LEGAL NOTES VOL 11/2021

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UNIVERSITY OF JOHANNESBURG v AUCKLAND PARK THEOLOGICAL SEMINARY AND ANOTHER 2021 (6) SA 1 (CC)

Contract — Interpretation — Contextual approach — Bearing of parol evidence rule and whole agreement clauses on contextual approach to interpretation.

Contract — Parties — Delectus personae — Identification of.

Lease — Long lease — Whether lessee was delectus personae.

Applicant had, on receiving the Minister of Education's approval, concluded a long lease with first respondent for it to establish a college providing tertiary education (see [7]). Later, and without obtaining the approval of applicant, first respondent ceded its rights of use under the agreement to second respondent (see [8]). Having learnt of this, applicant took the view that first respondent's rights under the lease were personal to it and incapable of cession, and that the cession constituted a repudiation of the lease, which it purported to accept. It then cancelled the agreement (see [9]). The respondents, however, disputed applicant's entitlement to cancel, causing applicant to approach the Johannesburg High Court seeking their eviction and the cancelling of the lease's registration on the title deed (see [10]). Applicant then obtained the relief sought, causing respondents to appeal to the full bench, which dismissed the appeal (see [13]). Thereafter respondents appealed to the Supreme Court of Appeal, which found that if the agreement was properly interpreted, the rights concerned were not personal to first respondent, and were accordingly capable of cession (see [15] and [19]). It upheld the appeal and substituted the High Court's order with one dismissing applicant's claims (see [16]).

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the June 2012 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

Applicant thereupon appealed to the Constitutional Court which upheld the appeal (see [20] and [123]). It considered the following.

- Generally contractual rights were freely transferable, and rights-holder B could without the consent of duty bearer A, cede his rights to C. However, such rights would only be transferable on A's consent, where the rights concerned were so personal in nature as for it to make a reasonable or substantial difference to A that B rather than C be entitled to enforce them. That is, where B was the delectus personae (see [2], [58] and [86]).
- The standard approach to contractual interpretation was to be applied when construing whether a right was delectus personae (see [69]). That approach had to be adopted when interpreting any contractual provision, not only those that were unclear or ambiguous, and was a holistic exercise of simultaneously considering the text, context and purpose of the provision concerned (see [65], [67] and [69]). Such context — the facts — to be taken account of included the circumstances leading to the contract's conclusion and the knowledge of the negotiators who produced it (see [66] – [67]). However not all evidence as to context was admissible, and to establish context, evidence was to be used as conservatively as possible. That notwithstanding, where there was disagreement as to the admissibility of contextual evidence, the holistic approach to interpretation required a court to err on the side of admission: such evidence could later be disregarded for lacking weight (see [68]). As for the presence of a whole agreement clause, such could not oust a court's obligation to take the aforementioned approach to interpretation or alter the relevance of contextual evidence in that enquiry (see [81]). As to the interaction of the parol evidence rule and the contextual approach to interpretation, the parol evidence rule excluded evidence aimed at amending a written agreement and so did not prevent the bringing of contextual evidence which was aimed at interpreting the agreement (see [90] and [92]).

Here, taking account of the context and purpose of the agreement (see the factors at [94] – [97]) first respondent was delectus personae in that it would make a substantial difference to applicant were first respondent's rights ceded to second respondent (see [99]). Given this, and given that no consent had been obtained for the cession, first respondent had repudiated the agreement, so entitling applicant — given the gravity of the repudiation — to cancel the contract (see [103], [108] and [111]).

Leave to appeal granted; the appeal upheld; and the Supreme Court of Appeal's order set aside and substituted so as to dismiss respondents' appeal against the full bench's decision (see [123]).

PUBLIC PROTECTOR AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2021 (6) SA 37 (CC)

Public Protector — Powers — Remedial action — Whether Public Protector required to grant hearing before making decision on remedial action.

In Parliament, during question time, the leader of the opposition posed a question to the President (see [27]). Though the question had not been, as per parliamentary procedure, submitted before time, the President nonetheless answered (see [29]). The question itself raised a transfer of funds from a company to a trust and therefrom to the President's son and questioned the propriety of it (see [27]). In his answer the

President acknowledged this payment and assured of its legality (see [29]). However, shortly thereafter, the President addressed a letter to the Speaker informing her he had actually been mistaken in this answer: the payment's beneficiary had in fact been a campaign established to support his then candidacy for the presidency of the country (see [30]).

This caused the leader of the opposition (and later the second applicant, the Economic Freedom Fighters) to make a complaint to the Public Protector that the President had breached the code of ethics (the Executive Ethics Code) applying to members of the national executive (see [33] and [36]). The complaints were that the President had wilfully misled Parliament (see [34]). (Provision 2(3)*(a)* of the Code provides that 'Members of the Executive may not . . . wilfully mislead the legislature to which they are accountable . . .' (see [20]).)

On receipt of the complaint the Protector gave the President notice thereof and invited his response which he provided (see [37]).

The Protector and President later met, and the Protector raised, in addition to the opposition's complaint, an alleged failure by the President to declare donations to his 2017 presidential campaign. In response the President disputed any obligation to disclose these donations, on the basis that they were not made to him (see [38]).

The Protector then furnished the President with her preliminary report and afforded him an opportunity to respond, which he did (see [40]). Later the Protector released her final report (see [41]). She found the President had violated provision 2(3)*(a)* of the Code; had failed to disclose donations to himself; that some of these donations raised a reasonable suspicion of money laundering; and that, in breach of provision 2(3)*(f)* of the Code, he had exposed himself to a conflict between his official responsibilities and private interests (see [41] – [42]).

As remedial action the Protector directed the Speaker to refer the violations to a Parliamentary Committee and to demand publication of all of the donations; directed the National Director of Public Prosecutions to investigate evidence of money laundering; and the National Commissioner of Police to investigate lying under oath by a third party (see [43]). Furthermore she ordered these parties to submit plans to her of how these actions would be implemented (see [44]).

The response of the President was to institute and obtain the review of these findings and remedial actions in the High Court and their setting aside (see [5]).

Here the Protector applied to the Constitutional Court for leave to appeal directly to it (see [45]). It granted leave but dismissed the appeal, and in doing so held as follows (see [52]):

- The High Court's finding that the Protector materially erred in interpreting provision 2(3)*(a)* to include 'inadvertent' misleading of Parliament could not be faulted (see [57] – [59] and [63]).
- The Protector's finding that the President had exposed himself to a risk of conflict between his official responsibilities and private interests, was, as found by the High Court, flawed, in that the scope of the complaint had not included this issue, and no evidence had been provided by the Protector as to the private interests and official responsibilities implicated (see [65], [67], [80], [82], [86] and [93]).
- Neither legislation or the Constitution empowered the Protector to investigate the affairs of the campaign for the President's presidency, and nor indeed did such an investigation fall within the ambit of the complaint to her (see [98], [100] – [103], [107] and [109]).

- The Protector's finding that the President had engaged in illegal activities raising a suspicion of money laundering had no basis in fact and nor had the Protector the power to investigate such an issue (see [110] – [112] and [115] – [116]).
- Though unnecessary to decide the issue, the Supreme Court of Appeal's characterisation of the Protector's decision as not being administrative in nature was open to some doubt: this characterisation appeared contrary to case law to be based on the identity of the functionary concerned rather than on the nature of the power as required (see [118] – [120]).
- Implicit in s 7(9) of the Public Protector Act was that where the Protector contemplated taking remedial action against an individual, that individual was entitled to make representations on the contemplated action (see [125]). To this end the Protector was required to sufficiently describe the envisaged action as to allow a meaningful response thereto (see [126]). Consequently here, where the President was afforded no hearing at all, the decision as to remedial action was fatally flawed (see [127]).
- The remedial action was further flawed in the Protector ordering the Speaker of Parliament to perform actions that the Speaker had no power to perform (referral of the President's purported breach of the ethical code to a parliamentary committee, and ordering publication of all donations to the President) (see [132] – [133]); and it was moreover doubtful whether the Protector could require the Speaker, the National Director of Public Prosecutions and the National Commissioner of Police, as an element of a supervisory order, to report to her (see [136]). Indeed it was uncertain whether a supervisory order could be issued in these circumstances at all (see [136]).
- The Protector's investigation had not been properly conducted in that she had failed to maintain an open and enquiring mind: she had made findings unsupported by the facts, indeed at odds with them, and she had been 'unduly suspicious' of the persons she was investigating (see [139] – [140]).
- The High Court's dismissal of the third applicant's (Amabhungane's) case ought to be set aside and it remitted to the High Court for adjudication (see [145]). (Amabhungane had asked that the Code be interpreted to require disclosure of donations to campaigns for political party leadership or alternatively for a finding that the Code was unconstitutional (see [4]).)

Ordered: leave to appeal given; appeal dismissed; dismissal of Amabhungane's claim of constitutional invalidity of the Code set aside and it remitted to the High Court for adjudication; the President ordered to pay Amabhungane's costs; no order as to costs in respect of the other parties (see [149]).

Mogoeng CJ, dissenting, would have upheld the appeal, set aside the High Court's judgment, and remitted Amabhungane's constitutional claim for reconsideration (see [204]).

His dissent focused on the propriety of the Public Protector's investigation of the donation to the campaign for the then Deputy President's presidency.

In this regard the Chief Justice examined the scope of the complaint made to the Protector and noted that it embraced the donation to the campaign, the relationship between the donor and Mr Ramaphosa, and a possibility of money laundering (see [153] – [154]). Accordingly the requisite that her investigation fall within the ambit of the complaint was satisfied (see [155] and [196]). It was, moreover, required of her to investigate: her doing so fell within her constitutional duty to strengthen the democracy (see [171]).

The donation itself raised issues of personal benefit, disclosure and conflict of interest, against the background of the Code's requirement of disclosure of benefits received and its proscription of self-exposure to conflicts of interest (paras 6(2)*(a)* and *(b)* and 2(3)*(f)* respectively) (see [157]). Such funding held the Chief Justice was a personal benefit requiring disclosure and which created a risk of a conflict of interest (see [163] – [164] and [166]).
As for the Protector not hearing the President on her contemplated remedial actions, the audi principle did not require her to do so: as with judges and magistrates, so here (see [180] – [181]).
In regard to emails the Protector had received from an anonymous source, which she had relied on, and to which she had given the President no opportunity to respond to, her reliance was justified: the emails were relevant, the President could tell his side before the Constitutional Court, and there was precedent to admit improperly obtained evidence on occasion (see [186] – [187]). Moreover privileging audi in this instance would stifle justice (see [193]).
Lastly, the Chief Justice warned against a magnifying of the errors of the Protector, and cautioned that only measured criticism should be levelled (see [199] and [203]).

JOHANNESBURG CITY v ZIBI AND ANOTHER 2021 (6) SA 100 (SCA)

Local authority — Municipality — Rates — Municipality within its powers to impose penalty tariff in instance of illegal or unauthorised use of property within its jurisdiction — Such action not ultra vires if in terms of validly adopted municipal property rates policy — Constitution, ss 156(5) and 229(1)*(a)*; Local Government: Municipal Property Rates Act 6 of 2004.

The respondents were owners of certain immovable property (the property) within the area of the City of Johannesburg Municipality (the Municipality). At a certain point, they started using the property as a 'student commune', contrary to the property's zoning classification as 'residential property'. Such conduct prompted the Municipality to impose a higher 'penalty tariff' on the respondents. In doing so, the Municipality purportedly acted in terms of the Rates Policy it had adopted and implemented in terms of s 8 of the Local Government: Municipal Property Rates Act 6 of 2004 (MPRA). That policy listed a number of categories of rateable property in respect of which different rates would be levied. One such item on the list was 'illegal use', which included all properties used for a purpose not permitted by the zoning thereof in terms of any applicable Town Planning Scheme or Land Use Scheme, to which a penalty tariff would apply. The respondents launched an application in the Johannesburg High Court challenging the Municipality's penalty tariff. The High Court found that the Municipality was only authorised to levy rates on the property based on the categorisation thereof in the valuation roll, namely in accordance with its 'Residential 1' zoning. If the Municipality wished to charge the punitive rate, the High Court reasoned, it was required to first amend the valuation roll or issue a supplementary roll and comply with the relevant legislative requirements that were designed to ensure compliance with the audi alteram principle. This the Municipality did not do. Accordingly, the High Court held, the Municipality's conduct was invalid. It ordered the Municipality to apply the residential category in its valuation roll when levying property rates against the respondents' property, and to rectify the relevant municipal account for the respondents' property, and change the rating tariff from

'illegal or unauthorised use' to 'residential', and to replace the tariff charge with a residential category rating. The Municipality was granted leave to appeal to the Supreme Court of Appeal (the SCA).

The central issue before it, the SCA held, was whether a municipality was entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorised use, without first having changed the category of the property on its valuation roll or supplementary roll from 'residential' to 'illegal or unauthorised' use. (See [21].) The respondents' view was that it could not, given that the rating of the property was done in accordance with the category of the property as set out in the municipality's valuation roll, in terms of the MPRA and the rates policy. The Municipality contended that the property rates policy was properly applied and there was no requirement that there should first be a recategorisation before the application of a penalty tariff. (See [21].)

Held, that a municipality's powers to *levy a penalty* in respect of the use of any property within its jurisdiction was not ultra vires its powers, provided it did so as part of a validly adopted property rates policy (see [20]). (In reaching this conclusion, the court had regard to ss 229(1)*(a)* and 156(5) of the Constitution, which directly granted municipalities lawmaking powers in respect of the imposition of rates on properties (see [14] and [16]), as well as various provisions of the MPRA, enacted to regulate the imposition of rates by municipalities, the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 (see [14], [15], [17] and [18]).)

Held, further, that the Municipality had validly adopted its rates policy (see [22]). And, in terms of that policy, properly interpreted, the imposition of a higher tariff regarding rates payable on a residential property which was used for a purpose other than its authorised purpose, as had happened in this case, did not require a recategorisation of the property on the valuation roll. (See [30], [32] – [33].) (The SCA reasoned, inter alia, that the 'illegal' or 'unauthorised use' category in the policy did not refer to a category of property in terms of the 'valuation roll', but rather to the landowner's unlawful *conduct* (see [26] and [27]). The primary permitted use of the property, the court noted, was always residential (see [32]).)

Held, further, that the respondents' unlawful conduct in operating their property as a student commune constituted clear jurisdictional facts for the application of the Municipality's policy of the penalty tariff (see [34]). Appeal upheld, and High Court order replaced with one dismissing application (see [37]).

Schippers JA (with Carelse AJA concurring) dissented from the majority. He held that the Municipality was not authorised by the Rates Act — it had purported to act in terms of s 8 thereof (see [49]) — to determine 'illegal use' as a category of rateable property (see [52]). This was so, Schippers JA held, for a number of reasons, inter alia, the following: One, 'illegal use' was not a use as such (see [52]). Two, the uses of property in s 8(1) plainly constituted lawful uses (see [53]). Three, it was impossible to determine a value for illegal use (see [54]). Four, the penalty tariff was not a rate, in terms of the definition of the term (see [55] – [57]). Five, the illegal-use category could not be applied equitably as was required by s 3(3)*(a)* of the Rates Act. Finally, the determination of illegal use as a category of rateable property amounted to an 'impermissible differentiation prohibited by s 19(1) of the Rates Act (see [60] – [61]). Schippers JA concluded that the action by the Municipality in determining an illegal-use category of rateable property and imposing the penalty tariff violated the principle of legality in both respects. The action was beyond the powers conferred on the Municipality. It was also arbitrary because it was not

rationally related to the purpose for which the power to levy rates was given. (See [63].) He concluded that he would have dismissed the appeal (see [66]).

CAPITEC BANK HOLDINGS LTD v CORAL LAGOON INVESTMENTS 194 (PTY) LTD AND ANOTHER 2021 (6) SA 121 (WCC)

Contract — Enforcement — Covenant not to sue (pactum de non petendo) — Validity — Public policy — No public policy reason for non-enforcement of covenant where party seeking to evade it fully aware of its rights and both sides of equal bargaining power.

Contract — Enforcement — Public policy — Covenant not to sue (pactum de non petendo) — No public policy reason for non-enforcement of covenant where party seeking to evade it fully aware of its rights and both sides of equal bargaining power.

The applicant (Capitec) applied for an order enforcing an agreement not to sue * (the covenant). The covenant was part of a consent agreement under which Capitec waived various rights that would have prevented an adjacent transaction for the transfer of shares from taking place. Capitec was not a central party to that transaction and its consent was required purely to allow it to proceed. The covenant stated (i) that the respondents would not rely on the transaction to sue Capitec and (ii) that any dispute arising out of the transaction would be resolved by arbitration. When Capitec refused to grant a waiver to enable a transfer of certain shares, the respondents sued Capitec for R1,2 billion (the main action). In response Capitec raised, as a shield, the covenant, requesting the present court to order the withdrawal of the respondents' suit and a referral to arbitration. Capitec characterised the application as a claim for specific performance of the respondents' contractual obligation not to sue. It had a right, it said, to hold the respondents to the agreements (i) not to sue on the basis of the transaction and (ii) to have disputes settled by arbitration.
The respondents in turn argued that Capitec was committing an abuse of process by seeking to enforce the covenant by discrete application proceedings rather than by a special dilatory plea in the main action. They claimed that the waiver of rights in the covenant was contrary to public policy and, moreover, breached their constitutional right of access to the courts.
Held
The public policy argument against the enforcement of the covenant could not stand (see [29]). In the first place, the concept of waiver of rights was not applicable because, where parties agreed to arbitrate, it was more a question of agreeing not to exercise them (see [31]).
However, the core issue in the present matter was the *pacta sunt servanda* principle (see [32]). In this regard it was relevant that the facts showed that the parties were possessed of equal bargaining power and understood what they were getting into, which was in line with the *Beadica* requirements ‡ (see [33] – [34]). Moreover, a court's power to refuse to enforce a contractual term where it, or its enforcement, was contrary to public policy, had to be sparingly used, for public policy dictated that parties should be bound by their contractual obligations, especially where, as here, the contract was entered into voluntarily and for a specific purpose (see [35] – [36]). Had the covenant prohibited the respondents from litigating on *any* aspect of the consent agreement, it would indeed have been contrary to public policy. But here, where the respondents had freely surrendered limited rights to sue on a transaction

from which Capitec stood nothing to gain, public policy arguments were somewhat diluted (see [37], [40]).
Since neither the covenant nor its enforcement violated public policy and since a failure to grant specific performance would be unjust and contrary to public policy, the respondents would be ordered to withdraw their action against Capitec (see [47] – [48]).

CINDI FAMILY v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2021 (6) SA 133 (LCC)

Land — Land reform — Restitution — Claim for restitution of rights in land — Evidence — Inspection in loco — Purpose — Nature and import of statements made at inspection.

Evidence — Inspection in loco — Purpose — Nature and import of statements made at inspection.

The present matter dealt with a dispute concerning a pre-trial inspection in loco that took place on a number of farms on land constituting the subject-matter of a land claim brought by the plaintiff under the Restitution of Land Act. Participating in the inspection were, amongst others, the present appointed judge, Spilg ADP, and his assessor; the plaintiff claimant and its counsel, Mr *Whittington*, and expert; and the landowner defendants and their counsel, Mr *Havenga*, and expert. Prior to the inspection the parties listed the structure and features they wished to point out. During the course of the inspection, each party would point out the structure or feature they had previously listed, describe its physical characteristics they wished to have observed, and then give an indication of its basic significance, after which the opposing party and court would be given an opportunity to make their own observations. Counsel recorded their clients' comments with a Dictaphone. It was agreed that Mr *Havenga* would prepare a minute of the inspection from the contemporaneous audio recordings, and in the case of disagreement, the court would make a ruling on the final version of the minute. Such a dispute between the parties did arise. Inter alia, the plaintiff wished to have removed from the minute various voluntary statements made by a party or their counsel, going beyond physical observations, in which they explained the significance of a structure or feature that was being pointed out, or made various contentions in respect thereof. The basis for such a claim was the plaintiff's view that the minute should not include opinion evidence and the conclusions of the parties (see [6]).
In resolving the dispute, the court considered the nature and import of statements made during an inspection in loco. One of the purposes of an inspection in loco, the court held, was to enable a court to better understand the oral evidence that would be led. The purpose, the court held, ultimately, of a party's pointing-out of a structure or a feature during an inspection, was to advance a particular position or negate that taken by the other party. Where an inspection took place before evidence was led, some contextualising of the relevance of the structure or feature being pointed out was necessary. In practice, the respective legal teams would place on record the significance of each observation they had requested. (See [15].)
The court acknowledged that a statement made at an inspection did not constitute testimony before the court, and, having not been under oath, carried no weight in

favour of the person who uttered it until it was testified to during the trial hearing itself. It could not be said, however, that such a statement had no consequences and could be ignored (see [16], [17], [18] and [20]). Statements deliberately made before a judge during an inspection constituted allegations on record by the person who made the statement, and formed part of the material which could be introduced during the course of the trial, and which the other party could use in cross-examination in the ordinary way, such as to test veracity and reliability or, in the case of opinion evidence, the underlying premises. Such statements could also sometimes qualify as judicial admissions. (See [17] – [21].) The court noted the untenable situation that would arise were a relevant statement made by a party at an inspection not recorded and a dispute came about as to what was actually said (see [22]).
The court accordingly declined to remove those statements from the minute constituting contentions or explanations. The court did, however, instruct the parties to co-operate to clearly distinguish such statements from other common-cause facts, and who would adduce such statements in evidence. (See [27] – [29].)

DEMOCRATIC ALLIANCE v BRUMMER 2021 (6) SA 144 (WCC)

Estoppel — Res judicata — Issue estoppel — Application of doctrine — Meaning of 'issue' — Extent to which earlier judgment dealt with it — Whether issue of fact or law sought to be raised properly ventilated and finally adjudicated in earlier judgment — In casu, majority ruling that it was not — Unjust and inequitable to uphold special plea of issue estoppel.

The present appeal concerned the correct application of the respondent's (Brummer's) plea of res judicata in the form of issue estoppel. * The appellant political party (the DA), acting in terms of clause 3.5.1.9 of its federal constitution, † had terminated Brummer's membership for not paying his fees. As a result, Brummer, a career politician, lost his seat as municipal councillor.
Brummer sought to interdict the Independent Electoral Commission from filling the resulting vacancy. The matter ended up in the fast lane of the Western Cape High Court motion court, where counsel for Brummer informed the presiding judge (Traverso DJP) that his client wished to challenge the constitutionality of clause 3.5.1.9 for being contrary to public policy. Traverso DJP refused to entertain the challenge on the ground that no constitutional relief was sought in the notice of motion. She found that clause 3.5.1.9 was unambiguous: failure to pay the fees meant automatic termination of membership. Brummer's attempt to procure the reinstatement of his membership and the retention of his job therefore failed in that court.
Brummer did not appeal Traverso DJP's judgment. Instead, he commenced action proceedings against the DA in the Western Cape High Court for delictual, contractual and constitutional damages for the unlawful termination of his party membership. Just before trial was to commence, the DA sought to introduce a special plea of issue estoppel, insisting on its separate determination in limine. The court dismissed the special plea with costs and the DA launched the present appeal. The DA argued that the issue before Traverso DJP had been whether the DA had lawfully terminated Brummer's membership and that her judgment thus constituted res judicata in

respect of Brummer's subsequent damages claims. In an appeal to a full bench of the Western Cape High Court —

Held per Gamble J for the majority

The record of the proceedings before Traverso DJP showed that counsel for Brummer was cut short by the bench when he attempted to address the court on, inter alia, the constitutionality of clause 3.5.1.9 (see [79] – [80]).

The factual issue that arose in this matter, viz the termination of his membership, afforded Brummer various causes of action: he could dispute the amount of his indebtedness; he could show that he did not receive the DA's letter of demand; he could seek urgent interim relief; he could sue for damages in delict or contract; or he could seek constitutional relief for breach of rights (see [81] – [82]). But Traverso DJP had prevented Brummer from advancing any of them, the only cause of action effectively before the court having been his reinstatement as DA councillor. Much as Brummer had wanted to attack the enforceability of clause 3.5.1.9, he had been unable to do so. Since he was not given the opportunity to litigate his cause of action in relation to the damages to finality, it would be unjust and inequitable to uphold the special plea of issue estoppel. (See [83] – [85].)

Held per Wille J dissenting

Issue estoppel barred the revisiting of an issue, even if a different cause of action was relied on or different relief was claimed, provided it involved the determination of the same issue of fact or law. * While the strict application of the doctrine could sometimes result in unfairness, this was usually where the nature of the issue in dispute was in some doubt. But here it never was: Traverso DJP herself had no difficulty in circumscribing it. (See [26] – [27].)

The court's authority not to apply issue estoppel for reasons of justice and equity had to be assessed in the light of the principle that parties to litigation were required to bring forward their whole case and should not be allowed to relitigate the same issue by dressing it in different causes of action (see [28]). Issue estoppel existed to prevent litigants approaching a later court, on new papers and armed with fresh arguments, to revisit an issue that they had previously lost (see [33]). Traverso DJP could not have dismissed Brummer's application without a decision on the lawfulness of the termination of his membership. Not permitting the doctrine to apply would allow Brummer to escape the consequences of Traverso DJP's judgment and have the lawfulness of his membership termination decided afresh (see [32], [37]). There were no legal or factual grounds, based on either fairness or equity, that would justify a relaxation of the principles of issue estoppel in favour of Brummer. (See [56].)

DAWSON v SYDNEY ON VAAL CPA AND ANOTHER 2021 (6) SA 167 (NCK)

Land — Communal property — Communal Property Association — Placement under administration — Requirements — 'Just and equitable' — Meaning of — Communal Property Associations Act 28 of 1996, s 13(1).

Words and phrases — 'Just and equitable' — Meaning of in s 13(1) of Communal Property Associations Act 28 of 1996.

The first respondent in the present matter was the Sydney on Vaal Communal Property Association (the CPA). The applicant was one of its members and had been the CPA's commercial operations officer since June 2017. In the present application, instituted in the Kimberley High Court, the applicant sought an order that the CPA be placed under the administration of the Director-General: Land Affairs in

terms of s 13(1) of the Communal Property Associations Act 28 of 1996. It empowered the High Court (as well as magistrates' courts) on application to place a communal property association under administration of the Director-General: Land Affairs, or grant a liquidation order in respect thereof, where the association, 'because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or where it would otherwise be just and equitable in the circumstances'. The applicant submitted that the grounds for the application were to stop the continued maladministration of the CPA's affairs by the executive committee 'and that it would consequently be just and equitable that the association be placed under administration'. The applicant referred to the following instances of maladministration by the executive committee: manipulation of the payment of dividends aimed at favouring members of the executive committee; unauthorised payments; conflict of interest on the part of members of the executive committee; failure to act in the best interests of the association; and lack of proper financial management.

The court considered the meaning of s 13(1) of the CPA Act. It was clear, the court held, that a communal property association may be placed under administration where (1) it was unwilling or unable to pay its debts or was unable to meet its obligations, as a result of insolvency, or maladministration or any other cause; or (2) when it was just and equitable to do so. (See [146].) The court went on to hold that maladministration in itself was thus not an independent ground for placing an association under administration, as it was only relevant as a factor contributing to the association being unwilling or unable to pay its debts or unable to meet its obligations. (See [147].) However, the court allowed, subject to the circumstances of the case, maladministration may very well be a factor influencing the decision as to whether it would be just and equitable to place the association under administration or not. (See [149].)

When would it be 'just and equitable' to place a communal property association under administration? The court held that the test for determining whether it was 'just and equitable' *to liquidate a company* under the old and new Companies Acts, or *to place a company under business rescue* in terms of the new Companies Act, could be applied also to communal property associations. This was so in light of the similarities between s 13(1) of the CPA and those provisions of the new and old Companies Acts dealing with liquidation and business rescue. * (See [157] – [159] and [163].) (See cases quoted with approval in [64] – [66], which considered the meaning of 'just and equitable' in the context of the liquidation of small domestic private companies.)

The court concluded, based on the parties' versions as set out in their papers, that the applicant had failed to prove that it would be just and equitable to place the CPA under administration (see [172] and [183]). Most of the allegations, the court held, of maladministration on the part of the CPA's executive committee could not be relied on for an order placing the CPA under administration, as the events such allegations referred to took place under the previous executive committee, and not the present one (see [169], [173] and [177] – [181]). The court rejected the claim of a conflict of interest on the part of certain members (see [176]). Furthermore, the court held that many of the events the applicant impugned took place while the applicant, in his capacity as commercial operations manager, was to a large extent in control of, or at the very least involved with, the day-to-day running of the CPA (see [179]). The applicant could not seek the placement under administration of the CPA because of

a situation for which he was partly responsible (see [164] and [180]). The court went on to dismiss the application (see [184]).

MASAKO v MASAKO AND ANOTHER 2021 (6) SA 197 (NWM)

Magistrates' court — Civil proceedings — Practice — Judgments and orders — Default judgment — Rescission — Locus standi — 'Party' and 'person affected' — Neither category including legal representative of applicant for rescission, who lacks required direct and substantial interest in matter — Needs client's authorisation to apply — Magistrates' Courts Act 32 of 1944, s 36(1); Magistrates' Courts Rules, rule 49.

In the absence of authorisation by his client, a legal practitioner lacks locus standi to bring an application in a magistrates' court for the rescission of a default judgment against his client. This is because the legal representative lacks a direct and substantial interest in the matter and is thus neither a 'person affected' nor a 'party' as intended in s 36(1) of the Magistrates' Courts Act 32 of 1944 and rule 49 of the Magistrates' Courts Rules.
The fact that rule 2(1) of the rules defines 'party' as including an attorney or advocate appearing for a party, does not affect the substantive law on locus standi for rescission set out in s 36(1). Rule 2(1) includes legal representatives for the purposes of the granting of judgment, which would not be by default if a party's legal representative was present in court. This was entirely different from rescission, which was governed by s 36(1) and which magistrates were bound to apply. (See [7] – [15].)
The appellant had applied for the rescission of a default judgment under rule 49(1). The respondents argued in limine that the deponent to the founding affidavit, the appellant's attorney, lacked locus standi. The magistrate, applying s 36(1), upheld the point in limine and dismissed the application. The appellant appealed to the present court on the ground that the magistrate should have applied rule 49 read with rule 2(1), which clothed the attorney with the necessary locus standi. The court, stressing the appellant's failure to file an affidavit confirming that she had authorised the attorney to bring the application on her behalf notwithstanding the respondents' objection, dismissed the appeal. (See [14] – [16].)

MWS v NSS AND ANOTHER 2021 (6) SA 201 (NWM)

Marriage — Divorce — Anti-dissipation interdict pendente lite — Marriage in community of property — Applicant seeking interim order restraining pension fund from paying out spouse's pension interest — Spouse resigned in good faith and was in financial dire straits due to ill health and medical bills — No reason to deprive her of pension interest — Application for interim interdict dismissed.

Pension — Benefits — Divorce — Proprietary rights — Pension interest — Non-member spouse's share — Marriage in community of property — Non-member spouse seeking to interdict fund from paying out member spouse's benefits pending finalisation of divorce action — While marriage still extant, non-member spouse's pension interest protected under s 15(9) and s 20 of Matrimonial Property Act 88 of 1994 — Not entitled to have recourse to s 7(7) of Divorce Act 70 of 1979 while divorce still pending — Application for interim interdict dismissed.

The applicant (M) and the respondent (N) were married in community of property but divorce was in the air: N (the wife) had sued for divorce in July 2019. Pleadings were closed but the matter was not yet ripe for hearing. N, who resigned from her job in December 2019, was a member of the second-respondent pension fund (the fund). Her pension benefit was estimated at just under R2,9 million.

In this application M on an urgent basis sought an order restraining the fund from paying N her benefit pending the divorce. He submitted that he had a well-grounded apprehension that N was not prepared to share her pension interest with him, given that she was seeking a forfeiture order in the divorce action. He feared that she would dissipate the pension money in short order if it was paid out to her. He argued that ss 15(9) and 20 of the Matrimonial Property Act (MPA) would not adequately protect him since N was not being open about her financial position and the divorce proceedings were still at an early stage. In opposing the application N argued that the application was premature because the marriage was not yet dissolved.

Section 15 of the MPA governs a spouse's power to dispose of community property and s 15(9) allows an adjustment to the division of the joint estate where the other spouse's consent was not obtained. Section 20 of the MPA allows a court to order immediate division of the estate where prejudicial conduct by a spouse is shown. (See [18] – [21].)

Section 7(7) of the Divorce Act 70 of 1979 (the DA) provides for a member spouse's pension interest to be deemed part of his or her assets for the purpose of division of the joint estate upon divorce. (See [11].)

According to precedent an applicant in an anti-dissipation application must show that the respondent was wasting or secreting assets to which the applicant has no special claim with the intention of defeating the claims of creditors (see [23] – [25]).

Held

It was trite law that M, as non-member spouse, had a share in the pension interest of the first respondent by virtue of their marriage in community of property (see [26]). However, he could not lay claim to it while the divorce action was still pending. Should the divorce be finalised before the payment of the pension interest to N, M would be entitled to invoke s 7(8) of the DA to secure his share (see [27]). Therefore, much as M had a share in N's pension interest before the benefit accrued to her, he could not lay claim to it or even expect the fund not to pay unless he was able to succeed in the anti-dissipation application (see [29]).

The position was therefore that a non-member spouse was entitled to part of the pension interest once it became due or was assigned to the member spouse on the dissolution of the marriage. If the member spouse resigned from employment and the pension interest was determined and became payable before the divorce, the member could not at a later stage claim a pension interest in terms of s 7(7) and s 7(8) of the DA (see [30]). During the subsistence of the marriage the pension interest that accrued to the member married in community of property could be protected in terms of s 15 of the MPA (see [31]).

As to whether M was entitled to an anti-dissipation order on the ground that s 15 of the MPA would not adequately protect his pension interest: N resigned in good faith and there was nothing to gainsay her averment that she was in ill health or that she was in financial dire straits. M's assumption that N resigned in order to deprive him of his share of pension interest with the intention of dissipating it was not supported by the facts. He could not without good cause restrain the fund from paying out N's

benefit before the finalisation of the divorce action (see [37] – [38]). Hence M should be non-suited. Application dismissed with costs (see [40]).

OB v LBDS 2021 (6) SA 215 (WCC)

Marriage — Divorce — Divorce action — Deemed date of institution — Section 1(2) of Divorce Act deeming divorce action to be instituted on date on which summons issued — Interpretation of — Purposes and effect of — Divorce Act 70 of 1979, s 1(2).

Marriage — Divorce — Jurisdiction — Domicile — Requirements for establishment of jurisdiction on basis of domicile — Discussion of principles — Need for 'flexible approach' in 'hard cases' — Divorce Act 70 of 1979, s 2(1)*(a)*.

This was an appeal before the full bench of the Western Cape High Court against a decision of a single judge of the same division to dismiss the appellant's divorce action against the respondent on the grounds of lack of jurisdiction, owing to the fact that the appellant, contrary to her assertions, was not 'ordinarily resident' in the jurisdiction of the court in terms of s 2(1)*(b)* of the Divorce Act 70 of 1979 at the time of the institution of the divorce action. The relevant facts are, briefly, the following: The parties, both foreign nationals, decided to get married in South Africa, as same-sex marriages were recognised here, where they were not in their own countries. They travelled to South Africa before their marriage to look for a place to live, and, the appellant claimed, settled on Caledon, after meeting a certain Mr Kleyn who suggested the parties stay on his farm there. They contracted to do so. The parties entered a civil union in terms of the Civil Union Act 17 of 2006 on 6 December 2017 in Cape Town. However, while on honeymoon in Germany around end-December 2017, the appellant came to believe that the marriage was a mistake and the parties effectively parted. At this point, the appellant claimed, it was her intention to continue living and working in Caledon. She travelled to Moscow, where she was from, to make the necessary arrangements with her clients — she was an accountant — and returned to Caledon in around April 2018. On 18 October 2018 the parties concluded a settlement agreement in anticipation of divorce. The appellant issued summons in the Western Cape High Court on 7 November 2018, at which time she claimed she was 'ordinarily resident' in Caledon. The respondent was living in Namibia at the time. Service was effected on the latter only in April 2019. By this time, however, the appellant *was no longer living in South Africa*: she had relocated, permanently, to Russia, sometime at the end of December 2018.
The appeal court raised the question with the appellant's counsel whether the court could have jurisdiction on the basis of s 2(1)*(a)* of the Divorce Act, ie on the ground that the appellant was 'domiciled in the area of jurisdiction of the court on the date on which the action [was] instituted'; the appellant in the court a quo had sought to establish jurisdiction only on the ground of 'ordinary residence' in terms of s 2(1)*(b)*, and the court a quo had only addressed jurisdiction on that basis. The appeal court felt it necessary to raise the issue, given that the appellant's counsel had seemingly overlooked, and thus failed to draw to the court a quo's attention, s 1(2) of the Divorce Act, which provided that '(f)or the purposes of [the] Act a divorce action *shall be deemed to be instituted on the date on which the summons [was] issued* . . .'. Accordingly, the question was whether or not the evidence before the court a quo was sufficient to warrant the conclusion that the appellant was domiciled in its area of jurisdiction on 7 November 2018, the date when summons *was issued by the registrar*, and not the date when it was later served on the respondent in Namibia,

after the appellant had returned to Russia. The question of domicile came to be the focus on appeal (see [18]).
The appeal court * considered the purpose of the deeming provision in s 1(2) of the Divorce Act (see [24] – [29]). The court referred with approval to academic authority highlighting the importance of the provision in the context of jurisdictional disputes. It was said that, in light of the difficulties sometimes of effecting service of proceedings instituted, and the widespread practice of parties frequently attempting to forum-shop to secure the most favourable result, the institution of proceedings would at the very least secure the litigant the opportunity of litigating in their chosen jurisdiction (see [25] and [28]).
The court went on to consider whether, at the time the action was instituted on 7 November 2018, the appellant was domiciled within the area of the court's jurisdiction. Two elements, the court held, had to be met before domicile could be established: (1) physical presence; and (2) an intention to remain definitely. (See [35].) As to the latter element, the court held, again referring with approval to academic authority, that the most apt description of an intention to reside in a particular place for an indefinite period was 'until and unless something, the happening of which is uncertain, occurs to induce the person to leave' (see [36]).
The court held that, having regard to the evidence before the court a quo, it was persuaded that the present case constituted a 'hard case' on domicile, calling for *a flexible approach*. To lean on legal certainty alone, the court held, would militate against the interests of justice. It would follow, on this reasoning, that the appellant established on a balance of probabilities that, at the time of institution of the divorce proceedings, she was domiciled within this court's area of jurisdiction, and the court a quo thus had the requisite jurisdiction to grant the decree of divorce. (See [38].)
The court upheld the appeal, replacing the order of the court a quo with one granting divorce (see [39]).

ROAD ACCIDENT FUND v LEGAL PRACTICE COUNCIL AND OTHERS 2021 (6) SA 230 (GP)

Execution — Warrant of execution — Suspension of — Court's inherent jurisdiction to order — Exceptional circumstances and interests of justice — Application by Road Accident Fund for suspension of warrants of execution and attachments based on successful claims for 180-day period to prevent RAF's imminent financial collapse — Exceptional circumstances and interest of justice established — Application granted.

Motor vehicle accident — Road Accident Fund — Financial collapse — Measures to prevent — Application by RAF for suspension of warrants of execution and attachments based on successful claims for 180-day period so as to prevent RAF's imminent financial collapse — Exceptional circumstances and interest of justice established — Application granted — Road Accident Fund Act 56 of 1996, s 21(2)*(a)*.

The Road Accident Fund (the RAF) applied — under rule 45A of the Uniform Rules of Court or the common law or s 173 of the Constitution — for the suspension of all writs of execution and attachments against it based on court orders already granted or settlements already reached with claimants for a period of 180 days, so that it could make payment of the oldest claims first by date of court order or date of settlement agreement *a priore tempore*. This was intended as a short-term solution to stabilise the RAF's precarious financial position and to prevent the imminent danger that attachments against its essential assets (including its bank account)

would render it unable to comply with its constitutional obligation to pay compensation to traffic accident victims, and also trigger s 21(2)*(a)* of the RAF Act. * The court, exercising its inherent power to regulate its procedures under the common law and s 173 of the Constitution —

Held

Exceptional circumstances existed, taking into account the interests of justice, to order a temporary suspension for a limited period of 180 days. The granting of such a temporary stay was necessary to prevent the RAF's implosion and resultant constitutional crisis when the RAF would no longer be able to fulfil its constitutional obligation to provide social security and access to healthcare services for road accident victims, and s 21(2)*(a)* of the RAF Act was triggered. No imagination was required to fathom the likely dire situation of thousands of injured uncompensated road accident victims. (See [33] and [37].)

TETRA PAK SA (PTY) LTD v BLAKEY INVESTMENTS (PTY) LTD AND ANOTHER 2021 (6) SA 252 (KZD)

Penalty — Acceleration clause in settlement agreement — Agreement containing undertaking to pay large sum if any small instalment on lesser sum late — No liability for difference acknowledged — Provision for payment of large sum in terrorem and constituting penalty stipulation — Registrar's judgment for full amount set aside and penalty reduced to nil — Conventional Penalties Act 15 of 1962, s 1 and s 3.

In a written settlement agreement Blakey and one Panday (the defendants) undertook to pay Tetra Pak R25 million and to execute a consent judgment in that amount. The agreement provided further that the aforesaid was compromised such that that a sum of R10 million would be paid, by an electronic transfer of R5 million and another R5 million in equal monthly instalments, and that if any of the instalments was not paid on time, the amount of R25 million would automatically become due and payable. The agreement contained no admission of liability for R25 million, merely recording the undertaking to pay it as set out above. Pursuant to the settlement agreement the defendants paid R5 million by way of an electronic fund transfer. It also furnished Tetra Pak with eight postdated cheques of R625 000 to cover the balance of R5 million. The agreement made no mention of payment by cheque, merely that the balance would be *secured* by postdated cheques. Nothing prevented the defendants from paying one or more of the instalments by electronic fund transfer (see [8]).

When the second-last cheque was not paid on time because the bank was unable to contact the account-holder for confirmation, Tetra Pak, taking the view that the R25 million had become due and payable, obtained judgment on the confession to judgment from the Registrar.

In an application for rescission the main issue was whether the instalment was paid timeously (the outstanding payment was subsequently made) and whether the provision relating to the payment of the R25 million was a penalty as defined in the Conventional Penalties Act 15 of 1962, s 3. * Tetra Pak argued that the provision relating to the R25 million was a discount, not a penalty, in the sense that the amount owing was R25 million, discounted to R10 million on condition that the instalments were timeously paid.

Held
The cheque was never dishonoured; rather, there had been a delay because of an unsuccessful security check by the bank. The cheque was ultimately not honoured because it was not presented again, the instalment having been paid by electronic transfer. In those circumstances there was no late payment and the R25 million did not become payable. (See [11].)
But even if this conclusion were wrong, the provision relating to the payment of R25 million was *in terrorem*: a late payment of one instalment would increase the defendants' liability from 10 million to R25 million, which qualified as 'unreasonable compulsion'. ‡ It was a penalty stipulation that the defendants had agreed to only because they were confident that the R10 million would be paid when due, and not because they accepted liability for it, subject to a discount. That being the case, it was equitable to reduce the penalty to nil. (See [26] – [27].)

TREVO CAPITAL LTD AND OTHERS v STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD AND OTHERS 2021 (6) SA 260 (WCC)

Company — Directors and officers — Board of directors — Financial assistance — Financial assistance to related or interrelated company — Prohibition against except under conditions set out in s 45(3) — 'Related or inter-related company' — Whether concept including 'foreign company' — Companies Act 71 of 2008, s 45(1), (2) and (3).
Company — Directors and officers — Board of directors — Financial assistance — Financial assistance to related or interrelated company — Prohibition against except under conditions set out in s 45(3) — Requirement that board be 'satisfied' that *(a)* immediately after providing financial assistance, company would satisfy solvency-and-liquidity test; and *(b)* that terms under which financial assistance proposed to be given were fair and reasonable to company — Purely subjective belief not enough — Standard to be met was subjective satisfaction based on reasonable grounds — Companies Act 71 of 2008, s 45(3)*(b)*.

The Steinhoff Group, which comprised interrelated companies situated in South Africa and abroad, became the target of legal claims after there came to light revelations of numerous irregularities in their financial statements, leading to significant losses for shareholders, and defaults on loans. Trevo Capital Ltd (the first applicant) and two foreign companies, Hamilton BV and Hamilton 2 BV (the second and third applicants, respectively, collectively referred to as Hamilton), were two such claimants (in other proceedings). Two critical sets of related events gave rise to the present application.

- In order to raise funding, in January 2014 Steinhoff Finance Holding GMBH ('SFHG') — an Austrian subsidiary in the Steinhoff Group — issued to certain investors ('2021 bondholders') convertible bonds (the '2021 bond'), with a maturity date of 30 January 2021. Critically, the first respondent, Steinhoff International Holdings (Pty) Ltd (SIHPL) — a private South African company, and then the holding company in the Steinhoff Group — also issued a guarantee (the '2014 guarantee') in respect of the financial indebtedness of SFHG, such that in the event of a default by SFHG under the 2021 bond and its failure to pay the amount due, SIHPL was required to pay such amount to the 2021 bondholders.
- In around December 2015 revelations of accounting irregularities led to losses by the Steinhoff Group, and ultimately to SFHG being unable to comply with the

terms of the 2021 bond. A result was that the 2021 bondholders demanded payment from SIHPL pursuant to the 2014 guarantee. This state of affairs prompted the Steinhoff Group to effect a financial restructuring in respect of its debt, as follows: *Firstly*, SFHG entered into a so-called 'company voluntary arrangement' in around November 2018 with, inter alia, the 2021 bondholders (the 'CVA'), whereby *the maturity of the 2021 bond was extended to 31 December 2021*, and the SFHG debt in terms of the 2021 bond was 'restated' or reconstituted, in terms of which the 2021 bondholders would issue a cashless loan to the Luxembourg-based Steinhoff Group company, Lux Finco 1, in terms of a Facilities Agreement; the cashless proceeds of that loan Lux Finco 1 would then on-lend to SFHG, which would then in turn pay such proceeds over to the 2021 bondholders, thereby extinguishing its debt with them. *Secondly*, SIHPL for its part entered into a so-called 'contingent payment undertaking' (2019 CPU) in around August 2019 with, inter alia, the 2021 bondholders in terms of which it 'restated' its indebtedness under the original guarantee, but that such debt would no longer remain *immediately due and payable*, but would be deferred in terms of the CPU, such that the payment amount could not be demanded before 31 December 2021, and further that the amount recoverable from SIHPL would not exceed the so-called initial payment amount.
In the present application brought before the Western Cape High Court against, inter alia, SIHPL, the applicants claimed that both the 2014 guarantee and the 2019 CPU constituted the provision of financial assistance, as contemplated in s 45(1) of the Companies Act 71 of 2008, by SIHPL to SFHG and Lux Finco 1, respectively. Both SFHG and Lux Finco 1 were, as contemplated by s 45(2), 'related or interrelated company[ies] or corporation[s]' vis-à-vis SIHPL at the times the latter granted them financial assistance. In terms of s 45(3) of the Act, a board may authorise such financial assistance only *(a)* where preceded by a special resolution of shareholders approving such assistance; and *(b)* providing it was satisfied that 'immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and the terms under which the financial assistance was proposed to be given were fair and reasonable to the company'. The applicants argued that, in respect of the 2014 guarantee, the board, while purporting to have been satisfied that the conditions set out in *(b)* above had been met, could not reasonably have held that belief. SIHPL had relied on inaccurate and irregular financial statements that incorrectly suggested that the company was solvent. The applicants argued, pertinently, that a company acting reasonably would have uncovered the irregularities and realised that the financial statements were inaccurate. The applicants further argued, as to the 2019 CPU, SIHPL had not even purported to comply with s 45(3) in concluding the CPU, and in any event at that time SIHPL was factually and materially insolvent, in that its liabilities exceeded its assets on a consolidated basis. Accordingly, the applicants argued, both the 2014 guarantee and the 2019 CPU, as well as the resolutions by the board authorising them, were void in terms of s 45(6). They sought declarators to such effect, and their setting-aside, as well as an order interdicting SIHPL from making payments in terms of such instruments.

Preliminary point — whether s 45 applied to a 'foreign company'

Disagreeing with a preliminary point raised by SIHPL, the court held that the legislature intended that *foreign companies* would fall within the class of persons to whom financial assistance could only be extended by local companies upon compliance by the latter with the provisions of s 45(3). (See [52].) It reached such a conclusion, based on the following. Firstly, such an interpretation accorded with the

language used in the section: Section 45 applied to the giving of financial assistance to a 'related or interrelated company *or corporation*'. To interpret the word 'corporation' as including within its scope a foreign company would provide justification to the word's use in this context, avoiding superfluity, given the already wide meaning of 'company' [as per its definition, 'company' did not include a foreign company]. (See [46] – [52].) Secondly, such an interpretation was in keeping with the purpose of s 45, namely to prevent a company's directors abusing their powers by providing financial assistance to external entities or persons on terms which have insufficient regard to the interests of the company's creditors and shareholders. (See [50] – [52].)

Whether SIHPL satisfied the requirements of s 45 prior to the issuance of the 2014 guarantee

The court considered the requirement in s 45(3)*(b)* that the board '[be] satisfied' that the conditions set out in items (i) and (ii) were met. In this regard, it held that the purely subjective belief of directors could never be a sufficient test, since in that event a wilfully, or even negligently, ignorant judgment would suffice, in the face of obviously foreseeable circumstances pointing in a different direction. It approved of Trevo's submission that the requisite standard was 'subjective satisfaction based on reasonable grounds'. (See [61].)

However, the court accepted the submission of SIHPL that, based on the facts, information and documentation available to it at the time, the board was justified in concluding that the two conditions set out in s 45(3)*(b)* had been met (see [24], [67] and [72]). It highlighted the difficulty of the applicants' challenge, that it was almost wholly reliant on ex post facto analysis of the company's financial position with the benefit of hindsight (see [71]). It concluded that the applicants had failed to make out a case that the board, acting reasonably, could or should not have been satisfied that the financial assistance in the form of the 2014 guarantee satisfied both the solvency-and-liquidity test and that its terms were fair and reasonable. In the result the applicants had not made out a case that the 2014 guarantee was void for want of compliance with s 45. (See [72].)

Whether the SIHPL CPU was void for lack of compliance with s 45

The court rejected SIHPL's contention, that the 2019 CPU was merely a restatement of its debt under the 2014 guarantee and that there was therefore no creation of a new debt (see [115]). The effect, the court held, of the debt-restructuring arrangement, as constituted by the CVA referred to above, was to *discharge SFHG*'s debt to the bondholder (see [119] and [123]), thereby discharging SIHPL's liability under the 2014 guarantee (see [124] – [128] and [136]). The 2019 CPU entered into with a new party to the arrangements, Lux Finco 1, replaced the 2014 guarantee, and served to protect the bondholders in the case of Lux Finco 1 being unable to perform in terms of the Facilities Agreement entered into with the bondholders (see [119], [131] and [136]. The court went on to hold that the 2019 CPU consequently constituted new financial assistance by SIHPL to a company or corporation related or interrelated to it, namely, Lux Finco 1. (see [120] and [136]). Given that SIHPL had failed to comply with the provisions of s 45 in granting such financial assistance, the resolution of SIHPL's board authorising the conclusion of the SIHPL CPU, as well as the CPU itself, was void, by virtue of s 45(6) of the Companies Act. (See [137].) The court granted a declaration to such effect (see [137] and [140]).

VITAL SALES CAPE TOWN (PTY) LTD v VITAL ENGINEERING (PTY) LTD AND OTHERS 2021 (6) SA 309 (WCC)

Court — High Court — Jurisdiction — Ambit — Interdict — Court may assume jurisdiction to grant interdict even if act in question to be performed or restrained outside court's jurisdiction — Evolving information technology requiring courts to adapt their practices to ensure that orders were not rendered ineffective on technical jurisdictional grounds.

Intellectual property — Protection — Interdict — Access to information on servers hosted by respondent — Applicant's access to its intellectual property on respondent's servers terminated on grounds of contractual dispute — Interim relief pending resolution of contractual dispute granted.

Jurisdiction — High Court — Ambit — Interdict — Court may assume jurisdiction to grant interdict even if act in question to be performed or restrained outside court's jurisdiction — Evolving information technology requiring courts to adapt their practices to ensure that their orders were not rendered ineffective on technical jurisdictional grounds.

Spoliation — Mandament van spolie — When available — Access to information on servers hosted by respondent — No possession — Denial of access not spoliation — Application for mandament refused — Temporary interdictory relief, however, granted.

The applicant sought the restoration of its 'possession' of information housed on communal servers and a system hosted by the first respondent. Alternatively it sought an interim interdict to restore its access to the servers and system pending the institution of contractual proceedings. The applicant had accessed the servers and system at its Cape Town premises, which was also where its 'possession' was disturbed by the respondents, who had their offices in Gauteng.
The applicant argued that its alleged breach of contract was irrelevant because spoliation proceedings were aimed at redressing unlawful self-help and restoring the status quo before all else (ante omnia). The respondents in turn (i) argued that the court lacked jurisdiction because the cause of action arose outside the court's geographical area; (ii) argued that a spoliation order was incompetent because the applicant had exercised a mere personal right under the arrangement; and (iii) denied that the applicant was entitled to an interdict.

Held

It was permissible for the court to have jurisdiction to grant the interim relief sought and for an appropriate order to be executed at the first respondent's offices in Gauteng. Part performance of a contract within the court's jurisdictional area constituted a sufficient jurisdictional connecting factor for it to have jurisdiction, even if the contract was concluded elsewhere. In addition, a court could assume jurisdiction to grant an interdict, even where the act in question would be performed or restrained outside that area: rapidly developing information technology required courts to adapt their practices to ensure that their orders were resistant to technical arguments of a jurisdictional nature. (See [18] – [20].)
The applicant did not make out a case for spoliatory relief. For the *mandament van spolie* to be available, actual physical possession was critical. Here the applicant was laying claim only to undisturbed access based on reciprocal payment for the use of the services, and it could not seriously contend that it was ever in possession or quasi-possession of either the servers or the system. (See [21], [24] – [26].)

The applicant was, however, entitled to temporary interdictory relief. The balance of convenience favoured it: the servers and systems to which the applicant was denied access contained its intellectual property to which it needed access to effectively conduct its business. It could face closure if the relief were not granted. In contrast, no harm would be suffered by the first respondent if the interim relief were to be granted. Interim interdict pending resolution of the contractual dispute between the parties granted. (See [4], [34] – [35].)

SA CRIMINAL LAW REPORTS NOVEMBER 2021

EMORDI AND ANOTHER v FBS SECURITY SERVICES (PTY) LTD AND OTHERS 2021 (2) SACR 451 (WCC)

Arrest — By private person — Criminal Procedure Act 51 of 1977, s 42(1)*(a)* — Without warrant — Requirement of proper analysis and assessment of quality of information available to effecting person, applicable also to lay persons. —
Arrest — Justification — Without warrant — Mother with young child suspected of having stolen goods of trifling value from supermarket — Suspect detained overnight and released following morning without being charged — Police required to apply Standing Order (G) 341 and use less invasive means of procuring attendance at court — Arrest and detention unlawful.
Arrest — Justification — Shoplifting — Claim for unlawful arrest and detention by security guards — Treatment of suspected shoplifter not in terms of store's own protocols and mother with young child detained in shop for some two and half hours — Constituting breach of right to personal liberty and falling short of standards set by courts — Security company liable.
Evidence — Admissibility — Video footage — Footage of alleged shoplifting incident — Such footage not seen by any independent party or plaintiff, and not retained — Exclusion of such evidence constituting too blunt approach — Weight to be given to evidence, however, no more than marginal in circumstances.

The plaintiffs, wife and husband, respectively, instituted action against the defendants for unlawful arrest and detention, arising from an incident in which the first plaintiff was arrested for shoplifting. She was detained in the store for two hours before the arrest by the police and held overnight in the police cells before being released on warning. She was not prosecuted. Part of the evidence relied upon by the defendants to justify the arrest and detention consisted of video footage that had been seen by various of the witnesses, but had not been seen by any independent party or the plaintiffs.
In respect of reliance by the court on the video evidence, the court held that the mere exclusion of such evidence would be too blunt an approach. Evidence that something was allegedly seen on video footage, which was no longer available, could be taken into account by a court, but recognising that such evidence could not be meaningfully tested and the weight to be given to such would vary, depending on the circumstances. In the present case, the weight to be given to the footage could be no more than marginal, given that the store had negligently failed to preserve it,

the fact that it had not been seen by the party against whom it was invoked, and its potentially ambiguous nature. (See [79].)
The court held further that there was no reason why, in order to invoke s 42(1)*(a)* of the Criminal Procedure Act 51 of 1977, the principle that a person had to analyse and assess the quality of the information at their disposal critically, and not accept it lightly or without checking it where it could be checked, and that it was only after an examination of this kind that they would allow themselves to entertain a suspicion which would justify an arrest, should not also apply to lay persons, given that the consequences for the arrested person were equally drastic, whether applied by a police official or such lay person. (See [60] – [61].)
As to the treatment meted out to the first plaintiff, this was not in line with the dignified and interactive treatment of a suspected shoplifter in terms of the store's own protocol for dealing with the arrest of shoplifters, namely that such persons were taken to the manager's office (who had to be informed immediately); such persons had to be out of sight of the public; and asked if they had a medical condition that needed immediate medical attention, none of which had been done. Instead, the first plaintiff and her infant child were kept in an open area for some two and a half hours in full visibility of staff coming and going from the security office, and the crowd of persons at the gate calling for her release. The manner in which she had been treated constituted a breach of her right to personal liberty and fell well short of the standards set by courts in previous cases. (See [105].)
In respect of the legality of the arrest and detention overnight of the first plaintiff, the provisions of the South African Police Standing Order (G) 341 were instructive. (See [117].) Nothing in those orders, applied to the facts of the present matter, suggested that the arresting officer's decision to arrest the first plaintiff, as opposed to a less invasive means of procuring her attendance at court, was justified, nor any decision to detain her overnight. (See [118].)
The first and second defendants were accordingly jointly and severally held liable to the first plaintiff for any damages which she might prove, arising out of her unlawful arrest and detention at the store; and the third defendant for damages resulting from her unlawful arrest and detention in the police cells.

S v IT 2021 (2) SACR 494 (GP)

Rape — Sentence — Factors to be taken into account — Rape of older person — Such constituting aggravating circumstance — Older Persons Act 13 of 2006, s 30(4).

The appellant appealed against a sentence of 10 years' imprisonment imposed on him for the rape of his 65-year-old neighbour. It appeared that whilst drinking at his home, he decided to go to her premises with the intention of raping her. He armed himself with a panga and proceeded to her house where he threatened her, forced her to a bedroom and ordered her to lie on a bed. He violently raped her without her consent. In the course of the commission of the crime, the complainant's daughter called her name from outside and the appellant stopped the sexual act and ran away. His counsel contended that the term of 10 years' imprisonment was shockingly inappropriate, given the totality of the mitigating factors placed on record, and did not take account of the appellant's advanced age of 59. It was contended that the sentencing court misdirected itself in finding that the appellant would not serve the entire minimum term of imprisonment prescribed and therefore a deviation from the

minimum sentence was not warranted. It was also contended that the sentencing court had erred in having the appellant's name entered into the register for sexual offenders in terms of s 50(1)*(a)*(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, given that the conviction was not related to a sexual offence against a child or person who was mentally disabled, as provided by the legislation.
Held, that the offence was serious on the prevailing facts, and the rape of the complainant, being age 65 years, remained an aggravating circumstance, as provided for in s 30(4) of the Older Persons Act 13 of 2006. It could not be said that the magistrate had in any material manner misdirected herself in the execution of her judicial discretion, and there was no weighty justification for a deviation from the minimum term of imprisonment prescribed. (See [20] and [28].) The order, however, that the appellant's name be entered into the register of sexual offenders had to be set aside; instead, the prosecution was ordered to facilitate for the appellant to be brought before the sentencing court and for the consequences of s 31 of the Older Persons Act 13 of 2006 to be explained to him by the court, and for the crime and his personal details to be reported and entered in the prescribed form into the Register of Abuse of Older Persons held by the Department of Social Development. (See [32].)

S v LIN AND ANOTHER 2021 (2) SACR 505 (WCC)

Bail — Application for — Onus — Applicable schedule in terms of Criminal Procedure Act 51 of 1977 — Magistrate applying incorrect schedule, but completing application and ignoring error — Act not giving magistrate discretionary powers to proceed in terms of incorrect schedule — Court nevertheless upholding magistrate's dismissal of application for bail on facts before court.

The appellants appealed against the refusal by a magistrate to admit them to bail pending trial on charges of, inter alia, the landing, selling, receiving or possession of fish taken in contravention of s 44(2) of the Marine Living Resources Act 18 of 1998; the transport or possession of abalone (23 708 units valued at R7 million) which were not in a whole state in contravention of reg 36(1)*(b)* of the regulations promulgated under the Marine Living Resources Act; and a contravention of s 49 of the Immigration Act 13 of 2002, in that they were in the country without having a permit or visa to do so. The first appellant had a previous conviction for the same offences, for which he had served a term of imprisonment. The parties and the court a quo were in agreement that the case fell to be dealt with under sch 1 to the Criminal Procedure Act 51 of 1977 (the CPA) and the magistrate accordingly ruled that the bail application was an unscheduled one. It was only before judgment that the magistrate realised that, because of the first appellant's previous conviction, the application fell to be dealt with under sch 5 to the CPA. The magistrate, notwithstanding, decided to continue with the application as an unscheduled application for bail and proceeded to dismiss the application. On appeal,
Held, that the magistrate acted beyond the scope of her discretion, as the CPA did not give a court any discretionary powers to proceed on a wrong schedule, or to bypass its provisions. Accordingly, the approach by the magistrate, to consciously apply a wrong schedule in the bail application, was wrong, as contemplated in s 65(4) of the CPA, and on this basis alone the court could interfere with her decision. (See [21] – [22].)

Held, further, however, that considering the evidence led by the first appellant during the bail application, it was difficult to imagine what more he could have done to handle his application differently, even if he had known during the bail application that the matter fell firmly within the ambit of sch 5. It therefore seemed not just highly improbable, but plainly inconceivable, when regard was had to the evidence that was adduced, that he would have handled his application differently. Hence, even if the matter had proceeded in terms of said schedule in respect of the first appellant, it would not have made any difference, and there was therefore no room for remitting the matter to the court a quo for reconsideration. (See [35] and [38].)
Held, accordingly, on the facts, that the magistrate was not incorrect in coming to the conclusion that the interests of justice did not permit the release of the appellants. (See [75] – [76].) The appeal was dismissed.

S v MASHEGO 2021 (2) SACR 520 (MM)

Bail — Failure of accused on bail to appear at trial — Proper procedure to be followed for conviction of accused — Criminal Procedure Act 51 of 1977, s 67A.

In a special review on a conviction and sentence of six months' imprisonment for failing to appear in court, it appeared that the magistrate had not held the rank of magistrate for seven years, and the matter accordingly had to be sent on judicial review, as required by the provisions of s 302(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the Act). The magistrate in question conceded that the case was subject to automatic review and explained that his failure to send it 'was due to an error and/or oversight on my part due to workload'. The magistrate was asked to provide the authority for the proceedings held, which resulted in the accused being convicted of 'failure to appear in court' and sentenced to six months' imprisonment. He responded that the proceedings had been conducted in terms of ss 67(2)*(c)* and 67(3) of the Act.
Held, that s 67 could not be used to conduct an enquiry in which the accused was convicted and sentenced. However, if an accused released on bail failed to appear in court, his conviction would be based on a different section which required a different procedure, namely that under s 67A. In terms of the section, the accused would have to be charged by the prosecution, provided with a proper charge-sheet drafted, and have all the elements of the offence proved in a normal trial. The wording of the conviction by the magistrate, which made no reference to any statutory provision, made it look like the accused was convicted of a common-law crime. However, failure to appear in court was not a common-law crime and the conviction and sentence had to be set aside. (See [17] – [19].)

S v RAKIMANA 2021 (2) SACR 531 (LP)

Trial — Presiding office — Unavailability of to continue with trial — Magistrate retiring — Part-heard matter where evidence already adduced — Only special cases rendering resumption of trial impossible — In casu, nothing indicating that former magistrate absolutely unavailable and matter ordered to continue before same — Magistrates' Courts Act 32 of 1944, s 9(7)*(a)*.

A criminal trial in the magistrates' court advanced to the stage where five state witnesses had already testified in what had become a protracted trial. The magistrate who was hearing the matter then retired. The head of the court then submitted the matter on review, as the now retired magistrate had become reluctant to proceed with the trial. This was apparently due to an email written by the senior magistrate, that the matter had to start de novo, as his appointment as a magistrate had ceased on 31 July 2021.
On review, the court held that it was only special circumstances, such as death, recusal, dismissal or even mental aberration that could render the resumption of the trial by the affected officer impossible. In the present case there was nothing on the record to suggest that the former magistrate was absolutely unavailable, as envisaged by s 9(7)*(a)* of the Magistrates' Courts Act 32 of 1944, or that he was in any way debilitated such as to inhibit his resumption of the trial to a speedy conclusion. (See [24] – [26].) The court ordered the matter to continue before the previous magistrate.

S v MOYENG 2021 (2) SACR 538 (GP)

Appeal — Record — Lost, destroyed or incomplete record — Record of proceedings taking place some eight years earlier, in which appellant sentenced to life imprisonment for six counts of rape of underage children, destroyed on instruction of court manager — No prospects of finding or reconstructing missing record — Convictions and sentences set aside.

In an appeal to the High Court, without any leave to appeal having been granted, the record of the trial-court proceedings some eight years earlier, in which the appellant was sentenced to life imprisonment for six counts of rape of underage children, was not available, because the court manager had destroyed the court books and charge-sheets a few years earlier. It was unclear why the court manager had given the instruction to destroy the court records, but the fact that he had done so had subsequently led to a flurry of appeals. It was clear, however, that there were no prospects of finding or reconstructing the missing records, and in the circumstances the court ordered that the entire trial proceedings be set aside. No order for reconstruction could be made, because any such attempt was unlikely to succeed. (See [17] and [19].)

RABOTHATA v MINISTER OF POLICE 2021 (2) SACR 544 (GP)

Arrest — Use of force — Criminal Procedure Act 51 of 1977, s 49(2) — Reasonable grounds — What constitutes — Police official shooting and injuring plaintiff whom he thought to be suspect in hijacking — Identification by police official unreasonable in circumstances where significant difference in clothing of suspect — Conduct wrongful and unlawful.

The plaintiff instituted an action for damages for injuries suffered after he had been shot by a police officer. The defendant contended that the shooting was justified in terms of s 49(2) of the Criminal Procedure Act 51 of 1977, in that the officer suspected that the plaintiff was the person who had been involved in a hijacking earlier that day.

Held, applying the principles in *Selamolele v Makhado* (see [50]), * relating to the assessment of evidence, that the witnesses for the plaintiff were credible, the single witness for the defence was an unreliable witness, and a reasonable officer in his position should have been able to have noticed that the plaintiff, though dressed similarly to the suspect, had another distinguishing item of clothing, namely that he was wearing a white cap, which should have been visible to him if one were to believe his evidence that the suspect turned not just once, but four times, pointing a firearm at him. The wrong person had been shot and the police had no reasonable grounds to put him at the scene of the hijacking and/or to shoot at him. Their conduct was therefore wrongful and unlawful. (See [94].)

S v STUURMAN AND ANOTHER 2021 (2) SACR 559 (WCC)

Trial — Presiding officer — Unavailability of to continue with trial — Regional-court magistrates appointed as High Court judges — Effect of — Comparable to regional-court appointment having been terminated and jurisdiction in matters having ended — Judges unable to return to being regional magistrates for cases — Proceedings null and void.
Review — Special review in terms of s 304(4) of Criminal Procedure Act 51 of 1977 — In what cases — Unavailability of regional-court magistrates to continue part-heard trials where magistrates appointed as High Court judges — Provisions of s 304A not applicable, as accused not yet convicted.

In two matters that were submitted on review, ostensibly in terms of s 304A of the Criminal Procedure Act 51 of 1977 (the Act), criminal proceedings had commenced before regional magistrates, but were not completed because both judicial officers were subsequently appointed as judges to the Western Cape High Court. The request to the court was that the proceedings should proceed before the respective judges who had presided at the time in the regional courts. On review,
Held, that the judges in question could not be called upon to hear and finalise the matter in the regional court, as if they were still in the service of the Department of Justice in their capacity as regional magistrates. Their unavailability as a result of their appointment as judges was comparable to their regional-court appointments having terminated and their jurisdiction in the matters having ended. It followed ex lege that the proceedings before the judicial officers in question, which remained part heard, were a nullity. (See [8] – [9].)
Held, further, that, because the accused in each of the cases had not yet been convicted, the provisions of s 304A of the Act were not applicable. The two matters were in the regional courts and there was no reason to hold that a grave injustice would ensue if they proceeded to be finalised in those courts. There was therefore no reason for the court's intervention in the unconcluded proceedings in both cases, which ought to receive urgent attention in the regional court (See [16] – [17].)

Federation Internationale de Football Association v Sedibe and another [2021] 4 All SA 321 (SCA)

Civil Procedure – Jurisdiction – Attachment ad fundandam jurisdictionem – Right of an incola to attach property of a peregrinus to found or confirm jurisdiction not permissible if case does not involve a claim sounding in money nor an action in rem for movables.

After the appellant ("FIFA") suspended the respondent, Mr Sedibe, from participating in football for a period of five years and imposed a fine for match-fixing, he obtained an order attaching all FIFA's trademarks to found jurisdiction in order to review the decision against him. FIFA appealed against that order.

Held – The question on appeal was whether Mr Sedibe was entitled to the attachment order granted by the High Court.

The attachment was never sought for the purpose of recovering the fine imposed by FIFA, and was clearly not a claim sounding money. An action for damages based on defamation or similar was also never the basis for the attachment order.

The purpose of an attachment *ad fundandam jurisdictionem* is two-fold. First, it is to found or create jurisdiction where no other ground of jurisdiction exists at all. Second, it is to provide an asset in respect of which execution can be levied in the event of a judgment in favour of a plaintiff. The purpose of an attachment *ad confirmandam jurisdictionem* is to strengthen or confirm a jurisdiction that already exists. The object of the attachment is to provide an asset on which execution can be levied in total or partial satisfaction of a plaintiff's judgment.

Attachments to found or confirm jurisdiction are associated with the principle of effectiveness. The right of an *incola* to attach the property of a *peregrinus* to found or confirm jurisdiction does not apply to all cases but is limited to actions in *personam* in contract, quasi contract, delict, quasi-delict or other like causes to give, do or make good something for an opponent, that is, in cases sounding in money; and actions *in rem* for movables. The Court found no authority justifying an attachment in relation to an administrative decision of the kind in this case.

Based on the Court's conclusion that attachment is not permissible if the claim is not a claim sounding in money nor an action *in rem* for movables, and that such lack of jurisdiction cannot be cured by attachment, the appeal was upheld with costs.

Ferrostaal GmbH and another v Transnet Soc Ltd t/a Transnet National Ports Authority and another [2021] 4 All SA 330 (SCA)

Corporate and Commercial – Company law – Business rescue proceedings – Vote against business rescue plan – A court determining whether a vote against the adoption of a business rescue plan was inappropriate, exercises a discretion and appellate court's power to interfere is curtailed by broader policy considerations.

In December 2006, the first respondent ("Transnet") concluded a lease agreement with a company ("FMA") in which the appellants were shareholders. The leased property was located at the port of Saldanha and was to endure for a period of 15 years, terminating on 30 September 2022. In December 2016, FMA was placed under

business rescue and the business rescue practitioner (the “practitioner”), suspended FMA’s obligation to pay rental to Transnet.

Two business rescue plans published by the practitioner were rejected by Transnet, which happened to be FMA’s only independent creditor. In July 2019, the practitioner published a final revised business rescue plan. Transnet rejected the plan based on its conclusion that it was commercially unviable and failed to adequately protect Transnet’s interests as the major creditor of FMA.

As FMA’s shareholders, the appellants launched an application in the High Court, averring that Transnet’s rejection of the business rescue plan was inappropriate, and based on section 153(1)(b)(i)(bb) of the Companies Act 71 of 2008, sought an order setting aside Transnet’s vote against the adoption of the revised plan. The dismissal of the application led to the present appeal.

Held – One of Transnet’s concerns regarding the revised plan was its failure to provide a firm arrangement for the settlement of arrear rental. The Court found that concern to be valid. Since the advent of the business rescue proceedings, FMA had not paid rental due leading to the amount owing ballooning to approximately R40 million. It was therefore important for the revised business rescue plan to demonstrate that FMA would be able to settle the arrears.

Transnet’s misgivings as to whether future rentals would be paid was also a valid concern.

It was common cause that FMA was not fully utilising the leased property itself, and the court agreed with Transnet’s assertion that liquidation would free the premises up, leading to a competitive tender process that could potentially give Transnet an opportunity to fully exploit the property’s commercial value.

For the appellants to be successful in their appeal, the court had to be satisfied that the High Court was wrong in the exercise of its value judgment. A court determining whether a vote against the adoption of a business rescue plan was inappropriate, exercises a discretion. An appellate court’s power to interfere is curtailed by broader policy considerations. Finding that the High Court’s discretion was properly exercised, the present Court was not free to interfere with the decision.

The appeal was accordingly dismissed with costs.

Jugwanth v Mobile Telephone Networks (Pty) Ltd [2021] 4 All SA 346 (SCA)

Civil Procedure – Exceptions – An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient – Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed.

Civil Procedure – Particulars of claim in claim for payment – Exception to claim – Prescription – Because prescription must be invoked by the party wishing to rely on it, it is not necessary for particulars of claim to pre-emptively plead a basis to defeat a possible plea of prescription.

The appellant, an attorney, sued the respondent (“MTN”) for payment of his fees for work allegedly performed for MTN.

MTN raised an exception to the particulars of claim on the basis that they did not disclose a cause of action because the debts on which the claim was based had prescribed. The particulars of claim alleged that the contract on which the appellant sued was concluded in April 2006, and the services were said to have been rendered between 2006 and 2008. Summons was served during June 2015, more than six years after the last of the services was rendered and invoices issued. The present appeal was against the High Court's upholding of the exception.

Held – An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account. A cause of action is disclosed and judgment may be granted if the averments in the particulars of claim were proved.

Prescription is governed by the Prescription Act 68 of 1969 (the "Act"). The period of prescription for the debt in this case, in terms of section 11(d) of the Act is three years. Section 10(3) of the Act provides that payment of an extinguished debt is payment of a debt. Section 13 provides for circumstances in which the completion of prescription is delayed and sections 14 and 15 provide for circumstances in which the running of prescription is interrupted. In terms of section 17(2), prescription must be invoked by the party wishing to rely on it. The necessary corollary is that such a party might choose not to do so. A person invoking prescription bears a full onus to prove it.

Prescription is fact driven and various factors may rebut the defence. Noting that prescription must be invoked by the party wishing to rely on it, it was not necessary for appellant's particulars of claim to pre-emptively plead a basis to defeat a possible plea of prescription. However, MTN made two submissions in support of the High Court's judgment. It contended that because an exception is a pleading, the delivery of the exception was an effective way of invoking prescription under section 17(2). The second contention was that because prescription was invoked by the delivery of the exception, the appellant was required to plead a basis on which the claim had not prescribed. MTN argued that because the appellant did not amend the particulars of claim to do so, they no longer disclosed a cause of action and the exception was correctly upheld. Neither of those submissions found favour with the court.

Highlighting the problems with the High Court's finding in upholding the exception, the Present court upheld the appeal and dismissed MTN's exception.

Merifon (Pty) Ltd v Greater Letaba Municipality and another [2021] 4 All SA 356 (SCA)

Constitutional and Administrative Law – Municipality – Procurement of land – Local Government: Municipal Finance Management Act 56 of 2003, section 19 providing that a municipality may spend money on a capital project only if the money for the project has been appropriated in the capital budget; sources of funding have been considered, are available and are not committed for other purposes; and project has been approved by municipal council – Section 19 not complied with where acquisition of property had not been approved by council.

The appellant ("Merifon") and the first respondent municipality entered into an agreement of sale of immovable property, in terms of which the municipality was to

purchase certain land from Merifon. However, the Provincial Treasury refused to disburse the amount requested by the municipality on the ground that the purchase price was excessive. As a result, the municipality was unable to pay for the property.

Merifon instituted action in the High Court claiming payment of the purchase price and transfer costs from the municipality. The Court dismissed the action and granted judgment in favour of the municipality, finding the sale agreement null and void and unenforceable. Merifon brought the present appeal against that judgment.

Held – Section 19 of the Local Government: Municipal Finance Management Act 56 of 2003 formed the basis of one of the municipality's defences. The section provides that a municipality may spend money on a capital project only if the money for the project has been appropriated in the capital budget; the sources of funding have been considered, are available and have not been committed for other purposes; and the project has been approved by the municipal council.

The Court held that the first question to be considered was whether section 19 applied at all in this case. Procurement of land entails an acquisition of a capital asset and thus a capital project as contemplated in section 19. The court rejected Merifon's submissions that the Act does not apply to third parties such as private entities like itself. It was confirmed that section 19 was applicable and binding on the parties.

The next question was whether section 19 was in fact complied with by the municipality when it concluded the sale agreement. Merifon submitted that the department had confirmed the availability of the requisite funds, and pursuant thereto, the municipality had adopted a resolution to acquire the property. However, the Court found that the resolution could not be read to mean that the council had in actual fact resolved to acquire the property. The High Court was therefore correct in concluding that the agreement which was the foundation of Merifon's claim was legally unenforceable on account of the municipality's non-compliance with section 19.

In a further argument, Merifon invoked estoppel. It was argued that on the facts of this case, it was not incumbent upon Merifon to enquire whether the municipality had observed the relevant internal arrangements or formalities, but was entitled to assume that these were in actual fact complied with. The Court held that the principle of legality was implicated because what the municipality had done was at odds with the dictates of section 19. Where the peremptory provisions thereof were not complied with, the agreement to purchase the property could not be validated through the doctrinal device of estoppel.

The appeal was dismissed with costs.

South African Reserve Bank v Leathern NO and others [2021] 4 All SA 368 (SCA)

Banking and Finance – Blocking of bank accounts – Contravention of Exchange Control Regulations – Court's power to set aside blocking order – Where functionary had well-founded and reasonable suspicion that funds in account were being used as conduits for illicit financial flows from the country, court not entitled to set aside blocking order.

Banking and Finance – Funds in bank account – Ownership of funds – Where money is deposited into a bank account of an account holder it mixes with other money and, by virtue of commixtio, becomes the property of the bank – Account holder has no real right of ownership of the money standing to his credit, but acquires a personal right to payment of that amount from the bank, arising from their bank-customer relationship.

The appellant, the South African Reserve Bank ("SARB") blocked two bank accounts held with Grobank, on suspicion that the account holder ("Mr Bhorat") had used the accounts in contravention of Exchange Control Regulations. Mr Bhorat's estate was then provisionally sequestrated and the respondents as co-trustees of the insolvent estate successfully applied to the High Court for payment to them of the funds in the two bank accounts. The Reserve Bank appealed.

Three key issues were identified on appeal: whether the High Court was correct to set aside the blocking order; 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 whether a sequestration order invalidates a blocking order by operation of law.

Held – Regulations 22A and/or 22C, empower a functionary to issue a blocking order in respect of a banking account suspected of being used for illegal purposes. In this matter, a manager and an investigator in the Financial Surveillance Department of the SARB suspected that Mr Bhorat's accounts had been used as conduits for illicit financial flows from the country. The reasonableness of that suspicion had to be determined. The Court found that the suspicion was well-founded and reasonable, and that the High Court was not entitled to set aside the blocking order, as the provisions of regulation 22D, read with section 9(2)(d)(i)(bb) of the Currency and Exchanges Act 9 of 1933 were not satisfied.

The next question was whether Mr Bhorat was the owner of the funds standing to his credit. Generally, where money is deposited into a bank account of an account holder it mixes with other money and, by virtue of *commixtio*, becomes the property of the bank. The account holder has no real right of ownership of the money standing to his credit, but acquires a personal right to payment of that amount from the bank, arising from their bank-customer relationship. The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions. The evidence established that Mr Bhorat did not have an unfettered discretion in respect of the funds deposited into his accounts, and could only deal with them as directed by the depositors. The payment of the money by depositors into Mr Bhorat's account were bilateral juristic acts requiring the meeting of minds between the depositors and Mr Bhorat. Although there was no suggestion that Grobank was aware of that arrangement, the understanding between the depositors and Mr Bhorat meant that for the duration of the Reserve Bank's investigation, for as long as the accounts were subject to a blocking order, Mr Bhorat had no right to claim the funds based on the fact that there was reasonable suspicion that the accounts were used for purposes of contravening the regulations. 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 could block the funds and the trustees could not enjoy access to them.

The Court also rejected the trustees' contention that a blocking order lapses by operation of law once a sequestration order is granted, and that the assets subject to such an order vest in the insolvent estate.

The appeal was upheld with costs.

BRR v MBJ [2021] 4 All SA 383 (GJ)

Wills, Trusts and Estates – Testamentary trust – Dispute amongst trustees – Application for removal of co-trustees – Whether the conduct complained of imperilled trust property or its proper administration – Removal will only be ordered in the event that the removal will be in the interests of the trust and its beneficiaries.

Wills, Trusts and Estates – Testamentary trust – Rights of beneficiaries – Nature of rights – A trust is discretionary not only if the trustees have the discretion whether to pay income or distribute capital at all but also if the trustees have a discretion how much to pay or distribute – In both instances, beneficiaries will have contingent rather than vested rights.

A testamentary trust was administered by the applicant and the first and second respondents as trustees. In terms of the will of the testator, the whole of her deceased estate (other than personal effects) devolved on the trustees of a trust, who were required to administer the trust in their discretion for the care, upbringing, maintenance, education and benefit of the testator's three minor children. The applicant was the father of the children. With effect from September 2019, the trust had paid R20 000 per month to the three minor children as beneficiaries, effectively as maintenance. Dissatisfied with that amount, the applicant sought a monthly contribution towards maintenance of R41, 760 from the trust. The refusal of that request by the other trustees led to an application for their removal as trustees and the appointment of new trustees.

Held – The applicant was seeking what was effectively interim maintenance on behalf of minor children as beneficiaries of the trust, without seeking declaratory relief as to the obligations of the trust, if any, to make payment. He did not advance a legal basis upon which the trust could be ordered to make payment.

The rights which the minor children had as beneficiaries (and which could be asserted by the applicant as their legal guardian) were contingent or discretionary rights. Payments that were to be made to the beneficiaries were clearly expressed in the testator's will to be in the discretion of the trustees. A trust is discretionary not only if the trustees have the discretion whether to pay income or distribute capital at all but also if the trustees have a discretion on how much to pay or distribute. In both those instances, the beneficiaries will have contingent rather than vested rights. The minor children's rights to payment from the trust were contingent upon the trustees exercising a discretion in their favour to pay them. The trustees had not exercised their discretion to pay the beneficiaries the amount claimed on their behalf by the applicant, and so the minor children *qua* beneficiaries had no right to payment of that amount.

A further difficulty was that the applicant, in seeking relief on behalf of the beneficiaries, had not cited himself as a respondent in his capacity as a trustee. All trustees must be sued jointly when relief is sought against the trust.

The applicant's claim against the trust for the payment of an increased monthly amount was refused.

The applicant also sought an order declaring his three minor children as capital beneficiaries of the trust. Pointing out that the beneficiaries were both capital and income beneficiaries, the court also refused the relief in this regard.

Remaining for determination was the claim for the removal of the respondents as trustees. A court has an inherent power to remove a trustee from office at common law as well as in terms of section 20(1) of the Trust Property Control Act, 1998. It had to be decided whether the conduct complained of by the applicant imperilled the trust property or its proper administration. The court examined each of the allegations made by the applicant against the respondents and found no grounds to uphold the complaints. Not every failure by a trustee will result in a trustee being removed from office. Ultimately, the removal will only be ordered in the event that the removal will be in the interests of the trust and its beneficiaries. In any event, to remove the respondents would leave the applicant as sole trustee, giving him full control of the trust. That was undesirable.

The application was dismissed.

Commando and others v Woodstock Hub (Pty) Ltd and another [2021] 4 All SA 408 (WCC)

Constitutional and Administrative Law – Right to access to adequate housing – City's emergency housing programme – Programme not passing reasonableness and rationality tests where treatment of evictees in inner city differed from others, and was arbitrarily applied – Arbitrary nature of implementation of programme rendering it unconstitutional.

The constitutionality of the City of Cape Town's emergency housing programme and its implementation in relation to persons rendered homeless by eviction was at the heart of the present matter. The applicants were a group of some 25 persons (of which approximately half were children) who had been evicted from property where they had lived for their entire lives. The property, consisting of 5 subdivided and partitioned cottage units on a single erf, had been purchased by the first respondent (a property development company).

After the eviction order was granted against the applicants, the City of Cape Town was approached to provide emergency alternative accommodation to avoid them being rendered homeless. The emergency accommodation offered by the City was however, a distance away with no schools nearby and would require significant travel time to work and school.

Held – Section 25(1) of the Constitution, provides that no one may be deprived of their property arbitrarily and protects rights of ownership. Section 26(3) in turn, which provides that no one may be evicted from their homes arbitrarily, protects occupancy rights. In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, an eviction can only be effected by way of an order of court made

after consideration of all the relevant circumstances. The right of access to adequate housing, entrenched in section 26(1) of the Constitution, requires the State to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The court referred to case authority establishing that the provision of temporary or emergency accommodation to persons who find themselves in situations of crisis or emergency is an accepted part of the State's obligation to provide access to adequate housing, in terms of section 26. The Housing Act 107 of 1997 and the National Housing Code enacted in terms thereof, gives effect to the State's constitutional obligations in that regard. The Housing Code contains the national housing policy, and as such, it sets the principles, guidelines and standards that are to apply to the various housing programs which are to be implemented by the State.

In a challenge to the constitutionality of a housing programme in terms of sections 26(2) and 9(1) of the Constitution, the concepts of rationality and reasonableness are central.

The court found that the current position with regard to homeless evictees in the inner city and its surrounds was unclear and entirely arbitrary – failing to satisfy the rationality and reasonableness tests. There was a clear differentiation in treatment in relation to evictees in the inner city and those elsewhere. Evictees such as the applicants who had been living in Woodstock and Salt River for many years were at risk of relocation either to the outskirts of the City or to informal settlements outside the City, away from their workplace, educational facilities, clinics and places of religious worship, whilst other evictees would not be subjected to the same disadvantages. The differentiation was unfair and unreasonable.

Declaring the City's emergency housing programme unconstitutional, the court directed the City to take certain steps to address the problem, and the eviction order against the applicants was suspended in the meantime.

Garden Route Casino (Pty) Ltd and others v Premier of the Western Cape and others [2021] 4 All SA 445 (WCC)

Civil Procedure – Postponements – Court's approach – A postponement will not be granted, unless the court is satisfied that it is in the interests of justice and good cause is shown.

Liquor and Gambling – Casino operator licenses – Geographic exclusivity regime – Legal validity – Provincial Gambling and Racing Board empowered to grant a licence holder exclusivity to operate a casino within a specific area and period, and province's geographic exclusivity regime created by its own policy breaching allocation of powers to the Board by impermissibly usurping the Board's powers.

In terms of section 45 of the National Gambling Act 7 of 2004, the National Minister of Trade and Industry may prescribe the number of casino operator licences that may be granted in the country and in each province. In terms of section 30 of the Act, each provincial licensing has exclusive jurisdiction within its province to "investigate and consider applications for, and issue provincial licences in respect casinos, racing, gambling, wagering, other than for an activity or purpose for which a national licence

is required in terms of the National Act" and to conduct inspections to ensure compliance with the regulatory framework.

Section 2 of the Western Cape Gambling and Racing Act 4 of 1966 establishes a Board, whose main object is to control all gambling, racing and activities incidental thereto in the province and any policy determinations of the Executive Council relating to the size, nature and implementation of the industry.

In August 1997, the Executive Council of the Western Cape issued a policy (the "Policy") prescribing one casino operator licence for each of the five regions of the Western Cape; and an exclusivity period of ten years in respect thereof.

The applicants were dissatisfied with the Board's refusal to consider amendment of its casino licence licences so as to permit the performance of the licensed activities from premises in the Cape Metropole. The relief sought by the applicants in this application was premised on the fact that the Policy directives impermissibly, *inter alia*, usurped powers that were vested in the Minister in terms of section 81 of the Western Cape Gambling and Racing Act. A declaratory order was also sought to the effect that the applicants were holders of a casino operator's licence and not the holders of a "premises licence", and that the Board's refusal was wrongly premised on the fact that the applicants were the holders of a "premises licence".

According to the applicants, the impugned provisions of the Policy violated the fundamental constitutional principle of legality in that they were *ultra vires* and irrational. They further contended that the Promotion of Administrative Justice Act 3 of 2000 was inapplicable to this matter, and in any event, the impugned provisions were inconsistent with both the principle of legality and the requirements of the Promotion of Administrative Justice Act.

Held – The first issue was an application for postponement, brought by the Provincial Government. A postponement will not be granted, unless the court is satisfied that it is in the interests of justice and good cause is shown. The court refused the postponement, finding that the application was based on shaky ground and could not be said to be in the interests of justice.

The Court granted condonation of the late filing of the applicants' review application.

Having regard to the statutory powers of the Board, it was clear that it was empowered to grant a licence holder exclusivity to operate a casino within a specific area and period. Therefore, the geographic exclusivity regime created by the Policy breached the careful allocation of powers to the Board as it impermissibly usurped the Board's powers to make a determination. The exclusivity regime imposed by the Executive Council in the Policy was thus unlawful and invalid. The Court also held that the Board has the powers in terms of the Act to consider and determine an application by any of the applicants to relocate an outlying casino to the Cape Metropole; and that a casino operator licence is not a premises licence.

Malherbe v S [2021] 4 All SA 510 (WCC)

Criminal Law and Procedure – Fraud – Elements of offence – Alleged misrepresentation forming part of offence must have been made with the intent to defraud – Intention requirement relates to intention to cause actual or potential

prejudice that the fraudster must have when he makes the misrepresentation – Absence of such intent leading to fraud charge being set aside.

Convicted on one count of fraud and one count of money laundering in contravention of the Prevention of Organised Crime Act 121 of 1998, the appellant was sentenced to an effective term of 15 years' imprisonment.

The appellant was a senior manager of Eskom, and was seconded by Eskom to serve as managing director of one of its subsidiaries ("PNES'"). The money laundering charge related to the appellant's handling of the profits that had accrued to him though the business operations of a company ("EUS") established by him, in respect of two outsourcing contracts between EUS and PNES. The appellant's role in bringing about the conclusion of the contracts between EUS and PNES provided the foundation for the charge of fraud brought against him. Central to the allegations against the appellant, was the allegation that he had not disclosed his interest in PNES. It was common cause that if the appellant were successful with his appeal against the fraud conviction, the conviction on the money laundering charge would also fall away.

Held – The charges of fraud brought against the appellant were poorly drafted and led to the misconceptions on which the prosecution proceeded. The court saw fit to recapitulate the elements of the common law crime of fraud, which include a misrepresentation "with the intent to defraud". The latter requirement relates to the intention to cause actual or potential prejudice that the fraudster must have when he makes the misrepresentation.

The evidence established clearly that the appellant did disclose his interest in the conclusion of the contracts. His declaration of interest served to alert his fellow directors to the need for them to give appropriately critical scrutiny to any of his opinions in proposing the contract. It was also not established that the appellant had misrepresented that the conclusion of the contracts complied with the applicable procurement policies. The instances of non-compliance with the procurement policies which were shown to have occurred could either not be attributed to the appellant, or could not be regarded as a misrepresentation by the appellant because the relevant facts were within the knowledge of his co-directors.

In its judgment, the trial court accepted the evidence of the State's main witness, the general manager in the transmission division of Eskom. The magistrate made no acknowledgement of the many shortcomings and contradictions in the witness's evidence. Highlighting the misdirections committed by the trial court, the present Court concluded that the conviction on the count of fraud could not be sustained and the appeal against it had to be upheld. The appellant was acquitted of the charges against him.

South African Arms and Ammunition Dealers Association v Minister of Police [2021] 4 All SA 538 (GP)

Civil Procedure – Court orders – For compliance with court order, parties to whom it applies must know what it requires them to do – Test in interpreting a court order entails determining manifest purpose of order, with court's intention to be ascertained primarily from language of the order in accordance with usual rules relating to interpretation of documents.

Safety and Security – Firearms control measures required in terms of court order – Issue of tender for procurement of service provider to supply services for firearms control solution for police service – Whether court order required prior consultation with South African Arms and Ammunition Dealers Association – On proper interpretation of court order, issuing of tender bid for appointment of contractor, without prior consultation, not in contravention of court order.

On 24 March 2021, in response to a court order issued in August 2019, the Minister of Police and the National Commissioner of the South African Police Services caused a tender to be advertised for procurement of a service provider who would supply, design, migrate, and develop services for the Firearms Control Solution ("FCS") for the police service ("SAPS") to establish a FCS. The South African Arms and Ammunition Dealers Association (the "applicant") sought the setting aside of the tender on the ground that it was not consulted for its input as required by the 2019 court order.

According to the applicant, the simple interpretation of the court order was that consultation must take place before the bid specification was determined.

Held – Section 6 of Promotion of Administrative Justice Act 3 of 2000, as well as common law, clearly stipulates the instances in which administrative action taken by an organ of State can be taken on review and be set aside. The issue to be determined was therefore what exactly was ordered by the court order, in order to determine whether or not the respondents' issuing of the tender bid without the alleged consultation was non-compliant with the terms of the order, justifying the setting aside thereof.

For a court order to be complied with, the parties to whom the order applies must know what it requires them to do. If there is no clarity, the proper court to determine the interpretation to be placed upon an order is the court which made it (even if not the same judge). If on a proper interpretation thereof, the meaning remains obscure, ambiguous or otherwise uncertain, a court may generally clarify its judgment or order so as to give effect to its true intention, provided it does not alter the sense and substance of the judgment or order.

The test in interpreting a court order entails determining the manifest purpose of the order, with the court's intention to be ascertained primarily from the language of the order in accordance with the usual rules relating to the interpretation of documents.

Section 39(3) of the Firearms Control Act of 60 of 2000 requires firearms a dealer to keep such registers as may be prescribed, containing such information as may be prescribed, at the premises specified in the dealers' licence. The court's order in this case aimed to ensure that the respondents made it possible for dealers to comply with section 39(3) by establishing electronic-network connectivity as envisaged in the provisions of section 39(6) of the Firearms Control Act. The order set out the steps to be taken by the respondents in that regard. The issuing of the tender bid for the appointment of a contractor, without prior consultation, was found not to be in contravention of the court order.

The application for setting aside of the tender was dismissed.

Tradevest 041 (Pty) Ltd t/a Tradevest Logistics v Banzi Trade 40 CC [2021] 4 All SA 551 (WCC)

Corporate and Commercial – Alleged breach of contract – Claim for contractual damages – A contracting party which claims damages arising from breach of contract must prove that it actually suffered damage or loss – Whether prospective liability constitutes part of an injured party's patrimony – Claim not sustainable where claimant failed to establish requisite degree of inevitability of its future, contingent obligation to third party, and did not adduce sufficient evidence to establish damages it claimed to have suffered.

Corporate and Commercial – Carriage of goods – Claim for contractual damages for alleged loss of goods and failure to deliver – Failure to adduce sufficient evidence to discharge burden of proof to show that carrier breached agreement by failing to deliver load resulting in absolution from instance.

A subcontracting relationship between the appellant ("Tradevest") and the respondent ("Banzi") led to Banzi suing Tradevest for contractual damages, alleging that Tradevest had collected a consignment of sugar and failed to deliver it to a third party ("Twizza"), thus breaching the material terms of their agreement. The sugar had been housed in storage at a warehouse in the Port of Durban operated by Maydon Wharf Port Terminals ("MFT"), which had contracted Banzi to deliver the load to Twizza. Banzi in turn sub-contracted delivery of the load to Tradevest. The written component of the sub-contracting agreement was contained in an industry standard document known as a "load confirmation", or "load con" which contained a clause (clause 4) stating that the transporter would be held liable for any loss or damage to the cargo. Tradevest alleged that it had complied with its contractual obligations *vis-à-vis* Banzi and was not in breach of their agreement, denying that the load had not been delivered.

Held – Clause 4 of the terms and conditions stipulated the Banzi load con was incorporated in the contract between it and Tradevest. That was also in accordance with the common law principles governing the law of carriage of goods by a public carrier which are to the effect that the carrier, as the depositary, is liable for the loss or damage to goods entrusted into its care for the purposes of delivery to the nominated consignee. However, Banzi did not adduce sufficient evidence to discharge the burden of proof it bore to show that Tradevest breached the terms of the Banzi load con by failing to deliver the load of sugar to Twizza. The documentation it relied upon was largely hearsay and ultimately equivocal. The court *a quo* therefore erred in finding for Banzi and its decision was set aside.

The court then turned to the question of *quantum*, in case it were found to be wrong in its finding on the merits of Banzi's contractual claim. Discussing the approach to the assessment of contractual damages, the court stated that a contracting party which claims damages arising from breach of contract must prove that it actually suffered damage or loss. In order to succeed in that regard, the injured party would ordinarily be permitted to prove its damage by comparing the extent of its patrimony as a consequence of the breach with the position it would otherwise have been in had the breach not occurred. If there is a difference between the two positions, that would constitute the injured party's damage, thus entitling it to recover damages from the breaching party.

As Banzi's claim related to damage it anticipated it would suffer when MFT sought to hold it liable under their contract, court considered whether prospective liability constitutes part of an injured party's patrimony. It was concluded that Banzi had failed to establish the requisite degree of inevitability of its future, contingent obligation to MFT, and did not adduce sufficient evidence to sustain the damages it claimed to have suffered.

The appeal was thus upheld.

Trevo Capital Ltd and others v Steinhoff International Holdings (Pty) Ltd and others [2021] 4 All SA 573 (WCC)

Civil Procedure – Standing of investors to bring application for declaratory order regarding alleged breach of section 45(2) of the Companies Act 71 of 2008 – Proper plaintiff rule – Whether breach of section 45 is a wrong done to the company meaning that only the company or a shareholder deploying a derivative action is entitled to sue – Applicants having interest that was not too remote clothed them with standing to bring application.

Corporate and Commercial – Company law – Prohibition against provision of financial assistance to related company in terms of section 45(2) of the Companies Act 71 of 2008 – Applicability to foreign companies – Legislature intended that foreign companies would fall within the class of persons to whom financial assistance can only be extended by local companies upon compliance with the provisions of section 45(3) of Companies Act.

Serious irregularities in financial statements of Steinhoff International ("SIHPL") led to a massive decline in the value of its shares. Numerous claims were brought against Steinhoff companies by claimants, such as the applicants, whose shares had lost value. Most of the claims originated in a guarantee by SIHPL of a convertible bond issued to financial creditors and a subsequent contingent payment undertaking ("CPU") replacing the guarantee.

The applicants sought a declarator that the guarantee and the CPU constituted the provision of financial assistance by SIHPL to a related company as contemplated in section 45(2) of the Companies Act 71 of 2008.

The first and second respondents challenged the applicants' standing on the ground that they were not "proper plaintiffs" since a breach of section 45 is a wrong done to the company and it was only SIHPL or a shareholder deploying a derivative action that was entitled to sue. It was also contended that neither of the applicants had valid claims against SIHPL in law.

Held – The challenge to the applicants' standing could not be upheld. The Court discussed the applicability of the proper plaintiff rule against recovery of reflective loss, and confirmed that the applicants had an interest which was not too remote.

The respondents contended that the applicants' reliance on section 45 was misplaced because the transactions sought to be impugned related to the provision of financial assistance to a foreign company within the meaning of the Companies Act whereas section 45 does not apply to a foreign company. The court examined the Act's definitions of "company" and "corporation"; and discussed the approach to

statutory interpretation and the presumption against superfluity. It concluded that the Legislature intended that foreign companies would fall within the class of persons to whom financial assistance could only be extended by local companies upon compliance by the latter with the provisions of section 45(3). The question of whether SIHPL satisfied the requirements of section 45 before issuing the guarantee was however, answered against the applicants.

On a conspectus of all the evidence, the Court found that in concluding the CPU, SIHPL gave financial assistance to a related company in breach of the provisions of section 45 of the Act. In the circumstances, by virtue of section 45(6), the resolution of SIHPL's board authorising the conclusion of SIHPL CPU was void as was the CPU itself and the applicants were granted a declaration to that effect. The interdictory relief sought was refused.

END-FOR NOW