LEGAL VOL 10/2021

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SA LAW REPORTS OCTOBER 2021

SECRETARY, JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE v ZUMA AND OTHERS 2021 (5) SA 327 (CC)

Contempt of court — Sanction — Unsuspended imprisonment — Constitution, ss 12 and 35(3).

Applicant (Secretary of the Commission) had obtained an order from the Constitutional Court that first respondent (Mr Zuma) comply with summonses the Commission had issued to him to appear before it and testify. The Constitutional Court's order also directed Mr Zuma to comply with directives the Commission had issued. Notwithstanding the order Mr Zuma had not complied with the summonses or the directives. This compelled the Secretary of the Commission here to apply for a declarator that Mr Zuma was guilty of contempt of court and for the sentencing of him to two years' imprisonment (see [2]).
The court (per Khampepe ADCJ) examined first whether Mr Zuma was guilty of contempt and *held* that he was: as required for such a finding an order had been made, Mr Zuma had had knowledge of it and had failed to comply with it, and the establishment of these factors had given rise to a presumption of wilfulness and mala fides on his part, in respect of which he had failed to raise a reasonable doubt (see [38] – [40] and [42]).
The second issue was sanction, with the court holding that unsuspended committal was appropriate (see [46] – [47]). In reaching this conclusion it considered that a merely coercive order (an order allowing the contemnor to avoid imprisonment by complying with the order that had been disobeyed) would be futile; and while a purely punitive order had not been made before, the possibility of such had been raised (see [48], [54] and [56] – [57]). It was also necessary as a message that orders had to be obeyed, where contempt was corrosive of courts' power (see [60]).

[1] **A reminder that these Legal 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!**

There had though been the need, given the possibility of committal, to safeguard Mr Zuma's right to freedom, and to this end the court had invited him to make submissions on affidavit as to the appropriate sanction lest he be found guilty (see [63], [68] and [70]).
In response, Mr Zuma had drafted a 21-page letter (the affidavit was directed to be no more than 15 pages) which was unsigned and vituperative (see [72] and [133]).
Returning to the issue of sanction, the court considered factors militating for unsuspended committal as the just and equitable remedy in the circumstances. These were the court's inability to compel Mr Zuma to comply with its order, and the need to message, as aforesaid, that such non-compliance would meet with punishment (see [87]); the intensity of Mr Zuma's public attacks on the judiciary (see [88]); and his position as former President and what that entailed (see [97]).
There was then the appropriate length of committal, which was determined after examination of aggravating and mitigating factors (the attacks on the judiciary; Mr Zuma's position; his age), to be 15 months (see [123] – [124] and [128]).
As for costs, a punitive order was warranted by Mr Zuma's choices to defy the court's order and not to explain to it why (see [133] and [135]); and to publicly defame and vilify certain of its members (see [134]).
Ordered, inter alia, that the application for direct access would be granted. Mr Zuma was guilty of the crime of contempt and would be sentenced to 15 months' imprisonment. He would be ordered to pay the Secretary of the Commission's costs on the attorney and client scale. (See [142].)
The minority (per Theron J) agreed that contempt was established and that direct access should be granted on an urgent basis (see [143]).
She diverged from the majority by finding it unconstitutional to commit a person in civil contempt proceedings where compliance with the defied order had not been sought or where compliance had become impossible (see [143] and [267]). (Compliance was typically sought through an order that the contemnor comply with the defied order or be imprisoned (see [144]).)
In reaching this conclusion she considered the following:

- Purely punitive committal — committal not intended to ensure compliance — had never been granted before (see [184] and [187]).
- The law of general application concerned (the rule permitting committal with no coercive purpose) limited the rights in ss 12 and 35(3) of the Constitution (see [193] and [215]). The right in s 12, in that the deprivation of freedom was without criminal trial (see [199]); and the right in s 35(3) in that the summary notice of motion procedure derogated fair trial guarantees (see [205], [207] – [209] and [213]).
- Factors bearing on the limitations analysis were the paramount importance of the rights concerned and the considerable extent of their limitation (see [222] and [226]); and that while the limitation was rationally connected to the purpose of vindicating the rule of law, the weight to be accorded this interest had in this case to be discounted (see [228], [231] and [235]). This in that the magnitude of threat to the rule of law had been overcalculated and the cost in procedural protections would undermine it (see [233] – [234]). There were moreover less restrictive means to achieve the purpose: coercive committal orders in civil contempt proceedings or referral to the Director of Public Prosecutions for prosecution in criminal proceedings (see [236] and [239]). (Indeed, ordinarily, should a litigant approach a civil court for a purely punitive order, the proper approach would be to refer the matter to the Director of Public Prosecutions (see [267]).) Ultimately, weighing these factors together, they rendered the limitation unreasonable and unjustifiable (see [248]).

She would have ordered that Mr Zuma be committed, but that the committal be suspended on condition that he comply with the defied order. However, given that the Commission's tenure was at an end, ordered that the matter be referred to the Director of Public Prosecutions for its decision on whether to prosecute for contempt.

MCGREGOR v PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL AND OTHERS 2021 (5) SA 425 (CC)

Labour law — Dismissal — Unfair dismissal — Remedies — Compensation — Where reason for dismissal sexual harassment — Impact on award of compensation.

Dr McGregor was dismissed from his position as head of anaesthesiology at the George public hospital by his employer, the Department of Health, Western Cape, after he was found guilty of four charges of sexual harassment against a newly qualified medical practitioner, 30 years his junior, who had been completing an internship under his supervision. He appealed to the Public Health and Social Development Sectoral Bargaining Council. The arbitrator hearing such appeal found Dr McGregor *guilty of three of the four charges of sexual misconduct*, *yet concluded that the dismissal was substantively unfair* because Dr McGregor had not been treated the same as another employee facing similar charges, *and procedurally unfair* because he had been denied an opportunity to defend himself as relevant evidence was excluded during his disciplinary hearing. The arbitrator declined to order Dr McGregor's reinstatement but granted him compensation, in the amount of R924 679,92, equivalent to six months' remuneration. The Labour Court (LC), on review and cross-review, varied the arbitration award in that it found the dismissal to be substantively fair. It dismissed the Department's cross-review to set aside or modify the compensation award, finding that to do so would be inappropriate, given that the dismissal procedure followed by the Department had been unfair, and there was nothing to suggest the conclusion was reviewable. The Labour Appeal Court (LAC), on appeal and cross-appeal, agreed with the LC that Dr McGregor's dismissal was procedurally unfair, but substantively fair based on the seriousness of the misconduct. Importantly, for present purposes, the LAC stated that 'the department has not cross-appealed against the finding of procedural unfairness or the award of compensation' — an incorrect statement as the Department had in fact done so — and so did not revisit the arbitrator's compensation award. Both Dr McGregor and the Department approached the Constitutional Court seeking leave to appeal against the LAC's judgment and order. The CC refused Dr McGregor leave (see [11]), but granted it to the Department, which had argued the LC erred in failing to review the compensation award granted by the arbitrator where it had set aside the arbitrator's finding of substantive unfairness, and that the LAC erred in failing to address its cross-appeal, even though it had been addressed on the question of compensation (see [17] and [18]).
The CC noted that, in terms of s 193(1)*(c)* of the Labour Relations Act 66 of 1995, once a court or arbitrator had found a dismissal to be unfair, it possessed a discretion whether or not to grant an award of compensation (see [21]). As to the amount of compensation which may be awarded, s 194(1) of the LRA visited the court or arbitrator with a discretion (see [24]), but in terms of s 194(1) the award had to be one that could be considered 'just and equitable' (see [22]). The CC held that there were grounds in the present case to interfere with the amount of compensation

(see [32]): inter alia, the LC had failed to exercise its discretion to review the compensation judicially, in overturning the arbitrator's finding of substantive unfairness yet not reviewing the compensation award (see [29] and [32]); and it failed to apply itself to the relevant facts and circumstances (see [32]). The LAC simply ignored the Department's cross-review where it was legally required to consider it (see [32]). The result was that, since the dismissal was found to be substantively fair, no court had properly applied itself to the appropriateness of the extent of the compensation (see [32]).

The CC went on to hold that there were good prospects that, if reviewed, the amount of compensation awarded to Dr McGregor would be reduced (see [33]). In considering whether the amount of compensation awarded should be reduced, the CC considered the following:

- Given that the dismissal had been found to be substantively fair, it stood to reason that the award of compensation should not have remained the same (see [34]) (the CC noted that the extent of the Department's departure from substantive fairness weighed heavily on the mind of the arbitrator in awarding compensation) (see [34]).
- The only unfairness suffered by Dr McGregor was procedural (see [38]).
- The procedural irregularities in the present case were of no major consequence (see [36]).
- Dr McGregor had been found guilty of serious misconduct, ie three counts of sexual harassment (see [37]).

The CC further stressed that, when the reason for dismissal was sexual harassment, this had to be taken into account in deciding whether compensation was appropriate. This was because our Constitution not only provided for the right to fair labour practices, but also maintained that our constitutional democracy was founded on the explicit values of human dignity, integrity and the achievement of equality in a non-racial and non-sexist society under the rule of law. Yet sexual harassment stripped away at the core of a person's dignity and was the antithesis of substantive equality in the workplace. It also promoted a culture of gender-based violence that dictated the lived experiences of women and men within public and private spaces and across personal and professional latitudes. (See [42].)

The CC further emphasised the importance of considering the power imbalance that existed between the wrongdoer and the victim in sexual harassment cases (see [44]), and in this regard held that the harshness of the wrong was compounded when suffered at the hands of one's superior in the workplace (see [44]). As to the facts of the present case, the CC noted that Dr McGregor was 30 years the victim's senior, and in a position of authority (see [43]). Further, Dr McGregor was at all times oblivious to the power dynamics that undergirded his professional relationship vis-à-vis the victim, and he had vacillated between denying outright that his conduct constituted sexual harassment and flippantly downplaying the significance thereof. Furthermore, instead of showing remorse, Dr McGregor attempted to impugn the credibility of the victim as a witness. His refusal to recognise his wrongdoing added insult to injury, and his attack on the victim's credibility was salt to the wound. (See [45].)

Having regard to the above, the CC concluded that six months' compensation, for minor procedural hiccups in respect of gross misconduct, was altogether too generous, and did not accord with the principles of equity and justice. It ruled that an award of compensation to an equivalent of two months' remuneration would be appropriate in the circumstances. (See [48].) In this regard the CC remarked that a

sanction served an important purpose in that it sent out an unequivocal message that employees who perpetrated sexual harassment did so at their peril and should more often than not expect to face the harshest penalty (see [49]). Sexual harassment, the CC emphasised, occured at the intersection of gender and power, producing a potent stench of subordination, disempowerment and inequality that so seeped through the fabric of our society that it stained its core. Eradicating the scourge of sexual harassment would be a Sisyphean task if its perpetrators were compensated lavishly for their misconduct. (See [47].)

MKHATSHWA AND OTHERS v MKHATSHWA AND OTHERS 2021 (5) SA 447 (CC)

Costs — Special order — Punitive costs order — When to be awarded — Vexatious litigation and scurrilous remarks about judges — May warrant punitive costs.

The applicants sought leave to appeal from the Constitutional Court (the CC) against an *Anton Piller* order and interdict granted against them in the High Court by Roelofse AJ; this, after having unsuccessfully sought leave from the High Court and the Supreme Court of Appeal. The CC found that the application for leave should be dismissed, on the grounds that, based on its merits, it bore no reasonable prospects of success (see [9]). The question arose — and this formed the focus of the Constitutional Court — whether the respondents were entitled to a punitive costs order. This, in the light of the following: In their affidavit the applicants took issue with the fact that Roelofse AJ had heard the matters in camera, in accordance with a directive of the Judge President. The applicants submitted that such a course was inappropriate: The Judge President, the applicants submitted, had exercised undue and improper influence over Roelofse AJ, who consequently failed to act independently, impartially and without fear or favour in the course of hearing and deciding the matter (see [10]). Such charges in fact formed a basis, amongst others, for the applicants' appeal: the orders of the court a quo, the applicants submitted, were granted as a result of this improper influence, and were a nullity and stood to be set aside (see [11]).
Held, that the applicants had not approached the Constitutional Court with clean hands. They had stubbornly persisted with serious and unmeritorious allegations against Roelofse AJ and the Judge President, despite the fact that these allegations had been unequivocally addressed and disposed of by the Judge President in a letter to their legal representatives, and had no factual basis. The fact that these allegations formed a major basis of the application for leave to appeal to the Constitutional Court rendered this approach all the more reprehensible, for the following reasons. The applicants, in full knowledge of the Supreme Court of Appeal's dismissal of their application, as well as the letter sent by the Judge President, chose to sail a sinking ship into deeper litigious waters, and in the process relied heavily on these unsubstantiated and scandalous accusations as the rudder. This conduct was, at a minimum, vexatious and prejudicial to the respondents, who found themselves, once again, having to foot the bill for necessitated legal responses on issues that had no place in the Constitutional Court. (See [12] and [23].)
Held, further, considering that it was common practice to grant an *Anton Piller* order in camera, and in light of the letter referred to above, there was little room for any genuine or logical belief on the part of the applicants that any untoward and improper

conduct was perpetrated by the learned judges in the High Court. In persisting with their accusations, the applicants were either being wilfully ignorant of the practice and its objects, or they were attempting to turn a sow's ear into a silk purse. Aside from the prejudice caused to the respondents by this frivolous exercise, this was tantamount to an attempt to mislead the Constitutional Court by omitting relevant facts and tailoring others to fit an argument that simply could not pass muster. On numerous occasions the Constitutional Court had considered it appropriate to punish attempts at misleading the court with a punitive costs order. (See [24].)
Held, that the Constitutional Court enjoyed a sacrosanct power and privilege to uphold the law in furtherance of the constitutional project. Thus, the importance of its work and the limited judicial resources that it expended in the process ought not to be taken for granted, and it was incumbent upon a litigant to approach it with a bona fide, genuine case. It would not do for litigants to resort to unscrupulous tactics to succeed, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon judicial officers. This was because the judiciary, unlike other branches of government, had to rely solely on the trust and support of the public in order to fulfil its functions. Consequently, any conduct that undermined and eroded the authority and integrity of the judiciary had to be prevented. Litigants who resorted to the kind of tactics displayed in this matter had to beware that they were unlikely to enjoy the Constitutional Court's sympathies or be shown mercy in relation to costs. The only reasonable conclusion in the circumstances was that a punitive costs order was apposite. (See [26].)

BROCSAND (PTY) LTD v TIP TRANS RESOURCES AND OTHERS 2021 (5) SA 457 (SCA)

Contract — Pre-emption (right of first refusal) — Holder cannot acquire more rights than those afforded by grantor — Not becoming party to contract between grantor and third party — Instead, independent contract between grantor and holder arising.
Property — Acquisition — Doctrine of notice — Knowledge or constructive knowledge of prior personal right in respect of property — Right of first refusal — Enforcement against third parties.

This case dealt with (i) the application of the so-called *Oryx* mechanism * which allows the holder of a right of first refusal (pre-emption) by unilateral declaration to step into the shoes of a third party where that right was breached by a contract with the third party; and (ii) the doctrine of notice, under which someone who acquires an asset with knowledge of a personal right to it which his predecessor in title had granted to another, can be held liable to give effect thereto.
The facts were as follows. A and B concluded an agreement which for five years appointed B to conduct mining operations on certain land (parcel X) over which A had mining rights. B was granted a right of first refusal to enter into a new agreement with A, but on the expiry date A instead entered into a second contract with C and D. Under it, (i) A appointed C as mining contractor in respect of parcel X; and (ii) D appointed C as mining contractor over a second parcel of land (parcel Y).
This caused B to issue summons against A, C and D (the defendants), citing the breach of its right of first refusal. In line with this, B made a unilateral declaration of intent in which it stated that it had replaced C as mining contractor under the second agreement in respect of both of its aspects. B argued that since the defendants had concluded the second agreement despite their prior knowledge of its right of first

refusal, the doctrine of notice should, on equitable grounds, bridge any gap in its rights under the original agreement.
B accordingly claimed an order permitting it to mine on parcel Y and payment of damages for loss of profit in respect of the period it was allegedly prevented from doing so. C excepted to B's particulars on the basis that the original agreement conferred rights on B in respect of parcel X only, not parcel Y, which was not mentioned in the original agreement. The Western Cape High Court upheld C's exception, ruling that the *Oryx* mechanism did not extend beyond the original agreement to the second one. In an appeal to the Supreme Court of Appeal —
Held
The parcel X and parcel Y aspects of the second agreement were severable, involving as they did the exploitation of different minerals at different prices (see [16]). B's right of first refusal was in respect of parcel X, and its content did not change because of its breach, even by collusion. (See [17].)
The metaphorical 'stepping into the shoes' under the *Oryx* mechanism did not make the holder a party to the contract between the grantor and the third party; instead, an independent contract between the grantor and the holder came into existence. It followed that the *Oryx* mechanism permitted the holder to obtain rights only as against the grantor and only in respect of the subject-matter of the right of first refusal. (See [23].) This meant that in the present case the *Oryx* mechanism could not vest rights in B that it could exercise against D in respect of parcel Y. (See [24].)
And B had also misconceived the import of the doctrine of notice, the effect of which was to enable the holder to enforce its preferential personal right not only against the grantor but also against third parties who had interfered with the right with knowledge of it. It simply permitted the right to be enforced against parties in addition to the grantor, and mala fides did not add to the rights enjoyed by the holder. The extent to which C might have acted improperly in relation to the second agreement did not enlarge the ambit of the *Oryx* mechanism, by recourse to the doctrine of notice, to permit B to enjoy rights to parcel Y, which involved a discrete contract. B was essentially seeking compensation for C's alleged wrongful conduct in relation to the second agreement and had thus ventured into the law of delict under the guise of the doctrine of notice. (See [25] – [26].)
In the result the contract between C and D in respect of parcel Y did not breach B's right of first refusal. Since the gravamen of its particulars was therefore legally untenable, the High Court correctly upheld the exception. Appeal dismissed. (See [27] – [29].)

DISCOVERY LIFE LTD v HOGAN AND ANOTHER 2021 (5) SA 466 (SCA)

Insurance — Life insurance — Policy — Interpretation — Term requiring insurer to give insured 30 days to settle unpaid premium — Not operative where non-payment of premium pursuant to insured's repudiation of contract.

Contract — Breach — Repudiation — Test — Court reiterating that test objective and focused on perception, not intention of repudiating party.

Contract — Rescission — Acceptance of repudiation — Principles restated.

Ms C, who was insured under a life insurance policy with Discovery, died shortly after she had cancelled the policy. In proceedings by the beneficiaries (the respondents), Discovery defended the claim on the ground that the policy had been

cancelled and it had ceased to be on risk 12 days before Ms C's death. Ms C cancelled the policy in writing on 15 August 2018 (all dates below refer to 2018). On 15 August Discovery notified Ms C's broker that a notice period of 30 days applied to cancellations. Then, on 28 August, Discovery informed the broker that the policy would be cancelled with effect from 1 October 2018 and that the last day of cover would be 30 September 2018.

But in the meantime Ms C had, on 23 August, stopped payment of the September premium. Discovery informed Ms C that the policy had been cancelled with effect from 1 September. Ms C died on 22 September. The first respondent, the executor of Ms C's estate, then paid the September premium, in response to which Discovery sent a 'reinstatement' requiring the insured to make a 'declaration of health'. No such declaration was forthcoming and instead the respondents on 19 November submitted a claim under the policy. Discovery declined the claim on the ground that the policy had been cancelled with effect from 1 September.

The respondents sued for payment, asserting that Discovery had, when Ms C had sought to cancel the policy with immediate effect, elected, in its correspondence of 16 and 28 August, to hold her to the policy. The respondents further contended that Discovery had failed to notify Ms C of the unpaid September premium as required by the policy, which also required Discovery to afford her a 30-day grace period to pay the outstanding premium. As the premium was in fact paid, albeit by the first respondent, within the 30-day grace period, Discovery was obliged to pay out the sum assured.

Discovery opposed the application on the ground that the policy was cancelled on 10 September with effect from 1 September. Therefore the policy was no longer in force at the date of Ms C's death. It agued that the grace period only applied when the insured failed to pay a premium and did not extend the policy after cancellation (repudiation) by the insured or preclude it from cancelling forthwith in the event of such repudiation.

The High Court found in favour of the respondents on the ground that Discovery had accepted payment of the September premium, albeit from the first respondent. It ruled that there was an express term in the policy that Ms C's cancellation of the debit order would not result in the cancellation of the agreement.

In an appeal to the SCA the central issues were (i) whether Ms C's instructions to her bank to stop payment of the September premium amounted to repudiation in the light of her earlier letter of cancellation to Discovery; and, if so, (ii) whether the terms of the policy governing non-payment found application in instances of repudiation; and (iii) whether the provisions governing unpaid premiums overrode Discovery's right to cancel the policy for repudiation.

Held

Ms C's instruction to the bank not to pay the September premium could not be interpreted in any other way than that she no longer wished to remain bound by the policy and that she had no intention of honouring the term which required her to give a month's notice. She had clearly deliberately repudiated the policy (see [15]). The test for repudiation was objective, the emphasis being not on the repudiating party's state of mind but on that of the reasonable person placed in the position of the aggrieved party (see [17]). The insuperable hurdle confronting the respondents was that Ms C had at least twice been informed that she was bound to give 30 days' notice if she wished to cancel. Ms C was a professional person who knew the consequences of instructing her bank to stop payment. Discovery was therefore

perfectly entitled to accept the repudiation and cancel the policy immediately (see [18]).
Nor was Discovery obliged to have afforded Ms C a 30-day grace period in order to pay her outstanding premium: the period did not apply in cases where the cancellation was as a result of repudiation by the insured herself, only where non-payment did not, in the circumstances, amount to a repudiation of the policy. Ms C did not need reminding that her premium was unpaid: that was plainly her inferred intention (see [19]).
The instruction to the bank to stop payment should not be seen in isolation: the court had to consider the cumulative effect of the events from 6 August (when Ms C first informed Discovery of her intention to move to another insurer) to 10 September (when Discovery cancelled). Discovery was therefore not obliged to give Ms C notice to remedy the breach before exercising the right to cancel. It rightfully elected to cancel after Ms C repudiated (see [20]).
In summary, Ms C's policy was cancelled not for the non-payment of the premium per se but because Discovery elected to accept Ms C's repudiation of the contract. The grace-period provision could not exclude reliance on repudiation or even a mutual agreement by the parties to cancel the policy (see [21]). Appeal upheld.

ELECTORAL COMMISSION v DEMOCRATIC ALLIANCE AND OTHERS 2021 (5) SA 476 (SCA)

Commission — Jurisdiction — Power to adjudicate complaints of electoral irregularities limited to disputes of administrative nature — Complaint of contravening Code of Conduct by publishing false statements or allegations with intention to influence conduct or outcome of election — Such not of administrative nature — Electoral Commission not having jurisdiction to determine such complaint or to impose remedy therefor — Electoral Act 73 of 1998, s 89(2) and item 9(1)*(b)* of sch 2.

Election law — Electoral irregularities — Prohibition on persons publishing false information to influence outcome of election — Whether confined to mechanics or conduct of election — Electoral Act 73 of 1998, s 89(2).

The second-respondent political party, the Good Party, lodged a complaint with the appellant, the Electoral Commission of South Africa (the Commission), alleging that the first-respondent political party, the Democratic Alliance (the DA), had published false and defamatory allegations concerning its leader with the intention of influencing the outcome of the May 2019 national and provincial elections. These statements, the Good Party alleged in its letter of complaint, were in contravention of s 89(2) of the Electoral Act 73 of 1988, which proscribes the publication of false information with the intention of influencing the outcome of an election, and were also in breach of item 9(1)*(b)* of the Electoral Code of Conduct in sch 2 to the Electoral Act (the Code).
The Commission ruled that the s 89(2) issue was for the courts to decide but that the DA had contravened item 9(1)*(b)* of the Code, and directed the DA to, inter alia, make a public apology. This ruling was subsequently set aside by the Electoral Court on review at the instance of the DA. The present case concerned the Commission's appeal to the Supreme Court of Appeal (the SCA).
At issue was whether the complaint fell within the ambit of disputes that 'arise from the organisation, administration or conducting of elections and which are of an administrative nature' as contemplated in s 5(1)*(o)* of the ECA. A further issue was

whether — as the Electoral Court had held, relying on *DA v ANC* * — the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code was confined to 'the mechanics or conduct of an election'.

Held

Section 5(1)*(o)* was the only provision in election legislation authorising the Commission to adjudicate disputes. A complaint that a political party breached item 9(1)*(b)* of the Code, by publishing false or defamatory allegations about the candidate of another party, plainly was not a dispute of an administrative nature within the meaning of s 5(1)*(o)* of the ECA. The complaint had nothing to do with the management, organisation or administration of an election, neither did it relate to the electoral or regulatory framework necessary for the process of conducting elections. The Electoral Court was thus correct to hold that the conduct complained of was not a dispute of an administrative nature. The Commission had no power under s 190 of the Constitution or s 5(1)*(o)* of the ECA to have made a finding that the Code has been contravened. The Code did not confer on the Commission any power to impose a sanction for a breach of the Code. At best, the Commission was empowered, in terms of s 103A of the Electoral Act, to resolve a complaint about an infringement of the Code through conciliation. (See [32] – [33] and [48].)

DA v ANC did not hold that the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code had no application beyond statements regarding 'the mechanics of the conduct of an election'. (See [53] – [56].)

FERROSTAAL GMBH AND ANOTHER v TRANSNET SOC LTD AND ANOTHER 2021 (5) SA 493 (SCA)

Company — Business rescue — Business rescue plan — Vote — Rejection — Application to court to set aside rejection vote on grounds of being inappropriate — Whether it was just and reasonable to set aside creditor's vote against adoption of proposed business rescue plan — No reason to interfere with discretion exercised by High Court to refuse to set aside vote — Appeal dismissed — Companies Act 71 of 2008, s 153(1)*(b)*(i)(*bb*), s 153(7).

The present matter concerned the terms of a proposed business rescue plan (BRP) published in July 2019 aiming to regulate the affairs of the company Ferromarine Africa (Pty) Ltd (FMA), which had been placed in business rescue in December 2016. Such BRP provided for the continuation of a 15-year lease that FMA, as lessee, had entered into in December 2006 with the Transnet National Ports Authority (Transnet) — presently FMA's only independent creditor — and in terms of which FMA had been further granted an 'option' to renew but on terms still to be negotiated and agreed upon prior to the date of termination, failing which the option clause would have no effect. The BRP also provided that *Transnet approve the terms of a proposed sublease between FMA* and ArcelorMittal for a period of three years; and *that the repayment of the arrear rentals in respect of the main lease be deferred until the commencement of the extended period*, and that repayment be rescheduled on terms to be agreed between Transnet and FMA. Transnet voted against the adoption of the BRP. So, the appellants — Ferrostaal GmbH and Atlantis Marine Projects (Pty) Ltd, both shareholders of FMA — applied to the Western Cape High Court seeking an order setting aside Transnet's vote. They relied on the

Companies Act 71 of 2008, s 153(1)*(b)*(i)*(bb)*, which entitled affected persons to apply to court to set aside, *on the grounds that it was inappropriate*, the vote of shareholders rejecting a BRP. The High Court, per Bozalek J, dismissed the application. The appellants were granted leave to appeal to the Supreme Court of Appeal (SCA).

The appellants argued that the rejection of the BRP was not in the best interests of Transnet, having regard to the low return that would be yielded in the case of liquidation (which would in effect be the consequence of allowing Transnet's vote to stand) (see [9]). For its part, Transnet argued that the BRP failed to adequately provide for the protection of its interests and was hinged on numerous contingencies and uncertainties (see [10]), and, in addition, argued that the renewal of the lease on the terms set out in the BRP violated the provisions of s 56(5) of the National Ports Act 12 of 2005.

The SCA noted that in terms of s 153(7) of the Companies Act a court may, on an application in terms of ss (1)*(b)*(i)*(bb)*, set aside a vote if it were satisfied that it was reasonable and just to do so, having regard to the interests of the persons who voted against the BRP; the provisions made in the proposed BRP with respect to the interests of such persons; and a fair and reasonable estimate of the return to such persons if the company were liquidated (see [13]). In addition to such requirements, the SCA noted, a court should take into account all relevant circumstances, and the purpose of business rescue, when determining whether it would be just and equitable to set aside a rejection vote (see [14]). In this regard, the court had regard to the following:

- In terms of the BRP, *arrear rental would not be paid* unless and until the extension of the lease had been agreed upon between Transnet and FMA (see [20] and [21]). No explanation was provided by FMA for its not starting to pay the arrear rentals during the remaining period of the lease (see [20]).
- The renewal of the lease was not a *fait accompli*: the parties' agreement in regard to the renewal of the lease amounted merely to an unenforceable agreement to negotiate in the future (see [23]).
- Even were the lease to be extended, the terms of the repayment still needed to be agreed upon. In the case of failure to agree, the BRP provided that the arrears would have to be amortised over the 15-year extended period of the lease; Transnet was placed in a weakened position regarding the negotiation of the terms of the extended lease. (See [23].)
- In order to generate sufficient revenue to cover FMA's monthly rental obligations in the future, the BRP provided that FMA would enter into further subleases with *potential subtenants*; and that it would make a cash contribution from its own resources. (See [25] – [27].) However, FMA had not yet secured prospective additional subtenants (see [26]). Further, the BRP made no mention of where the cash contribution would be obtained (see [26]).

In light of the above, the SCA found to be warranted Transnet's concern about the implementation of the BRP, being as it was dependent on the occurrence of future uncertain events, and Transnet's doubts about the commercial viability of FMA (see [25], [26] and [29]). The SCA accordingly approved of Transnet's contention that the implementation of the revised BRP would not achieve the legislated objective set out in s 7*(k)* of the Companies Act, of facilitating the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders (see [29]).

The SCA further had regard to the provisions of s 56(5) of the National Ports Act, which enjoined port authorities, that had decided to outsource the services they were statutorily required to perform, to follow procedures that were fair, equitable, transparent, competitive and cost-effective (see [30]). A contractual term that obliged an organ of state to extend a lease agreement despite the tenant not settling a substantial arrear rental could not be said to be cost-effective, and its enforcement would severely prejudice Transnet (see [31]). Setting aside the vote in question, the SCA stressed, would give an imprimatur to non-compliance with peremptory legal requirements pertaining to public procurement, and the High Court was correct to decline to do so (see [31]).

The SCA went on to address the appellants' claims that the return that would be yielded by FMA's liquidation would be less than the return yielded on implementation of the BRP. Such conclusion, however, the SCA held, was not supported by the evidence presented. (See [32] – [34].)

Finally, the SCA considered s 128(1)*(b)*(i) which envisaged a *temporary* supervision of the distressed company by the business rescue practitioner (see [35]). Given the fact that the payment of arrear rental would only be negotiated at the end of the head lease which would terminate in three years' time, and that the arrears would, in the absence of an agreement on the structuring of the repayments, be amortised over an extended 15-year period, the vague arrangement set out in the revised BRP could not be described as 'temporary' within the contemplation of s 128(1*)(b)*(ii) of the Act. (See [36].)

The SCA concluded that there was no reason to interfere with the exercise of discretion of the High Court to refuse to set aside Transnet's vote against the adoption of the BRP, on the basis that its vote was not inappropriate considering all the circumstances. (See [11], [37] – [39].) It accordingly dismissed the appeal (see [40]).

FIRSTRAND BANK LTD v SPAR GROUP LTD 2021 (5) SA 511 (SCA)

Banker — Relationship between banker and client — Rights of bank in respect of credit balance in client's account — Where bank aware that client having no legitimate claim to funds deposited by third party into its client's bank account — Bank may not use such funds to set off client's debt to bank.

Banker — Duties — Where bank aware that client having no legitimate claim to funds deposited by third party into its client's bank account — Under duty to take steps to prevent harm to third party by way of misappropriation of those funds by its client — Bank's failure to prevent harm to third party rendering it co-wrongdoer with the client for theft.

Delict — Specific forms — Pure economic loss — Misappropriation by bank's client of funds deposited into client's accounts by third party, where bank aware that client having no legitimate claim to such funds — Banker under duty to take steps to prevent harm to third party by way of misappropriation of such funds by its client — Bank's failure to prevent harm to third party rendering it co-wrongdoer with client for theft.

After a franchisee had defaulted on the terms of a franchise agreement between it and the respondent (Spar), the parties came to an arrangement that the franchisee's outlets would be run by Spar at its own cost and for its own benefit. An aspect of this arrangement which had not been finalised was that credit card payments continued

to be made into the franchisee's three bank accounts held with appellant, FirstRand Bank (FirstRand). Spar's efforts to get the franchisee and FirstRand to alter the receiving accounts, so that it would have control over these funds, were unsuccessful. FirstRand subsequently used the funds to set off moneys owed to it by the franchisee, and also allowed the controlling mind behind the franchisee (one Mr Paolo) to withdraw funds from two of the accounts. This despite both FirstRand and the franchisee at all times being aware of Spar's claim to the deposited funds.
Spar was unsuccessful in its High Court action against FirstRand to recover the moneys disbursed from the accounts by Mr Paolo and the sums set off by FirstRand. This result was reversed on appeal to the full court of the division. In the present case, FirstRand's appeal to the Supreme Court of Appeal, the main issues were: (1) whether FirstRand was entitled to set off the credits that derived from the funds deposited into the franchisee's accounts by Spar against the franchisee's debts owing to itself; and (2) whether FirstRand owed a legal duty to Spar not to allow the franchisee to utilise the money deposited into the franchisee's accounts, when FirstRand knew that the franchisee had no valid claim to those funds, and so was liable in delict for the losses Spar suffered.

Held, as to (1)

The moneys deposited into the franchisee's accounts were the proceeds of Spar's trading activities and to which the franchisee had no claim; the franchisee enjoyed no personal right against FirstRand to the funds credited to its accounts that derived from Spar's deposits. FirstRand could not contend that the franchisee's indebtedness to it was set off against its indebtedness to the franchisee, because FirstRand owed no such debt to the franchisee. FirstRand's defence of set-off would therefore fail.
Where a deposit, to the knowledge of the bank, was made into the bank account of a customer to which the customer had no entitlement, the bank could not set off its customer's indebtedness to the bank against the credit in the customer's account deriving from such deposit. (See [46] – [50] and [86].)
The third party whose moneys were deposited enjoyed a claim against the bank for the amount so credited. Since the bank incurred no liability to its customer (here, the franchisee), without an obligation to pay the third party who had the original entitlement to the funds deposited (here, Spar), the bank (here, FirstRand) would be unjustly enriched. (See [62] – [63] and [89].)

Held, as to (2)

FirstRand enabled Mr Paolo's conduct by allowing him to operate the accounts, well knowing that the franchisee had no claim to the credits reflected in the accounts; it was a joint wrongdoer owing a legal duty to Spar. A customer, with no entitlement to moneys deposited into their account, who knew that they enjoyed no such entitlement, may not make disbursements from the account in respect of credits deriving from these moneys. To do so amounted to theft. A bank that knew that its customer enjoyed no such entitlement, and nevertheless permitted its customer to make disbursements in these circumstances, rendered itself a joint wrongdoer. As such, the bank owed a legal duty to the third party who was entitled to the moneys deposited and suffered loss as a result of the customer's disbursements. (See [75] and [86].)

MITSUBISHI HITACHI POWER SYSTEMS AFRICA (PTY) LTD AND ANOTHER v MURRAY & ROBERTS POWER & ENERGY 2021 (5) SA 532 (SCA)

Engineering and construction law — Civil engineering contract — Subcontractor — Right to information — Incident of contractor's duty of good faith and cooperation — Subcontractor seeking disclosure of incentive arrangements between contractor and employer to assess own entitlement to benefits under subcontract — No conflict of duties preventing contractor from making requested disclosure — Confidentiality claim unfounded.

The three parties in this matter, Eskom (the employer and second respondent), Mitsubishi (the contractor and first appellant) and M&R (the subcontractor and first respondent) were contractually related in a set of construction contracts for the building of power stations for Eskom. M&R sought disclosure of an 'incentive agreement' between Eskom and Mitsubishi and of the benefits Mitsubishi received under it. M&R was not party to the incentive agreement but the subcontract between Mitsubishi and M&R provided in clause 11.3 that Mitsubishi would pass on to M&R such portion of the contractual benefits received from Eskom 'as may relate to the subcontract works'. M&R argued that it needed the information sought to determine its share of the benefits received by Mitsubishi under the main contract.
Mitsubishi refused to make the disclosure, arguing (i) that the contractual benefits referred to in clause 11.3 did not include contracts to which M&R was not a party (the privity argument); and (ii) that a 'variation agreement' it had concluded with M&R excluded additional compensation under clause 11.3 (the extinction argument). Mitsubishi also argued that if disclosure were ordered, it would be forced to breach its confidentiality to Eskom under the main contract.
The matter went to dispute resolution. The arbitrator ruled that while M&R had a contractual right to disclosure, the main contract bound Mitsubishi to keep the incentive agreement confidential, absent consent by Eskom (which it refused to give). In an application by M&R the Johannesburg court ruled in favour of M&R that there was no contractual obstacle to the relief sought. It directed Mitsubishi to disclose the incentive agreement and the actual benefits received.
Mitsubishi and Eskom appealed to the Supreme Court of Appeal, which ruled on three issues: whether M&R had a contractual right to require disclosure from Mitsubishi; if so, whether Mitsubishi owed Eskom a duty to keep the incentive agreement and the details pertaining to it confidential, and, if so, whether this precluded M&R from exercising its right to disclosure; and, lastly, the scope of M&R's right.

Held

Neither the privity argument nor the extinction argument could prevail. Nothing in clause 11.3 required M&R to be in privity of contract with Eskom and Mitsubishi to have an entitlement to a portion of the contractual benefits received by Mitsubishi: to the contrary, it contemplated that the contractual benefits received by Mitsubishi under the main agreement gave rise to a pass-on obligation owed by Mitsubishi to M&R under the subcontract. M&R did not have to be a party to the main agreement to enforce a bargain it struck under the subcontracts (see [14]). There was also no proof that the variation agreement novated clause 11.3 and thereby extinguished the pass-on obligation (see [17]).
Since M&R's entitlements under clause 11.3 therefore held good, it could not make its claim to them under conditions of ignorance, as argued by Mitsubishi: absent

disclosure, M&R would be required to make an entirely vacuous demand predicated upon wholly speculative assumptions, and this could not have been contemplated when Mitsubishi and M&R concluded the subcontracts (see [22]). In addition, the good-faith principle obliged Mitsubishi to play open cards with M&R in this regard (see [24]). Parties cooperating in good faith did so on an informed understanding of their rights and obligations. In cases like the present, such information had to be provided by one of the parties to the contract (see [26]).
As to confidentiality, Mitsubishi's interpretation was at odds with both the main contract and the conditions of subcontract. Neither regarded subcontractors as third parties. The exercise by M&R of its right to disclosure was not precluded by Mitsubishi's confidentiality undertakings to Eskom in the main agreement. (See [30] – [38].)
As to the appropriate remedy, M&R could not secure a disclosure remedy that was greater than the right it enjoyed under clause 11.3. Mitsubishi's disclosure obligation had to be limited in two ways. First, Mitsubishi should only be required to disclose those portions of the incentive arrangements that were relevant to M&R's entitlement to contractual benefits under clause 11.3. Second, M&R was only entitled to the information that would permit it to ascertain the contractual benefits received by Mitsubishi that related to the subcontract works, namely the share of the contractual benefits to which M&R had a claim under clause 11.3. (See [42].) Appeal dismissed (see 46]).

SOUTH AFRICAN RESERVE BANK v LEATHERN NO AND OTHERS 2021 (5) SA 543 (SCA)

Exchange control — Exchange control regulations — Blocking order — Requirements for setting aside — No reasonable grounds — Whether established — Currency and Exchanges Act 9 of 1933, reg 22D read with s 9(2)*(d)*(i)*(bb)*.

Insolvency — Property passing to Trustee — Funds in insolvent's bank accounts blocked in terms of exchange control regulations — Whether such funds vesting in insolvent estate — Whether sequestration order invalidates blocking order.

A designated functionary of the Reserve Bank, who on reasonable grounds suspects a person to be involved in the contravention of any provisions of the regulations promulgated under s 9 of the Currency and Exchange Act 9 of 1933 (the Act), is empowered under regs 22A and/or 22C to issue a blocking order in respect of a banking account suspected of being used for illegal purposes. Regulation 22D provides, among other things, for the review of an order made in terms of reg 22A or 22C.
On 15 June 2017 the appellant, the South African Reserve Bank (the Reserve Bank), issued a blocking order * against two bank accounts of one Mr Bhorat held with the fourth respondent bank on the suspicion that these accounts had been used as conduits for illicit financial flows.
On 20 June 2017 Mr Bhorat's estate was provisionally sequestrated at the instance of the South African Revenue Service (Sars). The trustees, the respondents here, in a reg 22D review, obtained a High Court order lifting the blocking order and declaring that the blocked funds formed part of Mr Bhorat's estate. The absence of reasonable grounds for the blocking order is one of the bases for setting it aside in terms of reg 22D, read with s 9(2)*(d)*(i)(*bb*) of the Act. The High Court was not persuaded that there was reasonable suspicion, noting 'no proof of any kind was before the court'.

In the present case, an appeal by the Reserve Bank to the Supreme Court of Appeal, the issues were (1) whether the High Court was correct to set aside the blocking order; (2) whether the funds standing to the credit of Mr Bhorat's bank accounts 'belonged' to him and fell into his insolvent estate, thus vesting in the trustees; and (3) whether a sequestration order invalidated a blocking order by operation of law.

Held

(1) The High Court applied the wrong test by requiring the Reserve Bank to provide some 'proof' that the regulations had, in fact, been contravened. All that was required of the Reserve Bank was a suspicion based on reasonable grounds, which had to be objectively assessed. The High Court also failed properly to assess the explanation and evidence provided by the Reserve Bank. In all the circumstances, the Reserve Bank's suspicion was well founded and reasonable. The High Court was thus not entitled to set aside the blocking order, as the provisions of reg 22D, read with those of s 9(2)*(d)*(i)*(bb)* of the Act, were not satisfied. (See [15] – [16].)

(2) The general position in our law was that where money was deposited into a bank account of an account holder, it mixed with other money and, by virtue of commixtio, it became the property of the bank. The account holder had no real right of ownership of the money standing to his credit but acquired a personal right to payment of that amount from the bank. It was not a universal rule that only an account holder may assert a claim to money held in its account with a bank. Where to the knowledge of the bank and the account holder, the account holder had limited control over the funds, the right to claim the funds standing to the credit of the account did not accrue to the account holder but to the depositor. In this case, on the uncontroverted version of the Reserve Bank, there seems to be an understanding between the depositor(s) and the account holder that the latter is only entitled to deal with the funds as directed by the depositor. The High Court's conclusion that Mr Bhorat enjoyed a personal right to the funds as against the fourth respondent bank could not have been made on the evidence before it and on the basis of the law governing these matters. At this stage the trustees had no better claim than Mr Bhorat as against the Reserve Bank. Provided the Reserve Bank's blocking order complied with the regulations, it may block the funds and the trustees could enjoy access to them, whatever was ultimately proven as to who had a claim to the funds. Viewed in this light, the trustees' application to the High Court was premature and should not have succeeded. (See [17], [20], [24] and [29] – [30].)

(3) The purpose of a blocking or attachment order in terms of the regulations was to secure assets which may be liable to forfeiture in terms of the regulations. This added to the general context of the regulations in that a blocking order was provisional only and the final position can only be determined if the Reserve Bank sought a forfeiture order. A blocking or attachment was therefore a prerequisite for a valid forfeiture of the funds to the state. If a blocking order was terminated by the grant of a subsequent sequestration order, the forfeiture of the assets used in the contravention of the regulations might never be realised. The remedy of forfeiture, a sanction of public law imposed to protect the currency and the economy, would be lost by operation of the law of insolvency. That was an absurdity so glaring that the legislature could not have contemplated it. A blocking order functioned to temporarily delay a determination whether the funds in a blocked account vest in the trustees. For that reason, in the interim, the trustees were not entitled to demand that the funds be paid out to them for distribution. (See [36] – [39].)

WATSON NO v NGONYAMA AND ANOTHER 2021 (5) SA 559 (SCA)

Company — Shares and shareholders — Application for restoration of shares — Claim that shares donated on basis of misrepresentation that persons with BBBEE credentials would benefit — Case withdrawn against registered shareholder and entities alleged to be beneficial shareholders not cited — Order by court against individual said to have made representation incapable of execution — Issues, including ownership of shares involving corporate structures, complex — Motion proceedings inappropriate.

Mr Watson was ordered by the High Court to 'take whatever steps . . . necessary to restore' to Thunder Cats Investments 92 (Pty) Ltd (Thunder Cats) shares in Nkonjane Economic Prospecting and Investment (Pty) Ltd (Nkonjane) which had been donated by Thunder Cats to Bosasa Youth Development Centres (Pty) Ltd (Bosasa Youth). The basis of the High Court's order was that the donation was validly cancelled as it was induced by Watson's misrepresentation that the 'beneficial shareholders' in Bosasa Youth had Black economic empowerment (BBBEE) credentials, when he and his family were the ultimate beneficiaries.
The application was withdrawn against Bosasa Youth, originally cited together with Watson, who died shortly after the order and before the High Court granted his leave to appeal. This case concerned that appeal, prosecuted by the executor of his deceased estate.
Nkonjane had been created as a vehicle for Watson, Ngonyama and one Mr Macingwane, to invest in Ntsimbintle Mining (Pty) Ltd (Ntsimbintle). They initially agreed that 10% of their equity in Nkonjane would be donated, in equal shares, to two companies to hold it on behalf of BBBEE beneficiaries. In 2003 it was decided to instead use Bosasa Youth to hold 25% in Nkonjane on behalf of the beneficiaries. In the same year, Watson transferred his shareholding in Ntsimbintle to Bosasa Operations (Pty) Ltd, which later became African Global Operations (Pty) Ltd (Operations), of which Bosasa Youth was a wholly owned subsidiary.

When an offer was made by an investment company to buy out Nkonjane's shares in Ntsimbintle at R33 million for each of their 25%, Operations and Bosasa wanted to sell but not Ngonyama and Macingwane. Ngonyama withheld his consent to the sale, citing a right to nominate groups of shareholders to hold shares in Bosasa Youth in accordance with the original agreement. In 2015 Operations and Bosasa Youth successfully applied for Nkonjane's winding-up, during the course of which it was agreed that each Nkonjane shareholder would buy from the liquidator its pro rata portion of Nkonjane's shares in Ntsimbintle (the Agreement). This so that they would thereafter hold their shares directly in Ntsimbintle. The envisaged substitution was implemented in October 2016.
In the High Court application Ngonyama claimed that it was only in September 2017 that he and Macingwane learnt that at no relevant time had there been BBBEE shareholders in Bosasa Youth; the donation of the shares by him and Macingwane was premised on ensuring that historically disadvantaged individuals would benefit from an investment opportunity and would be entitled to lay claim to and enjoy the benefits thereof, including the receipt of dividends. Watson and Bosasa Youth both opposed the application. The provisional liquidators of Nkonjane were not joined. Bosasa Youth's defences were that no misrepresentation had taken place because Ngonyama knew that it was a wholly owned subsidiary of Operations; and that

whatever claims concerning the return of the shares Ngonyama and Macingwane might have had against Watson and/or Bosasa Youth, were compromised under the Agreement and therefore moot.
It was only when provisional liquidators of Bosasa Youth belatedly sought to intervene that the Supreme Court of Appeal became aware that it had been liquidated after an opposed voluntary liquidation. An application to take Bosasa Youth out of liquidation had been successful but at the time of the High Court's hearing of the Ngonyama and Thunder Cats application, that matter was subject to appeal (which was subsequently upheld so that Bosasa Youth remained in liquidation).

Held

The withdrawal of the case against Bosasa Youth did not excuse the court below from considering mero motu whether its joinder and continued presence were obligatory and whether, without its continued presence, any order made would be effective. How could the provisional liquidators of Bosasa Youth not have a substantial and direct interest in the litigation conducted in the High Court? When the company was placed in provisional liquidation that consideration did not fall away. The withdrawal of the claim against Bosasa Youth and the non-joinder of the liquidators, or the failure to inform the High Court of their existence, and then later, of the pending appeal, were reason enough to vacate its decision. (See [52] and [54] – [55].)
The conclusions reached by the High Court as to Watson's alleged misrepresentation were not justified. Ngonyama's own version of the agreement in relation to BBBEE shareholding, and the verification thereof, was inconsistent and vague; there was material doubt as to whether, at the time Ngonyama and Macingwane donated shares to Bosasa Youth, Watson made any fraudulent misrepresentation as to an existing fact or his state of mind. (See [54] and [59].)
The High Court was correct to conclude that the Agreement did not constitute a compromise but a share substitution agreement. Its conclusions on the true ownership of the disputed shares was not correct. It used the expression 'beneficial ownership' rather loosely. In the sphere of corporations, the beneficial ownership of shares referred to the case where shares, although registered in the name of a nominee, were in truth owned beneficially by a person whose name did not appear on the company's share register. Bosasa Youth was the registered shareholder of the disputed shares. (See [60] – [63].)
The lis against Bosasa Youth having been withdrawn, absent a rectification of Ntsimbintle's share register or the dispute between Bosasa Youth and the present respondents concerning the ownership of the shares being finally adjudicated, any order made involving Bosasa Youth's liquidators having to restore the shares held in its name was of no value; it was not binding on them and so had no practical effect. A court order must be framed in terms that were capable of being enforced. (See [63] and [66].)
Questions of ownership of shares, as opposed to questions related to rectification of a share register, were more often than not dealt with by way of a trial, rather than on motion, especially where the issues were complex or difficult.
The robust approach followed by the High Court in resolving all the issues on affidavit, given the complexities involved, was not appropriate. (See [65] – [67].) The appeal would accordingly be upheld.

ILEX SOUTH AFRICA (PTY) LTD v NATIONAL HEALTH LABORATORY SERVICE AND OTHERS 2021 (5) SA 587 (GJ)

Government procurement — Procurement process — Extension — Where no award made within bid period — Process complete and award after closing date unlawful — Not possible to give parties further opportunity to bid or to extend their bids — Any such extension amounting to reviewable irregularity.

Government procurement — Procurement process — Irregularities — Award after expiry of bid period — Process complete and award after closing date unlawful — Not possible to give parties further opportunity to bid or to extend their bids — Any such extension amounting to reviewable irregularity.

Government procurement — Tender — Award — Review — Remedy where successful — Discretion of court — Court allowing award to stand despite its invalidity, given advanced state of implementation of tender, urgency of its uninterrupted implementation and unlikelihood that state would get more cost-effective solution if tender redone.

The present application concerned a R1 billion tender issued by the first respondent (the NHLS) for the supply of HIV/Aids viral load testing equipment. The tender was not awarded within the bid period but after its extension by the NHLS. The applicant (Ilex), the losing bidder, sought an order setting aside the appointment of the winning bidders on the ground that the tendering process was unlawful and invalid inter alia because the winner's bid was accepted after it had expired. *
The closing date for submissions was 11 June 2018 and the bid validity period was 120 days, meaning that the bids were open for acceptance until 9 October 2018, by which date the NHLS had not yet accepted any offers. On the next day the NHLS extended the bid validity period for another 120 days, but Ilex argued that the right to do so had no life of its own and had lapsed on 9 October 2018.

Held

Ilex's above submission was correct. If regard was had to the principles governing public tenders and in particular the requirement of transparency, the bids expired on 9 October 2018. For the NHLS to have continued with the process thereafter amounted to a reviewable irregularity and on that basis alone Ilex should be granted the relief prayed for (see [39]). The subsequent solicitation of new offers by the NHLS was unconstitutional, flying in the face of the philosophy underlying public tenders. Those offers did not follow on a public procurement process and were unlawful (see [40]). Once the validity period of the bid submissions had expired without the NHLS having awarded the bid, the tender process was complete and the NHLS could no longer continue with that process or take any decisions pursuant to bids submitted in response to the request for bids (RFB). The NHLS was then compelled to readvertise the bid (see [41]). By the time the tender validity period had expired, there was nothing to extend because the tender process was concluded (see [43]).

In addition, the confusing formulation of the pricing documentation of the RFB created vagueness and uncertainty that resulted in the disqualification of Ilex. Hence the purpose of a tender, which was to elicit the best solution through a process that was fair, equitable, transparent, cost-effective and competitive, was not achieved. Since vagueness and uncertainty were grounds for review, the award to the winning bidders was also invalid on this ground (see [66] – [67]). Ilex's disqualification had in

addition been arbitrary, irrational and unlawful because there was no legal basis on which to disqualify it (see [77], [79]). It was unlawful exercise of state power (see [80]).
However, because of the disruption a setting-aside of the awarded contracts would cause, the dire consequences for millions of South Africans with Aids, and the unlikelihood that the state would receive a more cost-effective solution if the tender were redone, the court would exercise its discretion by declining to set aside the contracts awarded to the (innocent) successful bidders (see [84], [91] – [96]).
As to costs, the court found no reason to depart from the general rule that the successful party should get its costs. Since the respondents were by and large successful despite the order of invalidity, an order for costs would be granted against the applicant in favour of the respondents (see [97] – [98]).

LM v DM 2021 (5) SA 607 (GP)

Marriage — Divorce — Divorce proceedings — Institution by curator bonis — Common law developed to allow curator bonis to institute divorce proceedings on behalf of incapacitated person — If so, whether approval of Master required.

This matter was cast in the form of an exception in which the respondent (the original plaintiff), DM, in his capacity as WM's court-appointed curator bonis, instituted divorce proceedings against LM, WM's wife. WM was incapacitated by a stroke and subsequent dementia, and living in a care centre.
LM (the original defendant, here the excipient) excepted to DM's particulars of claim on the ground that DM lacked locus standi because matrimonial issues were too personal and could not be performed by a curator. This position was in line with current common law, which held matrimonial proceedings to be too intimate and personal to be instituted by a curator. LM also argued that the court order that appointed DM as WM's curator was not complied with since no averment was made in the particulars that DM had obtained the necessary approval from the Master to institute the action. The order authorised the institution of a matrimonial action by DM but LM argued that the order could not authorise DM to do that which was against the law.
DM, while conceding that the institution of matrimonial proceedings by a curator on behalf of a patient of unsound mind should not normally be allowed, argued for the development of the common law in accordance with the Bill of Rights. He contended that an order authorising him to institute proceedings on behalf of WM would beneficially develop the common law in accordance with s 173 of the Constitution.
The issue was thus whether it would be in the interest of justice to authorise and empower a curator to institute matrimonial proceeding on behalf of an incapacitated person.
Held
It would be in the interests of justice to develop the common law. The court, in exercising its inherent power, should be able to authorise and empower a curator to institute proceedings of a matrimonial nature on behalf of an incapacitated person who is unable to decide whether he or she should remain in the marriage or not (see [24]). In such circumstances the court should allow some other evidence to demonstrate the irretrievable breakdown of the marriage, as in this case, where a normal marriage relationship was, in view of WM's condition, no longer possible (see [25]).

While it was true that a court order went against what was permitted by the common law, it was trite that court orders had to be obeyed until set aside by a court of law (see [32]). Here the order that authorised DM to institute the divorce proceedings was binding, and therefore this ground of exception fell to be dismissed (see [37]). But LM's exception in regard to DM's failure to obtain the approval of the Master had to be upheld. The order was clear and unambiguous: the Master's approval was required at the outset and not after proceedings had already been instituted (see [46], [49]).
Exception upheld and plaintiff's claim dismissed (see [50], [53]).

NOMANDELA AND ANOTHER v NYANDENI LOCAL MUNICIPALITY AND OTHERS 2021 (5) SA 619 (ECM)

Practice — Applications and motions — Urgent applications — Non-compliance with rule 41A(2)*(a)* raised in limine — Whether application to proceed as it stood — Uniform Rule 41A(2)*(a)*.

Rule 41A(2)*(a)* provides that '(i)n every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation'; and rule 41A(2)*(b)* that 'a defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation'.
In this case the applicant's urgent application for interim relief was met with respondent's point in limine that the applicant failed to comply with rule 41A(2)*(a)*. At issue was whether the court should allow the application to proceed as it stood.
Held
Rule 41A(2)*(b)* compels the respondents to also file their notice as to whether they agree or oppose referral of the dispute for mediation. The rule did not suggest that their compliance was dependent on the applicant's filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere in the answering affidavit was it stated that they would have wished to explore or not explore the mediation process, but could not do so for reason of the applicant's non-filing. They could have complied with their part of the obligation in terms of the rule or communicated their stance on mediation regardless of the applicant's failure. The rules were meant to be complied with, but they were meant for the court, and not the other way round. While it was ideal that litigants comply with this rule, in the interests of justice the issues raised in the application called for immediate resolution rather than removing the matter from the roll in order for the litigants to pronounce on whether they would agree or oppose mediation. The point in limine would accordingly be dismissed. (See [9] – [11].)

PRAG NO AND ANOTHER v TRUSTEES, MITCHELL'S PLAIN INDUSTRIAL ENTERPRISES SECTIONAL TITLE SCHEME BODY CORPORATE AND OTHERS 2021 (5) SA 623 (WCC)

Sectional title — Body corporate — Duties — Duty to insure sectional title scheme's buildings — Scope of — Sectional Titles Schemes Management Act 8 of 2011, ss 3(1)*(h)* and *(k)*.

Housing — Consumer protection — Community schemes ombud — Appeal against adjudicator's order — Adjudicator's jurisdiction — Whether competent to adjudicate damages claim brought by owner of unit.

The Harprag Trust (the Trust) owned a unit in Mitchell's Plain Industrial Enterprises Sectional Title Scheme. The respondent was its body corporate. After a fire damaged the unit in July 2017, the scheme's insurers advised the respondent that pending the filing of valid electrical and fire-equipment certificates of compliance by all the owners of units in the scheme, insurance cover for damage caused by fire would be suspended. Before these were forthcoming, in July 2019 the Trust's unit was destroyed in a fire. The resulting insurance claim submitted by the Trust against the scheme's insurers was repudiated.

The Trust applied to an adjudicator appointed in terms of the Community Schemes Ombud Services Act 9 of 2011 (the CSOS Act) for an order that the scheme pay to it a sum in lieu of damages allegedly sustained by the Trust pursuant to the fire, together with lost rental which it suffered as a result. The Trust based these claims on the failure by the respondent body corporate to ensure that at all material times the buildings in the scheme were insured for their replacement value, in breach of its statutory duty in terms of ss 3(1)*(h)* and *(k)* of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA). These subsections respectively oblige body corporates 'to insure the building or buildings [in a sectional title scheme] and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed' and 'to pay the premiums on any insurance policy effected by it'. The alternative bases for the Trust's claims were that the relief prayed for was competent under s 39(1)*(e)* and/or s 39(6)*(a)* of the CSOS Act (see [19] – [21]).

The adjudicator dismissed the application on the basis that the relief sought fell outside of his statutory jurisdiction. In the Trust's statutory appeal to the High Court:

Held

As to the scope of duties imposed by STSMA, ss 3(1)(h) and (k)

While the body corporate had a statutory duty to insure all buildings belonging to the scheme, which necessarily included individually owned sections and those parts of the building(s) owned by all members of the scheme in common undivided shares, as common property, it was not intended that an individual owner would have a right to sue it for any damages which may have been sustained in respect of the owner's individual section only. Under the STSMA a body corporate's duties primarily related to the scheme's common property, ie the common interests of members of the scheme, not the interests of an individual member. An individual section belonged to an individual owner; they would ordinarily be responsible for any loss suffered in relation thereto. A breach of these provisions was not intended to afford the owner of an individual section a right to sue a body corporate for damages which may have been sustained in respect of that section only, where only the individual interests and

rights of the owner had been affected, and not the common, ie communal, interests of owners of sections or units in the scheme (See [13] – [15].)

As to adjucator's jurisdiction under CSOS Act

The orders which can be made by an adjudicator in respect of the different categories which are provided for in s 39 of the Act were primarily directed at matters having a bearing on the sectional title community concerned as a whole, ie on members of the sectional title scheme itself, and not on individual members. The CSOS Act envisaged disputes between members of a sectional title scheme and the administrators thereof, not those personal to owner. Here the damages claims were personal to the Trust as the individual owner of a section in the scheme and did not pertain to the scheme itself, and so did not fall within the CSOS Act's ambit and could not competently be brought under it. (See [16] – [19].)

ROYAL PALM BODY CORPORATE v VAHLATI INVESTMENTS (PTY) LTD AND ANOTHER 2021 (5) SA 632 (KZP)

Sectional title — Developer — Meaning of in STSMA — When ceasing to be developer — Sectional Titles Schemes Management Act 8 of 2011, s 1.

Sectional title — Sectional title scheme — Management rules — Inconsistency between management rules based on STA regulations and those under STSMA — Validity of earlier inconsistent management rule — Sectional Titles Act 95 of 1986; Sectional Titles Schemes Management Act 8 of 2011.

While the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) repealed the Sectional Titles Act 95 of 1986 (the STA), s 10 of the STSMA preserves the management rules of the old Act, rendering them to operate in parallel with the management rules under the new Act's regulations. (See [16] – [21] and [24].)

Rule 57(2)*(c)* of the appellant's 1988 management rules provides that a quorum at a general meeting was a number of owners holding at least 20% of the votes by representatives recognised by law and entitled to vote, while rule 19(2)*(b)* of the management rules under the new Act's regulations provides that a quorum at a general meeting is constituted 'by members entitled to vote and holding one third of the total votes of members in value, *provided . . . the value of votes of the developer must not be taken into account*'.

The respondents lodged a complaint with an adjudicator under the Community Schemes Ombud Services Act 9 of 2011 (the CSOS Act), that the appellant's annual general meeting was invalid — the quorum not reached without including the votes of the appellant's developer, which under the STSMA's management rules fell to be excluded. It was common cause that the applicant's developer, Gateway Royal Palm (Pty) Ltd, was at the relevant time no longer the owner of the land but one of the owners of the appellant.

Faced with this inconsistency, the adjudicator ruled that rule 57(2)*(c)* of the old management rules was repealed by the provisions of the new management rules, and that the meeting was not quorate because the developer's vote was not excluded. In the present case, a statutory appeal in terms of s 57 of the CSOS Act against the adjudicator's findings, the issues were —

- the validity of rule 57(2)*(c)*; and
- the meaning of 'developer', more specifically at what point someone who owned the land, developed and sold the scheme to the owners, ceased to be a 'developer' for the purposes of the STSMA.

Held
Where a later statute was irreconcilable with an earlier one, the latter must be regarded as having been impliedly repealed. Rule 57(2)*(c)* of the old management rules was impliedly repealed by rule 19(2)*(b)* of the new management rules under the STSMA and its regulations. (See [34] – [36] and [50].)
The STSMA's definition of a 'developer' was couched in the present tense; a developer was a person who was the registered owner of land. Once a person ceased to be the owner of the land, they were no longer a 'developer' in terms of the STSMA. Accordingly, Gateway Royal Palm (Pty) Ltd was no longer a 'developer', but the owner, and therefore entitled to vote at the annual general meeting as the owner. The adjudicator erred in excluding its votes; the meeting was quorate. The appeal would accordingly be upheld. (See [37] – [43], [50] and [51].)

STANDARD BANK OF SOUTH AFRICA LTD v NKHAHLE AND OTHERS 2021 (5) SA 642 (WCC)

Administration of estates — Property of estate — Sale of — Restriction on sale in execution of property in deceased estates — Default judgment sought for order, inter alia, authorising sale of mortgaged property of deceased estate — Failure of plaintiff to allege in particulars of claim that notice in terms of s 29 of Administration of Estates Act published by Master — Court declining to authorise sale — Administration of Estates Act 66 of 1965, ss 29 and 30.

The present matter concerned an application for default judgment, in which was sought an order, inter alia, declaring an immovable property in a deceased estate to be specially executable; authorising the plaintiff to execute against the property; authorising the Registrar to issue a warrant of execution; authorising the sheriff to execute such warrant; and directing, in terms of s 30*(b)* of the Administration of Estates Act 66 of 1965, that the mortgaged immovable property may be sold. The motion court when hearing the unopposed application raised a concern. Section 29 of the Administration of Estates Act provided that every executor shall cause a notice to be published calling upon all persons having claims against the deceased estate to lodge such claims with the executor within a stipulated period. And s 30 provided that no person charged with the execution of any writ or other process shall *(a)* before the expiry of the period specified in the notice referred to in s 29; or *(b)* thereafter unless, in the case of property of a value not exceeding R5000, the Master or, in the case of any other property, the court, otherwise directed, sell any property in the estate of any deceased person which had been attached whether before or after his death under such writ or process [subject to a proviso not relevant here]. Despite these provisions, the plaintiff had failed to include an allegation in its particulars of claim that notice had been given as prescribed in s 29. Would it be competent, the court asked, in terms of s 30*(b)* of the Act, for the court to authorise the sheriff to sell the mortgaged property in execution?
Held, that s 30 made it plain that a sale in execution of a deceased's property could not occur until after the deceased estate had been advertised in terms of s 29 of the Administration of Estates Act and the period stated in such advertisement within which claims might be lodged with the executor had expired (see [8]). [This was subject to an exception not relevant here.]
Held, that [subject to the aforementioned sole exception], the provisions of s 30*(a)* constituted an absolute bar to the sale in execution of property out of a

deceased estate until s 29 had been complied with, and s 30*(b)* permitted the court to authorise a sale in execution only after there had been such compliance (see [9]). *Held*, that it had not been established that there had been compliance with s 29 of the Act (see [11]). Accordingly, while the application for default judgment would be granted, and permission granted to attach the mortgaged property, an order would not be made authorising the sale in execution of the property. Once there had been compliance with s 29 of the Act, a fresh application would have to be made for leave from the court in terms of s 30*(b)*. (See [12].)

SA CRIMINAL LAW REPORTS OCTOBER 2021

RODRIGUES v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2021 (2) SACR 333 (SCA)

Prosecution — Permanent stay of prosecution — Application for — Delay in prosecution of — Allegation of political interference by executive in causing delay — Applicant failing to show impact of such interference on factors relating to whether substantial fairness of trial tainted.

The appellant applied for leave to appeal against a decision of the High Court which had dismissed his application for a declaratory order that criminal proceedings instituted against him relating to the death of the late Mr Timol at a police station in Johannesburg constituted an unfair trial as envisaged by s 35(3) of the Constitution, and that he be granted a permanent stay on the charge of murder in the criminal proceedings against him. The application was advanced on the basis that the full court erred in concluding that the delay in bringing the prosecution would not taint the fairness of the trial; in its finding that he was not being prosecuted for an improper motive; and in not finding that the alleged political interference by the Minister of Justice and the State President, by stopping Truth and Reconciliation Commission cases (TRC), had caused the unreasonable delay and had the effect of tainting the fairness of the trial he was required to face.
The majority of the court held that the issue of the alleged political interference in the prosecution of crimes such as the present one, and its ongoing impact and relevance for prosecutions that might still be instituted in future, was certainly relevant, and for that reason there was a compelling reason to grant leave to appeal. (See [7].)
Held, that it was perplexing and inexplicable why, during the 14-year period between 2003 and 2017, the executive adopted a policy position conceded by the state parties, that TRC cases would not be prosecuted, particularly in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the National Prosecuting Authority, its constitutional obligation to prosecute crimes, and the interests of the victims and survivors of those crimes. The full court rightly recommended a proper investigation into these issues by the first respondent. (See [26] – [27].)
Held, further, that, while the issue of political interference was a matter of great seriousness, the absence of detail as to why it occurred was not an impediment to the determination of the matter. There was simply no evidence showing what impact

the political interference had on factors relating to whether the substantial fairness of the trial was tainted. (See [30].)
Held, further, that the appellant had not established that he had or would likely suffer trial-related prejudice if he were not granted a permanent stay of prosecution and brought to trial. The trial court would be best suited to deal with any issue of potential prejudice and the appeal accordingly had to fail. (See [39].)
In a separate judgment, Cachalia JA held that the appellant had not demonstrated any legal or factual basis that he had any reasonable prospects of success in an appeal. Neither had he advanced a comparable reason for the court to entertain the appeal. The application for leave to appeal thus had to be dismissed. (See [62].)

S v TILAYI 2021 (2) SACR 350 (ECM)

Robbery — Attempted robbery — What constitutes — Armed group waiting to intercept cash-in-transit van abandoning attempt when it heard that police accompanying vehicle — Amounting to no more than preparation and not constituting actus reus required for crime.

General principles of liability — Common purpose — Withdrawal from commission of planned crime — Whether disassociation rendering party liable for subsequent actions of co-conspirators — Necessary to determine form of common purpose.

The appellant and his co-accused were indicted to stand trial in the High Court on one count of murder, four counts of attempted murder, attempted robbery with aggravating circumstances, and the unlawful possession of firearms and ammunition. The appellant was found guilty on all the charges, except on one count of attempted murder. He was sentenced to life imprisonment in respect of the count of murder and to an effective 18 years' imprisonment in respect of the other counts. The High Court found that the appellant was a participant in the planning of the robbery of a cash-in-transit vehicle en route to deliver cash at a pension paypoint. While the conspirators were lying in wait for the arrival of the cash vehicle, armed and ready, they were warned, with some insider assistance from the security company, that the money van was being accompanied by members of the South African Police Service (the SAPS). In response they decided not to carry out their plan and to leave the area, but in making their escape they were spotted by the police and followed. During a car chase, gunshots were fired at the police officials and later, after the conspirators had abandoned their vehicles and fled into a forest, they fired further shots at the police, one of which killed a police official.
In respect of the counts of attempted robbery, the court held on appeal that, although the preparations necessary to execute the robbery were completed, at the time of the interruption of their conspiracy, the conduct of the appellant and the group did not amount to anything more than preparation, and there was no act that could be said to go towards the actus reus required for the crime of robbery. At the relevant time they were still in control of the course of events as the money van had not yet arrived and they still had the time and the opportunity to change their minds, which in fact they did when it turned out to be unsafe to carry out their plans to rob the money van. In the result the appellant's conviction on the charge of attempted robbery could not stand. (See [14].)

In respect of the further charges, it was argued for the appellant that once it was accepted that he and the other conspirators had withdrawn from the commission of the planned crime of robbery, he could no longer be held liable for the subsequent actions of any of his co-conspirators. The court held here that as a general proposition this argument had no legal basis and was without merit. It was not disassociation from the crime of robbery itself that would release the appellant, as a participant in a common purpose, from liability for the acts of any of his or her co-accused, but rather his disassociation from the common purpose itself. Furthermore, the argument suggested that the absence of an accused person who was a co-conspirator, from the scene at the time of the commission of a crime other than the one which they had conspired to commit, would exonerate that accused from any liability for that other crime. That gave no consideration to the form of common purpose that found application, and that it was the nature of the common purpose that found application on the facts, that was determinative of whether or not the appellant would be exonerated from liability, should it be found that he was not present at the scene of the crime. (See [15] – [17].)

The court held further that it was important to note that common purpose had two forms, firstly where there was a prior agreement to commit a common offence; and secondly, where liability arose from an active association and participation in a common criminal design with the requisite blameworthy state of mind. (See [19].) The significance of this was that, otherwise than a common purpose that arose from active association, if liability was based on a prior agreement, the accused need not be present at the scene of the crime at the time of the commission of the crime. It was therefore important to identify the form of common purpose that found application on the facts of any particular case, and to ask the right questions. In the present matter, the agreement to hold up the cash-in-transit vehicle gave rise to and was the primary source of a common purpose. The appellant was a party to that agreement, and he actively associated himself with its execution. He was present at the meeting where the robbery was planned and played a leading role in its planning. He had accompanied the group from the cleansing ceremony to the prearranged place where the ambush was to take place. He remained with the other occupants of the vehicle during the car chase and fled into the forest. He was one of the occupants of the vehicle from which shots were fired at the police. He was clearly a participant in the common purpose and would consequently be liable for any act committed by him or any of his co-conspirators which fell within the scope of the common purpose. (See [27] – [31].)

As to the question whether the appellant had effectively withdrawn from the common purpose, the court held that the appellant's departure from the place of the intended crime was a neutral factor and was not done voluntarily and with the intention to withdraw from the overall common objective, but was motivated by flight, intended to evade detection and apprehension. The appellant consequently remained responsible for all the acts done by his co-conspirators which fell within the scope of the common design. The appellant's role in the venture was not insignificant. (See [38].)

Held, on the facts, that the inescapable inference to be drawn from the evidence as a whole was that the group and the individual participants in the common purpose had the necessary intention and control required for a conviction on the basis of joint possession of the firearms. The group agreed to acquire the firearms that were to be used in the execution of the primary offence of robbery, the elements of which offence required the theft of the money by means of an act of force. The firearms

were necessary instruments in the execution of the robbery in the manner it was planned. (See [43].) The court accordingly upheld the convictions on all counts, except that of the count of attempted robbery, and dismissed the appeal against sentence.

S v KILLIAN 2021 (2) SACR 371 (WCC)

Sentence — Suspended sentence — Conditions of suspension — Framing of — Conditions must be sufficiently related to specific offence of which accused convicted.

The accused was convicted of contravening s 17*(a)* of the Domestic Violence Act 116 of 1998 (the Act), in that, contrary to the prohibition contained in a protection order, he had entered his mother's house whilst under the influence of alcohol. He admitted that he had breached the terms by entering his mother's house in such a condition and threatening to kill her. The magistrate sentenced the accused to a fine of R5000 or six months' imprisonment which was wholly suspended for a period of two years on condition that he was not again convicted of assault which was committed during the period of suspension. On a query by the court on review, *Held*, that a subsequent court would not be able to make a finding that the accused breached the conditions of suspension, because he had not been convicted of assault. The sentence imposed was in either event not in accordance with justice because it was not sufficiently related or connected to the offence he was charged with, and neither was it clearly formulated to achieve the objectives of informing the accused what he had to do or avoid in order to ensure that the sentence was not put into operation. (See [8] and [9].) The sentence was accordingly set aside and replaced with a sentence of a fine of R5000 or six months' imprisonment, which was suspended for a period of two years on condition that he was not convicted of contravening s 17*(a)* of the Act, or assault, and which was committed during the period of suspension.

S v SWANEPOEL AND ANOTHER 2021 (2) SACR 374 (GP)

Prosecution — Permanent stay of prosecution — Application for — Claim that accused were to be used as witnesses against their co-accused in terms of s 204 of Criminal Procedure Act 51 of 1977 — Accused not called to testify against co-accused because he had died before trial could commence — Conditions of s 204 not met — Stay refused.

The applicants applied for the permanent stay of their prosecution for dealing in rhino horn without permits in contravention of the National Environmental Management Biodiversity Act 10 of 2004. They were initially charged together with another accused who was charged with 108 similar counts, whilst they were only charged with two counts. Their erstwhile co-accused died shortly before the trial was due to commence. As part of the preparations for trial, a state advocate had made overtures to the applicants, with the view to using them as state witnesses against their co-accused in terms of s 204 of the Criminal Procedure Act 51 of 1977, but they had only provided written statements implicating their co-accused and had not yet been consulted by a prosecutor in preparation for the trial. They alleged that they

had a contract with the state and a legitimate expectation not to be prosecuted as a result. They felt aggrieved that their constitutional rights and expectation for just administrative action by the state had been infringed.
Held, that the procedure that was adopted when the prosecutor called a s 204 witness was that he or she informed the court before the witness started to testify, and the court then explained to the witness that he or she was obliged to answer all questions put, notwithstanding that the answer may be self-incriminating, and that if they answered frankly and honestly, they might be indemnified and discharged from prosecution. The applicants were not called to testify against their former co-accused due to his demise before his trial could commence, and the conditions enshrined in s 204 had not therefore been met. Since the applicants had not given evidence, their application had no foundation in law and could not succeed. (See [14] – [16].)

S v MOUSSA 2021 (2) SACR 378 (GJ)

Plea — Prosecutor has no title to prosecute — Abuse of process — Agreement between state advocate, accused and legal representative that matter would be withdrawn upon accused making payment to complainant — Effect of — State advocate not entitled to enter into such agreement and Deputy Director of Public Prosecutions refusing to honour such and proceeding with trial — Prosecutor abusing position, but continuation of proceedings not constituting abuse of court process — Criminal Procedure Act 51 of 1977, s 106(1)*(h)*.

The accused raised a special plea in terms of s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA), contending that the prosecutor had no title to prosecute him for various counts of fraud and a count of money- laundering. He based his plea on an alleged agreement entered into with the state that the charges against him would be dropped if he made a payment of R1 million to a bank, the complainant in the criminal charges. There was in fact an agreement drawn up by a state advocate which provided that the state would 'deliberate on the matter further and provide a final response to [the accused]' after confirming with the bank that the amounts making up the R1 million had been paid. The agreement was signed by the state advocate and the accused and his attorney. At a later stage, the state advocate falsely or mistakenly told the court that the agreement had been made an order of court. Said state advocate later came to the accused in tears and told him that her superior, the Deputy Director of Public Prosecutions (the DDPP), had refused to withdraw the charges.
The accused contended that the state had abused its prosecutorial powers by advancing the interests of the complainant by getting him to pay the R1 million, and that this had brought the administration of justice into disrepute. By the state entering into the agreement and persisting in its performance, the court processes were thereby being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.
The court accepted the evidence of the accused as to the circumstances in which the agreement came about, the state advocate declining to testify.
Held, that the state advocate must have been aware that she did not have the authority to withdraw the matter against the accused, but, despite this, she created the impression with the accused that upon payment of the money to the complainant the matter would be withdrawn. She had abused her position by informing the

accused thus. The most serious abuse came about when she informed the court that the agreement had been made an order of court, whilst this was not the position. By informing the court thus she did not act in good faith, alternatively made a mistake. (See [91] and [93].)
Held, that, although the accused had proven on a balance of probabilities that the state advocate had abused her position as prosecutor, it could, however, not be found that the institution or continuation of the prosecution would constitute an abuse of the court processes. The accused had not shown that the prosecution was conducted for an ulterior motive or was vexatious, frivolous, or designed to oppress the accused. (See [99].)
Held, further, to decide whether the abuses of the state advocate affected the title to prosecute as contemplated in s 106(1)*(h)*, the court had to consider who was vested with the decision or title to prosecute. The indictment in the matter was signed by a DDPP. The court prosecutors, including the state advocate in question, were not vested with title to prosecute beyond the right to represent the prosecuting authority in court. Consequently, the accused's plea in terms of s 106(1)*(h)* of the Criminal Procedure Act could not be upheld. (See [100] – [102].)

THALES SOUTH AFRICA (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS NO AND OTHERS 2021 (2) SACR 400 (KZP)

Prosecution — National Director of Public Prosecutions — Authorisation in terms of s 2(4) of Prevention of Organised Crime Act 121 of 1998 — Prosecution on charges of racketeering in terms of s 2(1)*(e)* of POCA — Legality review — Whether sufficient information placed before NDPP on which it could rationally conclude there was reasonable and probable cause for prosecution.

Prevention of crime — Offences — Contravention of s 4 of Prevention of Organised Crime Act 121 of 1998 — Money-laundering — What constitutes — Concept much wider than simply looking at whether money 'hot' or 'dirty' — Always link betweem corruption and laundering of proceeds — Essence of money-laundering lying in disguise of proceeds of crime and not detracting from fact that corruption and money-laundering were also separate offences.

The applicant applied for the review of the decision to institute a prosecution against it under s 2(4) of the Prevention of Organised Crime Act 121 of 1998 (POCA) on a charge of racketeering in contravention of s 2(1)*(e)* of POCA. The applicant contended that the principle of legality applied to s 2(4) of POCA and that insufficient information had been placed before the first respondent, on which he could rationally conclude that there was reasonable and probable cause to believe that the applicant had, directly or indirectly, or with common purpose, participated in the enterprise run by one Mr Shaik, through a pattern of racketeering activity comprising the planned, ongoing, continuous or repeated participation or involvement in at least two sch 1 offences. The charges related to payments made by the applicant to one Mr Zuma, later to become president of the country. The applicant contended that the prosecution had split the alleged corrupt agreement and the alleged payment into two separate counts in order for it to constitute a pattern of racketeering. The fourth respondent, the lead counsel for the state, submitted that the applicant was at all material times aware of the ongoing bribes paid by Mr Shaik to Mr Zuma under their ongoing retainer and that the applicant participated in Mr Shaik's racketeering as an

accessory after the fact to the bribes paid to Mr Zuma under his general retainer before an encrypted fax agreement; as an accomplice to the bribes paid to Mr Zuma under his general retainer after the encrypted fax agreement; and by agreeing to pay Mr Zuma's bribes of R500 000 per annum in terms of the encrypted fax agreement.
Held, that it was difficult to fault the reasoning of the first respondent, bearing in mind what was contained in the various memoranda by the prosecution, the indictment, and in particular its preamble and summary of substantial facts and the various judgments in the Shaik matters. (See [69].)
Held, furthermore, that there was always a link between the underlying crime of corruption and the money-laundering of its proceeds, simply because the very essence of money-laundering lay in the disguise of the proceeds of a crime. It did not, however, detract from the fact that they were two separate offences.
Held, further, that it was clear from the definitions of money-laundering and the proceeds of unlawful activities, read with what was set out in s 4 of POCA, that the concept of money-laundering was much wider than simply looking at whether the money was 'hot' or 'dirty'. (See [82].)
Held, further, that, in the present matter, the crime of corruption had been completed after the offer had been made or there was an agreement to pay. When it, however, came to the actual payment of the bribe, the proceeds of the crime, it was agreed that the payment had to be concealed or disguised, especially in light of the spotlight being cast on all activities surrounding the so-called arms deal. It was concealed by disguising the money to be paid to Mr Zuma as a payment in terms of the service-provider agreement between four separate entities, before eventually reaching its destination for the benefit of Mr Zuma. (See [86].)
Held, further, that, in the final analysis, it was clear that sufficient information had been placed before the first respondent on which it could rationally conclude that there was reasonable and probable cause for the prosecution in question. (See [93].)
The application was accordingly dismissed.

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER v MASIA 2021 (2) SACR 425 (GP)

Arrest — Without warrant — Lawfulness of — Magistrate in maintenance enquiry ordering arrest and detention of respondent to coerce him into increasing amount of maintenance he offered — Arrest and detention unlawful — Court awarding damages of R75 000.
Court — Judicial officer — Liability of — Delictual liability — Magistrate ordering arrest and detention of respondent in maintenance enquiry in order to coerce him into increasing his offer of maintenance — Magistrate acting maliciously and therefore not immune from liability.

The respondent appeared before a magistrate at a maintenance enquiry in terms of the Maintenance Act 99 of 1998. The magistrate was not satisfied with the offer of R300 per month made by the respondent and ordered the arrest and detention of the respondent in the police cells for one night. The respondent was then arrested and detained and told to go and think clearly and thoroughly and to come up with a better offer. He was arrested without a warrant, was not charged with any offence, nor was he found guilty of any offence. The arrest took place in full view of his colleagues. He was released the following day after he made an offer to pay maintenance of R700 per month. He instituted a claim for wrongful arrest and detention, and the claim was

upheld with the respondent being awarded damages of R75 000 for unlawful arrest and detention. The appellants appealed against the judgment and contended, inter alia, that the magistrate was protected from claims arising out of the performance of his judicial function.
Held, that the bullying tactic of detaining the respondent without a warrant of arrest was a clear abuse of judicial power and the magistrate had acted maliciously. The magistrate had acted as an employee of the first appellant in the exercise of his duty, and having acted maliciously, did not enjoy judicial immunity. He had accordingly committed a delict against the respondent whilst acting within the course and scope of his employment, and the first appellant was therefore vicariously liable. (See [43], [44] and [48].)
Held, further, the police officer had simply executed an order of the magistrate and he was not entitled to second-guess the order. The arresting officer therefore had not acted unlawfully and the appeal of the second appellant, the Minister of Police, had to be upheld. (See [50] – [51].) The first appellant's appeal was accordingly dismissed.

S v AM 2021 (2) SACR 437 (WCC)

Rape — Sentence — Factors to be taken into account — Corrective rape — Constituting hate crime and endemic in country — Courts to send out clear message that it would not be tolerated — Sentence of life imprisonment upheld on appeal.

The appellant appealed against the sentence of life imprisonment imposed on him for a contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The appellant was a 41-year-old man and the complainant a 21-year-old woman, a neighbour of the appellant. The complainant was invited into the appellant's house by the appellant's sister who later left the house. When the complainant wanted to leave, the appellant suddenly became aggressive, threw her onto a bed and said he 'could make her a woman'. This referred to the complainant being a lesbian, which was known to the appellant. Although the complainant suffered no serious injuries, the appellant did push a pillow over her face, which made her dizzy, almost asphyxiating her. It was contended for the appellant that the sentence was disproportionate to the offence.
Held, that the appellant was aware of the sexual orientation of the complainant, and indicated to her that he could make her a woman, in the belief that rape could cure or correct her sexual orientation. Ultimately, corrective rape constituted a hate crime and was endemic in our country. Courts should send out a clear message that these types of attack would not be tolerated.
The complainant was severely traumatised by the incident, which was still evident when she testified in court three years after the incident. The magistrate had taken into account all the relevant circumstances, both mitigating and aggravating, and there were no substantial or compelling circumstances justifying interference with the sentence imposed. (See [16] – [17].) The appeal was dismissed.

S v CA 2021 (2) SACR 443 (WCC)

Plea — Plea-and-sentence agreement — Procedural requirements set out — Criminal Procedure Act 51 of 1977, ss 105A(4)*(a),* 105A(6)*(a)* and 105A(7).

In an automatic review that came before the court in terms of s 85 of the Child Justice Act (the CJA) the court was concerned with a number of procedural irregularities in the way in which a plea-and-sentence agreement was dealt with by the court a quo, as well as with the prosecutor and legal representative of the accused. These irregularities were: the accused appeared and the prosecutor proceeded to put the charge to the accused without informing the court that there was a plea-and-sentence agreement concluded, and the accused was also not asked to confirm whether such an agreement was entered into when the proceedings commenced; the court only enquired of the prosecutor whether he had consulted with the investigating officer, with due regard to at least the nature of the offence and the personal circumstances of the accused, and with the complainant, long after the accused had pleaded and after the agreement was read into the record; the defence attorney did not read or deal with part C of the agreement, which dealt with the mitigating and aggravating factors, as well as the agreed sentence; and, after questioning the accused in terms of s 105A(6)*(a)*, the court proceeded to convict the accused and then enquired whether he had previous convictions.
Held, that, before the accused was required to plead, the prosecutor was obliged under s 105A(4)*(a)* of the Criminal Procedure Act 51 of 1977 to inform the court that an agreement contemplated in ss (1) was entered into, and, pursuant to that information, the court was enjoined to confirm with the accused if indeed such an agreement had been entered into. The court also had to satisfy itself, before the accused pleaded, whether the prosecutor had complied with the requirements of the provision. It had to be stressed that the section was peremptory and aimed at protecting an accused person against entering blindly and unthinkingly into a plea-and-sentence agreement. (See [6] – [8].)
Held, further, that, once the court was satisfied that the accused admitted the allegations levelled against him and that he was guilty of the offence, the court had to proceed to consider the sentence agreement in terms of s 105A(7). It was not expected at this stage of the proceedings for the court to convict the accused. In other words, the consideration of sentence had to take place before the conviction of the accused. (See [10] – [11].)
Held, however, that there had been substantial compliance with the provisions of s 105A, and the conviction of the accused was in accordance with justice. The sentence imposed by the court had, however, to be corrected, as the conditions for suspension of the sentence had to be restricted to those offences 'committed' during the period of suspension, a word which the magistrate had omitted. (See [14] – [18].)

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Bertie Van Zyl (Pty) Ltd t/a ZZ2 and others v Minister of Agriculture, Forestry and Fisheries and others [2021] 4 All SA 1 (SCA)

Agriculture and Animals – Regulation of sale, export and import of agricultural products – Designation of assignee in respect of particular product – Power of assignee in terms of section 3(1A)(b)(ii) of the Agricultural Product Standards Act 119 of 1990 to determine own fees – Constitutionality of power given to assignee, without supervision, to determine the extent of fee – Assignee's determination of fee payable not inconsistent with section 25 or 195(1) of Constitution.

Agriculture and Animals – Regulation of sale, export and import of agricultural products – Designation of assignee in respect of particular product – Assignee's determination of fee payable procedurally flawed and liable to be set aside as it was the outcome of a flawed process.

The appellants brought an application in the High Court for an order to declare section 3(1A)(b)(ii) read with section 3A(4) of the Agricultural Product Standards Act 119 of 1990 unconstitutional and invalid. They also sought to review and set aside the determination of inspection fees by the second respondent ("Procon").

The Act controls the sale, export and import of certain agricultural products. The first respondent (the "Minister") may prohibit the sale of a prescribed product unless it complies with prescribed classifications and standards. In terms of section 2(1) of the Act, the Minister may designate a person in the employ of the Department of Agriculture (the "Department") as the executive officer to exercise the powers and perform the duties conferred under the Act. The Minister may also, in terms of section 2(3)(a), designate a person, with regard to a particular product, for the purposes of the application of the Act. A person so designated is an "assignee" in respect of that particular product.

Section 3(1A)(b)(ii) states that a "fee determined by such assignee shall be payable". The appellants complained that the power of the assignee to determine its fees was a unilateral determination, not subject to supervision, nor to ministerial or other control and was thus unconstitutional. It was also contended that the provision constituted an arbitrary deprivation of property that infringed section 25 of the Constitution.

Held – It was not the requirement that a fee was payable that the appellants contended constituted the deprivation of property. Rather, it was the power given to the assignee, without supervision, to determine the extent of the fee that was objected to. The Court pointed out that if the power was exercised to determine a reasonable fee for the service given, there was no deprivation of property. Moreover, the power given to the assignee was capable of being exercised in a manner wholly consistent with section 25 of the Constitution. The appellants also contended that the challenged provision offended against the rule of law and section 195(1) of the Constitution. Without justiciable rights to enforce, there was no basis upon which the court could declare invalid a law that is inconsistent with a value or principle. Accordingly, the appellants' constitutional challenge to section 3(1A)(b)(ii) had to fail.

The Court then turned to the appellants' application for review of Procon's determination of fees on the ground that the determination was procedurally unfair, and that the determination was irrational. It was found that the notice and comment

procedure followed by Procon was flawed as the notices contained inadequate information to allow parties to meaningfully participate in the consultative process that followed. Consequently, the consultative process did not meet the requirements of procedural fairness. The fee determination made by Procon could also not stand, since it was the outcome of an unfair process. It was thus reviewed and set aside.

The High Court did not consider the merits of the review because it found that the appellants had failed to exhaust their internal remedy. In that it erred, and the appeal in respect of the High Court's order dismissing the review succeeded.

Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd [2021] 4 All SA 14 (SCA)

Trade (Customs and Excise) – Fuel levy applicable to use of diesel fuel in terms of Customs and Excise Act 91 of 1964 – Claim for refund of fuel levy by mining company – Whether mining operations in relation to which diesel refunds were claimed had been carried on for own primary production in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of Schedule 6 to the Act and therefore qualified for a refund of levies – Where activities underlying fuel levy rebate claims not constituting primary production activities, claims disallowed.

In the course of its coal mining operations, Glencore used vehicles and equipment requiring diesel fuel. In terms of the Customs and Excise Act 91 of 1964, diesel attracted a fuel levy. Glencore's claims for a refund of the fuel levy were disallowed by the appellant (the "Commissioner") on the ground that Glencore did not use the diesel in primary production activities in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of Schedule 6 to the Act. The High Court upheld Glencore's appeal, leading to the Commissioner appealing to the present Court.

Held – The primary issue for decision on appeal was whether the mining operations in relation to which diesel refunds were claimed by Glencore had been carried on for own primary production in mining as contemplated in Note 6(f)(ii) and (iii) of Part 3 of Schedule 6 to the Act and therefore qualified for a refund of levies as asserted by Glencore. A related, but subsidiary issue, was whether the list of activities set out in Note 6(f)(iii) of Part 3 of Schedule 6 to the Act which qualify as own primary production activities in mining was exhaustive. The answer to that question turned solely on the interpretation of the word "include" in Note 6(f)(iii) in light of the underlying purpose to which the fuel rebates were directed.

The appeal hinged on the proper interpretation of the expression located in Note 6(f)(ii)(aa) of Part 3 to Schedule 6, namely "own primary production activities in mining". The Court set out the principles of statutory interpretation, and applying such rules, concluded that Glencore's activities underlying the fuel levy rebate claims did not constitute primary production activities in mining.

On the related question, it was held that the long list of inclusions in Note 6(f)(iii) of Part 3 of Schedule 6 served to carefully circumscribe the ambit of the activities in respect of which rebate refunds could be claimed under the relevant item, thereby dispelling any notion that the list of inclusions was open-ended.

The High Court's order was set aside and the appeal upheld.

Davidan v Polovin NO and others [2021] 4 All SA 37 (SCA)

Property – Eviction order – Jurisdictional requirement to trigger an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched – Finding that occupier had consent to occupy property meaning that she had a right of occupation and could not be an unlawful occupier – Eviction order not justified in circumstances.

The respondents were trustees in a trust which owned a house in which the appellant and her partner had resided together. In September 2019, the High Court granted an order in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, evicting the appellant and all those who occupied through or under her, from the property. According to the appellant, she and her partner had entered into an oral agreement with the trust, allowing them to occupy the property. After the death of her partner, the appellant was requested to enter into a formal lease agreement with the trust. Her refusal led to the trustees obtaining an eviction order against her.

Held – The jurisdictional requirement to trigger an eviction under the Act is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched. Section 1 of the Act defines an unlawful occupier as “a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land”. Consent is defined as “the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question”.

The key question was whether the appellant enjoyed a right of occupation. The first enquiry was whether the appellant had the necessary express or tacit consent to reside on the property owned by the trust. In other words, it had to be established whether the oral agreement had been proved. After establishing that the appellant had the necessary consent, the Court considered whether the appellant’s right to occupy was lawfully terminated. The appellant relied on the oral agreement with the previous trustee in support of her allegation of consent having been obtained to occupy the property. The trust would have been obliged to comply with the terms of that agreement before it could terminate the appellant’s right of residence. The underlying basis for the termination had to be legal, for example the expiration of the lease or a material breach of the terms of the agreement. There was no suggestion that the oral agreement was terminated.

The majority of the Court concluded that the appellant was not an unlawful occupier in terms of the Act. The eviction order was not justified and the appeal was upheld with costs.

In a dissenting judgment, it was stated that the appellant did not have consent or any other right to occupy the property, and therefore the trustees had no obligation to terminate her right of residence. The eviction order was viewed as just and equitable.

Electoral Commission of South Africa v Democratic Alliance and others
[2021] 4 All SA 52 (SCA)

Constitutional and Administrative Law – Direct reliance on provisions of Constitution for exercise of right – Principle of subsidiarity – Where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality.

Constitutional and Administrative Law – Elections – Complaint to Electoral Commission – Alleged contravention of Electoral Code of Conduct – Powers of Electoral Commission – Adjudication of disputes – Commission erring in view that section 190(1) and (2) of the Constitution, in terms of which it was enjoined to manage elections and was granted additional powers prescribed by national legislation, gave it the power to determine a complaint concerning a breach of the Code and to take remedial action.

Constitutional and Administrative Law – Principle of legality – A body exercising a public power must act within the powers lawfully conferred on it – Electoral Commission's determination of complaint concerning breach of Electoral Code of Conduct violating principle of legality.

In March 2019, the second respondent (the "Good Party") lodged a complaint with the Electoral Commission of South Africa, alleging that the first respondent (the "DA"), had contravened section 89(2) of the Electoral Act 73 of 1998 and item 9(1)(b) of the Code in the run up to the national and provincial elections held on 8 May 2019 by publishing false information with the intention of influencing the outcome of an election, and false and defamatory allegations concerning the Good Party leader, Ms Patricia De Lille.

Ms De Lille was a former member of the DA. In guidelines prepared for campaigners of the DA, it was stated that Ms De Lille had been fired because she was involved in all sorts of wrongdoing in the City of Cape Town. It was that and related statements which grounded the Good Party's complaint. The Commission found that the DA had contravened item 9(1)(b) of the Electoral Code of Conduct and ordered it to issue a public apology. DA launched an application in the Electoral Court to review and set aside the Commission's decision. The Court held that the Commission's power to adjudicate disputes was limited to the mechanics of an election, and it had no power to adjudicate an issue which was not administrative in nature. It was thus concluded that decisions of the Commission were invalid and had to be set aside. That led to the present appeal.

Held – The Commission erred in submitting that section 190(1) and (2) of the Constitution, in terms of which it was enjoined to manage elections and was granted additional powers prescribed by national legislation, gave it the power to determine a complaint concerning a breach of the Code and to take remedial action. It had made its finding against the DA in terms of section 5(1)(o) of the Electoral Commission Act 51 of 1996. A decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action. In any event, none of the provisions relied on grounded the power to make a finding that the Code had been contravened or to take remedial action under it. Secondly, the Commission was precluded from relying directly on the Constitution by the principle of subsidiarity. Where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or

challenge its constitutionality. It cannot bypass legislation and rely directly upon the right.

The principle of legality, an aspect of the rule of law, requires that a body exercising a public power must act within the powers lawfully conferred on it. The Commission violated that principle when it decided that the DA had breached the Code.

Adonisi and others v Minister for Transport and Public Works: Western Cape and others and a related matter [2021] 4 All SA 69 (WCC)

Constitutional and Administrative Law – Socio-economic rights – Housing – Spatial segregation – The Social Housing Act 16 of 2008 seeks to promote access to socio-economic resources in urban areas, creating a new category of subsidised housing (social housing schemes) – Sale by City of Cape Town, of property capable of being used for development of a social housing scheme to provide affordable housing – Regulations regarding disposal of State land invalid due to failure to provide for public participation process – Decision to sell property reviewed and set aside.

A property ("Tafelberg") in Sea Point, Cape Town was the location for a building established as a school in 1899. Over the years, the property was expanded and developed, and a small block of flats (Wynyard Mansions) was built on the south eastern corner of the property. Later, the property was used to house a remedial school, which was closed in June 2010. Since then, the property stood unused.

As owner of the properties housing the school and Wynyard Mansions, the Western Cape (the "Province") local government commenced steps in August 2010 to determine the most suitable way to utilise the derelict property. The tenants of Wynyard Mansions were given notice and the property was eventually sold to the Phyllis Jowell Jewish Day School (the "Day School"), in 2016, for R135m.

Two separate applications to challenge that sale were brought and were consolidated for the purposes of the hearing. The first application (the "RTC application") was brought by housing activists. In 2017, the National Minister launched her own application for declaratory and other relief, and joined the National Department of Human Settlements (the "DHS") as second applicant.

The RTC application sought a declaratory order that the relevant authorities had failed to comply with their constitutional obligations to redress spatial apartheid in central Cape Town; the review and setting aside of the sale of the property; and ancillary relief. In the second application, the Minister, also calling for the review and setting aside of the sale of the property to the Day School, stated that the Province was statutorily obliged to engage and consult with her prior to the sale of the property, and that the failure to do so rendered the disposal of the property unlawful.

Held – Cape Town remains one of the most spatially divided cities in South Africa. Evidence was received of the nature and effects of spatial segregation and socio-economic exclusion and the extent to which they remain barriers to equality and justice in the city. The phenomenon of "inverse densification", explained in the judgment, led to poor and working class residents being unable to afford accommodation in the inner city or surrounding central areas.

The Social Housing Act 16 of 2008, seeking to promote access to socio-economic resources in urban areas, created a new category of subsidised housing (social

housing schemes). RTC contended that the Tafelberg property presented an ideal opportunity for the development of a social housing scheme to provide affordable housing to those living and working in the Sea Point area.

Sections 25 and 26 of the Constitution entrench the rights to gain access to land on an equitable basis and to have access to adequate housing. The court explained the mandated approach to litigation involving the vindication of socio-economic rights, and undertook a study of the relevant legislative enactments relevant to the case.

The Court confirmed that the decision to sell the property, and the subsequent decision not to resile from the sale agreement, both constituted administrative action and that the Province was bound to observe the provisions of the Promotion of Administrative Justice Act 3 of 2000 in the steps that it took to dispose of the property.

Regulations were issued under the Western Cape Land Administration Act 6 of 1998, and in Regulation 4 the procedure to be followed in relation to the disposal of provincial State land was prescribed. The Court found the prescribed procedure to be unfair and unlawful in not affording a fair opportunity to make representations to the Province. The regulations were inconsistent with the overall architecture of section 4 of the Promotion of Administrative Justice Act, which contemplates a public participation process before a decision is made. The court issued a declaration of invalidity and set aside the relevant parts of the Regulations.

In terms of the Government Immovable Asset Management Act 19 of 2007, State property must be deemed surplus before being disposed of. The Province stated that as of June 2010, the Tafelberg School and Wynyard Mansions sites became surplus. The court found that not to be the case. The sale of the property was thus unlawful and reviewable on this ground too.

The National Minister was also granted similar relief in her application.

Botha v Steyn [2021] 4 All SA 87 (KZD)

Family Law and Persons – Marriage – Existence of – Plaintiff not entitled to decree of divorce and claim to defendant's estate where alleged wedding ceremony did not fulfil legal requirements, and plaintiff was always aware of the true status.

The plaintiff instituted action seeking a decree of divorce against the defendant, as well as payments of R100 000 per month and half of the nett value of the defendant's estate.

Having met and become engaged in 2005, the parties resided together, travelling between London and South Africa. In 2007, they hosted a ceremony which was meant to be a wedding ceremony. Guests were flown from South Africa to London at the defendant's expense and the parties exchanged rings at the ceremony. However, the wedding was not registered as there was insufficient time to obtain a marriage licence. On their return to South Africa, the parties cohabited as husband and wife until December 2007 when the marriage began floundering. By 2009 the relationship had ended permanently, and in 2014 the plaintiff started the litigation in this matter by issuing summons against the defendant.

Held – The evidence of an English solicitor, consulted by the defendant on discovering the problem regarding obtaining of a marriage licence, testified that he had advised

the defendant that the ceremony could proceed as a “blessing ceremony”. He also stated that he had been requested by the parties after the ceremony, to draw up an agreement regulating their cohabitation as they were not married. The plaintiff was said to have been aware of the legal status of the relationship at that point. The defendant also called an expert in English law as a witness. Her testimony was that the absence of a marriage licence meant that there was no marriage. The Court’s only task was to determine whether there had been a valid marriage. It found the plaintiff to be a poor witness who failed to prove that she had been married to the defendant.

The Court was satisfied that there was never a marriage contracted between the plaintiff and the defendant, and therefore there could be no talk of a decree of divorce. The plaintiff was always aware that there never was a marriage existing between her and the defendant as the prerequisites for a marriage in English law had not been met. She knew that the ceremony had no legal effect and that they would need to undertake another ceremony in terms of the marriage laws of South Africa if they were to be validly married.

It was held that the defendant had made an overwhelming case for the dismissal of the plaintiff’s action with costs, which costs should be granted at a punitive scale.

Brentmark (Pty) Ltd and another v Puma Energy South Africa (Pty) Ltd
[2021] 4 All SA 106 (WCC)

Civil Procedure – Claim for delictual damages arising from conduct of lessor which resulted in demise of lessee’s business – Basis of claim for delictual damages relating to breach of contract by lessor – Pure economic loss – Exception to claim as relating to sub-lessee which was not a party to contract alleged to have been breached by lessor – Where lessor’s conduct fell short of standards of decency and fairness that informs the substantive law of contract and did not measure up to the behaviour to be expected of a party in its position, court dismissing exception.

A service station operated by the first plaintiff (“Brentmark”) sold petroleum products supplied to it by the defendant (“Puma”). An adjoining convenience store was operated by the second plaintiff (“OK”). The premises on which the plaintiffs’ businesses were conducted was leased for the owner (“Caledonian”) by a company (“Brent Oil”) from which Brentmark sub-leased the property. Brent Oil later changed its name to Puma. The convenience store business was conducted by OK in terms of a further sub-lease the “BrentOK sub-lease” concluded between it and Brentmark. Brent Oil (and subsequently Puma) was not a party to the BrentOK sub-lease, while OK was not a party to the dealer agreement or the Brentmark sub-lease.

Dissatisfied with the allegedly onerous terms of the dealer agreement and Puma’s refusal to revise such terms, Brentmark entered into a sale agreement in respect of the service station and OK in turn sold the convenience store. In terms of the Brentmark sub-lease, Puma’s consent was needed for the sale of the filling station. Its refusal to furnish consent was alleged by Brentmark to constitute a breach of contract, and Brentmark gave notice of cancellation of the agreement. However, subsequent discussions between the parties led to the termination of the agreement being postponed until 31 January 2019. According to Brentmark, Puma took certain commercial steps that ultimately led to the demise of its filling-station business, forcing it to close the filling-station business. The convenience store business of OK was similarly forced to close.

The plaintiffs sued Puma for damages for breach of contract.

Puma filed a notice in terms of rule 23(1) raising an exception to the particulars of claim, averring that they were both vague and embarrassing, and/or lacked averments necessary to sustain their causes of action.

Held – In order to succeed with the exception, Puma had to persuade the court that upon every interpretation which OK's claims against it could reasonably bear, no cause of action was disclosed. It also had to show that the claims were bad in law.

The exception related to delictual damages for pure economic loss occasioned to a plaintiff by a defendant whose causal negligence has allegedly resulted in such loss. Puma contended that OK had failed to make out a case that Puma's breach of the dealer agreement with Brentmark, a contract to which it claimed OK was a stranger, was wrongful to the extent that Puma should be held liable to OK for damages in delict.

The Court held that in a case such as the present, where there was no established legal precedent for the claim asserted by OK, the Court would be required to consider whether the claim so advanced met the relevant policy considerations such as such as indeterminate liability, blameworthiness, and vulnerability to risk. The Court found the alleged conduct of Puma to fall short of the standards of decency and fairness that informs the substantive law of contract and did not measure up to the behaviour to be expected of a party in its position.

The exception was dismissed.

Gartner and another v University of Cape Town and others [2021] 4 All SA 143 (WCC)

Civil Procedure – Exceptions to particulars of claim – Approach to exceptions – A court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.

Pharmaceutical and Health – Health professions – Claim against regulatory authorities – Alleged breach of duty of care – Exception to claim averring that particulars of claim failed to disclose a cause of action upheld as plaintiffs not pleading facts establishing such duty of care.

In 2012, the plaintiffs were admitted to a postgraduate degree offered by the first defendant ("UCT"). They commenced their studies for the two-year degree on the understanding that they would be admitted to a one-year paid neuropsychology internship registered with the second defendant (the "HPCSA"), alternatively the third defendant (the "Board"). The second and third defendants were also collectively referred to in the judgment as "the authorities". After completing the degree, a minor dissertation and an internship, the plaintiffs and UCT intended that the plaintiffs would be entitled to apply to the HPCSA, alternatively the Board, for registration as professional neuropsychologists, would be registered and accredited as such by the HPCSA and entitled to practice as such for their own respective accounts.

However, prior to the commencement of the internships, UCT advised the plaintiffs that the authorities had not created and/or registered the professional category of neuropsychology and that no formal internship category for neuropsychologists had been established, but would register them as unpaid interns. On completion of such internships, they would be entitled to enter the profession of neuropsychology. Notwithstanding their qualifications, the completion of the prescribed internships and the payment of the requisite fees, the plaintiffs were not registered by the authorities as neuropsychologists and they were unable to conduct professional practices as such or earn an income therefrom.

In January 2018, the plaintiffs instituted action claiming damages for loss of income from UCT, the HPCSA and the Board jointly and severally. The present judgment dealt only with the plaintiffs' alternative claims against the HPCSA and the Board and the authorities' preliminary response thereto by way of exception.

The HPCSA and the Board filed an exception comprising five grounds to the amended particulars of claim.

Held – In deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.

In order to succeed with their exception, the authorities had to persuade the court that upon every interpretation which the plaintiffs' claims against them could reasonably bear, no cause of action was disclosed; that the claims were bad in law; and that there was a real point of law or a real embarrassment, failing which the exception had to be dismissed.

In the first exception, it was averred that the particulars of claim were vague and embarrassing or lacked averments necessary to sustain a cause of action *inter alia* because the HPCSA and the Board could not register the plaintiffs other than in accordance with the provisions of regulation 5 of the Regulations promulgated by the Minister under the Health Professions Act 56 of 1974. It was averred further that as statutory bodies, the HPCSA and the Board could not exercise any powers not conferred upon them or perform any functions not imposed upon them by the Act read with the Regulations. The third exception stated that insofar as the plaintiffs had pleaded a breach of a duty of care, they were required to allege facts establishing such duty of care. In the fifth exception, it was averred that the particulars of claim failed to disclose a cause of action against the second and third defendants because it could not be found that the authorities were under a legal duty, by exercising care, to avoid loss being caused to the plaintiffs – and could not be held liable for the alleged negligent performance of their statutory duties in the absence of *mala fides*, which the plaintiffs did not allege.

The above three exceptions were upheld and the plaintiffs were afforded one month to amend their particulars of claim further.

Mwale v Financial Services and another [2021] 4 All SA 167 (GP)

Financial Services Regulation – Pyramid scheme – Carrying on business of bank – Financial Services Tribunal dismissal of application for reconsideration of directive by Prudential Authority – Nature and requirements of reconsideration application before Tribunal – Financial Services Tribunal decision not open to challenge on review where its conclusion was justified by the facts and bias alleged by applicant was not proven.

On 28 June 2018, second respondent, the Prudential Authority (the "Authority") issued a direction in terms of section 83 of the Banks Act 94 of 1990 against the applicant and a close corporation in which he was sole member. It was common cause that during 2010, the applicant joined an illegal pyramid scheme.

The applicant applied to the Financial Services Tribunal for a reconsideration of the decision of the Authority. The Tribunal's dismissal of his application led to the present application for review of that decision. The grounds of review were that the Tribunal's decision was influenced by a material error of law; that the decision was unreasonable; that it was irrational; and that the Tribunal (and specifically the chairman) was biased.

Held – A reconsideration application must be made in accordance with the Tribunal Rules, must contain full particulars of the grounds on which the application is based and must be drafted to conform as far as possible to a standard form. The court described the procedure around proceedings before the Tribunal.

A reconsideration application constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act 3 of 2000. The court had regard to the Authority's reasons to determine whether the Tribunal correctly dismissed the reconsideration application. The Authority had found that the pyramid scheme in which the applicant had participated had conducted the business of a bank in contravention of the Banks Act, and the Tribunal could not fault that finding. Arguing that the Tribunal had materially erred in its interpretation of "the business of a bank", the applicant alleged that his involvement in the pyramid scheme was not a regular feature of his business practice. The Tribunal held that the acceptance or obtaining of money, directly or indirectly, from members of the public by the applicants, was a regular feature of the scheme, and was satisfied on the facts that the applicants conducted the business of a bank. The court agreed with the Tribunal's evaluation of the facts and the conclusion reached.

The court was also not persuaded that the Tribunal decision was unreasonable or irrational, as there were sufficient facts before the Tribunal to justify the conclusion that it should not interfere with the discretion exercised by the Authority.

For the applicant to establish bias by the Tribunal, he had to show that he (as the person who apprehended bias) and the apprehension itself were reasonable. He failed to discharge the onus upon him in that regard.

The application was accordingly dismissed with costs.

South African Breweries (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs [2021] 4 All SA 189 (WCC)

Civil Procedure – Urgency – General rule is that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis – Exception to the rule is where there is an ongoing violation of rights.

Constitutional and Administrative Law – Powers of Minister of Co-operative Governance and Traditional Affairs – Making of regulation to suspend and limit the sale, dispensing or transportation of alcoholic beverages during State of national disaster – Section 27(2) of the Disaster Management Act 57 of 2002 empowering Minister to make regulations – Impugned regulation found to be lawful, and issued in a procedurally fair manner.

Restrictive measures put in place by the Minister of Co-operative Governance and Traditional Affairs in an effort to curb the spread of the Covid-19 pandemic included making regulations to suspend and limit the sale, dispensing or transportation of alcoholic beverages. The Minister's power to make such regulations flowed from section 27(2) of the Disaster Management Act 57 of 2002. The applicant ("SAB") sought review of the making of regulation 29 on 27 June 2021, which suspended and limited the sale, dispensing or transportation of alcoholic beverages, and led to a total prohibition on the sale and dispensing of alcoholic beverages as from that date.

Explaining the necessity of the impugned regulation, the Minister stated that certain restrictive measures were necessary at different stages of the pandemic depending, *inter alia*, on the rate of new infections, the rate of hospitalisations, the capacity of the healthcare system, and its ability to cope. The regulation was centrally aimed at achieving the ultimate objective of increasing the capacity of the healthcare system, through a reduction in the number of alcohol-related trauma and emergency cases. The measures were also said to decrease the likelihood of transmissions, because of the social aspect of liquor consumption and an associated decrease in inhibition.

Held – The first issue to be addressed was whether the matter qualified as urgent when the alcohol ban had been in place in some form since 2020. The general rule is that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis. An exception to the rule is where, as in this case, there is an ongoing violation of rights of persons. The bringing of the application on an urgent basis was thus justified.

The court confirmed that the Minister's regulation-making powers constituted administrative action in terms the Promotion of Administrative Justice Act 3 of 2000.

In contending that the impugned regulation constituted unlawful administrative action, and that the regulation was reviewable, the SAB submitted that the Minister's power to regulate the sale, dispensing or transportation of alcoholic beverages did not include the power to impose a wholesale prohibition of the kind contained in the impugned regulation. It contended that the impugned regulation was therefore *ultra vires* the Minister's powers. The court held that on a proper understanding of the Disaster Management Act which only operates during a limited time under a State of National

Disaster, and for a period not longer than three months (unless extended by notice in the *Gazette*), regulation 29 cannot possibly be interpreted to mean that the sale, distribution and transportation of alcoholic beverages will remain in place for an indefinite period. The only sensible interpretation is that regulation 29 suspends the sale, distribution and transportation of alcoholic beverages for a specific period. The court held further that the regulation was not *ultra vires*, because the Minister has the power, by augmenting existing legislation through regulations, to suspend the distribution of liquor in a State of Disaster, and to make regulations which are inconsistent with existing liquor laws.

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Although there was no prior consultation immediately prior to the implementation of the current regulations published on 27 June 2021, such consultation had taken place less than two weeks previously. The exigencies of the situation and the latter fact meant that that regulation 29 was made in a procedurally fair manner.

The application was dismissed with costs.

Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty) Ltd and others [2021] 4 All SA 219 (WCC)

Civil Procedure – Amicus curiae – Rule 16A of the Uniform Rules, together with court's inherent jurisdiction to regulate its own process, governing admission to proceedings of an amicus curiae – Discretion to admit an amicus is taken in the interests of justice.

Civil Procedure – Class action – Class action will be certified where there are some issues of fact, or some issues of law (or a combination thereof) that are common to all members of the class and can appropriately be determined in one action.

Civil Procedure – Class action – Opt-out class action – Nature of – Opt-out class action automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action.

Certification of an opt-out class action was sought by the applicants, who were seeking to end alleged fraudulent conduct by the respondents. The applicants alleged that the respondents targeted consumers needing loans, duped them into concluding unwanted contracts for legal services, and deducted unauthorised amounts from their bank accounts.

Two applications by non-parties to the suit were brought for leave to intervene, and for admission as *amicus curiae*.

Held – The admission to proceedings of an *amicus curiae* is governed by rule 16A of the Uniform Rules as well as the court's inherent jurisdiction to regulate its own process. Ultimately, the discretion to admit an *amicus* is taken in the interests of justice. The party seeking such admission succeeded in this matter.

The Court referred to the benefits and representative nature of class actions. A class action does not require every member of the class to have an identical cause of action or to put forward identical facts and seek identical relief. Nor does such an action need to dispose of every aspect of a claim for certification to be granted. It is sufficient that there be some issues of fact, or some issues of law (or a combination thereof) that are

common to all members of the class and can appropriately be determined in one action.

The Court was satisfied that the interests of justice warranted certification in this case.

The type of class action sought was an "opt-out" action. Such a class action automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action. The Court held that the present matter was suited to an opt-out class action.

Finally, the Court granted the applicants' request for the appointment of a "special master" to attend to the administration of the class action, including the verification of claims, the disbursement of payments and the management of any surplus amounts.

Van der Walt v Director of Public Prosecutions [2021] 4 All SA 251 (ECG)

Criminal Law and Procedure – Application for permanent stay of prosecution – Alleged delay in prosecution and improper motive for bringing charges – In absence of well-founded apprehension of trial-related prejudice, and where allegations of improper motive on part of prosecution were merely speculative, court refusing stay of prosecution.

Criminal Law and Procedure – Application for permanent stay of prosecution – Jurisdiction – Provisions of section 342A of the Criminal Procedure Act 51 of 1977 showing that Magistrates' Court lacks jurisdiction to entertain an application for a permanent stay of prosecution.

An application to the Commercial Crimes Court for the permanent stay of prosecution of all cases in which the applicants faced charges was dismissed, leading to the present application for review of that decision. The review application was based on a purely jurisdictional challenge.

Held – Due to conflicting decisions, the legal position on the question of whether the regional Magistrates' Court has jurisdiction to entertain an application for a permanent stay of prosecution is somewhat uncertain. The Court examined the provisions of section 342A of the Criminal Procedure Act 51 of 1977. Section 342A(1) empowers a court before which criminal proceedings are pending to investigate any delay in the completion of such proceedings. The jurisdictional factors for a section 342A enquiry are as follows. First, it must appear to the court that such delay is unreasonable and second, that it could cause substantial prejudice to the prosecution, the accused or his legal adviser, the State or a witness. Section 342A(2) lists factors which the court shall consider in determining whether the delay is unreasonable, and allows a court to consider any factors not listed in the section if the court believes it relevant. If the court concludes that the proceedings are being unreasonably delayed, a list of possible remedies is available in section 342A(3), aimed at the elimination of any delay in pending criminal proceedings providing for no other outcome of the enquiry, and certainly not a permanent stay of prosecution. Noting the far-reaching effect of a permanent stay of prosecution, the Court held that if it was the intention of the Legislature that the power to grant an order for a permanent stay of prosecution be exercised by any court before which criminal proceedings are pending including a lower court, the Legislature would have made such a provision in section 342A.

A Magistrates' Court only has jurisdiction to deal with matters which are assigned to it by an act of parliament. If those courts were intended to also grant a permanent stay

order, the Legislature would have included such a relief amongst the orders that are listed in section 342A (3) of the Criminal Procedure Act. Therefore, in the absence of a specific provision in section 342A or any other provision of the Act, the Magistrates' Court lacks jurisdiction to entertain an application for a permanent stay of prosecution. Consequently, the Commercial Crimes Court which dealt with the applicants' application for such an order did not have jurisdiction to do so and as such those proceedings had to be set aside.

The Court then turned to the application for it to consider a permanent stay of prosecution. According to the applicants, they were being maliciously prosecuted, as a result of the influence of a third party with whom their business relationship had soured. The Court could not find support for that allegation. Furthermore, the complexity of the charges and the substantial documentation that needed to be properly analysed, suggested that the length of time the first respondent took to investigate the case was not unreasonable.

It was concluded that there was no well-founded apprehension of trial-related prejudice which ought to be eliminated. There was also no substance to any allegations levelled against any prosecutor having acted inappropriately or negatively affecting the applicant's right to a fair trial.

Consequently, the application for the review and setting aside of the Commercial Crimes Court's decision was set aside but the application for permanent stay of prosecution was dismissed.

Vermeulen and another v Mellet NO and others [2021] 4 All SA 281 (FB)

Wills, Trusts and Estates – Inter vivos trust – Whether a trust inter vivos may be the owner of a member's interest in a close corporation, without complying with statutory requirements – Close Corporations Act 69 of 1984, section 29 providing that only natural persons may be members of a corporation and no juristic person or trustee of a trust inter vivos in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation – If a trust with multiple trustees wants to become a member of a close corporation, it must appoint a representative of the trust to be a member, and that trustee will then become the member of the close corporation and not the trust.

The respondents were trustees in a trust. Additionally, the first and third respondents held a 60% and 40% member's interest respectively in a close corporation. When the first respondent wished to sell his member's interest, the appellants offered to buy it. To ensure that payment should be made to the trust and not to the first respondent personally, the parties agreed that his member's interest would be transferred to the trust and that the trust would sell it to the appellants. The trust and the appellants then entered into a sale agreement in respect of the 60% member's interest. It was recorded that the trust as seller was the holder of 60% of membership interests in the corporation.

After the 60% member's interest was transferred into the name of the trust, it was confirmed by accountants that the corporation's membership had changed and that the first respondent was no longer a member of the corporation. In April 2018, 100% of the member's interest was inexplicably transferred to the third respondent. The member's interest was never transferred to the appellants.

The appellants did not comply with their contractual obligation to furnish security, and the respondents approached the court *a quo* essentially seeking an order directing the appellants to comply. The appellants launched a counter-application for an order that the purported agreement be declared null and void for non-compliance with the provisions of the Close Corporations Act 69 of 1984.

The issues before the lower court were whether a trust can hold membership interest in a close corporation, and whether the agreement entered into between the trust and the appellants was valid. Both questions were answered in the affirmative, the application succeeded and the counter-application was dismissed.

Held – On appeal that section 29 of the Close Corporations Act states that "only natural persons may be members of a corporation and no juristic person or trustee of a trust *inter vivos* in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation". Thus, a trust with multiple trustees may not, without more, be a member of a close corporation. If such a trust wants to become a member of a close corporation, it must appoint a representative of the trust to be a member, if the trust deed does not contain a contrary provision. That trustee will then become the member of the close corporation and not the trust. The trust in this case had multiple trustees. There was no indication that one of them was appointed as the representative trustee to hold the member's interest. The Court held that the trust could not sell something that it could not legally possess. Only the authorised trustee could enter into an agreement to alienate the member's interest. The majority decision was that the agreement was *void ab initio* and had to be set aside. The appeal was thus upheld.

In a dissenting judgment, the view was that while trusts are not legal persons capable of owning property, even immovable property is now frequently registered in the name of a trust. A Companies and Intellectual Property Commission Practice Note was referred to, stating that trusts *inter vivos* can now become and be members of close corporations. The dissenting opinion was therefore that the sale agreement did not offend the provisions of section 29.

Zingwazi Contractors CC v Eastern Cape Department of Human Settlements and others [2021] 4 All SA 299 (ECG)

Construction – Building contract – Dispute resolution by adjudication – Whether provision that determination by adjudicator would be immediately binding upon, and implemented by the parties conflicting with right to a fair public hearing in section 34 of the Constitution – Court finding that private aspect of adjudication removes it from ambit of section 34 of the Constitution and that dispute resolution provision not contrary to public policy.

In terms of a building contract concluded between the applicant ("Zingwazi") and the first respondent (the "Department"), Zingwazi was to provide a community centre in the Eastern Cape. The contract provided for dispute resolution by way of settlement, adjudication, arbitration and mediation. A determination by the adjudicator would be immediately binding upon, and implemented by the parties. If dissatisfied with the determination, either party could give notice of dissatisfaction to the other party and to the adjudicator within 10 days of receipt of the determination, and refer the dispute to arbitration. The determination would remain in force and continue to be implemented

until overturned by an arbitration award. The Rules of Adjudication of the eighth respondent ("JBCC") provided in rule 6.1.4, that the adjudicator's written determination would be binding on the parties until overturned or varied through arbitration.

When a dispute arose between the parties, the tenth respondent as adjudicator, made a determination in favour of Zingwazi, for payment by the Department of the sum of R12 657 815,80. The Department was dissatisfied with the determination and elected to refer the matter to arbitration, and did not pay in terms of the determination. Zingwazi instituted motion proceedings against the first to seventh respondents for an order directing them to prosecute the arbitration proceedings to finality and to pay in terms of the adjudicator's determination. An order was subsequently made by agreement in terms of which Zingwazi's relief was granted, but was suspended pending the determination and finalisation of a counter-application by the second respondent (the "MEC"). If the counter-application was dismissed, the suspension was to terminate within two days of such dismissal.

In the counter-application, currently before the present Court, the MEC sought declarations of invalidity against two clauses in the contract and rule 6.1.4. Relying on the right to a fair public hearing in terms of section 34 of the Constitution, it was argued that the impugned provisions conflicted with the rule that a judgment is usually suspended pending an appeal or review; and that the adjudication process did not adhere to the principles of natural justice in various respects.

Held – The private aspect of adjudication removes it from the ambit of section 34 of the Constitution.

Following the approach advocated by the Constitutional Court, the court considered whether the impugned provisions were contrary to public policy as informed by constitutional values. The immediate enforceability of the adjudicator's decision did not prevent an aggrieved party from proceeding to arbitration where a fair hearing would be afforded. Confirming the efficacy of adjudication as a dispute resolution process, the court stated that the voluntary nature thereof ensured against a contractual term being unfairly weighted in favour of only one of the parties. None of the grounds raised by the MEC in support of the contention that the Adjudication Rules were in conflict with section 34 of the Constitution were found to be sustainable.

Finally, the court addressed the MEC's contention that the Construction Industry Development Board ("CIDB") and the Minister of Public Works should have been joined in the counter-application. Highlighting the nature of the dispute, the court found neither of those parties to have a direct interest in the matter.

The counter-application was thus dismissed.

END-FOR NOW