LEGAL NOTES VOL 9/2021

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SECRETARY, JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE v ZUMA 2021 (5) SA 1 (CC)

Commission — Witnesses — Privileges — No right to remain silent — Privilege against self-incrimination applicable — Proper approach to raising such privilege — Commissions Act 8 of 1947, s 3(4).

The respondent witness (Zuma) failed to remain in attendance at the applicant commission (the Commission) where he was summoned to appear from 16 – 20 November 2020, having left without being excused from further attendance after his application for recusal of the Commission's chairperson, moved for on the first day of his appearance was dismissed (by the chairman) on 19 November 2020.
Before leaving, Zuma's counsel cautioned that the recusal ruling would be reviewed, and if he were compelled to attend, he would take the witness stand but would not testify — implying that Zuma had a right to remain silent during the proceedings before the Commission. The Commission thereafter approached the Constitutional Court, by way of an application for direct access and on an urgent basis, for its intervention to secure his appearance before the Commission.
Two amici curiae were allowed to make submissions, one raising the issue whether s 3(4) of the Commissions Act 8 of 1947 — which provides that in the case of witnesses giving evidence before a commission 'the law relating to privilege as applicable to a witness giving evidence . . . [in a criminal trial]
shall apply' — must be construed as excluding the privilege against self-incrimination but retaining all other privileges.

Held

As to the application for direct access

Given the seriousness of the threat that the allegations investigated by the Commission posed to democracy if established, it was in the public interest to grant

[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!**

direct access to enable the Commission to conduct a proper investigation of matters it was tasked to determine. (See [67] and [70] – [71].)

As to the merits

The obligation on a witness was to remain in attendance until the proceedings were concluded or they were excused by the chairperson of the Commission from attendance. Zuma's conduct in defying the process lawfully issued under the authority of the law was antithetical to our constitutional order. The Commission established a claim for compelling him to obey its process and testify before it. (See [87] – [88].)

As to witnesses' rights

Witnesses who appear and testify before a commission had no right to remain silent. Section 6 made it a criminal offence to refuse to answer lawfully put questions fully and satisfactorily. Allowing witnesses to invoke such a right before a commission was contrary to the plain text of the Act, and would seriously undermine commissions and frustrate their investigations. It was implicit that the Act required witnesses to answer all questions — except a privilege which would be available to a witness at a criminal trial as per s 3(4). (See [91] – [93].)

A statutory provision compelling witnesses to give self-incriminating evidence would be inconsistent with the constitutional right to freedom and security of the person, which right included the privilege against self-incrimination. Interpreting s 3(4) in a manner promoting the Bill of Rights, it bore a meaning promoting the right not to be compelled to give self-incriminating evidence. Section 3(4) must therefore not be construed as excluding the privilege against self-incrimination. (See [95] and [101] – [105].)

The privilege against self-incrimination was not there for the taking by witnesses; it was for the witness to claim privilege against self-incrimination. Sufficient grounds must be demonstrated to the chairman of the commission that, in answering a question, the witness would incriminate himself or herself in relation to a specified crime. (See [109].)

SITHOLE AND ANOTHER v SITHOLE AND ANOTHER 2021 (5) SA 34 (CC)

Marriage — Proprietary rights — Community of property — Default position that marriages under BAA out of community of property — Constitutionality of s 21(2)*(a)* of MPA permitting adjustment of proprietary regime to include accrual — Constitution, s 9; Black Administration Act 38 of 1927; Matrimonial Property Act 88 of 1984, s 21(2)*(a)*.

Marriage — Proprietary rights — Statutory regime — Matrimonial Property Act 88 of 1984, s 21(2)*(a)* retaining out-of-community default for Black couples married under Black Administration Act of 1927 — Discriminatory and unconstitutional — All such marriages declared to be in community of property — Opt-out via High Court application available.

At the time first applicant (Mrs Sithole) married first respondent (Mr Sithole), the Black Administration Act 38 of 1927 governed the marriage's proprietary consequences (see [4]). Under the Act marriages of Black couples were automatically out of community of property, a regime different to the one applying to couples of other races, whose marriages were by default in community of property (see [12] and [23]).

This position was changed in 1988 with the introduction into the Matrimonial Property Act 88 of 1984 of, inter alia, s 21(2)*(a)* (see [14]). Under the section Black couples

were permitted within two years from late 1988 to adjust their marriages' out-of-community status to include accrual (see [14]).
In the present case Mrs Sithole, who had not known her marriage was out of community of property, or of the two-year option to change that position, challenged the constitutionality of s 21(2)*(a)* (see [2]). This on the ground that the section unfairly discriminated against women in her position on the grounds of race and gender (see [2]).
The High Court agreed with this contention and here Mrs Sithole applied to the Constitutional Court to confirm the High Court's declaration of constitutional invalidity (see [3] and [11]).
The court (Tshiqi J writing) confirmed the High Court's order and declared the section unconstitutional and invalid to the extent that it perpetuated the BAA's discriminatory default position of marriage out of community of property. It further declared that marriages under the BAA would by default be in community of property (save for those couples who opted for out of community of property) (see [59]).
The court reasoned as follows:

- The provision had perpetuated a difference of treatment of Black people and those of other races, where there was no legitimate government purpose for such a differentiation (see [21]).
- While in form the provision enabled equal treatment, in substance it continued the prior position through requiring Black couples to take laborious steps to attain the proprietary position of people of other races (see [24]).
- The section prejudiced women more than men and so was unfairly discriminatory on the ground of gender (see [27] and [42]). The prejudices concerned were multiple and intersectional and impacted women's rights to dignity, property, housing, healthcare, food, water and social security (see [27]).
- There was no possible basis on which to justify the limitation of rights (see [45]).

BISSCHOFF AND OTHERS v WELBEPLAN BOERDERY (PTY) LTD 2021 (5) SA 54 (SCA)

Spoliation — Mandament van spolie — When available — Letters cancelling lease agreements and warning possessor of land not to trespass on previously leased land — Not constituting deprivation, let alone unlawful deprivation, of possession — Spoliation order not competent.

The appellants had leased out a number of farms to respondent. The appellants' attorneys sent two letters, both dated 1 February 2016, to the respondent's attorneys in which they were informed that all agreements between them were cancelled, and that the respondent should not trespass upon the land. Based solely on what was stated in the letters, the respondent, on an urgent basis, obtained a High Court spoliation order with costs. In the appeal against that order to the Supreme Court of Appeal —
Held
For a spoliation order there must be unlawful spoliation, ie a disturbance of possession without the consent and against the will of the possessor. A minimum threshold or degree of actual physical interference or deceit sufficiently grave to qualify as effective deprivation of possession was required; the disturbance substantial enough to effectively end or frustrate the complainant's control over the property. Where the conduct complained of merely constituted threatened

deprivation of possession, the *mandament van spolie* was not available as a remedy because it was aimed at the actual loss of possession. The mere use of 'strong and unequivocal' words in a letter, that a person should not trespass upon land, did not constitute deprivation, let alone unlawful deprivation, of possession of the land. The High Court erred. The appeal would be upheld. (See [5] – [7], [12] and [20].)

BLENDRITE (PTY) LTD AND ANOTHER v MOONISAMI AND ANOTHER 2021 (5) SA 61 (SCA)

Spoliation — Mandament van spolie — When available — Access to server and use of email.

In this matter Mr Moonisami (first respondent) and Dr Palani (second appellant) were directors of Blendrite (Pty) Ltd (first appellant) (see [1]). Factually Palani was in control of Blendrite. A dispute arose between the pair and Palani claimed Moonisami had resigned. Moonisami contested this. Ultimately Palani caused Blendrite (via instruction to Global Network Systems (Pty) Ltd (second respondent)) to effect the termination of Moonisami's access to Blendrite's email and server (see [2]).
Moonisami then approached a High Court claiming his peaceful and undisturbed possession of access had been unlawfully denied him and he obtained an order that it be restored (see [3]).
Blendrite and Palani then applied for leave to appeal but this was refused, causing them to apply for and receive such leave from the Supreme Court of Appeal (see [4]).
It upheld the appeal (see [21]): only quasi-possession of a supply of a service that arose as an incident of possession of corporeal property was protected by the *mandament van spolie* (see [15] – [16]). Here Moonisami's prior access was not an incident of possession of corporeal property in that he possessed none to which such access related (see [17] and [20]). More likely, his access was a contractual right whose quasi-possession was not protected by the remedy (see [15] and [20]).
The High Court's order set aside and replaced with an order dismissing the application (see [21]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v TONELERIA NACIONAL RSA (PTY) LTD 2021 (5) SA 68 (SCA)

Revenue — Customs and excise — Classification of articles for customs duty — Correct approach to interpretation of tariff headings — Whether oak staves mimicking maturational effect of wine barrels were 'other coopers' products' in tariff heading 44.16 — Customs and Excise Act 91 of 1964, sch 1.

Toneleria Nacional RSA (Pty) Ltd (Toneleria), the respondent, was the subsidiary of a Chilean company, Toneleria Nacional Ltda (TN), which manufactured oak barrels for the maturation of wine. In addition, TN manufactured oaken staves serving the same purpose, which are placed on racks in steel maturation tanks (see [2]).
In dispute was the Commissioner of the South African Revenue Service's classification of the staves for customs duty purposes. The Commissioner determined tariff heading 4409.29.90 to apply, while Toneleria contended that the tariff heading 44.16, which attracts no duty, was appropriate. Tariff heading 44.16

encompassed '(c)asks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves'. (See [3].)
Toneleria made a statutory appeal to the High Court against this ruling, and the High Court upheld it, declaring that the staves fell under tariff heading 44.16. Here the Commissioner, with the High Court's leave, appealed to the Supreme Court of Appeal (see [3]).
The court upheld the appeal and amended the High Court's order so as to have it dismiss the application (see [43]).
In coming to its conclusion, the court considered the following.

- The proper approach to classification was a three-stage process, to be undertaken in consecutive order. The first stage was to determine the tariff heading's meaning. Only once this determination was made could the analysis shift to the second stage, which was to discern the nature of the product in question. When this stage was complete the third could be approached, which was to decide whether the item concerned fell within the class of objects identified in the tariff heading. (See [4] and [9].)
- It was inappropriate to apply the 'always speaking' approach to the interpretation of statutes to the Harmonised System of tariff headings. The System was intended to be compendious insofar as products were concerned (this in the interests of uniform interpretation), and any revision of a tariff heading, so as to include a product within it, was for the World Customs Organisation to determine (see [25]).
- After considering dictionaries, encyclopaedias, reference books, other publications and evidence led by the parties, other coopers' products could be determined to be wooden products, manufactured by coopers and requiring the use of traditional skills, techniques and expertise of a qualified cooper (see [12], [20] and [23]).
- In nature, staves, like barrels, were made of oak and toasted and seasoned as they were (see [27] and [32]). Moreover, staves had the same maturational role in respect of the wine (see [36]).

However, in contrast, staves' production process was far less complex than that of making a barrel, and staves' manufacture did not require the skills and techniques of a cooper. Indeed, staves need not be made by a cooper (see [34] – [35], [39] and [41]).

Moreover, staves did not have the storage function that was common to a barrel and the other coopers' products that were listed in the tariff heading (see [36] and [42]).

In light of these dissimilarities, staves' similarities to oak barrels were insufficient to bring staves within the class of 'other coopers' products' in the tariff heading (see [42]).
The appeal accordingly, as stated, upheld (see [43]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v TOURVEST FINANCIAL SERVICES (PTY) LTD 2021 (5) SA 86 (SCA)

Revenue — Value-Added Tax Act — Financial services — Vendor conducting currency-exchange business through its branches and charging value-added tax on commission — Whether inputs acquired for use partly in making taxable supplies and partly in making exempt supplies — Value-Added Tax Act 89 of 1991, s 2(1).

While 'financial services' as defined in the Value-Added Tax Act 89 of 1991 (the Act) are exempt from value-added tax, s 2(1) of the Act provides that activities which are deemed financial services — including the exchange of currency — will not be so deemed to the extent that the consideration payable in respect thereof is 'any fee, commission, merchant's discount or similar charge, excluding any discount cost'.
The respondent taxpayer (TFS) was a vendor conducting a foreign currency-exhange business through a number of branches. It charged a commission, based on a percentage of the transaction value, and levied value-added tax (VAT) on the commission. A client purchasing foreign currency therefore paid it an amount made up of the quoted rand value of the foreign currency, plus the commission and VAT. A client selling foreign currency would receive the quoted rand value of the currency, less the commission and VAT. Prior to September 2013 TFS completed its VAT returns on the basis that not all the VAT paid by it on acquiring goods and services for its branches constituted deductible input tax, and so applied an apportionment in terms of s 17(1) of the Act.
After receiving tax advice that no apportionment was required because the goods and services obtained for the branches were in fact used by it wholly in the course of making taxable supplies and not at all in the course of making exempt supplies, TFS claimed an input tax deduction in the September 2013 tax period, based on the view it had overpaid VAT in each tax period over the prior five years. In April 2016 the appellant, the Commissioner for the South African Revenue Service (the Commissioner), issued an additional assessment adding back an amount on the basis that an apportionment of input tax was necessary because the goods and services had been acquired by the respondent for use in the course of making both taxable and exempt supplies.
TFS' objection failed but its subsequent appeal to the tax court was successful. The present case concerned the Commissioner's appeal to the Supreme Court of Appeal. At issue was whether the respondent, in conducting its enterprise of currency exchange through its branch network, made both taxable and exempt supplies (as the Commissioner contended) or whether it only made taxable supplies (as TFS contended).

Held

The fact that, by virtue of the proviso in s 2(1), what would otherwise have been an exempt financial service was to an extent treated as a taxable supply (so that the commission carried VAT) did not mean that the activity lost its exempt nature entirely. It remained an exempt supply for all other purposes, while the taxable component carried VAT. It followed that the proviso created a mixed supply out of an identified activity, rather than causing the activity to lose its exempt status in its entirety. Accordingly, the effect of the proviso in the present context was merely to add a taxable element to what was, and at its core remained, an exempt financial service. It turned the activity into a partly exempt and a partly taxable supply. That being so, any tax paid on goods and services acquired by TFS must be apportioned and only the part attributable to the taxable supply may be deducted as input tax. TFS' attempt to claim the entire VAT charge as deductible input tax must therefore fail. It followed that the respondent's deduction in the September 2013 VAT return of the full unclaimed VAT expense over the previous five years was impermissible, and that the appeal would be upheld. (See [16] and [17].)

HELEN SUZMAN FOUNDATION v MCBRIDE AND OTHERS 2021 (5) SA 94 (SCA)

Practice — Parties — Amicus curiae — Amicus curiae persisting in appeal despite settlement by parties — Amicus seeking on appeal to expand issue for adjudication — Such conduct impermissible.

Police — Independent Police Investigative Directorate — Executive director — Tenure — Renewal — Interpretation of s 6 of Independent Police Investigative Directorate Act 1 of 2011 — Renewal of tenure of executive director of Independent Police Investigative Directorate not at instance of incumbent but within remit of Parliamentary Committee on Policing — Role of Minister of Police limited to making recommendation — Such interpretation not inimical to independence of body — Independent Police Investigative Directorate Act 1 of 2011, s 6.

When Mr McBride's five-year term of appointment to the position of executive director of the Independent Police Investigative Directorate (IPID) was coming to an end, he wrote to the then Minister of Police, enquiring whether he intended to renew his contract. The Minister's response, that he did not, prompted Mr McBride to accuse the former of acting unlawfully, in making a unilateral decision, and demand that he withdraw such decision, and refer it instead to the relevant parliamentary committee, namely the Parliamentary Committee on Policing (the PCP), the rightful body to make the determination. Despite the Minister's assertions during correspondence to the effect that he 'did not intend to remove [him] from office', and that he would refer his decision to the relevant parliamentary committee, Mr McBride ultimately sought the intervention of the Gauteng Division of the High Court, Pretoria, in an application against the Minister and the PCP, both of whom opposed.
Section 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the Act) in ss (1) provided that the Minister had to nominate a person for appointment to the office of executive director of IPID, and in ss (2) that the relevant parliamentary committee had to confirm or reject such appointment. Subsection 6(3) of the Act provided that the appointment was for a term of five years, which was 'renewable for one additional term only'. Mr McBride asserted the importance that IPID — given its vital constitutional role, as an independent investigative body, mandated by s 206(6) of the Constitution to investigate police misconduct and offences — be perceived and experienced by the public as an independent entity. This was not possible, he submitted, if critical decisions, such as the appointment of the executive director, were made by the executive arm of government, without oversight. (See [14] – 15].) He accordingly sought orders for the setting-aside of the Minister's decision; and declaring s 6(3)*(b)* of the Act to be 'unconstitutional and invalid to the extent it conferred the power to renew the appointment of the Executive Director of IPID on the Minister of Police, rather than on the [PCP]'. (See [13].) The non-government organisation, the Helen Suzman Foundation, the only appellant in this matter, applied successfully to be admitted as amicus. In its application it argued that the interpretation of s 6(3) of the IPID Act that best vindicated constitutional imperatives was that the appointment of the executive director of IPID was renewable *at his or her instance* and not at the instance of either the Minister or the PCP. After the admission of the HSF, as well as another NGO, Corruption Watch, the parties, McBride, the Minister and the PCP, came to agree that, inter alia, under s 6(3) of the Act, the Minister's role was in fact limited to making a recommendation, and that the PCP made the decision whether to renew the executive director's tenure (see [22],

[39] and [45]). The parties sought the court's leave to have their agreement made an order of court. The HSF objected, arguing that the interpretation captured in the settlement order, in placing the power to renew the appointment of the executive director of IPID in the hands of politicians in the guise of the PCP, was constitutionally untenable, as it compromised the independence of that office. (See [23].) The High Court, however, rejected HSF's objections (see [26] for reasons), and made the settlement agreement an order of court. HSF applied for leave to appeal, and was granted it by the Supreme Court of Appeal (SCA) (see [28]).

The SCA noted the peculiar aspects of the appeal (see [1]). For one, it no longer involved as primary participants the disputants in the court below; rather, it was an appeal brought by an amicus curiae after the dispute in the court below had been settled and an agreement between the litigating parties was made an order of court (see [1]). Furthermore, there was an attempt by the amicus during the hearing to extend the challenge beyond the scope of the initial dispute, which concerned the correct interpretation of s 6(3) of the Act, to raise the purported illegality of the PCP's decision-making process on the ground of lack of guidelines (see [1] and [36]). This, the SCA held, was impermissible, in circumstances in which there had been no foreshadowing at all, either in the application for admission as an amicus, or by any of the parties. There was no evidence on which such an adjudication could take place and there was no attempt by the HSF, in the court below, to adduce such evidence which would then, in turn, have given the opposing parties a right to challenge by way of evidence and submissions of their own. What an amicus should not be permitted to do was to make out an entirely new case on appeal without the necessary evidence and without regard to due process. (See [67].) *As to the central dispute* —

Held, to be overstated the argument of HSF that, in order to safeguard IPID's independence and thus make it constitutionally compatible, the renewal process had to be removed from *the remit of any political actor, including the legislature*. (See [45] and [46].) Firstly, it postulated a higher degree of independence than that required by the Constitutional Court, namely adequate or sufficient independence to enable IPID to fulfil its mandate effectively. Secondly, the principal threat to IPID's independence lay in the executive having exclusive powers over it without oversight on the part of the legislature. (See [46].) However, Constitutional Court judgments demonstrated that a role played by the legislature in relation to independent bodies was not inimical to the independence of those bodies (see [46] and see cases referred to in [47] – [53]). They refuted the central premise of the HSF's argument, that not only the involvement of the executive, but also that of the legislature, interfered with the independence of an organisation such as IPID. They in fact identified the involvement and oversight of the legislature as an important element of the protection of the functional and structural independence of independent statutory bodies. The legislature, in other words, was a bulwark against the erosion of their independence. (See [54].) Accordingly, the foundation of HSF's interpretation of s 6(3) —that because the PCP having the power to renew undermined IPID's independence, it was necessary to interpret s 6(3) in a different way that was purportedly constitutionally compatible — was untenable. (See [55].)

Held, as to the competing interpretations of s 6 of the IPID Act, that the wording of s 6 in general supported that contained in the settlement order, ie that the power to renew the tenure of the executive director of IPID was vested in the PCP, while the Minister's role was limited to communicating his or her views to the PCP (see [57] – [58]). In contrast, s 6's text was not reasonably capable of being interpreted in the

manner favoured by the HSF (see [59]). Not only was such interpretation illogical, it could also have disastrous consequences. (By way of example, the court referred to what it described as the absurd result of a person who failed miserably in their role as executive director being granted the determinative voice in deciding their continued tenure. (See [59].) Accordingly, appeal dismissed (see [60]).

PEPKOR HOLDINGS LTD AND OTHERS v AJVH HOLDINGS (PTY) LTD AND OTHERS 2021 (5) SA 115 (SCA)

Company — Legal personality — Companies in group of companies separate legal entities even if wholly owned — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

Interdict — Interim interdict — Application to preserve res litigiosa pendente lite — Requirements restated and applied — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

Practice — Applications and motions — Allegations of fraud — Inappropriate to make findings on motion — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

This case concerned two appeals to the Supreme Court of Appeal, with its leave, against an urgent interim interdict issued by the High Court restraining the appellant companies from dealing freely with their property, pending the determination of an action instituted by the first to fifth respondents. The appellants in the first appeal were Pepkor Holdings Ltd (Pepkor), Pepkor Speciality (Pty) Ltd (Speciality), Tekkie Town (Pty) Ltd (Tekkie Town); in the second, Steinhoff International Holdings NV (Steinhoff NV) and Town Investments (Pty) Ltd (Town Investments).
Through a series of transactions, the Tekkie Town shares were ultimately purchased by Pepkor Holdings Ltd, and the Tekkie Town business sold to Speciality. Pepkor and Speciality were not parties to the main action when the High Court issued the interdict, but joined as parties subsequently. The action was instituted in May 2018 against Steinhoff NV and Town Investments (Pty) Ltd.
The respondents had ceded their claims and sold 56,94% of their shares in Tekkie Town (Pty) Ltd to Steinhoff NV, for a purchase price discharged by the issue of shares in Steinhoff NV to each of the respondents (the consideration shares). They alleged that the value of the consideration shares had been overstated and were but a fraction of their value when the sale agreement was concluded, and claimed redelivery of the equity. Their cause of action was that Steinhoff NV's true financial position had been fraudulently misrepresented and concealed to induce them to enter into the sale agreement.
The repondents' case for the urgent interdict was that the Tekkie Town shares and business became *res litigiosa* — property which was the subject of litigation — which entitled them to an interdict pending the final determination of the main action. The appellants contended that the doctrine was inapplicable because the companies within the Steinhoff Group were all separate corporate entities, each with its own board of directors which manages its business and affairs; Steinhoff NV did not control Pepkor.

In granting the interim interdict, the High Court had made certain conclusions on allegations of fraud and control by Steinhoff NV over its subsidiaries (see [33] – [38]). These were also placed in issue on appeal.

Held

When applying to preserve *res litigiosa* pendente lite, in addition to the requirements for an ordinary interdict, the property which was the subject of the interim interdict must be the subject of the action; and the action and the interim application must be between the same parties. (See [19].)

Here the doctrine was inapplicable for three reasons:

- The doctrine only applied where there was a lis between the plaintiff enforcing a right to or ownership of property and the possessor thereof. Here it could not apply to Pepkor and Speciality since the res described in the particulars of claim in the main action was not *litigiosa* in relation to them. Also, here there was no question of property subject to litigation in the main action being transferred while those proceedings were pending; the Tekkie Town shares and business were transferred to Pepkor and Speciality, respectively, well before the main action was instituted. (See [25] – [26].)
- The order issued by the High Court did not preserve the property at issue in the main action, but affected Steinhoff NV's right to deal with different property, ie the shares which Steinhoff NV held directly and indirectly in any of its subsidiaries, or any juristic persons related to it. There was no entitlement to preserve that which never served as the res vendita in terms of the sale agreement. (See [26] – [29].)
- On the pleadings before the High Court, the main action was not one in rem, but an action in personam, and pleadings had not closed when the interdict was granted. The source of the right asserted was a legal relationship between the plaintiffs and the defendants in the main action; not a legal relationship between the plaintiffs and the property itself. The cause of action was an alleged fraudulent misrepresentation that induced the respondents to enter into the sale agreement. The relevant property would therefore have become *res litigiosa* only after litis contestatio. (See [30] – [31].)

The respondents' allegations, that Steinhoff NV controlled all corporate actions within the Steinhoff Group, were simply not established on the papers in the interdict application. Neither did they make out a case on those papers for the High Court to disregard the appellants' separate corporate personalities. The High Court erred. The respondents produced no evidence to substantiate fraud in the application for the interdict, other than facts of the transactions subsequent to the sale agreement themselves, and the accounting irregularities in relation to the Steinhoff Group. It followed that the High Court's order would be set aside. (See [40] and [46].)

It was an established principle that a company was a legal entity distinct from its shareholders and that property owned by a company was not that of its shareholders. The principle applied equally where the company was a subsidiary or even a wholly owned subsidiary of another company. In terms of s 66(1) of the Companies Act 71 of 2008, the board of a subsidiary must independently manage and direct the business and affairs of the subsidiary company. The board of a holding company was thus not able to dictate the decisions of the board of a subsidiary, even if that subsidiary was a direct, wholly owned subsidiary. (See [43] – [44].)

The cases made it clear that it was inappropriate and unwise for findings of fraud or deceit to be made on the basis of untested allegations on motion, which were denied on grounds that could not be described as far-fetched or untenable. (See [39].)

MT *PRETTY SCENE***:**
GALSWORTHY LTD v PRETTY SCENE SHIPPING SA AND ANOTHER 2021 (5) SA 134 (SCA)

Shipping — Admiralty practice — Summons — Associated-ship arrest — Detail required — Clear and concise statement of nature of claim sufficient — Same detail as pleading not required — Practice Directive 27 of KwaZulu-Natal Division not to be read as requiring more — Admiralty Proceedings Rules, rule 2(1)*(a)*, rule 4(3).

Shipping — Admiralty practice — Summons — Associated-ship arrest — Defect in summons not invalidating arrest — Arrest not nullity merely because claim insufficiently specified.

Shipping — Admiralty law — Maritime claim — Enforcement — Arrest — Associated-ship arrest — Deemed ownership of charterer — Charterer placed in position of owner of ship concerned when claim at issue arose — Immaterial whether charter subsequently terminated or vessel no longer existing — Admiralty Jurisdiction Regulation Act 105 of 1983, s 3(7)*(c)*.

Shipping — Admiralty law — Maritime claim — Enforcement — Arrest — Associated-ship arrest — Second arrest in anticipation of first arrest being set aside — Permissible — Not barred by s 3(8) — Proper interpretation of s 3(8) — Admiralty Jurisdiction Regulation Act 105 of 1983, s 3(8).

The present matter arose out of the 2016 arrest of MT *Pretty Scene* as a ship 'associated' with MV *Jin Kang*, which had in June 2007 been time-chartered to Parakou Shipping Pte Ltd from the appellant, Galsworthy. Delivery was due to take place in April 2009 but Parakou, which had concluded a back-to-back time charter with an entity that went bankrupt soon afterwards, repudiated its charterparty with Galsworthy.

Galsworthy proceeded to London arbitration, seeking damages from Parakou. Galsworthy was successful, obtaining — in August 2010 — two awards totalling USD 41 million. To enforce them, Galsworthy applied ex parte to the three South African coastal High Court divisions for orders directing the registrars to issue warrants of arrest and writs of summons in respect of eight *Jin Kang*-associated ships, including *Pretty Scene*, which was arrested when it arrived in Durban in June 2016. *Pretty Scene*'s owner, the first respondent (PSS), ‡ applied in the Durban High Court (Vahed J) to set aside the arrest. It was successful. Galsworthy then effected a second arrest of the vessel. This time the application to set it aside was unsuccessful (Henriques J). Both cases went on appeal to the full court, which dismissed the appeal against Vahed J's order but upheld the one against Henriques J's order. In the result both arrests were set aside and a counter-application for security for a claim of wrongful arrest granted. *Pretty Scene* was sold and the proceeds distributed. Galsworthy appealed to the Supreme Court of Appeal.

One of the issues was whether the underlying writ of summons in respect of the first arrest of *Pretty Scene* was defective because it contained insufficient facts to establish that the vessel was an associated ship as intended in the Admiralty Act 105 of 1983 (the Admiralty Act). In this respect it was argued that the summons did not comply with the requirements in *The Galaecia*‡ and a practice directive of the KwaZulu-Natal High Court. The parties seemed to have accepted that the invalidity of the summons would lead inexorably to the invalidity of the warrant of arrest. This

purely procedural objection was upheld by Vahed J and his decision endorsed by the full court.

Another issue arose out of PSS's argument that it was not competent for Galsworthy to have carried out the first arrest for the purpose of the enforcement of the London arbitration awards because the *Jin Kang* was no longer on charter to Parakou when the awards were made, with the result that Parakou's deemed ownership of *Jin Kang* had ceased when the claim arose.

Lastly, there was the issue of the legality of the second arrest and whether the full court correctly overturned Henriques J's finding that the arrest was in order. PSS argued that it was an abuse of process for Galsworthy to have effected the second arrest to protect its position in the event of the failure of the first arrest.

Held

The challenge to the warrant was misconceived. Even if the writ of summons was defective, the defect had to invalidate both the order that the warrant be issued and the warrant itself (see [11]). And even were the summons and the warrant of arrest linked, a defect in the former would not invalidate the arrest. The warrant was not a nullity just because the claim was insufficiently specified (see [13]). In addition, since an arresting party was entitled to alter the entire basis of its claim if an arrest in rem was challenged, it could supplement a deficient summons in the same way as Galsworthy had done in response to the application to set aside the first arrest (see [15]).

The judgments in the High Court and the full court attached greater significance to *The Galaecia* than was warranted. It was no more than an extended obiter dictum on procedural issues and had no binding effect (see [25]). The Practice Directive, * which in para 2 required the summons to 'contain a statement of the facts upon which the claim was based and the facts on the basis of which it is stated that a ship was an associated ship', was the source of confusion. It had led the courts below to erroneously demand the kind of detail that should appear in particulars of claim, which was not what the directive required. The only way to remedy this was to direct that this sentence was inconsistent with the requirements of Admiralty Rule 2(1)*(a)*, which required the summons to set out a clear and concise statement of 'the nature of the claim' (see [27], [47], [50]).

The second issue was when a claim on an arbitration award arose. While the Admiralty Act viewed an arbitration award as a 'self-standing' claim independent from the underlying claim, that did not mean that the claim on the arbitration award could be detached from the underlying claim: the two were inextricably bound together. However, in considering when the award claim arose for the purposes of an associated-ship arrest, it was necessary to have regard to the underlying claim (see [67]).

In the case of charterparty claims, the charterer was under s 3(7)*(c)* of the Admiralty Act deemed to be the owner of the ship concerned 'in respect of any relevant maritime claim for which the charterer and not the owner is alleged to be liable'. Here the ship concerned was the *Jin Kang.* The relevant maritime claim was, in the first instance, the underlying claim which gave rise to the awards and, secondly, the claim based on the awards. It followed that the deeming had to be a deeming of ownership when the claim arose (see [69]).

When the claim was against the owner of the vessel, the fact that its ownership had terminated subsequently, or even that the vessel no longer existed, was irrelevant. All that mattered was that it was owner when the claim arose. The purpose of the deeming provision is to place the charterer who was liable for the claim in the same

position as the owner. The vessel (the *Jin Kang*) was under charter and the charterer (Parakou), not the owner, was liable for claims arising in relation to it. For the purpose of identifying an associated ship that may be pursued for that claim the charterer will be deemed to be the owner of the ship when the claim arose (see [71]).
As to the second arrest of *Pretty Scene*, s 3(8) of the Admiralty Act provided that '(p)roperty shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant'. Its sole purpose was to govern arrests in South Africa. It did not extend to arrests made in other jurisdictions and Henriques J correctly ruled that its effect was that a second arrest of the same ship in relation to the same claim was only prohibited where security had been given for that claim (see [90]). Henriques J therefore correctly dismissed the application to set aside the second arrest (see [93]).
In *MV* Fortune 22*: Owners of the MV* Fortune 22 *v Keppel Corporation Ltd* 1999 (1) SA 162 (C) the court wrongly ruled that English law applied to s 3(8) of the Admiralty Act by virtue of s 6(1) of the Admiralty Act, and that s 3(8) extended to arrests made in jurisdictions other than South Africa. The section had to be interpreted in the light of South African law and there was nothing to indicate that its application extended to arrests in foreign jurisdictions (see [89]).
On the strength of the above the appeal against the order of Vahed J would be upheld and the one against that of Henriques J dismissed. In the result, the application to set aside the arrest of *Pretty Scene* would be dismissed (see [98]).

VAN ZYL v AUTO COMMODITIES (PTY) LTD 2021 (5) SA 171 (SCA)

Suretyship — Surety — Liability — Business rescue — Effect of adoption and implementation of business rescue plan on company's sureties' liability to creditor — Whether sureties released from liability — Interpretation of s 154(1) and (2) of Companies Act — Under situation of ss (1), company's debt to creditor discharged, such that sureties debt also discharged — Under situation of ss (2), no discharge of debt, but effect merely that company granted personal protection against enforcement of debt against it; but sureties' liability not extinguished — Companies Act 71 of 2008, s 154(1) and (2).

Company — Business rescue — Business rescue plan — Release of company from debts — Effect of adoption and implementation of business rescue plan on company's sureties' liability to creditor — Whether sureties released from liability — Interpretation of s 154(1) and (2) of Companies Act — Under situation of ss (1), company's debt to creditor discharged, such that sureties' debt also discharged — Under situation of ss (2), no discharge of debt, but effect merely that company granted personal protection against enforcement of debt against it; but sureties' liability not extinguished — Companies Act 71 of 2008, s 154(1) and (2).

The respondent, Auto Commodities (Pty) Ltd (Auto Commodities), supplied petroleum products on credit to the company Blue Chip Mining and Drilling (Pty) Ltd (BCM). BCM's CEO at the time — the appellant, Mr Van Zyl — agreed to stand surety for its resulting debts. BCM fell into financial difficulties, so was placed in business rescue, in December 2014. A business plan was adopted in June 2015, which provided, in clause 7, that 'the controlled winding-down of the Company's affairs and the successful finalisation of Proceedings will only be achieved upon adoption of this Business Rescue Plan in terms of which the Company will be

released from the payment of some of its debts'. The plan was implemented, as a result of which Auto Commodities received dividends, totalling R1,9 million, in December 2015 and December 2016, respectively. After the substantial implementation of the business plan, business rescue terminated on 31 January 2017. Subsequently, Auto Commodities sued the appellant in his capacity as surety in the Kimberley High Court for the shortfall with respect to BCM's original indebtedness. Auto Commodities was successful in its claim, so the appellant sought leave to appeal to the Supreme Court of Appeal, and was granted it.

The broad question on appeal was whether the appellant was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. In arguing that he was not, the appellant relied on s 154 of the Companies Act 71 of 2008, titled 'Discharge of debts and claims', and more specifically s 154(2), which provided that, *if a business rescue plan had been approved and implemented in accordance with the Act, a creditor was not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan*. The appellant submitted that, given the implementation of BCM's business rescue plan, in terms of s 154(2), properly interpreted, BCM was released from any further indebtedness to Auto Commodities. Accordingly, he submitted, given that suretyship was an accessory obligation, he in turn was released from liability. (See [2] and [14].) The SCA held that, in fact, the appeal could be dismissed based on the construction of the deed of suretyship itself: even were one to assume that the implementation of the business plan had the effect of discharging BCM from liability to Auto Commodities, the latter's rights under the suretyship were, by virtue of clauses 3 and 5.4 thereof, unaffected. (See [3] – [10].) The SCA nevertheless addressed the legal point raised, given the degree of uncertainty in the legal landscape surrounding the impact of an approved and implemented business plan (see [10]).

The SCA ultimately held that, under s 154(2), properly constructed, the impact of the implementation and approval of a business rescue plan was simply that a company was granted *personal* protection against the enforcement of a debt against it (see [28] – [29] and [32]). Subsection (2) went no further than precluding a creditor from pursuing claims against the company; it did not affect or extinguish the liability of a surety to a debt (see [45]). (This was in contrast, the SCA held, to the situation provided for under s 154(1) of the Companies Act, upon which the appellant had not relied, which dealt with the position of a creditor who had 'acceded to the discharge' of a debt, who would as a result of the implementation of the business rescue lose the right to enforce such debt (see [22]). Under such subsection, given the strong language used, not only did the creditor lose the right to enforce the debt, but *the company's debt itself was also discharged*, which conveyed in ordinary parlance that it ceased to exist. (See [22] – [23].) In such a situation the surety would likewise be discharged, in line with the general principle that the liability of the surety was accessory to that of the principal debtor so that the discharge of the latter served to discharge the former. (See [25].)

The SCA accordingly rejected the appellant's argument that his liability as surety to Auto Commodities was discharged upon adoption and implementation of BCM's business rescue plan (see [45]). It dismissed the appeal (see [46]).

ZUMA v DEMOCRATIC ALLIANCE AND ANOTHER 2021 (5) SA 189 (SCA)

State attorney — Powers — Whether may fund private attorneys to represent former official in matter involving official in his personal capacity — State Attorney Act 56 of 1957, ss 3(1) and 3(3).

In the early 2000s the Presidency and State Attorney came to make decisions that the state would pay for private representation for then President Zuma in criminal matters in which he was in his personal capacity the accused (see [15]).
The present respondents (the Democratic Alliance and Economic Freedom Fighters) had later obtained the setting-aside of these decisions and a direction that the State Attorney should recover the amounts so paid (see [18]).
Here Mr Zuma appealed, the Supreme Court of Appeal dismissing the appeal and holding as follows (see [3] and [52]).

- Any delay in bringing the review had not been unreasonable: though the funding decisions had come to the public attention in the first decade of the 2000s, their details had only crystallised very recently (see [27] – [28]). It was moreover difficult to speak of delay, in that while the decisions concerned had been taken many years before, the impugned action flowing therefrom (the funding) was ongoing (see [30]).
- Section 3(1) of the State Attorney Act 56 of 1957 only authorised the State Attorney to perform work on behalf of the government, where the attorneys' work it had procured here from a private firm was on behalf of an official in his personal capacity (see [32] – [33]). The decisions establishing this arrangement were thus ultra vires and invalid (see [35]).
- Nor did s 3(3) empower the State Attorney to fund Mr Zuma's private representation (see [43]). The section allows the State Attorney 'to perform . . . functions in . . . connection with . . . matter[s] in which . . . Government . . . though not a party, is interested or concerned in, or in connection with . . . matter[s] in which . . . Government . . . though not a party, is interested or concerned in, or in connection with . . . matter[s] where, in the opinion of the State Attorney . . . it is in the public interest that such functions be performed . . .'. (see [36]). In this regard, whether there was a government or public interest involved required assessment of the nature of the proceedings, the issues, and whether there was legitimate reason to support a non-governmental party's position (see [39]).

Here government or the public could not have a legitimate interest in supporting a defence of a former government official to charges of corruption: deployment of state resources to delay or obstruct such a proceeding would subvert government and the public's interests (see [40]).

- Moreover, the divergence or conflict of the public and government's interest with those of Mr Zuma would preclude the State Attorney acting for him (see [42]).
- Finally, ss 3(1) and 3(3) only permit the State Attorney to perform the State Attorney's functions: they do not authorise the State Attorney to outsource its functions to private attorneys (see [43]).

The High Court's conclusion as to a remedy which was just and equitable (an accounting by the State Attorney, repayment by Mr Zuma) could not be faulted: the funding had been provided subject to an undertaking by Mr Zuma to repay it and it could be presumed he had made provision for this eventuality (see [44]). (He had not in any event presented evidence contradicting this presumption (see [44]).)
A repayment order would remedy abuse of public resources, vindicate the rule of law, and reaffirm the principles of accountability and transparency (see [45]).

Moreover, the nature of the discretion exercised by the High Court warranted no interference (see [46]).

- Baseless and scandalous allegations about the High Court's impartiality justified a punitive costs order on the attorney and client scale (see [51] – [52]).

AARIFAH SECURITY SERVICES CC v JAKOITA PROPERTIES (PTY) LTD AND OTHERS 2021 (5) SA 207 (GJ)

Land — Sale — Pre-emption — Exercise — Formalities — Current status of law.

Land — Sale — Pre-emption — Exercise — Manner — Current status of law.

Land — Sale — Pre-emption — Enforcement — Current status of law.

The present matter addressed in the main the formal requirements for the proper exercise of a pre-emptive right by the holder thereof in respect of immovable property owned by the right grantor, where such right granted the holder the right to prohibit the grantor from selling the property to a third party without first having given them (the holder) the opportunity to purchase on terms that were no less favourable than the terms on which the grantor sought to sell to the third party (see [52]).

An application came before the Johannesburg High Court, in terms of which the applicant, Aarifah Security Services CC (Aarifah), sought an order for the transfer to it of immovable property which it claimed it had purchased from the first respondent, Jakoita Properties (Pty) Ltd (Jakoita), in terms of an agreement of sale purportedly entered into in April 2018. The court hearing the matter ordered the separate determination of the issue, *whether in January 2018 Aarifah had validly exercised its right of pre-emption in terms of clause 18 of the lease agreement* it had previously, in September 2017, entered as lessee with Jakoita as lessor, in respect of a commercial property owned by the latter. The clause in question provided that '(s)hould the landlord want to sell the [property] the tenant will have first option to buy and will be given 48 hrs to respond'.

In December 2017 Jakoita executed a deed of sale as seller with the party Nu-Line as purchaser, and on 16 January 2018 one Mr Pereira (Pereira) on behalf of Jakoita sent an email to Mr Khan of Aarifah, informing Mr Kahn that an 'Offer to purchase' had been received from Nu-line, but that, as per clause 18, he had had first option to buy, and was entitled to a 48-hour period to indicate his intention. Aarifah argued that it validly exercised its pre-emptive right when, on the same day, Khan sent an email to Pereira in which he stated that he would 'definitely be willing to put forward an offer and sign an OTP in this regard to purchase the property' (see [47]). Jakoita disagreed that this email qualified as a valid exercise of the pre-emptive right, as it did not purport to make, or to accept, a clear offer on the terms of the Nu-Line OTP; at most, it indicated a willingness to make an offer, which was to follow. In any event, Jakoita added, the email could not constitute a valid exercise of a right of pre-emption with respect to the sale of land, as it failed to comply with the requirements of the Alienation of Land Act 68 of 1981. A formal offer (ZK4) did follow, sent via email, but this, Jakoita asserted, occurred (29 January 2018) long after the expiry of the 48-hour time period; and in any case failed to match the terms of the Nu-line OTP. (See [51].) To the extent that the email of 16 January might not qualify as a valid exercise of its right, Aarifah countered that by the latest on 16 March 2018, an offer complying with the formalities had been made, in the attorneys' letter of demand signed in the conventional fashion, asserting that Aarifah had exercised its

right (see [68]). Further, Aarifah argued that in order for Jakoita to trigger the pre-emptive right, it was obliged to make an offer to Aarifah on the terms of the Nu-Line offer, complying with the formalities of the Alienation of Land Act (see [85]), which it had failed to do. This would mean that the occurrence of the contingency provided for in clause 18 was insufficient for the 48-hour period to commence, and even notification of the occurrence of the contingency was insufficient, because Aarifah was entitled to expect an offer from Jakoita, which it, Aarifah, then had 48 hours to accept (see [86]).

Held, as to the formal requirements for the exercise of a pre-emptive right, that the law could be summarised as follows (see [60]):

- One should distinguish the covenant embodying the pre-emptive right, and acts that turned it into an agreement of sale between the grantor and the grantee.
- The covenant embodying the pre-emptive right, even in respect of the sale of land, did not need to comply with the formalities. It was binding if it was proved as a contract deliberately concluded, conferring a personal right.
- The only way in which the pre-emptive right could become an agreement of sale between grantor and grantee was if both executed it in writing, in compliance with the formalities. There had to accordingly be an offer and an acceptance, both in writing and signed.
- The holder may enforce its pre-emptive right by submitting an offer that complied with the formalities if it were accepted, and compelling the grantor to countersign it, or having the registrar or some other official authorised to countersign in the event that the grantor failed to countersign the holder's offer.

Held, further, that the way a holder exercised the right of pre-emption in the context of sales of land was by submitting a signed offer to the grantor (on terms no less favourable to the grantor than the contending offer, or on whatever terms the right allowed) that complied with the formalities. Further remedies then depended on whether the grantor signed such offer or not. Should the grantor decline to do so, the holder could not adopt the attitude that it was without more entitled to transfer as if it had a sale — it had to first achieve the completion of the sale by compelling the grantor to accept the offer in conformity with the formalities.

Held, applying the legal principles to the facts, that any offer made by Aarifah in exercising its pre-emptive right had to comply with the formalities of the Alienation of Land Act 68 of 1981 (see [62]). Section 13(1) of the Electronic Communications and Transactions Act 25 of 2002 required a special designated electronic signature for any document to comply with a statutory requirement that something be executed in writing. A 'normal' signature, such as one finds at the foot of an email, whilst it might suffice for a formality requiring a signature laid down in contract, could not suffice if the signature was required by statute. More fundamentally, however, s 4(3) and (4) read with schs 1 and 2 of ECTA made it clear that its provisions could in any event not be employed to validate deeds of sale under the Alienation of Land Act. (See [63].) Accordingly, the email of 16 January could not be said to comply with the Alienation of Land Act (see [62]), and Aarifah's principal submission that that email had to be regarded as the effective exercise of its right of pre-emption could not be sustained (see [64]).

Held, further, to the extent that Aarifah sought to rely on the letter of 16 March 2018, or the OTP ZK4, both were sent after the 48-hour period had expired, if such period was triggered by the notification on 16 March 2018 that Jakoita had received an offer from Nu-Line (see [71]).

Held, further, that there was no authority in law supporting the general principle contended for by Aarifah that, in order to trigger a pre-emptive right that had to be exercised within a given time period after a contingency arises, *the seller* had to in fact first make a valid offer consistent with the pre-emptive right (see [101]). Further, the words of clause 18 did not support such a proposition (see [102]).
Held, accordingly, that the applicant did not exercise its right of pre-emption in terms of clause 18 of the lease concluded in September 2017 (see [129]).

BOUWER OBO MG v ROAD ACCIDENT FUND 2021 (5) SA 233 (GP)

Children — Guardianship — Children's Act not making provision for new type of guardianship — No such thing as 'de facto' guardian — Children's Act 38 of 2005, s 1 sv 'Guardianship', s 18(3).

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — Never in best interests of children — Void or voidable.

MG, a 7-year-old girl, was injured when a car driven by her great-grandmother, Ms G, was involved in an accident. The plaintiff was appointed *curator ad litem* to pursue her damages claim against the Road Accident Fund. The RAF conceded liability and counsel for the plaintiff prepared a draft order. The court, however, mero motu raised the issue of the validity of contingency fee agreements (CFEs) Ms G had concluded on behalf of MG. The curator (the nominal plaintiff) indicated that he had ratified the CFEs because MG was represented by Ms G, her de facto guardian. MG had resided with Ms G both at the time of the accident and when she concluded the CFEs, and only later went back to live with her biological mother, who did not participate in these proceedings.
Counsel for the plaintiff argued that Ms G, as de facto guardian, was legally qualified to sign the CFEs. He further argued that a broad interpretation should be afforded to the word 'guardianship' in the Children's Act 38 of 2005 so that it would include de facto guardianship of the kind provided by Ms G. He contended that the phrase 'other person who acts as guardian of a child' in s 18(3) of the Act — which stipulates the duties of a guardian — included persons who were not one of the types of guardian recognised in South African law. These were natural (parents), testamentary (appointed in the testament of the last surviving parent) and assigned (appointed by the court).
Held
The definition of the word 'guardian' in s 1 of the Act was clear and unambiguous and had to be understood within the ambit of South African law as outlined above (see [33]). The words 'other person who acts as guardian of a child' did not create a further type of guardian, a 'de facto' guardian. At best, a de facto guardian would be the person contemplated in s 23 of the Act, but no real guardianship was awarded to such a person, only the specific responsibilities and rights awarded by the court in question (see [35]). The true position of Ms G was that contemplated by s 32 of the Act, but that was a position that was assigned by the court, which did not happen here (see [38]). At the time the CFEs were concluded Ms G had no authority or court-awarded rights to act on behalf of MG. In particular, she could not usurp the rights contemplated in s 18(3)*(b)* of the Act (see [40]).
There was another reason why Ms G could not have concluded the CFEs, and that was because a CFE was in the best interests of the legal practitioner representing

the child, not the child itself (see [41]). With CFEs, the risks involved in potential litigation was crucial; where the risk was minimal, or so far removed, that the necessity of concluding one was questionable, it might not pass the limitations imposed by the Contingency Fees Act 66 of 1997 (see [42]). Here MG was barely 7 years old and a passenger in a motor vehicle involved in a collision, so that no contributory negligence could be attributed to her. There was thus no risk in claiming damages from the defendant. No CFE was therefore necessary. The CFEs were voidable transactions, if not void, and the mere fact that the curator ratified them was of no consequence. There was no valid agreement to ratify and it was not in MG's best interests to slice away a sizable portion of the award to be allowed (see [43] – [45]).

CJ PHARMACEUTICAL ENTERPRISES (PTY) LTD AND OTHERS v MAIN ROAD CENTURION 30201 CC t/a ALBERMARLE PHARMACY AND ANOTHER 2021 (5) SA 246 (GJ)

Insolvency — Voidable dispositions — Void transfer of business — Failure to comply with notice requirements in s 34(1) of Insolvency Act 24 of 1936 — Invalidity relative, being only as against creditors, not absolute.

Insolvency — Voidable dispositions — Common law — Actio Pauliana — Requirements.

Sale — Of business — Validity — Sale of business as intended in s 34(1) of Insolvency Act 24 of 1936 — Failure to publish required notice — Invalidity relative, being only as against creditors, not absolute.

Section 34(1) of the Insolvency Act 24 of 1936 provides that where a notice of intended transfer has not been published in respect of a relevant transfer by a trader within the period before the date of transfer specified in that subsection, such transfer 'shall be void as against [the trader's] creditors for . . . six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period'. This invalidity is not absolute but relative: during the specified six-month period the transfer is void only as against the trader's creditors and for their purposes. Thus, the protection afforded to creditors is that, during the specified six-month period, they may treat such a transfer as being void for the purpose of recovering payment of their debts. (See [10] – [12] and [17].) In order for the transfer of an asset to be set aside under the *actio Pauliana* because it was detrimental to the transferor's creditors where the former later became insolvent, it must be shown that the transfer diminished the transferor's assets; that the transferor made the transfer with the intention of defrauding its creditors; and that there was collusion between transferor and transferee (see [24]).

MATJHABENG LOCAL MUNICIPALITY v MCDONALD AND OTHERS 2021 (5) SA 254 (FB)

Company — Register of companies — Deregistration of company — Effect — Properties registered in names of deregistered company — Common-law principle to effect that properties registered in name of deregistered company vesting in state as bona vacantia — Whether common law should be developed such that municipality automatically becoming owner of bona vacantia situated within its municipal

boundaries, or upon declaration to such effect — Court declining to develop common law in manner sought, not being convinced that such development would be consistent with inherent basic principles of SA law following upon promulgation of Constitution.

The Matjhabeng Local Municipality was the applicant in three cases heard together, considering their similarity to each other, in the Free State High Court. In each application, the Municipality sought relief against the previous director/directors of a company that had become deregistered and that owed money to it for arrear rates and taxes, to the following effect:

- That the property registered in the name of the deregistered company *be declared bona vacantia the property of the municipality*; and that
- the Registrar of Deeds be authorised and directed to transfer the properties to the Municipality.

The common law did not support the Municipality's claim of ownership and registration of the properties in *its name* ([27]), its being long established that property that had become ownerless — which would be the case of the property of a company on its deregistration — *passed automatically to the state* as bona vacantia, without any form of delivery being necessary (see [1], [16], [19], [28]). The Municipality, while conceding the common-law position (see [24] and [28]), argued, however, that the above common law was no longer relevant but had been changed by the Constitution, and should be developed such that a municipality automatically became owner of bona vacantia within its municipal boundaries, or upon declaration to such effect (see [2], [24] [30]). Such development was demanded, the Municipality argued, given the obligation imposed on municipalities by s 229 of the Constitution to levy and collect rates and taxes from its residents and property owners, and the corresponding duties imposed on ratepayers by ss 5(1)*(g)* and 5(2)*(b)* of the Systems Act to pay for municipal services; and taking into account that municipalities had been granted by s 151(3) of the Constitution the right to govern on their own initiative the local government affairs of their communities, and by s 156(1) executive authority and administrative powers in respect of listed local government matters, which included 'municipal public works in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law'. (See [28] – [30].)

Held, that, in order to grant relief in favour of the applicant, the court would have to depart from the common law and a long list of authorities. The court was not convinced that a development as suggested by the Municipality would be consistent with inherent basic principles of SA law following upon the promulgation of the Constitution. It would not be a case of adapting 'the common law to reflect the changing social, moral or economic fabric of the country', but a dramatic departure from existing legal principles. Such a major change in order to reform SA law was the prerogative of the legislature and not the judiciary. In fact, the Public Finance Management Act 1 of 1999 and its regulations and schedules were indicative * of the legislature's intention not to change the common-law principles in respect of bona vacantia. (See [40].)

Held, accordingly, that the Municipality was not entitled to any relief, with ownership in the immovable property passing to the state, being the Government of the Republic of South Africa (see [42]).

MPHATSOI v VAN STADEN 2021 (5) SA 267 (LCC)

Land — Land reform — Magistrates' courts — Powers under ESTA — Whether s 17(4) of ESTA granting magistrates power to invoke civil contempt process — Extension of Security of Tenure Act 62 of 1997, s 17(4).

Appellant and respondent had settled a claim brought by appellant under s 14 of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the settlement had been made an order of court by the magistrates' court which was exercising ESTA-derived jurisdiction in the matter (see [2]).
When respondent later failed to comply with the order, appellant applied to the magistrates' court for an order sourced in s 17(4) of the Act that respondent was in civil contempt (see [3]). (Section 17(4) provides inter alia that 'the rules of procedure applicable in applications in the High Court shall apply mutatis mutandis in respect of any proceedings in a magistrate's court in terms of this Act'.)
The application was, however, dismissed on the ground that the High Court rules were not the source of the High Court's power to employ the civil contempt process: the High Court's inherent powers were. Thus the magistrates' court could not invoke the process by dint of s 17(4) and the rules (see [4]).
Here appellant appealed to the Land Claims Court, urging that s 17(4) should be interpreted to include the power to invoke such process (see [5]).
Held, confirming the magistrates' court's reasoning, that the appeal should be dismissed: the power to invoke the civil contempt process came from the High Court's inherent jurisdiction rather than the rules that s 17(4) imported, and no other provision of the statute granted magistrates' courts such a power (see [10], [15] and [17]).

STANDARD BANK OF SOUTH AFRICA LTD v SIBANDA 2021 (5) SA 276 (GJ)

Judge — Indisposition — Civil trial — Effect — After hearing of evidence completed, presiding judge becoming indisposed and unable to deliver judgment — Whether trial to start de novo due to importance of presiding judge's observation of witness demeanour — Critical evaluation of demeanour as factor in evaluating witness credibility — Competent for parties to agree that transcript of evidence, together with documentary exhibits, be placed before another judge for hearing of argument and delivery of judgment.

Evidence — Witnesses — Credibility — Demeanour of witnesses — Critical evaluation of demeanour as factor in evaluating witness credibility.

Practice — Trial — Indisposition of judge — Effect — After hearing of evidence completed, presiding judge becoming indisposed and unable to deliver judgment — Whether trial to start de novo due to importance of presiding judge's observation of witness demeanour — Critical evaluation of demeanour as factor in evaluating witness credibility — Competent for parties to agree that transcript of evidence, together with documentary exhibits, be placed before another judge for hearing of argument and delivery of judgment.

After the hearing of evidence was completed, the presiding judge became indisposed and unable to deliver judgment. The parties agreed that the transcript of proceedings, together with documentary exhibits and the parties' written heads of

argument that were furnished to the trial judge, be placed before court for delivery of judgment.
The court, in deciding to proceed as agreed, as opposed to ordering the trial to start de novo, *held* that the premise for starting the trial de novo — that the presiding judge's observation of witness demeanour was of such great value that a judge would not be able properly to determine the matter upon a mere reading of the record — was not supported by social science (see [5] – [10]) or case law; its value should not be overemphasised (see [10] – [14]).

TSOTETSI AND OTHERS v RAUBENHEIMER NO AND OTHERS 2021 (5) SA 293 (LCC)

Land — Land reform — Magistrates' court — Jurisdiction — Whether limited to subject-matter referred to in s 19(1)*(a)* of ESTA (proceedings for eviction or reinstatement and criminal proceedings in terms of ESTA) — Or whether, in terms of more generous interpretation, court also enjoying jurisdiction, by virtue of s 19(1), to grant interdicts and declaratory orders as to rights of parties in terms of ESTA, whether or not that relief relating to subject-matter referred to in s 19(1)*(a)*, but provided relief is 'in terms of ESTA' — Extension of Security of Tenure Act 62 of 1997, s 19(1).

The appellants were occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) of a farm owned by a trust of which the respondents were trustees. By agreement (the details of which were in dispute) the appellants kept cattle on a portion of the property, where they were allowed to graze. That portion of land, it was common cause, became overgrazed, such that it required rehabilitation, prompting the respondents to bring an application in the Vrede Magistrates' Court in the Free State for the removal of cattle. The magistrate hearing the matter found that the appellants were land users as defined in s 1 of the Conservation of Agricultural Resources Act 43 of 1983 (CARA), and, as such, they were jointly responsible with the Trust as landowner in terms of reg 9(1)*(a)* – *(e)* of the regulations made under CARA to take as many of the measures prescribed as were necessary in the situation to protect the veld on the farm unit effectively against deterioration and destruction, which they had failed to do. In such circumstances, the magistrate gave orders to, inter alia, the following effect: (1) that the appellants move all their livestock from the property before a specified date; (2) that, in the event of their failing to do so, the Sheriff of Vrede do so; and (3) that the allocated area be completely rested for a minimum period of two growing seasons, after which a maximum of five head of the appellants' cattle (in line with the requirements of CARA) be returned to graze in the allocated area. The appellants appealed against such orders, in terms of s 19(2) of ESTA, to the Land Claims Court.
A key issue that arose on appeal was whether the magistrates' court had had jurisdiction to hear the matter. In terms of s 19(1) of ESTA, a ' magistrates court *(a)* shall have jurisdiction in respect of (i) proceedings for eviction or reinstatement, and (ii) criminal proceedings in terms of this Act; and *(b)* shall be competent (i) to grant interdicts in terms of this Act; and (ii) to issue declaratory orders as to the rights of a party in terms of this Act'. The LCC raised mero motu the following. Was a restrictive interpretation of s 19(1) called for, such that the magistrates' court's jurisdiction in terms of ESTA, and in turn the LCC's appellate jurisdiction, was limited to the *subject-matter* referred to in s 19(1)*(a)* of ESTA (proceedings for eviction or reinstatement and criminal proceedings in terms of

ESTA)? Or was a more generous interpretation appropriate, such that the magistrates' court, by virtue of s 19(1)*(b)*, also enjoyed jurisdiction to grant interdicts and declaratory orders as to the rights of parties in terms of ESTA, whether or not that relief related to the subject-matter referred to in s 19(1)*(a)*, but provided the relief is 'in terms of ESTA' (see [18]). Apart from these aspects raised by the court, the appellants argued that the magistrates' court did not have jurisdiction, as the orders granted could be classified as neither interdicts nor declarators. (It was common cause that the subject-matter of the present case did not fall under ss (1)*(a)*.)

After hearing arguments from the parties, the court held, as to *the question of jurisdiction*, that the more generous approach should be adopted, for three reasons. One, s 19(1)*(b)* was reasonably capable of the more generous interpretation and this interpretation was not in any way strained: in particular, the different words used to introduce ss (1)*(a)* and *(b)*, ie 'jurisdiction' and 'competence', respectively, were not incompatible and the concept of subject-matter jurisdiction was readily embraced in the concept of judicial 'competence' (see [25]). Two, there were various textual indications that the legislature intended the generous interpretation to be adopted: for example, in the use of the word 'competence' in the context of s 19(1)*(b)*, where elsewhere, in s 20(1), the word 'powers' was used when indicating the ability of the LCC to grant interlocutory orders, declaratory orders and interdicts where doing so was necessary or reasonably incidental to the performance of its functions in terms of ESTA; and further the use of the word 'and' between s 19(1)*(a)* and *(b)*, suggesting that s 19(1)*(b)* added to the subject-matter jurisdiction of what was contemplated by s 19(1)*(a)*. (See [26].) Three, the generous interpretation of s 19 better promoted the spirit, purport and objects of s 34, which secured everyone the right to access to courts, and s 25(1) and (6), which secured landowners the right to property and land occupiers the right to security of tenure, of the Constitution of the Republic of South Africa, 1996 (see [27] an [28]).

The court further held that the orders in question were interdicts in nature (see [30]). Further, that the close nexus between the statutory rights derived from ESTA and the personal rights that flowed from an agreement with an ESTA occupier which regulated grazing, rendered an order about the latter to be '*in terms of*' ESTA for purposes of s 19(1)*(b)* (see [31]). (The court thereby rejected the appellants' argument that the phrase 'in terms of' was limited to statutory rights derived from ESTA, holding that it included sufficiently connected rights derived from an agreement with an ESTA occupier to keep and graze cattle on the property in question (see [33]).) Accordingly, the jurisdictional objection raised by the appellants had to fail (see [36]).

As to the merits, the court ultimately held that court magistrate was correct in granting an order for the removal of the cattle (see [43]). To the extent that the appellants had argued that historically the trustees had provided alternate grazing camps to rotate grazing, the court held, they had failed to plead terms of any agreement which would allow the court to conclude that there was a contractual duty to supply grazing land for rotational purposes (see [40]); further, it was not established on the papers that any such historical practice ever existed (see [41]). The court held, however, that the magistrate, in determining the number of cattle to be returned as five, as per the requirements of CARA, had committed an error (see [48]); and replaced such order with one allowing the appellants, after a period of two growing seasons, to return 'only the number of livestock permitted by the provisions of the Conservation of Agricultural Land Act 43 of 1983 and its regulations applicable at that time' (see [51]).

ZAMANI MARKETING AND MANAGEMENT CONSULTANTS (PTY) LTD AND ANOTHER v HCI INVEST 15 HOLDCO (PTY) LTD AND OTHERS 2021 (5) SA 315 (GJ)

Arbitration — Review — Whether rule 53 of application — Whether arbitrators' notes part of rule 53 record — Arbitration Act 42 of 1965, s 33; Uniform Rules of Court, rule 53.

Applicants and first – sixth respondents had been involved in a dispute which had gone to arbitration, and in which those respondents had obtained an award in their favour (see [1]). Applicants later instituted a review of the arbitrators' (7th – 9th respondents') award and called on the arbitrators under rule 53(1)*(b)* to despatch to the registrar the record of the arbitration proceedings (see [1] and [7]). This the arbitrators had done save for the documents annotated with their notes (see [7]). Applicants in response issued a rule 30A notice requesting despatch of the annotated documents and, on the arbitrators' refusal instituted these proceedings to compel their production (see [2] – [3]).
The arbitrators' reasons for refusal were that rule 53(1)*(b)* was not of application to reviews of awards brought under s 33 of the Arbitration Act 42 of 1965 and in any event that their notes were not part of the record (see [3] and [7]).
Held, that rule 53 was of application in s 33 reviews of arbitration awards and that this finding was supported by the language of the rule, case law and the rule's utility in making for a fair review proceeding (see [16] – [17], [19], [21] and [24] – [25]).
Held, further, that the arbitrators' notes did not form part of the record and that their production could not be compelled under rule 53 (see [44]). This as such notes could be fragmentary, provisional, exploratory or subject to revision or discard and their relationship to the award's reasoning could not be determined with certainty (see [36] and [39] – [40]). Moreover, the notes, as the 'raw material' of reflection, ought to be produced under conditions of utmost freedom and this might be curtailed if production thereof could be compelled (see [41]).
Appeal dismissed (see [46]).

SA CRIMINAL LAW REPORTS SEPTEMBER 2021

MANANGA AND OTHERS v MINISTER OF POLICE 2021 (2) SACR 225 (SCA)

Arrest — Without warrant — Legality of — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Arrest for assault involving infliction of dangerous wounds as mentioned in sch 1 to Act — Whether wound dangerous, objectively determined — Complainant having lacerations to face which required to be sutured, and suffering fractured wrist — Arresting officer entitled to regard wound as dangerous, justifying arrest.

The court was required to determine on appeal against a decision dismissing the appellants' claim for wrongful arrest, whether the police officer who had arrested the appellants for an assault with intent to do grievous bodily harm had the authority to do so in terms of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). The complainant had allegedly been assaulted by the appellants and was taken to

hospital where the lacerations to his head were sutured and his fractured wrist was put into a plaster-of-Paris cast. He was kept in hospital for four days as he had lost a lot of blood and was dehydrated. When the arresting officer read the police docket, he went to interview the complainant and saw his wounds. He also took statements from other witnesses. He then arrested the appellants and charged them with assault with intent to do grievous bodily harm. It was contended on appeal that in order for the police officer to have lawfully arrested the appellants he could only have done so for an offence mentioned in sch 1 to the CPA, the operative one being an assault where a dangerous wound was inflicted. It was contended that there was no proof that the wounds inflicted on the complainant were 'dangerous'.
Held, that the question, whether the suspicion by the person effecting the arrest was reasonable, had to be approached objectively. Accordingly, the circumstances giving rise to the suspicion had to be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. The information before the arresting officer in the docket, coupled with his own observations of the injuries, which were objectively proved, demonstrated an actual suspicion, founded upon reasonable grounds, that an assault in which dangerous wounds had been inflicted had been committed. The respondent had therefore proved that there were reasonable grounds to suspect that both the injuries to the head and the fracture of the wrist, which endangered the use of the limb, constituted dangerous wounds. (See [20].) The appeal was accordingly dismissed.

MALEBE-THEMA AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS 2021 (2) SACR 233 (GP)

Arrest — With warrant — Lawfulness of — Arrest for malicious purposes — Arrest unlawful.
Damages — Measure of — For malicious prosecution — Plaintiffs arrested and prosecuted for nefarious purposes — Damages of R100 000 awarded to each plaintiff.

The plaintiffs instituted action against the defendants for wrongful arrest and detention and malicious prosecution. Their arrests arose from their involvement in organising a birthday party for the Divisional Commissioner of the South African Police Service (the SAPS) at which the police brass band was engaged to perform. It was alleged that the plaintiffs had used the SAPS' funds for the party. The plaintiffs alleged that the celebration coincided with a regular feedback session. The plaintiffs were discharged at the end of the state's case. In their defence, the defendants alleged that the arrests were lawful, a warrant having been authorised by a magistrate for their arrests. They also alleged that the prosecution was instigated on the advice of the National Director of Public Prosecutions and therefore denied that they maliciously set the ball in motion for the prosecution of the plaintiffs.
The court held that no evidence had been placed before it by the defendants, and that the attendance of the plaintiffs before a criminal court could not have been secured or obtained in any manner other than for the defendants to have applied for the authorisation of a warrant to secure their attendance before court. It had also not been rebutted by the defendants that, for these types of meetings, catering had always been arranged, in respect of which prior application for funding was made. As such, the benefit derived from the catering on the day was for all the members present at such gathering and employed by the SAPS, and not per se exclusively for

only the two plaintiffs. The inescapable conclusion was that, for one or other nefarious reason, the relationship between the plaintiffs and the Divisional Commissioner seemed to point to the real reason why the plaintiffs had been targeted for their noble actions, and nothing else, and that no criminal conduct could be attributed to their actions. (See [18] and [22] – [23].)
The court held, further, that on his own evidence, the second defendant was unable to place before the court reasonable and probable grounds to have instigated and initiated the proceedings, and his failure to have regard to the findings of an internal report prepared by the third defendant, and to obtain all possible evidence on the matter from all potential witnesses, pointed to malice on his part. In the circumstances the plaintiffs had proved malicious prosecution. (See [25].) The court held that an appropriate award for damages would be R100 000 each for malicious prosecution; R50 000 each for an unlawful arrest and detention; and the plaintiffs' claim for legal fees. (See [30].)

S v SONI 2021 (2) SACR 241 (SCA)

Murder — Sentence — Imprisonment — For murder committed as culmination of lengthy campaign of revenge against deceased who was accused of having cuckolded appellant — Appellant using corrupt policemen to entrap and lay false charges against deceased — Sentence of 25 years' imprisonment not disproportionate.
Evidence — Witness — Cross-examination — Incomplete due to death of witness — Witness cross-examined over contents of video-recording during trial-within-trial — Recording admitted into evidence, but counsel given leave to cross-examine witness at subsequent stage — Witness having testified and been cross-examined in main trial, but dying before further cross-examination — Evidence of witness in main trial not affected if video-recording evidence excluded — Trial court ought to have excluded such evidence and allowed other evidence of witness.

The appellant embarked on a campaign of revenge against the deceased after he suspected him of having had an intimate relationship with his (the appellant's) wife. This involved attempts to entrap the deceased, a medical doctor, in fake charges of sexual assault; charges of being in possession of illegal drugs by planting them at his practice; a charge of assault; spray-painting the words 'sex pest' and 'sex doctor' on the walls of his practice; having him assaulted; and, finally, having him killed. He was sentenced to 25 years' imprisonment on the murder count, the court finding that there were substantial and compelling circumstances to justify a sentence less than the prescribed minimum sentence of life imprisonment. He was sentenced to a total of 30 years' imprisonment on all the counts. It was contended on his behalf that the sentence was shockingly inappropriate. The High Court took into account, in sentencing the appellant, his personal circumstances, as well as the impact and effect of the crimes on the deceased's family, the nature of the crime, the seriousness of the offences, their cumulative effect and the interests of society, including the possibility of rehabilitation. The appellant was 42 years old at the time of sentencing and a first offender. He was an accomplished businessman who had grown up in a staunchly conservative Hindu family, suffered from poor health and depression, and had been married for 11 years before the marriage ended in divorce. Although he was a co-holder of parental rights and responsibilities in regard to the two children born of the marriage, the divorce was settled giving recognition to

the appellant being the primary caregiver of his daughter. He was also a community-orientated person who contributed to charities and feeding schemes.
Before dealing with the merits of the appeal, the court was obliged to consider a question of admissibility which had arisen as a result of circumstances caused by the death of a witness. During the course of the trial, the state called a witness who testified in a trial-within-a-trial about a video that he had recorded on his cellphone during a journey which he had taken with the appellant. He was cross-examined at length about the video and, at the conclusion of the trial-within-a-trial, the judge admitted the video recording into evidence and incorporated it as evidence in the main trial. Leave was then granted to the defence to recall the state witness in question. Before he could be further cross-examined, the witness died, and the appellant contended that all of his evidence had to be excluded from consideration, on grounds that to allow it would infringe the appellant's constitutional right to challenge the evidence, and that the trial court had erred in failing to do so.
The court held on appeal that the right to recall the witness was restricted to further cross-examination within a specified remit, namely with regard to the video evidence that had been admitted into evidence. But if the video were excluded from the evidence, then the appellant had suffered no infringement of his right because the right was never of application outside the contents of the video. And since the exclusion of the video evidence eliminated any damaging evidence recorded on video, nothing more was required to be fair to the appellant. The fullest exercise of his right could never have achieved more than what was secured by such exclusion. There was no reason why the rest of his evidence should not be allowed to stand simply because the right to cross-examine the witness on the contents of the video could not be exercised. Wholesale exclusion would lack rational justification and would lack proportionality, and would not make the trial any fairer to the appellant, in comparison to the remedy which the court considered appropriate, namely the exclusion of the video evidence. The court a quo had accordingly erred in failing to rule that the video evidence had to be excluded. (See [86] – [93].)
The court then turned to examine the merits (the conviction for murder was confirmed; the appeal on the remaining counts upheld in part and dismissed in part) and sentences imposed on the appellant.
Held, as to the sentences, that it was important to bear in mind that the appellant persisted in exacting revenge and ultimately conspired in and embarked on a campaign to kill the deceased, resulting in the cold-blooded murder of the deceased. Never once had he shrunk from his campaign of using corrupt policemen to do his bidding and using money as a means to an end. The sentence of 25 years' imprisonment was not shockingly inappropriate or disproportionate to the seriousness of the crime. It was an appropriate and salutary sentence which was balanced and fair. (See [149] – [150].)
Held, further, that, given the circumstances in which the offences in the other counts occurred, they were all closely linked to the murder count and formed part of the scheme upon which the appellant had embarked, one carefully planned and ultimately culminating in the commission of the murder. In the light of the cumulative effect of the sentences, they were to run concurrently with the sentence for the murder count. (See [153].)

SAVOI AND OTHERS v NATIONAL PROSECUTING AUTHORITY AND ANOTHER 2021 (2) SACR 278 (KZP)

Trial — In camera hearing — Application for special case in terms of s 32 of Superior Courts Act 10 of 2013 — Whether applicant had laid sufficient foundation for such dispensation.

The applicants were charged with bribery, racketeering, money-laundering, fraud and corruption in the KwaZulu-Natal and Northern Cape divisions of the High Court. The present application was part of a series of applications brought by the applicants after they had launched a permanent stay of prosecution on 27 May 2013. They placed reliance on legal professional privilege to have a portion of that hearing held in camera. The respondents opposed the application and raised three points in limine, namely the absence of jurisdiction of the court to hear issues that related to the Northern Cape cases; that a previous order of the court precluded the court from hearing the application; and that the trial court was best suited to deal with the admissibility of evidence and any challenge thereto. The applicants alleged that 69 documents had been unlawfully seized from them in three separate operations; that the search and seizure of the documents were in violation of their right to legal professional privilege; and that a mechanism was required to view the documents when the permanent-stay application was heard. They submitted that the proposed mechanism should not infringe on their privilege, and for this reason they required the representatives of the state to sign a confidentiality undertaking in a form proposed by the applicants, attached to the notice of motion. The application for a special case was brought in terms of s 32 of the Superior Courts Act 10 of 2013 (the Act). They relied on their annexure K to their application, which was an index to privileged documents.
The majority of the court (Steyn J, with Kruger J concurring) held that, as of right, privilege could not be claimed without jurisdictional facts being placed before them. Annexure K served as the factual foundation for the privilege and should have specified the circumstances that qualified the communication to be privileged. To do differently would mean that any communication, if claimed to be privileged, would qualify as privileged communication without meeting any of the requirements. The court was required to decide on a narrow issue, namely whether the applicants succeeded in showing that their case was sufficiently special to be heard partly in camera. The relevant issue was not whether the state would be able to give a confidentiality undertaking, but whether the applicants could legitimately claim that the state should give such an undertaking. In the circumstances of the present case, the applicants had failed to lay a factual foundation that would qualify their case as special, and were accordingly not entitled to the relief that they sought. (See [33] and [42] – [43].) The court was further not persuaded that the previous court order should be disregarded, and held that it remained final and valid until amended or varied. The applicants had not identified which of the items listed in annexure K related to that order, and they accordingly had to be excluded. (See [49].) As to jurisdiction, the court held that jurisdiction was not something that derived from an agreement between the parties, nor could a court assume jurisdiction not conferred upon it by statute. The KwaZulu-Natal Division exercised jurisdiction over criminal matters within its jurisdiction, and the applicants had failed to show that the court had jurisdiction over the Northern Cape matters. (See [54].) In the result, the majority of

the court were not persuaded that the applicants had made out a special case as required in terms of s 32 of the Act.
In a separate concurring judgment, Henriques J held that, if the court was excused from the obligation of making a determination regarding the privileged status of the documents in annexure K, as conceded by counsel for the applicants, the conclusion, that a special case or special circumstances existed to warrant a deviation from the general rule of open public hearings, was nullified. (See [88] – [89].) The main judgment ought not therefore to have delved into the respondents' other points in limine and made findings on such issues. (See [96].)

S v MENYUKA 2021 (2) SACR 316 (GJ)

Bail — Pending appeal — Applicant granted leave to appeal — Convicted of murder and attempted murder — Application in terms of s 321(1)*(b)* of Criminal Procedure Act 51 of 1977 — Test for — Provisions of s 60(11)*(a)* or *(b)* of Act applicable and required to show exceptional circumstances.

The applicant was convicted in the High Court of murder and attempted murder and was sentenced to 27 years' imprisonment. The trial judge (since deceased) refused leave to appeal, but in 2017 leave was granted by the Supreme Court of Appeal to appeal to the full court against conviction and sentence. The applicant commenced serving his sentence in August 2013. In the present application, he applied in terms of s 321(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) for bail pending the appeal.
As to the test to be applied in determining the bail application, the court held that the provisions of s 60(11)*(a)* or *(b)* of the CPA were applicable, and that exceptional circumstances had to be shown before a person, convicted of a sch 6 offence and sentenced to long-term imprisonment, was released on bail pending an appeal. Despite the wide discretion provided in s 321, a starting point should be that exceptional circumstances would have to be shown in order to be granted bail which effectively suspended the sentence of the applicant until his appeal was dealt with. (See [22].)
In the circumstances where the conviction of the applicant was premised on limited evidence and there was a likelihood that a court of appeal might set aside the conviction of the applicant; where the applicant had shown that he would not abscond should his appeal not be successful and that he had served more than seven years of the sentence and might become eligible for parole at some stage; where if the applicant was not granted bail he would remain in custody and continue to serve his sentence for at least approximately 10 months; and where there had been an undue delay of his appeal for a period of approximately four years, the applicant had established on a balance of probabilities that exceptional circumstances existed which permitted his release on bail in the interests of justice. (See [30] and [33] – [36].)

S v PAPIYANA AND ANOTHER 2021 (2) SACR 327 (ECM)
Trial — Assessors — Absence of — Magistrate proceeding with trial in absence of one assessor because of lack of human resources provided by relevant authority — Proceedings vitiated by irregularity — Magistrates' Courts Act 32 of 1944, s 93*ter*.

The two accused appeared in a regional magistrates' court on charges of murder and were asked by the magistrate whether they wished to be tried in the presence of assessors. They responded in the affirmative and on the date of trial one assessor was present. The magistrate nonetheless proceeded with the trial as far as closing argument at the end of the state and accused's cases, but then became concerned that the proceedings might not have been in accordance with justice and submitted the matter on review because of the absence of the second assessor.
Held, that the provisions of s 93*ter* of the Magistrates' Courts Act 32 of 1944 were peremptory and the absence of the assessor merely because of the lack of human resources provided by the Department of Justice and Constitutional Development was not a justification for non-compliance with the section. The magistrate had accordingly committed a gross irregularity by proceeding with the matter in the absence of one assessor, and the proceedings had to be set aside. (See [10] – [12].)

ALL SA LAW REPORTS SEPTEMBER 2021

Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others [2021] 3 All SA 647 (SCA)

Civil Procedure – Evidence – Whether evidence of manner in which the parties implemented the subscription agreement could be considered in light of parol evidence rule – Explaining scope of parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question.

Civil Procedure – Mootness – Court having discretion to entertain the merits of an appeal, even where the matter is moot – Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal.

Corporate and Commercial – Subscription of shares agreement – Subsequent disposal of shares – Existence of requirement of consent for sale – Interpretation of subscription agreement – Rules of interpretation set out by court.

In terms of a subscription of shares agreement, the first appellant (“Capitec Holdings”) issued 10 million shares to the first respondent (“Coral”). Coral, in turn, was required to allot and issue shares to the second respondent (“Ash Brook”). A company holding a majority interest in Ash Brook, and various parties related to it (the “Regiments Parties”), Coral and the third respondent, Transnet Second Defined Benefit Fund (the “Fund”), entered into a settlement agreement in terms of which the Fund would be paid R500m by the other parties in settlement of claims it had against the Regiments Parties. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares. Capitec Holdings’ consent was requested for the disposal of the shares by Coral. Its refusal of consent led to Coral and Ash Brook approaching the High Court which held that Capitec Holding’s refusal to consent to the sale of the sale shares was in breach of its contractual and common law duties of good faith and reasonableness. Capitec Holdings appealed against the order that it consent to the sale.

Coral, Ash Brook, and the fourth and fifth respondents submitted that the decision of the present Court would have no practical effect or result, and in terms of section 16(2)(a) of the Superior Courts Act 10 of 2013, the appeal should be dismissed.

Held – The court has a discretion to entertain the merits of an appeal, even where the matter is moot. Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal. The appeal in this case was of practical consequence, and was not moot. But even if it were, the interpretation of the relevant clause (clause 8.3) in the subscription agreement was a legal issue of consequence for the future of the parties' commercial relationship. The point regarding mootness was thus dismissed.

On the merits, the key question was whether Capitec Holdings' consent was required before Coral could sell the sale shares to the Fund, and if it was, whether Capitec Holdings owed duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale.

In considering the provisions of the subscription agreement that had relevance for deciding whether Capitec Holdings' consent was required, the court referred to the established rules of interpretation. Of significance in the exercise, was the submission by Coral and Ash Brook that the manner in which the parties implemented the subscription agreement was relevant evidence as to what clause 8.3 meant. The wider approach to interpretation endorsed in case law referred to by the court states that extrinsic evidence is admissible to understand the meaning of the words used in a written contract. However, the parol evidence rule which remains part of our law, states that barring exceptional circumstances, extrinsic evidence is inadmissible to contradict, add to or modify the contract. Explaining the scope of the parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question. That led it to conclude that the subscription agreement did not require Capitec Holdings' consent to the sale by Coral of the shares to the Fund. The Court also discussed the role of good faith and public policy in the context of freedom of contract.

The appeal was upheld.

City of Johannesburg Metropolitan Municipality v Zibi and another
[2021] 3 All SA 667 (SCA)

Property – Property rates – Application of penalty tariff – Zoning of property – Unauthorised use of property – Power of municipality to impose a penalty tariff for illegal or unauthorised use of property within its jurisdiction – Imposition of penalty against property owners is necessary and incidental to the effective performance of municipality's functions and services, and is therefore not ultra vires its powers, provided it does so as part of a validly adopted property rates policy.

In terms of a High Court order, the appellant municipality was directed to apply the residential category reflected on its valuation roll, when levying property rates against the respondents' property. Until October 2015, the municipality had levied a property rate of R898,01 monthly on the property, which at all relevant times had been zoned "Residential 1". However, from October 2015 onwards, such rate escalated to R3 592,05. The increased amount was a penalty tariff for the respondents' unlawful or unauthorised use of the property.

The respondents contended that the municipality should have first re-categorised the property from Residential 1 to "illegal or unauthorised" use on its valuation roll, before imposing the escalated levy.

The High Court agreed that the failure to first re-classify the property in respect of unauthorised use amounted to a contravention of the municipality's rates policy which in turn contravened section 3 of the Local Government: Municipal Property Rates Act 6 of 2004. It was held that the municipality was only authorised to levy rates on the property based on the categorisation thereof.

Held – The power of a municipality to raise a surcharge over and above a rate it levies in respect of a property, is sourced in section 156(5) of the Constitution. Thus, the consequence of having an original power is that a municipality's power to levy rates is not dependant on enabling national legislation as it is derived directly from the Constitution. The imposition of a penalty against property owners is necessary and incidental to the effective performance of the municipality's functions and services. A municipality's powers to levy a penalty in respect of the use of any property within its jurisdiction, is therefore not *ultra vires* its powers, provided it does so as part of a validly adopted property rates policy. The municipality's rates policy was not the subject of the respondents' challenge in this case. The court confirmed that the said policy was validly adopted and implemented.

On a proper interpretation of the policy, it was clear that the penalty tariff was not applied as a property category, and was levied for illegal or unauthorised use were directed against a property owner's illegal conduct, and not the property itself. The municipality was correct in that the imposition of a higher tariff for rates payable on residential property, which is used for a purpose other than its authorised purpose, as happened in this case, does not require a re-categorisation. The penalty or higher tariff the municipality validly imposed in respect of the respondents' property, only sought to address the current situation to the extent and for the duration of the illegal land use in operation.

Pointing to various misdirections in the High Court's judgment, the present Court upheld the appeal and set aside the High Court order.

In a dissenting judgment it was stated that the action by the municipality in determining an illegal use category of rateable property and imposing the penalty tariff, ostensibly in terms of sections 3 and 8 of the Local Government: Municipal Property Rates Act 6 of 2004, violated the principle of legality, and was beyond the powers conferred on the municipality. It was also said to be arbitrary on the ground that it was not rationally related to the purpose for which the power to levy rates was given.

Esorfranki (Pty) Ltd v Mopani District Municipality [2021] 3 All SA 686 (SCA)

Civil Procedure – Evidence – Refusal by trial court to have regard to affidavits filed and received into evidence – There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit – Where parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged.

Civil Procedure – Plea of res judicata – Party relying on defence required to establish that the same cause of action between the same parties has been litigated to finality ie the same relief has been sought or granted.

Delict – Tender award by Organ of State – Fraudulent awarding of contract – Unsuccessful tenderer claiming damages for loss of profit being the economic loss it suffered in consequence of it not being awarded the contract – Factual and legal

causation –Whether impugned conduct was factually linked to the harm caused and whether harm suffered was sufficiently closely linked to the wrongful and unlawful conduct to establish liability – Where neither test was satisfied, delictual claim failing.

In August 2010, the respondent municipality ("Mopani") invited tenders for the construction of a water pipeline. When the contract was awarded to a joint venture, the appellant ("Esorfranki") as unsuccessful tenderer, instituted a claim for damages based on loss of profit, against Mopani and the two entities making up the joint venture. The claim was based on the allegation that the award of the tender was as a result of wrongful and intentional conduct, amounting to dishonesty and fraud. It was alleged that Mopani's decision to award the contract to the joint venture was vitiated by bias, bad faith, ulterior purpose and dishonesty. In consequence, Esorfranki was alleged to have suffered damages based on the profit it would have earned had the contract been awarded to it as the successful tenderer as it should have been. The present appeal was against the High Court's dismissal of the claim.

Held – The High Court improperly refused to have regard to affidavits filed by Ersorfranki and received into evidence before the court. That led to the court not determining whether the evidence before it established the pleaded cause of action upon which Esorfranki relied. There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged.

The respondent also pleaded a defence of *res judicata*, on the ground that Esorfranki had previously brought an application for review of the tender decision. A plea of *res judicata* requires the party who relies thereupon to establish each of the three elements upon which the exception is based, namely that the same cause of action between the same parties has been litigated to finality ie the same relief has been sought or granted. The present Court held that although the parties were the same, the cause of action and the relief sought in the trial action was not the same as that pursued before the review court. A plea of *res judicata* was thus not available to Mopani in such circumstances.

The requirements for a delictual claim are a wrongful act or omission, fault in the form of negligence or intention, causation, and finally damages in the form of patrimonial or non-patrimonial loss. Esorfranki's particulars of claim contained several allegations relating to the wrongful and culpable conduct of Mopani and its employees in awarding the tender to the joint venture. The court found, based on the evidence before it, that the decision-maker acted deliberately and dishonesty, with bias in favour of the joint venture. It acted in bad faith, with an ulterior purpose and, fraudulently. That was found to provide a basis for a delictual claim.

The Court then turned to the issue of causation. Esorfranki pleaded that but for the unlawful conduct of Mopani, it would have been awarded the contract. The evidence presented by it established that it presented an eligible or valid bid, ie one that complied with all of the qualifying criteria. Its price was the lowest presented. The differential between its price and the price of the joint venture was approximately R10 million. The bid adjudication report indicated that Esorfranki scored the second highest number of points after the joint venture. The question was whether the harm suffered by Esorfranki was sufficiently closely linked to the wrongful and unlawful conduct to establish liability. Esorfranki's claim was one for loss of profit being the economic loss

it suffered in consequence of it not being awarded the contract. The Court found that legal causation had not been established, and dismissed the appeal.

A dissenting judgment would have upheld the appeal, the view being that causation was in fact established.

Minister of Co-Operative Governance and Traditional Affairs v De Beer and another (Council for the Advancement of the South African Constitution and another as *amici curiae*) [2021] 3 All SA 723 (SCA)

Civil procedure – Courts – Court hearings – Propriety of virtual hearing – Where appeal had full record and heads of argument were available to judges hearing appeal, there was no reason why a virtual hearing for the purposes of hearing oral argument would attenuate the open justice principle.

Constitutional and Administrative Law – National state of disaster – Regulations promulgated during pandemic – Constitutionality and validity – Where constitutional challenge not pleaded with specificity and clarity, and review court not applying rationality test to each of the impugned Regulations, granting of review application not sustainable.

In response to the threat to national health and safety presented by the global outbreak of the Coronavirus, the appellant, as Minister of Co-operative Governance and Traditional Affairs promulgated Regulations under section 27(2) of the Disaster Management Act 57 of 2002. The first respondent ("Mr De Beer") was a member and president of the second respondent (the "LFN"), a non-governmental organisation, which acted primarily as a tenants' association.

The respondents challenged all the Regulations promulgated from the outset of the government's response to the pandemic.

The present appeal was against the High Court's declaring almost all of the regulations unconstitutional and invalid. The Minister contended that the High Court had strayed beyond the pleadings; alternatively, that the respondents had not properly pleaded their constitutional attack, which was upheld by the High Court and the attack based on the Bill of Rights was too vague for the Minister to answer. It was also argued that the respondents had not raised a proper rationality attack and, in any event, the High Court's application of the rationality test was fundamentally flawed. Finally, the High Court's orders were said to be impermissibly vague.

Held – The respondents complained that the Regulations were overbroad, but without providing a proper factual foundation for that conclusion, and without specifying why that was so. The court described the founding affidavit as displaying the theme of COVID-19 denialism.

The Court had scheduled a virtual hearing of the matter, as one of the measures taken by courts during the pandemic. The respondents objected thereto, insisting that the court was required to conduct the oral hearing in person, and in a court in Bloemfontein, failing which it would not be acting in accordance with its judicial duties. The Court pointed out that litigants may not specify the conditions under which they are willing to have a matter heard and adjudicated. The appeal was one with a full record and the heads of argument were available to the judges hearing the appeal. There was no reason why a virtual hearing for the purposes of hearing oral argument on any aspect of this appeal would attenuate the open justice principle.

On the merits, the court held that the Minister had been called upon to answer a case that was framed in almost unintelligible terms. The High Court found for the respondents on a case not made out in the founding affidavit and based largely on dispersed and inadmissible assertions and its own speculation as to how the Regulations ought to have been framed. Secondly, the respondents did not plead, or properly plead, the constitutional attack that was upheld by the High Court. It was found further that the High Court did not properly apply the rationality test to each of the impugned regulations. Instead, it embarked upon a comparative exercise and for the rest, it relied upon conjecture and speculation.

Concluding that neither the challenge brought, nor the High Court's reasons for sustaining that challenge could be allowed to stand, the appeal was upheld.

Rodrigues v National Director of Public Prosecutions of South Africa and others [2021] 3 All SA 775 (SCA)

Criminal Law and Procedure – Prosecution based on inquest finding – Delay in prosecution – In determining whether or not there was any undue delay or if an inquest should be held, all relevant factors, including the time when the accused person is charged, should be considered – While political interference which might have occurred during one of the periods of delay was serious, no evidence of how such interference impacted on factors relating to fairness of the trial – Application for permanent stay of prosecution refused in absence of proof that accused would suffer trial-related prejudice if he was not granted a permanent stay.

In connection with the death of political activist, Mr Ahmed Timol whilst in police custody in 1971, the appellant was charged with murder and obstructing the administration of justice. His application for declaratory relief regarding the fairness of the criminal proceedings instituted against him was dismissed.

In seeking leave to appeal, the appellant averred that the Full Court erred in concluding that the delay in bringing the prosecution would not taint the fairness of the trial and violate the appellant's right to a fair trial. He submitted that the court erred in finding no improper motive in his prosecution and in not finding that political interference by the Minister of Justice and the State President caused the unreasonable delay and had the effect of tainting the fairness of his trial.

The Court granted leave to appeal on the basis of the submission regarding political interference.

Held – The background facts relevant to the merits of the appeal were as follows. Following Mr Timol's death, an inquest was held in 1971. It was concluded that Mr Timol had committed suicide by jumping out of a window before he could be stopped, and that no person was responsible for his death. Requests for the re-opening of the inquest of the deceased in terms of section 17A of the Inquests Act 58 of 1959 led to a second inquest being held in 2017. It was found that Mr Timol was tortured by police and pushed from the building with the intent to kill him. The appellant was found to have participated in a cover up to conceal the murder and it was ordered that he be investigated with a view to being prosecuted.

In determining whether or not there was any undue delay or if an inquest should be held, all relevant factors, including the time when the accused person is charged, should be considered. The period before the accused person is charged is important

and cannot be ignored. The Court should carefully consider whether any delay infringed the accused's right to have his trial begin and be concluded without unreasonable delay under section 35(3)(d) of the Constitution. The 23-year period from 1971 to 1994 was pre-democracy and was not taken into account in the determination of the delay. Any delay in the next period was beyond the control of the prosecution, insofar as the necessary process of the Truth and Reconciliation Commission occurred in that time. The third period, from 2003 until 2017, was crucial because it was when the alleged political interference occurred. While acknowledging the seriousness of political interference which might have occurred, the Court found no evidence showing how such interference impacted on factors relating to fairness of the trial.

Not persuaded that the appellant had established that he would suffer trial-related prejudice if he was not granted a permanent stay of prosecution and was brought to trial, the Court dismissed the appeal.

A second judgment agreed that the appeal be dismissed, but for different reasons. It was opined that as there were no compelling reasons to entertain the appeal, much less reasonable prospects of success, the appellant had not made out a proper case for the appeal to be entertained by the court.

Special Investigating Unit and another v Engineered Systems Solutions (Pty) Ltd [2021] 3 All SA 791 (SCA)

Constitutional and Administrative Law – Procurement – Award of tender – Review application based on principle of legality – Appeal against dismissal of review application – Delay – Test in legality review is whether the delay is unreasonable – While delay found to be unreasonable, court considering whether it should nevertheless be overlooked in the interests of justice – Lack of merit leading to appeal being dismissed.

A decision by the Department of Correctional Services in 2011, to introduce an Electronic Monitoring System ("EMS") led to its advertising a tender for the supply and management of a pilot project in that regard. Bids were received from various entities, including the respondent ("ESS"), which was awarded the contract.

In April 2016, the President of South Africa referred for investigation to the first appellant (the "SIU"), certain allegations in respect of the affairs of the Department, relating to irregularities in the procurement of the EMS and payments relating thereto. The SIU reported that its investigation revealed a number of irregularities in the procurement processes relating to the tenders awarded to ESS. It therefore brought a review application seeking to set aside the Department's decisions in awarding the tender. The appellants also sought the review and setting aside of the Service Level Agreements and any other contracts entered into pursuant to the pilot and final tenders.

Held – The review application had to be seen as one based on legality rather than on the Promotion of Administrative Justice Act 3 of 2000.

The first issue was that of delay in bringing the review application. The SIU sought condonation in that regard. The test in a legality review is whether the delay is unreasonable. In assessing delay, the first question to be determined is the reasonableness of the delay. If the delay is found to be unreasonable, the next

question is whether it should nevertheless be overlooked in the interests of justice. The reasonableness of the delay is assessed by considering the explanation for the delay, which must cover the entire period of the delay. Where the delay is found to be unreasonable, there must be a basis for a court to exercise its broad discretion to overlook it. Factors to be considered are potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; the nature of the impugned decision; and the conduct of the applicant.

The Court is obliged by virtue of the provisions of section 172(1)(a) of the Constitution to declare invalid any law or conduct that is inconsistent with the Constitution, to the extent of its invalidity.

In this case, the explanation for the delay did not cover the entire period, and was unreasonable. The Court went on to consider whether the delay should be overlooked in the interest of justice. Finding the review application to lack merit, it answered that question against the appellants.

The appeal was dismissed.

Special Investigating Unit and another v Engineered Systems Solutions (Pty) Ltd [2021] 3 All SA 791 (SCA)

Constitutional and Administrative Law – Procurement – Award of tender – Review application based on principle of legality – Appeal against dismissal of review application – Delay – Test in legality review is whether the delay is unreasonable – While delay found to be unreasonable, court considering whether it should nevertheless be overlooked in the interests of justice – Lack of merit leading to appeal being dismissed.

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In this case, the explanation for the delay did not cover the entire period, and was unreasonable. The Court went on to consider whether the delay should be overlooked in the interest of justice. Finding the review application to lack merit, it answered that question against the appellants.

The appeal was dismissed.

Timasani (Pty) Ltd and another v Afrimat Iron Ore (Pty) Ltd [2021] 3 All SA 843 (SCA)

Civil Procedure – Court proceedings during business rescue – Requirement of notice to creditors – Non-joinder – Section 145(1) of the Companies Act 71 of 2008 not requiring the joinder of every creditor in such proceedings.

Corporate and Commercial – Company law – Business rescue – Claim by creditor against company in business rescue for repayment of deposit paid – Moratorium on legal proceedings – Section 133(1) of the Companies Act 71 of 2008 provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with – Moratorium inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

Upon the first appellant ("Timasani") being placed in business rescue on 28 July 2015, the second appellant, as business rescue practitioner, was authorised to sell its assets in terms of a business rescue plan adopted by its creditors.

Prior thereto, the respondent ("Afrimat") had made an offer to purchase Timasani's assets, and had paid a deposit of R1 700 000 to Timasani. The contracts for the purchase of the assets did not materialise due to the non-fulfilment of suspensive conditions.

In the present appeal, the question was whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings imposed by section 133 of the Companies Act 71 of 2008 (the "Act"). The present appeal was against the High Court's declaration that section 133 was inapplicable and its order that Timasani repay the deposit.

One of the points raised by Timasani was that of non-joinder in that Afrimat had failed to join all its creditors to the proceedings in terms of section 145(1) of the Act.

Held – The test for non-joinder is whether a party has a direct and substantial interest in the subject matter of the proceedings, ie a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court. Section

145(1) of the Act sets out the rights and obligations of creditors when participating in business rescue proceedings as a whole. Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in terms of section 145(1)(a) rests on the business rescue practitioner. Being a general notification requirement, the purpose of section 145(1)(a) is to inform creditors of court proceedings brought during business rescue. It does not require the joinder of every creditor in such proceedings. Afrimat was thus not required by section 145(1) of the Act to join all Timasani's creditors in the application to recover its deposit.

On the question of whether section 133(1) of the Act precluded Afrimat from claiming repayment of the deposit, the court held that the section is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect. It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court.

The court held that properly construed section 133(1) provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with. The latter part of the provision was relevant in the present appeal. Afrimat contended that section 133(1) was inapplicable because the deposit did not belong to Timasani and it was in unlawful possession thereof. The provision limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

The High Court's finding that the deposit was property in respect of which Timasani exercised the powers of a trustee, as envisaged in section 133(1)(e) of the Act was not endorsed, as the deposit was not paid as property in trust.

The appeal was dismissed with costs.

Eskom Holdings Soc Limited v Econ Oil and Energy (Pty) Ltd and others [2021] 3 All SA 857 (GJ)

Constitutional and Administrative law – Award of tender – Irregularities in process rendering decision unlawful and requiring setting aside – Self-review determined in terms of the principle of legality – Court clarifying that the subject matter of a review should be the decision to award the contract and not each decision along the way in the process.

Corporate and Commercial – Contract – Existence of binding contract – Existence of an offer and an acceptance insufficient where there is no animus contrahendi.

The applicant ("Eskom") had issued a tender for the supply of fuel oil for a period of five years. Following the tender process, a recommendation was made to Eskom's Board of Directors (the "Board") to award the tender to various parties, the first respondent ("Econ") being one of them. Eskom maintained that the process adopted in executing the tender by various committees and individuals within Eskom was blemished by numerous irregularities, resulting in an outcome that was unlawful. It therefore sought to have the decision of its Board to award the tender to various parties

reviewed and set aside. In addition, it sought a declarator to the effect that no binding contract was ever concluded between itself and Econ.

Held – Eskom's application was for self-review, and had to be determined in terms of the principle of legality.

The court found that in managing and implementing the tender, Eskom had failed to comply with the prescripts of section 217 of the Constitution, the provisions of the Public Finance Management Act 1 of 1999 and those laid out in the Regulations under the Act. Therefore the ineluctable conclusion was that the impugned decision was unlawful and had to be set aside in its entirety.

Econ then attempted to argue that a decision by a sub-committee of the Board (the "IFC") granting a mandate to the Executive Tender Committee to conclude contracts for a period of five years with Econ and two other entities constituted administrative action which stood until set aside on review. The court refuted that, holding that the IFC decision might exist in fact, but did not have any legal consequences. Secondly, the decision did not constitute administrative action. It was a decision that mandated negotiations to commence. Case law establishes that the subject matter of a review should be the decision to award the contract and not each decision along the way in the process.

The finding that the impugned decision was unlawful meant that the question as to whether there was a binding contract concluded between the parties was moot, as were all the other ancillary issues raised in this application. However, the court deemed it important to address the issue of the existence of a contract anyway.

The evidence showed that there were many unresolved issues that had to be addressed and were being addressed, but which ultimately failed to produce consensus between the parties. The conduct of the parties throughout was consistent with the understanding that until they both signed an original document addressing their respective concerns, there was no contract. The existence of an offer and an acceptance is a necessary but at times insufficient condition for a binding contract to be established. For that to occur there has to be *animus contrahendi*. There was none in this case.

Finally, the Court rejected the submission by Econ that Eskom had unreasonably delayed in bringing the application or review.

Magashule v Ramaphosa and others [2021] 3 All SA 887 (GJ)

Constitutional and Administrative Law – Political parties – Participational rights – Suspension of party member in terms of rule in party's constitution after member was criminally charged – Constitutional validity of suspension – Precautionary suspension not attracting principles of natural justice and suspension of a member in terms of relevant rule not a violation of the right to participate in the activities of a political party.

At the heart of the present matter was a dispute within the country's leading political party (the "ANC"). The applicant ("Mr Magashule") was the Secretary-General of the party until his suspension in 2020 after several criminal charges were brought against him relating to his tenure as Premier of the Free State from 2009–2017. The second respondent ("DSG"), in the letter of suspension, invoked rule 25.70 of the ANC constitution as the basis of Mr Magashule's suspension. The constitutional validity and

implementation of rule 25.70 formed the basis of the applicant's case and was central to the dispute. Mr Magashule contended that suspension violated the principles of natural justice, including the *audi alteram partem* principle, and a number of his constitutional rights. He also addressed a letter to the first respondent ("Mr Ramaphosa") in which he purported to suspend him as the President of the ANC. When asked by the DSG to publicly withdraw Mr Ramaphosa's suspension letter and apologise, he refused.

Held – The ANC, in an effort to combat corruption, had taken a resolution that those members accused of corruption might be expected to step down from their positions. Members who were criminally charged, and who did not step aside, would be suspended under rule 25.70 of the ANC constitution. The issues were whether rule 25.70 was unconstitutional in relation to the ANC constitution and the South African Constitution; the constitutionality and validity of the ANC's step-aside rule; the validity of Mr Magashule's suspension and of Mr Ramaphosa's suspension as party President; and the validity of the letter requiring Mr Magashile to withdraw his purported suspension of Mr Ramaphosa and to apologise.

The Court found that rule 25.70 did not conflict with the ANC constitution for any of the reasons advanced by Mr Magashule. Nor could it be found that the rule was unconstitutional on the basis that it was silent on the principles of natural justice. A precautionary suspension does not attract the principles of natural justice and cannot be rendered open to attack when those principles are not applied. Furthermore, it could not be argued that suspension of a member in terms of rule 25.70 constituted a violation or a limitation of the right to participate in the activities of a political party.

Mr Magashule's challenge to the step-aside rule was also without merit, which was found to have been properly adopted and applied.

It was found that Mr Magashule was in fact afforded a hearing before he was suspended. He participated in all the processes relating to the development, formulation, and adoption of the resolutions resulting in the formulation of the Guidelines on the implementation of the step-aside principle, and had ample opportunity to make representations regarding his own suspension.

As the mandatory requirements to effect such a suspension were absent, there was no basis to confirm the purported suspension of Mr Ramaphosa.

The application was dismissed with costs.

South African Human Rights Commission v Msunduzi Local Municipality and others [2021] 3 All SA 939 (KZP)

Environment – Right in section 24 of Constitution to safe environment and to have environment protected – Operation by municipality of waste disposal site in contravention of environmental legislation and required norms and prescripts constituting breach of duty of care and violation of section 24 of Constitution – Declaratory relief and structural interdict to ensure compliance with court's order warranted by municipality's conduct.

The first respondent was a municipality and the owner and operator of a landfill site located within its area of jurisdiction.

In February 2020, the applicant (the "Commission") commenced with an investigation of the municipality's operation of the landfill site and its failure to comply with its constitutional obligations in terms of section 24 of the Constitution in operating and maintaining the site in a manner that caused no harm to the health and well-being of the citizens of Pietermaritzburg and surrounding areas. The Commission's founding affidavit set out a long history of non-compliance on the part of the municipality in respect of its WML and constitutional obligations. It was stated that compliance notices issued by the second respondent (the "Department") in terms of the National Environmental Management Act 107 of 199 did not change the municipality's conduct.

The Commission sought declaratory relief against the municipality regarding its violation of the terms of its Waste Management Licence ("WML"); its failure to comply with compliance notices issued by the Department; its failure to comply with section 24 of the Constitution; its fundamental breaches of various provisions of other relevant legislation; and its failure to fulfil its obligations in terms of international law. The Commission also sought a structural interdict in order to allow the court to exercise some form of supervisory jurisdiction over the municipality to ensure that the order was implemented.

Held – The WML was the instrument that regulated the municipality's operation and management of the landfill site. The holder of a WML is required to operate a landfill site lawfully within the prescripts of the prevailing legislation and in accordance with certain norms and standards set by the Minister of Environmental Affairs from time to time. The issue for determination was whether the municipality had discharged its duty of care in terms of the relevant legislation.

Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that *inter alia*, prevent pollution and ecological degradation. The National Environmental Management Act and the National Environmental Management: Waste Act 59 of 2008 are part of a suite of legislative measures contemplated by section 24 of the Constitution. In terms of section 16 of the former Act, the municipality was required, *inter alia*, to ensure that waste was treated and disposed of in an environmentally sound manner. It was also required to manage waste in such a manner that it did not endanger health or the environment or cause a nuisance through noise, odour or visual impacts. The evidence pointed to an abject failure by the municipality to comply with its WML and to fulfil its constitutional duties to the citizens of Pietermaritzburg and surrounding areas.

The Court granted declaratory relief as well as a structural interdict to ensure compliance by the municipality.

Zuma v Minister of Police and others [2021] 3 All SA 967 (KZP)

Civil Procedure – Jurisdiction – Whether High Court having jurisdiction to suspend the execution of a specific order of the Constitutional Court – Constitutional Court is highest court in the hierarchy of courts, and its decisions cannot be undermined by a lower court – Application to High Court to rescind Constitutional Court's order of contempt of court ill-conceived.

The refusal by the applicant, Mr Zuma, to comply with a summons issued by the Judicial Commission of Inquiry into State Capture, Fraud and Corruption in the Public Sector, Including Organs of State, led to the Constitutional Court declaring him in contempt of court, and sentencing him to 15 months' imprisonment. Mr Zuma applied to the Pietermaritzburg High Court for rescission of the said order.

Held – Mr Zuma's challenge to the *locus standi* of the Commission and the seventh respondent in opposing the rescission application was summarily rejected as being grounded on an unsound rationale.

The main issue was whether the High Court had jurisdiction to suspend the execution of a specific order of the Constitutional Court. Mr Zuma contended that the court had jurisdiction as the order for his committal to prison was to be executed within the court's jurisdiction.

The Court referred to the hierarchy of courts as set out in Chapter 8 of the Constitution. Section 167 sets out the Constitutional Court's jurisdiction. It is trite that there is no higher authority than the Constitutional Court, and its decisions cannot be undermined by a lower court. The Court emphasised the importance of the doctrine of judicial precedent. It went on to hold that should the court accede to the contentions advanced on behalf of Mr Zuma, then the hierarchy would be disturbed and there would be no finality to legal decisions.

Mr Zuma also challenged the constitutionality of the Criminal Procedure Act 51 of 1977, contending that there is no requirement that the crime of civil contempt, as in the present circumstances, should be dealt with in accordance with that Act, and the Constitution. It was submitted that Mr Zuma could not challenge the constitutionality of the Criminal Procedure Act on a direct and urgent basis to the Constitutional Court, on the grounds that it allowed for civil contempt proceedings to be conducted outside of its provisions without a trial. It was contended further that as the Constitutional Court does not have primary jurisdiction in terms of section 167(4) of the Constitution, the challenge must first be brought in the High Court. It was further argued that the suspension of the execution of the committal order was in the interests of justice, and that the High Court could grant such order in terms of section 173 of the Constitution. The Court rejected those submissions, confirming the constitutionality of the civil contempt procedure.

While the above findings rendered it unnecessary to deal with the interim relief sought by Mr Zuma, the court nevertheless found that the requirements for such relief had not been established.

The application for rescission was dismissed with costs.

END-FOR NOW