customary law and statutory Permission to Occupy ("PTO") rights of the residents and occupiers, protected by the Constitution, the Interim Protection of Informal Land Rights Act 31 of 1996 and the KwaZulu-Natal Ingonyama Trust Act.

As a result, the applicants sought an order declaring the conduct of the Trust and the Board unlawful, unconstitutional and invalid. They also raised the failure by the third respondent (the "Minister") and the fourth respondent (the "MEC") to properly execute their statutory and constitutional duties. The applicants contended that the Trust and the Board's conclusion of leases of Trust-held land with beneficiaries and residents who were the true owners of such land, had the effect of depriving the beneficiaries and residents of their customary law rights and/or informal rights and interests in the land.

Held – Section 25(1) of the Constitution provides that no-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Section 2 of the Interim Protection of Informal Land Rights Act provides protection against the deprivation of existing informal rights to land, including PTOs. It requires that any deprivation of informal rights to land must be with the rights holders' consent. If the land is held on a communal basis, the community's custom or usage must be followed, compensation should follow, and approval by the majority of community members present at a specially convened meeting is required.

The rights of persons to occupy or use Trust-held land were acquired through Zulu customary law, customs and usage. The actions of the Trust and the Board had the effect of depriving the holders of PTO or other informal rights in Trust-held land, of their security of tenure. Inducing residents and occupiers to enter into lease agreements without properly informing them of the nature of the agreements infringed the right to procedural fairness.

The conduct of the Trust and the Board constituted an arbitrary deprivation of PTO rights, customary law rights, and informal rights to or interests in Trust-held land, and was unlawful and unconstitutional. The Court found that the Minister and the MEC were guilty of dereliction of their statutory and constitutional duties. The relief sought by the applicants was granted.

Gigaba (born Mngoma) v Minister of Police and others [2021] 3 All SA 495 (GP)

Civil Procedure – Application for decision on lawfulness of arrest and confiscation of property pending criminal proceedings – Jurisdiction – Where alleged illegality of police actions directly affected applicant's rights, court having jurisdiction to intervene even before criminal proceedings properly commenced.

Civil Procedure – Urgency – Rule 6(12) of the Uniform Rules of Court sets out the principles for establishing urgency – A requirement for establishing urgency is an explanation for the applicant's belief that substantive redress in due course is unattainable.

Criminal Law and Procedure – Arrest – Lawfulness of arrest – Where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorised purpose such person acts mala fide and in fraudem legis.

The applicant was married to a former national Minister ("Mr Malusi Gigaba"). In July 2020, the fourth and fifth respondents, being police officials and members of the Hawks, arrived at the Gigaba home to investigate two alleged offences. The first was malicious damage to property in respect of a Mercedes Benz G-Wagon, and the second related to *crimen injuria* in respect of a WhatsApp message which had been sent from the applicant's cellular phone to an associate of Mr Gigaba. Two days after the first visit, the police officers returned and demanded all the applicant's electronic communication devices and gadgets in connection with the *crimen injuria* complaint. A week later, they arrested the applicant.

In the present application, the applicant challenged the lawfulness and constitutionality of her arrest and prosecution, and of the confiscation of the electronic communications equipment.

The respondents raised two points *in limine* regarding urgency and the court's jurisdiction to grant the relief sought and opposed the application on the merits.

Held – Rule 6(12) of the Uniform Rules of Court sets out the principles for establishing urgency. One of the requirements is an explanation for the applicant's belief that substantive redress in due course was unattainable. Based on the respondents' conduct, the Court was satisfied that the applicant would not obtain redress in due

course as she would be subjected to continuous violations to her dignity, restrictions of movement, invasion of privacy and abuse of power.

Regarding jurisdiction, the respondents argued that the criminal court in which the applicant was to be tried was the correct forum to deliberate on the constitutionality of the arrest and admissibility of evidence. The Court considered the applicant's interest in the matter, and whether the alleged illegality directly affected her rights. The complaint of confiscation of the applicant's property without a warrant and the refusal of the right to legal representation established such interest. The Court therefore did have jurisdiction in the matter. It also had to be established that it was in the interests of justice for the court to hear the application. The application of the principle of natural justice involves striking a balance between public and private interest.

The Court found compelling reasons why the issues raised by the applicant should be addressed by it. There were serious allegations of breach of the applicant's privacy and abuse of power by the applicant's politically affiliated husband who directed a domestic dispute to the Directorate for Priority Crime Investigation under the guise of a conspiracy to commit murder against him. The Court was satisfied that it should intervene before the criminal proceedings properly commenced.

In considering the lawfulness of the arrest, the Court could not find that the magistrate who issued the warrant acted *mala fides*. The next question was whether the police officers' decision to arrest the applicant was lawful and whether they were responsible for the malicious prosecution of the applicant. Where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorised purpose such person acts *mala fide* and *in fraudem legis*. The Court confirmed that the arresting officers abused their powers, presumably to avenge a complaint made by Mr Gigaba and not for any lawful purpose. The arrest was accordingly *in fraudem legis*. Based thereon, the confiscation of the applicant's possessions was unlawful. As the items seized had already been returned, the respondents were directed to restore all information unlawfully removed from applicant's electronic equipment.

Heathrow Property Holdings No 3 CC and others v Manhattan Place Body Corporate and others [2021] 3 All SA 527 (WCC)

Property – Community schemes – Sectional title scheme – Conduct rule – Dispute regarding rule – Jurisdiction – Primary forum for adjudication of disputes in terms of the Community Schemes Ombud Services Act 9 of 2011 is the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and necessary experience – High Court intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction.

As owners of 3 loft apartments in a mixed-use sectional title scheme, the applicants objected to a conduct rule adopted by the body corporate of the scheme in 2003. The rule acknowledged the right which owners had to let their units, but sought to regulate the terms thereof in respect of short-term rentals for periods of less than 6 months. The respondents explained that the rule was adopted with a view to addressing security issues pursuant to an increase in short-term rentals of residential units in the scheme.

In 2017, other owners of loft units challenged the ambit and application of the rule by referring a dispute in this regard to the statutory Ombud, as provided for by the Community Schemes Ombud Services Act 9 of 2011. The complainants sought to set aside the rule on the basis that it was unreasonable, and also sought the setting aside of penalties levied by the trustees as fines. The adjudicator found the rule to be reasonable and fair.

Held – The application had been brought on an urgent basis without any basis therefor being established. Secondly, the applicants did not set out any instances where they were unjustifiably refused permission to let their units on a short-term basis since February 2020. Consequently, they had no standing to bring an application in that regard.

A further issue raised by the Court was that the application effectively sought to bypass the dispute resolution mechanisms which have been established by the Community Schemes Ombud Services Act. The issues which the applicants sought to have determined by the court fell squarely within the ambit of the Act which provided for the determination of such disputes by an adjudicator. The legislature intended that the primary forum for adjudication of disputes in terms of the Act is to be the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and the necessary experience (not only in relation to the adjudication of disputes, but also in relation to community scheme governance). The High Court is intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction (ie oversight over the discharge by the Ombud and its adjudicators of their duties and powers), and not an adjudicatory jurisdiction.

The matter was consequently struck from the roll, with costs, on the scale as between attorney and client.

Kedibone obo MK and another v Road Accident Fund and another and another as *amicus curiae* and a related matter [2021] 3 All SA 544 (GJ)

Civil Procedure – Road Accident Fund matters – Settlement agreements – Judicial oversight – Judge President's Practice Directives requiring every settlement agreement involving the Road Accident Fund to be interrogated by a judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified.

Civil Procedure – Road Accident Fund matters – Settlement agreements – Role of attorneys – Any offer of settlement may be accepted after the legal practitioner has filed an affidavit with the court setting out details of the proposed settlement – Road Accident Fund is not empowered to make an out of court settlement in respect of a contingency fee agreement.

The Court was presented with two cases involving claims against the Road Accident Fund ("RAF") on behalf of children, where the parties had entered into settlement agreements and wished to have the agreements made orders of court. The plaintiff's attorney in both matters was the same person. The Court discovered that the amounts which it was being asked to order the RAF to pay, had already been paid by the RAF pursuant to an out of court settlement concluded between the RAF and the attorney (Ms Meistre). Investigations then revealed that Ms Meistre had received the money into her trust account and had then immediately paid herself fees out of the amount

received from the RAF - without a court order and without the fees charged being taxed by the Taxing Master. That was despite the court being led to believe by both legal representatives that the settlement agreement in each case would occur pursuant to the orders being granted.

Held – The Judge President's Practice Directive 2.1 of 2019 was directed specifically at settlement agreements involving the RAF, and requires every settlement agreement to be "interrogated by a Judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified in relation to the law, the facts, and the expert reports upon which they are based." To subvert the process, some plaintiff's attorneys then attempted to oust the court's jurisdiction by claiming that they were entitled to enter into out of court settlements with the RAF and that the settlement court had no jurisdiction where neither the RAF nor the plaintiff sought that that the settlements be made an order of court. The court held that such an approach subverted the legislative scheme created by the Contingency Fee Act 66 of 1997. In terms of a further Practice Directive, the Taxing Master was not allowed to tax costs where claims were settled *inter partes* without a court order or discharge document. Settlement agreements in cases where the defendant is the RAF had to be enrolled in Settlement Court for the agreement to be made an order of court before the taxation may be enrolled.

The entire RAF system is underpinned by the legislative scheme in the Contingency Fees Act. Any offer of settlement may be accepted after the legal practitioner has filed an affidavit with the court (the section 4(1) affidavit) setting out details of the proposed settlement with reference to the likely prospects of success at a trial, why the settlement is recommended, an outline of the fees to be charged with reference to the difference between fees charged on settlement as opposed to the fees charged if the matter were to go to trial, and details that the client fully understands his position as far as the proposed settlement is concerned. Where there is a contingency fee agreement (which would rationally be the case in all RAF matters where action is instituted using the services of an attorney) the RAF is not empowered to make an out of court settlement. The making of payment without a court order, is incompetent and contrary to the statutory scheme which binds the RAF.

Compliance with the Contingency Fees Act in relation to children's claims involves a heightened duty on the attorney representing the child. The Court set out the information to be provided in the peremptory section 4(1) affidavit.

The Court explained who should be regarded as the guardian of the child, and when a curator *ad litem* should be appointed.

Finally, the management of funds awarded to children by the RAF was considered, with the various possible options described.

The settlement agreements in both matters before the court were invalid for want of compliance with the Contingency Fees Act. The Court issued an order setting out what was required of the parties before approaching the court again.

Massyn v De Villiers NO and others [2021] 3 All SA 578 (WCC)

Corporate and Commercial – Insolvency – Extension of powers of liquidators to include establishing enquiry into company's affairs, in terms of section 417 of Companies Act 61 of 1973 – Whether liquidators had established jurisdictional

requirement that the company was unable to pay its debts in the course of being wound up – In absence of positive assertion that company was able to pay its debts at the material time, argument based on lack of jurisdictional requirement found to be without merit.

Corporate and Commercial – Insolvency – Extension of powers of liquidators – Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything which the court may consider necessary for winding up the affairs of the company and distributing its assets.

The applicant was one of two directors in a company which was finally liquidated on 9 November 2020. The company had conducted business as a fund manager trading in foreign currencies. Three investors/creditors, who had invested more than R20m, had sought the company's liquidation when it was unable to honour their withdrawal request – made after investigations revealed that the company's business activities were fraudulent and in contravention of financial services legislation.

As provisional liquidators of the company, the second and third respondents had obtained an order extending their powers to include establishing an enquiry into the affairs of the company in terms of section 417 of the Companies Act 61 of 1973, appointing the first respondent (Mr de Villiers) as commissioner and authorising him to summon persons to be examined at the enquiry. The enquiry was adjourned pending the outcome of the present application for rescission of the order which established the enquiry and extended the powers of the respondents. In the alternative, the removal of Mr de Villiers as commissioner and setting aside of the subpoenas issued by him, was sought.

In support of the application, it was contended that the liquidators had failed to establish a jurisdictional requirement, namely, that the company was unable to pay its debts in the course of being wound up. A related argument was that no section 417 enquiry could be established before the company had been placed in final liquidation, it being common cause that the impugned order was made while the company was in provisional liquidation.

Held – To claim that the jurisdictional fact of the company's inability to pay its debts had not been established, the applicant had to go further and at the very least assert that the company was able to pay its debts at the material time. However, at no stage prior to the granting of either the provisional or the final liquidation order was it ever asserted on behalf of the company that it was able to pay its debts. The order could therefore not be set aside on that basis.

The applicant also averred that the liquidators had sought and been given powers without making out a case therefor. Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything which the court may consider necessary for winding up the affairs of the company and distributing its assets. The court found that the provisional liquidators had established a case that all the powers they sought were necessary for them in their role as provisional liquidators, save for the power to sell movable assets and to agree to any reasonable offer of composition.

Turning to the alternative relief, the court considered the allegations of bias levelled against Mr de Villiers. It concluded that the conduct referred to could never justify a

reasonable apprehension of bias on the part of the commissioner by the applicant or someone in his position.

Apart from the two minor amendments to the impugned order, the application was dismissed with costs.

S v Moussa [2021] 3 All SA 599 (GJ)

Criminal law and procedure – Plea in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977 – Claim that prosecutor had no title to prosecute on the ground that the prosecution constituted an abuse of the court's process – As the title to prosecute vests in the prosecutorial authority as represented by the Directorate of Public Prosecutions, abuses by the court prosecutor not affecting title to prosecute.

Charged with numerous counts of fraud, theft, and money laundering in contravention of section 40(b)(i) of the Prevention of Organised Crime Act 121 of 1998, the accused pleaded not guilty on all counts.

It was alleged that the accused caused the withdrawal of money against uncleared deposits which ultimately resulted in a loss for the relevant bank.

Significantly, apart from the plea of not guilty, the accused pleaded in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977, that the prosecutor has no title to prosecute on the ground that the prosecution constituted an abuse of the court's process. It was alleged in that regard, that a written agreement was entered into between the accused and the prosecution that on his making payment of the amount of R1,000,000 to the attorneys of the complainant bank, the prosecution of the accused would be reconsidered and stopped.

Held – The accused's complaints were levelled against the court prosecutor and the Deputy Director of Public Prosecutions. The complaint against the latter was a complaint aimed at the prosecuting authority and not against the court prosecutor, and was not covered by section 106(1)(h). However, the complaint against the court prosecutor at the time of the alleged abuse, was not excluded from the ambit of the section. Case authority establishes that the title of a private prosecutor may be challenged by an accused on the basis that the prosecution constitutes an abuse of process. The question was whether that could also apply to a State prosecutor. In this case, it had to be decided whether the prosecutor abused her position during the course of her dealings with the accused and, if so, whether that amounted to an abuse of the court's process. If answered in the affirmative, the question then was whether the behaviour of the prosecutor resulted in the prosecutorial authority losing "title" to prosecute as contemplated in section 106(1)(h).

The only disputed issue in this case was the accused's allegation that the prosecutor had informed the accused prior to the signing of the written agreement, that should he pay the R1 million, the matter against him would be withdrawn. The Court found the version of the accused more probable than that of the State as it seemed highly improbable that the accused would have paid the R1 million, under his difficult financial circumstances, if he did not firmly believe that the matter would have been withdrawn against him once payment was made.

A prosecutor should act within the prescribed legislative framework when dealing with the prosecution of an accused. An act of a prosecutor exceeding a statutory power is

invalid under the Constitution according to the doctrine of legality. The Court found that the prosecutor must have been aware that she did not have the authority to withdraw the matter against the accused, yet allowed the accused to believe otherwise. In so doing, she abused her position. More importantly, she misled the court into believing that the agreement had been made an order of court. What could not be found was not be found that the institution or continuation of the prosecution would constitute an abuse of the court processes. Moreover, the question remained whether the abuse affected the title to prosecute as contemplated in section 106(1)(h). Based on the fact that the title to prosecute vests in the prosecutorial authority as represented by the Directorate of Public Prosecutions, abuses by the court prosecutor did not affect the title to prosecute. The accused's plea in terms of section 106(1)(h) therefore could not be upheld.

Woodlands Dairy Proprietary Limited v Minister of Agriculture, Forestry and Fisheries in the Government of the Republic of South Africa [2021] 3 All SA 619 (GP)

Agriculture – Dairy industry – Inspection – Designation of assignees in terms of section 2(3)(a) of Agricultural Product Standards Act 119 of 1990 for inspection of dairy products – Determination of assignee's fees – Fees reviewable where not rationally connected to the purpose sought to be achieved.

Constitutional and Administrative Law – Judicial review – Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requires the review proceedings to be instituted without unreasonable delay – Section 9 permitting extension of period by agreement, or by a court, where interests of justice so require – Where explanation for delay and prejudice to other party severe, extension not in interests of justice.

As part of its function Department of Agriculture Forestry and Fisheries (of which the first respondent was Minister) monitored and exercised control over various agricultural sectors, such as the dairy industry. The second respondent (the "Executive Officer") was appointed by the Minister in terms of section 2(1) of the Agricultural Product Standards Act 119 of 1990 (the "Act"). The third respondent ("Nejahmogul") was designated by the Minister in December 2016 as an assignee in terms of section 2(3)(a) of the Act, specifically for the inspection of dairy and related products.

The first applicant ("Woodlands") was the third largest producer of milk and long-life dairy products in South Africa, and the second applicant ("Milk SA") was established by the dairy industry to deal with issues of common interest to role players within the industry. The applicants challenged the constitutionality of section 3(1A)(b)(ii) of the Act and sought an amendment of the Act so that any fees determined by an assignee in terms of section 3(1A)(b)(ii) be made subject to regulatory control over, and approval by the Minister and/or the Executive Officer, prior to the imposition of such fees upon the owner of any agricultural products. They further sought the setting aside of the Minister's invitation of potential service providers to apply for designation as assignees in respect of dairy and related products, and of Nejahmogul's designation as an assignee. Other associated relief was also sought.

Held – The Act empowers the Minister to designate any person or entity as an assignee. In terms of section 3(1A)(b)(ii), fees may be charged in respect of the powers exercised and duties performed by the Executive Officer or the assignee to ensure compliance with the Act.

After the Minister designated Nejahmogul as assignee for dairy and related products, a protracted period of discussions occurred between Nejahmogul and the dairy industry regarding the manner in which Nejahmogul would fulfil its obligations and exercise its powers, particularly regarding the cost of inspections and the testing of products. By the time the commencement date of inspections arrived, an impasse had been reached, causing the applicants to approach court.

Section 3(1A)(b)(ii) provides that an assignee may charge fees for carrying out its functions, and payment of the fee determined by it was mandatory. The applicants took issue with the fact that the assignee was given the unfettered right to determine its own fees. They contended that their right, in section 22 of the Constitution, to freely choose their trade was affected. They also relied on section 33 of the Constitution, which guarantees the right to lawful, reasonable and procedurally fair administrative action.

Insofar as section 2(3)(b)(i) of the Act made the exercise of the assignee's mandate subject to oversight by the Executive Officer, the relief sought regarding unconstitutionality had to fail.

The application for the setting aside of the Minister's invitation to apply for designation as assignees, and of Nejahmogul's designation as such, was brought more than 180 days after the impugned actions took place. Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requires the review proceedings to be instituted without unreasonable delay. Section 9 permits the extension of that period by agreement, or by a court where the interests of justice so require. A court may only review an action if the interests of justice require an extension of time. Where the applicants' explanation for the delay was inadequate and the prejudice to Nejahmogul severe, the interest of justice an extension of the time limit.

Nejahmogul's determination and publication of fees was also sought to be reviewed and set aside. The Court found that the determination of Nejahmogul's fees was not rationally connected to the purpose sought to be achieved, and the fee structure was irrational. The determination and publication of the fees was accordingly set aside.

END-FOR NOW