LEGAL NOTES VOL 12/2021

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BW BRIGHTWATER WAY PROPS (PTY) LTD v EASTERN CAPE DEVELOPMENT CORPORATION 2021 (6) SA 321 (SCA)

Review — Grounds — Legality — Self-review — Constitutionally invalid agreement — Power of court to grant just and equitable remedy which might ameliorate potential prejudice to affected parties — Whether court under s 172(1)*(b)* of Constitution entitled to grant order whose effect is to allow lessee to remain in occupation of property under lease agreement declared unlawful by court, with view to preserving such innocent party's accrued rights — Constitution, s 172(1)*(b)*.

BW Brightwater Way Props (Pty) Ltd (Brightwater) and the state entity Eastern Cape Development Corporation (ECDC) were parties to a lease agreement, the former as lessee and the latter as lessor. It was the view of Brightwater that the ECDC had failed in its obligation to provide it with vacant possession, as the subject land in question was being occupied unlawfully by certain third parties. Brightwater accordingly approached the High Court (East London), seeking an order for the specific performance of the lease, demanding that the ECDC comply with its contractual duties by evicting the unlawful occupiers. ECDC responded by instituting a counter-application in the form of a legality review, seeking the setting-aside of the lease as unlawful. The High Court dismissed the main application and partly granted the counter-application. It found that the lease agreement lacked compliance with constitutionally imposed procurement procedures. *The court held that it was obliged to declare the lease to be constitutionally invalid*. It, however, *declined to set aside the lease agreement*. By virtue of s 172(1)*(b)*, which empowered a court when deciding a constitutional matter *to make any order that was just and equitable*, the court held, it had a discretion not to set the agreement aside in an attempt

[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!**

to *preserve the rights* which had accrued to the applicant in terms of the lease. Such a course was called for here, the court believed, Brightwater having been misled into believing that the ECDC had the power to enter into agreement with it. The final order, in addition to declaring the lease agreement to be invalid, stated in para *(c)* that the order of constitutional invalidity '[did] not have the effect of divesting the applicant of any rights to which it [was] entitled under the lease contract, but for the declaration of invalidity'.

The present cross-appeal by the ECDC to the Supreme Court of Appeal was directed mainly at the above para *(c)* of the High Court order embodying a remedy in terms of s 172(1)*(b)* of the Constitution. The ECDC submitted that the High Court could not rightly grant the order it did. Such an order, it argued, was unsound and contradictory. It could not, on the one hand, find itself unable to grant Brightwater specific performance by virtue of the invalidity of the lease agreement; yet, on the other hand, find Brightwater entitled to equitable relief to the effect that it was not divested of any rights under the lease agreement, whether accrued prior to the declaration of invalidity or thereafter. (See [19].) (The ECDC noted that the logical consequence of the High Court order was that it was entitled to remain in occupation of the premises in question for the full duration of the lease (see [19]).)

In determining the validity of the High Court's order, the SCA considered similar case law in which municipalities had sought to void agreements they had entered into, and in which the courts had had recourse to s 172(1)*(b)* of the Constitution to decline to set aside such agreements, even though invalid, with a view to preserving an innocent contractant's rights. The SCA noted that in those instances the rights which were preserved were the rights to be paid for work that *had already been done.* (See [22] – [27].) The SCA —

Held, that para *(c)* of the High Court's order could not exist side by side with that part of the order dismissing Brightwater's application to enforce the terms of the lease agreement. The High Court had misdirected itself by making the order which, in effect, nullified the declaration of invalidity by effectively upholding the contract in all respects, including future rights. The right to occupy the premises post a declaration of invalidity constituted future rights in favour of Brightwater, which was something that went beyond what may be preserved under s 172(1)*(b)* of the Constitution.

Held, further, that a contract or transaction which had no force and effect was necessarily void ab initio, and could under no circumstances confer any right of action. In the same breath, our jurisprudence had long recognised that courts generally have no power to enforce a term of a contract which it declared unlawful or void. What the law also recognised in both instances was performance or part performance in terms of a claim for unjust enrichment. The court had a discretion to permit a party to recover what was performed where a contract had been declared invalid. (See [29].)

Held, that, in the circumstances, the cross-appeal should succeed (see [30]).

CB AND ANOTHER v HB 2021 (6) SA 332 (SCA)

Marriage — Divorce — Settlement agreement — Interpretation — Meaning of 'remarriage'.

Respondent and first appellant were married but respondent initiated divorce proceedings which culminated in a court issuing a decree of divorce incorporating a settlement agreement, one provision of which provided for first appellant to 'pay . . .

R10 000 . . . maintenance to [respondent] per month until her death or remarriage' (see [2]).
Thereafter respondent began to cohabit with a third party. They later participated in a ceremony in a church in which a minister sanctioned their cohabitation so that they would not 'live in sin' (see [3]). On learning of the ceremony, first appellant concluded that it constituted a 'remarriage' as intended in the settlement agreement and ceased to pay respondent maintenance (see [1] and [4]).
Respondent then approached a High Court for a finding that first appellant was in contempt of the divorce order. First appellant counterclaimed for a declarator that the rites performed by the minister had established a common-law or Christian marriage, thereby terminating his maintenance obligations (see [5] – [6]).
The High Court found for respondent in respect of her claims and dismissed first appellant's counterclaim (see [7] – [9]). The first appellant appealed to the Supreme Court of Appeal.
The SCA (per Mocumie JA) set aside the High Court's orders as to contempt and costs but dismissed first appellant's appeal against the High Court's finding that the respondent had not 'remarried' (see [23]). In concluding that the ceremony had not established a marriage, the SCA pointed out that, properly interpreted, the meaning of 'remarriage' in the settlement was a marriage recognised by law, and that the ceremony performed had not created a union of this form (see [14] and [17]). This, as it had with full knowledge of the parties and audience at the time not complied with the formal requirements of the Marriage Act 25 of 1961 (see [16] – [17]).
In Makgoka JA's view respondent and first appellant had intended the word 'remarriage' to apply to a relationship which in substance was akin to a marriage, and, viewed in its full detail, respondent and the third party's relationship fell within this conceptualisation of 'remarriage' (see [30] and [34]).

HOLDEN v ASSMANG LTD 2021 (6) SA 345 (SCA)

Delict — Specific forms — Malicious prosecution — Action for — May, in addition to criminal prosecution, arise from disciplinary proceedings before statutory tribunal.

Medicine — Medical practitioner — Disciplinary proceedings — Health Professions Council of South Africa — Malicious prosecution claim by practitioner — Prescription — Proceedings before statutory tribunals like HPCSA akin to criminal ones — Result favourable to practitioner required for completion of cause of action — Prescription Act 68 of 1969, s 12.

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Malicious prosecution claim — Proceedings before statutory tribunal — Where nature of proceedings similar to criminal prosecution, result favourable to plaintiff required for completion of cause of action — Prescription Act 68 of 1969, s 12.

On 30 June 2008 the respondent company reported the appellant, a HPCSA-registered counselling psychologist, to the Health Professions Council of South Africa (HPCSA), alleging that she had committed a gross breach of professional ethics by making a diagnosis she was not qualified to make. On 13 November 2009 the HPCSA informed her that it was dropping the charges. On 6 August 2012 she instituted an action for damages for malicious prosecution against the respondent.

The respondent raised a special plea of prescription which was dismissed by the Pietermaritzburg High Court and by a full court on appeal.
To succeed with a claim for malicious prosecution a plaintiff must allege and prove that the prosecution had failed. * The appellant's case was that her cause of action therefore arose (and prescription commenced) only when she was told on 13 November 2009 that the complaint against her had been dismissed, with the result that her suit of 6 August 2012 fell within the three-year prescription period.
The respondent argued, however, that the strict principles of malicious prosecution and the requirement that the prosecution must have failed did not apply to disciplinary proceedings such as the ones conducted by the HPCSA. The respondent relied, inter alia, on the English decision in *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL), where the House of Lords held that the tort of malicious prosecution did not extend to civil disciplinary proceedings such as those instituted by a local authority against one of its councillors.
In an appeal to the Supreme Court of Appeal —
Held
The institution of a civil claim based on malicious prosecution before such prosecution was finalised could amount to prejudging the result of the pending proceedings. There was no discernible distinction between pending criminal proceedings and proceedings before statutorily created professional tribunals such as the HPCSA. The cause of action applied to both civil and criminal proceedings, not only the latter.
The decisions of an important tribunal like the HPCSA could have far-reaching consequences for someone like the appellant, who could lose her licence to practise. These tribunals employed procedures that bore all the hallmarks of a criminal prosecution and imposed sanctions that were punitive in nature. These features distinguished such proceedings from disciplinary proceedings before a voluntary association or even a city council such as in *Gregory*'s case. (See [10] – [11].)
Hence the appellant's cause of action arose only when she was able to establish that the prosecution had failed, namely when the HPCSA informed her that it had dismissed the respondent's complaint against her. It followed that her claim had not prescribed as at the date of summons. (See [18].)

INGOSSTRAKH v GLOBAL AVIATION INVESTMENTS (PTY) LTD AND OTHERS 2021 (6) SA 352 (SCA)

Court — High Court — Jurisdiction — Foreign peregrine plaintiff suing foreign peregrine defendant — Ground on which court can assume jurisdiction — If foreign peregrinus defendant submitting to jurisdiction of court, and ground of jurisdiction established that linked court to subject-matter of litigation, that would suffice for court to assume jurisdiction.

Court — High Court — Jurisdiction — Submission to — Foreign peregrine plaintiff suing foreign peregrine defendant — Factors to be considered in determining whether foreign defendant submitted to jurisdiction of court.

The present matter addressed the circumstances in which a South African court had jurisdiction to adjudicate a claim brought by a foreign peregrine plaintiff against a foreign peregrine defendant. Ingosstrakh (the appellant) and Global (constituting the first to third respondents — Global Aviation Investments (Pty) Ltd, Global Aviation

Investments Group (BVI) Ltd and Global Aviation Operations (Pty) Ltd) were both foreign peregrines with respect to South Africa. Ingosstrakh had undertaken to indemnify Global against all risks of loss or damage occasioned to a certain specified aircraft. It came to be that Global's aircraft did become damaged, and so Global demanded payment from Ingosstrakh of the full insured value, believing itself to be entitled thereto in terms of the policy as the damage rendered the aircraft a total loss. The latter refused to pay, disagreeing that the aircraft was a total loss. Consequently, Global decided to sue for an order declaring Ingosstrakh to be liable to indemnify it in terms of the policy, and for payment of US$2 500 000. It initially sought such relief by way of application proceedings, but these were dismissed (on 25 May 2015), given an existence of a dispute of fact. Global's next step was to seek an order in the court a quo, the Johannesburg Division of the High Court, authorising service of summons on Ingosstrakh *care of Steve Slatter Insurance Brokers in Durban, South Africa*, in doing so relying on a term in the policy requiring notices on Ingosstrakh to be served at such entity. Global was granted such leave and so issued summons on Ingosstrakh accordingly. Ingosstrakh filed a notice of intention to defend, but failed to follow that up with its plea, prompting Global to serve on it a notice of bar. The day before it was required to serve its plea in terms of such notice, Ingosstrakh instead served (in November 2015) an application in which it sought an order *(a)* setting aside the order authorising summons to be served on Slatter, as well as the subsequent service of the summons on Slatter; and *(b)* uplifting the notice of bar. *This application was dismissed, on 2 September 2016.* Subsequently, Global applied for default judgment against Ingosstrakh in the court a quo. Ingosstrakh opposed, and launched its own counter-application against Global, in which it sought that the judgment of 2 September 2016 be 'considered in relation to whether there was an obvious omission in failing to deal with its prayer for . . . uplifting the notice of bar'; in the alternative, that the court supplement the judgment to deal with the oversight. Ingosstrakh sought in the further alternative an order uplifting the notice of bar and condoning the late delivery of its plea. The court dismissed the application for default judgment, on the ground that it was unfair for Global to resort to such procedure in 'the midst of protracted litigation between the parties, and long after the entry of appearance to defend', and also in the face of disputed factual issues. The court also dismissed the counter-application on the basis that it lacked appellate/review jurisdiction to interfere therewith. Both Global and Ingossstrakh were granted leave to appeal to the Supreme Court of Appeal.

The SCA noted that what Ingosstrakh effectively sought in its counter-application was the upliftment of the notice of bar. This was the same that was sought in its application of November 2015, notwithstanding the addition in the counter-application of a prayer for condonation of the late delivery of Ingosstrakh's plea. (See [19].) The question of the entitlement of Ingosstrakh to the upliftment of the bar was definitively determined in the judgment of 2 September 2016. The court a quo was undoubtedly correct in dismissing the relief sought by Ingosstrakh for it to reconsider or supplement the judgment of 2 September 2016. The application was ill-advised, and the relief sought was incompetent, *the issue it sought to address being res judicata*. In all circumstances the order made by the court on 2 September 2016 stood, and Ingosstrakh was barred from filing its plea. (See [20].) That, the SCA held, should ordinarily be the end of the matter, and would entitle Global to have their application for default judgment adjudicated upon. (Note the SCA's criticism of what it described as the court a quo's contradictory finding that Global's default judgment application should be dismissed, despite its dismissal of Ingosstrakh's

counter-claim. (See [12] – [14].)) Nevertheless, to put the matter beyond doubt, the SCA proceeded to determine whether Ingosstrakh would have in any case been entitled to condonation for its failure to file a plea. (See [20].)
The SCA found that Ingosstrakh had failed to show good cause for the granting of condonation (see [53]). The SCA reached this conclusion based on the following:
One, Ingosstrakh failed to provide a reasonable and acceptable explanation for the fault (see [22] – [25]).
Two, it failed to demonstrate that it was acting bona fide (see [26]).
Three, most importantly, Ingosstrakh had failed to disclose a bona fide defence to Global's claim (see [52] – [53]):

- Ingosstrakh submitted in its draft plea that the court a quo did not have jurisdiction to hear the action instituted by Global: Global Aviation Operations and Ingosstrakh were foreign peregrines, of the Virgin British Islands and Russia, respectively. Clause 8 of the policy provided that it was governed by the laws of the insured's (Global Aviation Operations') country of domicile (the Virgin British Islands) and each party agreed to submit to the exclusive jurisdiction of the courts of the insured's country of domicile in any dispute arising from the policy.

The SCA held that the court did indeed have jurisdiction (see [36]). The law, in the SCA's view, was that if a foreign peregrinus defendant sued by a foreign peregrinus plaintiff submitted to the jurisdiction of the court, and a ground of jurisdiction was established that linked the court to the subject-matter of the litigation, that would suffice for the court to assume jurisdiction (see [30]). Attachment in these circumstances was unnecessary (see [30]). In the present circumstances, there was a ground of jurisdiction that linked the subject-matter of the litigation to the court a quo — the insurance policy was concluded in Johannesburg (see [31]). And, further, the cumulative effect of the proved facts established submission on a balance of probabilities (see [33] – [34]): inter alia, Ingosstrakh had selected a domicilium for service of process in this country (see [33]); further it had been involved in at least three substantive applications in the court a quo in respect of the policy at issue (see [34]).

- Ingosstrakh sought to argue Global was not entitled to declare a total loss as the threshold demanded by the policy had not been met. That is, the cost of repair of the damage, together with the cost of salvage and/or transport from the place of accident to the place of repair and return to the service, *was not* 75% or more of the agreed value. (See [43] – [44].) Based on the evidence, the SCA, once again, disagreed (see [49] – [52]).

The SCA concluded that Ingosstrakh was under bar from delivering its plea. It followed that the court a quo erred in dismissing Global's application for default judgment. It should have been granted, and Ingosstrakh's counter-application dismissed. The SCA replaced the High Court order with one so holding, dismissed the appeal, and upheld the cross-appeal (see [54]).

MINISTER OF HOME AFFAIRS AND OTHERS v JOSE AND ANOTHER 2021 (6) SA 369 (SCA)

Immigration — Citizenship — By naturalisation — Where requirements of s 4(3) met, officials obliged to grant citizenship — South African Citizenship Act 88 of 1995, s 4(3).

First and second respondents, who were brothers, had been born in South Africa of Angolan parents, had lived here from birth to majority, and had had their births registered. The requirements for citizenship having been met (see s 4(3) of the South African Citizenship Act 88 of 1995 in [3]), the brothers applied therefor to the Department of Home Affairs. Their applications, however, came to naught (see [10]). They thereupon approached the High Court and obtained an order that the Department grant citizenship (see [10]). The High Court, however, granted leave to appeal on the issue of whether it had been competent for it to order the Department to grant, as opposed to consider, the applications of the brothers (see [12]).
Held, by the Supreme Court of Appeal following Constitutional Court authority, that the decision on an application for citizenship involved no discretion at all on the part of the official taking it: once the requirements of s 4(3) were met the official was obliged to grant citizenship (see [22]). Appeal dismissed (see [35]).

SAMANCOR HOLDINGS (PTY) LTD AND OTHERS v SAMANCOR CHROME HOLDINGS (PTY) LTD AND ANOTHER 2021 (6) SA 380 (SCA)

Arbitration — Reference of dispute to arbitration — Extension of time for institution of arbitration proceedings — Proper approach and relevant considerations — Arbitration Act 42 of 1965, s 8.

Arbitration — Reference of dispute to arbitration — Extension of time for institution of arbitration proceedings — Requirement that 'undue hardship' will be caused if extension not granted — Discussion of — Arbitration Act 42 of 1965, s 8.

The present matter concerned an application under s 8 of the Arbitration Act 42 of 1965 for an extension of the time limit, set out in a time-bar clause in an arbitration agreement, by which a claimant had to initiate arbitration proceedings. That section allowed a court a discretion to extend such period, *if it was of the opinion that in the circumstances of the case undue hardship would otherwise be caused*. The relevant background is as follows. The second respondent, Samancor Chrome Ltd (Samancor Chrome), conducted manganese and chrome mining businesses and held certain steel investments, and was wholly owned by the first appellant, Samancor Holdings (Pty) Ltd (Samancor Holdings). An agreement was entered into in February 2005 between the first respondent, Samancor Chrome Holdings (Pty) Ltd (SCH) — as buyer — and Samancor Holdings — as seller — in terms of which SCH would *acquire the chrome business* by buying the shares in Samancor Chrome. The defined 'Effective date' was 1 June 2005. At this point, however, all conditions precedent to the sale had not yet been fulfilled and the required restructuring — with the aim of leaving Samancor Chrome *as a company owning only the chrome business* — not yet obtained. That only occurred on 3 April 2006. Between the effective and closing dates, Samancor Chrome continued in law as the owner of the 'chrome business' and the non-chrome businesses (the so-called Excluded Assets), with Samancor Holdings (the seller) as its shareholder; SCH, however, was granted de facto control of the chrome business. The agreement provided that Samancor Holdings indemnify SCH, with effect from the effective date, against all liability, damage or expense which SCH, as buyer, might suffer as a result of, inter alia, any proven liability of Chrome Holdings for *Taxation* in respect of the Excluded Assets (clause 24.1.5). Importantly for present purposes, it was also subject to a time-bar clause, clause 23.6, whose effect, when having regard to clause 43 providing for arbitration, was that a claim for an indemnity concerning income tax made in terms of

clause 24.1.5 became barred and unenforceable unless arbitration proceedings were issued and served prior to the sixth anniversary of the Effective Date, ie 1 June 2011.
What gave rise to the present matter was an additional assessment raised in September 2012 by Sars in respect of Samancor Chrome's tax year ended 30 June 2005, during which tax year Samancor Chrome's tax affairs were still being administered by Samancor Holdings, that increased taxable income, and levied on such amount additional tax, as well as penalty tax and interest. Samancor Chrome ultimately paid to Sars an amount of R27 420 297, which sum SCH subsequently claimed from Samancor Holdings, relating as it did to Excluded Assets. Samancor Holdings denied liability. So, in August 2013 SCH initiated arbitration proceedings against Samancor Holdings for the payment of this amount, relying, inter alia, on the indemnification clause 24.5.1. Samancor Holdings in response pleaded that the claim was time-barred, the cutoff date being 1 June 2011. SCH replicated by contending that the time-bar clause was unenforceable, being contrary to public policy; in the alternative, and if the arbitrator were to find the time bar enforceable, they prayed that the arbitration be stayed to allow them to seek an extension of time from the High Court in terms of s 8 of the Arbitration Act. Ultimately, the arbitrator found the time-bar clause to be contrary to public policy and ruled in favour of SCH. Samancor Holdings raised an appeal, which was heard by an arbitration appeal panel. The panel found that the time-bar clause was not unlawful, but that SCH should be afforded an opportunity to apply to the High Court for a s 8 extension. The panel thus stayed the appeal proceedings pending the outcome of such an application. SCH launched the s 8 application in the High Court, which granted SCH an extension 'until after the applicants' claim in the arbitration proceedings was initiated on or about 20 August 2013'. Samancor Holdings was granted leave to appeal to the Supreme Court of Appeal. Whether the High Court had properly exercised its discretion in granting an extension under s 8 of the Arbitration Act formed the focus of the appeal. The SCA,
Held, that the hardship which s 8 contemplated was hardship to the claimant because its claim was time-barred. Every claimant whose claim was time-barred could be said to suffer hardship through the loss of its claim, but the section required something more. The court had to be of the opinion that the claimant's hardship would be 'undue'. The ordinary meaning of that word conveyed a hardship which was unwarranted or inappropriate because it was excessive or disproportionate. Whether the hardship was 'undue' in this sense had to be determined with reference to the circumstances of the particular case. (See [32].)
Held, further, that there was nothing in s 8 to indicate that the power of extension should only be exercised rarely or in exceptional circumstances. There was no reason to add a gloss to the plain language of the section. A restrictive interpretation would be antithetical to s 34 of the Constitution, which guaranteed access to courts or other independent and impartial tribunals in order to have justiciable disputes adjudicated. (See [33].)
Held, further, that any circumstance rationally bearing on the 'undue' question may be taken into account by the court. Those that occurred readily to mind were: *(a)* the terms of the time-bar clause and the broader contractual setting; *(b)* the extent of the claimant's delay; *(c)* the explanation for the claimant's failure to bring the claim timeously; *(d)* the extent of the claimant's fault, if any, in relation to the delay; *(e)* whether the defendant caused or contributed to the non-compliance and, if so, the extent of the defendant's fault in that regard; *(f)* the nature and importance of

the claim; and *(g)* the extent of the prejudice, if any, suffered by the defendant in consequence of the delay. (See [35].)
Held, that the two circumstances where English courts granted an extension were also relevant factors in the exercise of a SA court's discretion in terms of s 8, namely if the circumstances were such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time; or if the conduct of one party made it unjust to hold the other party to the terms of the provision in question. (See [31].)
Held, further, that delay in launching proceedings was a relevant factor [in determining whether an extension should be granted], but it was not a threshold requirement. It was part of the global assessment of all relevant circumstances influencing the exercise of the court's discretion. (See [38] and [44].)
Held, in considering the High Court's conclusion *that undue hardship would be suffered* by SCH if an extension of time were not granted:

- That the High Court was correct in concluding that Samancor Holdings had suffered no relevant prejudice as a consequence of SCH's failure to launch its s 8 application as soon as Samancor Holdings had placed reliance on the time bar and instead waiting for the arbitration to run its course. (See [46] and [54].)
- That the High Court had not misdirected itself in finding that *Samancor Holdings* was culpable in submitting the 2005 tax return excessively late and understating its taxable income. (See [61].)
- That the High Court was correct in rejecting the suggestion that, by agreeing to the type of time bar in question, where time ran from *a fixed date*, here the effective date, unrelated to the coming into existence of the claim, SCH must have appreciated the risk that a tax claim might only arise *after expiry of the bar* and could not accordingly claim protection of s 8 of the Arbitration Act. All time-bar clauses, where arbitration was concerned, were subject to s 8 and an assessment of undue hardship. (See [65] and [68].)

Held, accordingly, that the High Court was entitled to reach the conclusion it did.
Appeal dismissed.

STANDARD BANK OF SOUTH AFRICA LTD AND OTHERS v MPONGO AND OTHERS 2021 (6) SA 403 (SCA)

Court — High Court — Jurisdiction — Main seat and local seat — Whether main seat of division could refuse to hear matter falling within jurisdiction of local seat — Whether High Court could decline to entertain matter falling within jurisdiction of magistrates' court — Whether there was duty to consider litigant's costs and access to justice when choosing court in which to proceed.

In matters before the main seats of the Gauteng and Eastern Cape Divisions, certain banks (the appellants) had brought applications against respondents (the respondents) for repayment of loans and leave to specially execute against immovable property. (The underlying transactions concerned had been home loans and purchases of motor vehicles on credit, and in all instances the respondents had defaulted on their payment obligations.) (See [2].)
In each division, the Judge President had placed several of those cases before a full bench and posed the courts certain questions (see [3] – [4]).
These resulted, in the case of the Gauteng bench, in an order that when a High Court and a magistrates' court had concurrent jurisdiction in a matter, the High Court

could refuse to hear the matter; and that a local seat could mero motu transfer a matter to the main seat, and vice versa, where it was in the interests of justice to do so (see [8]).
As for the Eastern Cape bench, it ordered that any National Credit Act matter falling within the jurisdiction of the magistrates' court had to be brought in that court (versus the High Court), save where exceptional circumstances were present (see [10]).
These orders caused the banks to appeal to the Supreme Court of Appeal, which considered that, in essence, two issues were raised: firstly, could a High Court refuse to hear a matter over which it shared jurisdiction with a magistrates' court; and secondly, could a main seat refuse to hear a matter falling within the jurisdiction of its local seat (see [1]).
It *held* that a High Court was obliged to hear a matter brought before it, even where the matter fell within the jurisdiction of a magistrates' court; and likewise a main seat had a duty to hear a matter brought before it, even where the matter fell within the jurisdiction of a local seat (see [88]).
It *held* further that a financial institution was not obliged to consider a litigant's costs and access to justice when it chose the court in which to proceed (see [88]). In coming to these conclusions, the court considered the following.

- Longstanding authority was to the effect that a High Court could not refuse to hear a matter that was brought before it and which was within its jurisdiction, and this translated more specifically into the rule that a High Court could not decline to hear a matter on the basis that it fell also within the jurisdiction of a magistrates' court (see [27], [29] and [39]). Likewise a main seat, which enjoys jurisdiction over the whole of its province, could not refuse to hear a matter within the jurisdiction of its local seat (see [33]).
- The Gauteng bench's finding that a High Court could refuse to hear a matter on account of its workload ran contrary to authority (see [42]).
- The ruling that it was an abuse of process to bring a matter within a magistrates' court's jurisdiction in a High Court was unsupportable: case law was against it and the reasons the banks supplied for the practice were entirely legitimate. (These included greater efficiency and the associated saving of costs, and the benefits of having judges rather than magistrates making decisions on special execution.) Moreover, where the law gave a litigant a choice of forum, exercise of that choice could hardly be characterised as an abuse of process (see [46] and [48]).
- Invoking s 34 of the Constitution to justify finding that only one of two courts with jurisdiction in a matter could hear that matter was misconceived: properly viewed the aims of s 34 were satisfied regardless of which court heard the matter (see [50] – [51]).
- The conclusion that the inherent power of the High Court justified compelling a bank to proceed in a court (allegedly) closer to the defendant, ran once again against authority; and indeed it was unsustainable to suppose that the power could be employed to override a litigant's existing right to choose its forum in the event of concurrency of jurisdiction. The only way to impugn such a right would be on the basis of its unconstitutionality (see [57]).
- Mechanisms were already in place to mitigate any prejudicial consequences of a choice of forum. These included statutory provisions and procedural rules allowing for a transfer of a matter from one court to another; a court's power to refuse to hear a matter where a plaintiff was abusing its process; and its power to make an appropriate order as to costs (see [58] – [59]).

- More generally, the Gauteng court's findings were eroded by an absence of evidence of prejudice on which it could found them (see [60]).
- The determination of the Eastern Cape bench that a High Court's jurisdiction was ousted in any National Credit Act matter was erroneous: it was unsupported by the National Credit Act or Magistrates' Courts Act and ran counter to established authority (see [77]).

The appeals upheld, the judgments of the Gauteng and Eastern Cape divisions set aside, and their orders substituted as described above, with declarators that a High Court was obliged to hear a matter brought before it, despite that matter falling within the jurisdiction of a magistrates' court, and that a main seat could not refuse to hear a matter even where that matter fell within the jurisdiction of the local seat. Ordered further that a financial institution was not obliged to consider a litigant's costs and access to justice when it chose the court in which to proceed (see [88]).

WENTZEL v DISCOVERY LIFE LTD AND OTHERS 2021 (6) SA 437 (SCA)

Insolvent — Property — Life insurance benefit — Husband and wife marrying in community of property and wife taking out life insurance with husband as beneficiary — Husband incurring debts and joint estate sequestrated — Wife later dying — Whether husband or trustees were entitled to insurance benefit.

Insurance — Life insurance — Policy — Proceeds of policy — Nominated beneficiary being an unrehabilitated insolvent — Husband and wife marrying in community of property and wife taking out life insurance with husband as beneficiary — Husband incurring debts and joint estate sequestrated — Wife later dying — Whether husband or trustees were entitled to insurance benefit.

Mr and Mrs Wentzel were married in community of property and Mrs Wentzel later took out life insurance with Discovery Life Ltd, with Mr Wentzel nominated as beneficiary in the event of her death. Thereafter the joint estate was sequestrated on debts apparently incurred by Mr Wentzel. Some years later, during the extancy of the insolvency, Mrs Wentzel died, and both Mr Wentzel and the trustees of the insolvent joint estate claimed the insurance proceeds.

The matter went to the High Court, which found for the trustees. Mr Wentzel appealed to the Supreme Court of Appeal (SCA).

Mr Wentzel's arguments were that the joint estate (rather than Mr Wentzel and Mrs Wentzel) had been the debtor (see [13]); that the Master's confirmation of the liquidation and distribution account had the effect that there were no longer debts payable to creditors (see [14]); that Mrs Wentzel's death ex lege dissolved the marriage and joint estate (see [14]); and that this allowed him again to hold property personally (see [7] and [14]).

The SCA rejected the argument, finding that the trustees were entitled to the insurance sum (see [19]). It considered that the joint estate was not the debtor but rather Mr Wentzel and Mrs Wentzel, with the joint estate merely the source to satisfy creditors' claims (see [13], [18]); that Mr Wentzel had indeed incurred the debts precipitating the sequestration and that those debts remained extant (a deficit remained in the joint estate's account) (see [14]); that Mr Wentzel remained insolvent; and therefore that all property accrued by him (encompassing the insurance proceeds) fell in his estate for use in satisfying the creditors' claims (see [15] – [17] and [19] – [20]).

The SCA dismissed the appeal and upheld the cross-appeal. It set aside the order of the High Court and replaced it with an order declaring that the trustees of the insolvent joint estate were entitled to the insurance proceeds and that the insurer should pay them to the trustees (see [30]).

BABELEGI WORKWEAR AND INDUSTRIAL SUPPLIES CC v COMPETITION COMMISSION 2021 (6) SA 446 (CAC)

Competition — Prohibited practice — Abuse of dominance — Excessive pricing — During crisis — Appellant, 5% player in national facemask market, in early stages of Covid-19 pandemic raising price of masks eightfold in successive steps — Despite its small size, appellant gaining market power and dominance as supplier of essential product during emergency — Eightfold price rise prima facie excessive — No evidence from appellant that increase based on conduct of competitors or anticipated cost increases — Prices unreasonable — Detriment to consumers evident — However, given small scale of sales and harm already suffered by appellant as result of litigation, court declining to impose penalty — Competition Act 89 of 1998, s 7 and s 8(1)*(a)*.

Competition — Prohibited practice — Abuse of dominance — Excessive pricing — 'Lucky monopolist' in time of crisis — Dominance (market power) may be inferred regardless of relative size of business — Competition Act 89 of 1998, s 8(1)*(a)*.

In 2019 the appellant, a seller of industrial workwear, was a small player in the SA facemask market, with a market share of under 5%. It did not manufacture the masks but purchased them in bulk from suppliers. Their sale made up just 3% of its 2019 revenue of just under R50 million.

Then came the Covid-19 pandemic. From 1 January to 5 March 2020 (the complaint period) * the appellant incrementally increased the price of its masks from R41 to R440 per box of 20. Selling 76 boxes of stock in hand, in March 2020 it made 75 times the profit it made on masks in an average pre-pandemic month.

After objections by the appellant's customers the respondent on 9 April 2020 initiated a complaint against it under s 8(1)*(a)* of the Competition Act 89 of 1998. It applied for an order declaring that the appellant was breaching s 8(1)*(a)*, interdicting it from continuing doing so and directing it to pay an administrative penalty equal to 10% of its annual turnover. The notice confined the respondent's case to s 8(1)*(a)*, ie excessive pricing by a dominant firm. The present dispute was the first that dealt with a contravention of the provision after its amendment by the Competition Amendment Act 18 of 2018 (effective July 2019). The Competition Tribunal found the appellant guilty and ordered it to pay a penalty of R76 040.

Under s 8, as amended, a 'dominant firm' may not 'charge an excessive price to the detriment of consumers or customers' (s 8(1)*(a)*). If there is 'a prima facie case of abuse of dominance because a dominant firm charged an excessive price, the dominant firm must show that the price was reasonable' (s 8(2)). An 'excessive price' is 'unreasonably' higher than a 'competitive price', taking into consideration, if need be, 'relevant factors', several of which are listed (s 8(3)), with one of them being 'the length of time prices have been charged at that level'. † A firm with a small share (less than 35%) of a market is considered 'dominant in a market' if it has 'market power' (s 7(c)), defined in s 1 as 'the power to control prices or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers'.

The Tribunal had found that the definition of a market 'becomes problematic and impractical in crisis situations such as Covid-19, for the market in question has been disrupted or distorted by that crisis' and that in such times 'the actual conduct of the firm can be used as a proxy to assess its market power'. The appellant's market power during the complaint period could be inferred from the fact that it 'behaved to an appreciable extent independently of its competitors, customers or suppliers'. The prices charged and mark-ups achieved during the complaint period bore no reasonable relation to the prices charged and mark-ups achieved before the pandemic, which the Tribunal found to be a 'sensible benchmark for what competitive prices would be under normal and effective competition'. The appellant was unable to show that the difference between the price charged and the competitive price was reasonable, and had taken egregious advantage of the vulnerability of its customers during the pandemic. The Tribunal concluded that the respondent had discharged the overall onus to justify the conclusion that the appellant was in violation of s 8 of the Act.

Appellant's arguments on appeal to the Competition Appeal Court were that the Tribunal had failed to delineate the relevant market and had incorrectly applied the test for dominance in s 7. It also failed to distinguish between market power and excessive pricing, and had instead conflated these concepts. Moreover, it mistakenly used the appellant's actual conduct to define market power. The Tribunal should have considered evidence showing that the pandemic had resulted in a new competitive equilibrium price for masks. The appellant's price increases were, moreover, reasonable because it had to make provision for anticipated increases in the acquisition price of masks. And as the complaint period spanned little more than a month, there was insufficient evidence of price durability, which was required if an excessive-pricing case was to be successfully prosecuted.

Held

The doctrine of excessive pricing was challenging for competition authorities because it required them, to a considerable extent, to act as price regulators. To assess whether a price was excessive, a yardstick had to be established to determine a competitive price against which the impugned price could be measured. Nonetheless, context mattered, and the pandemic required competition authorities to be concerned about price-gouging as firms sought to prey on desperate consumers in a time of disaster. (See [40] – [41].)

While increased demand and changing conditions of supply had resulted in a new equilibrium in the market, the argument based on a new and much higher equilibrium price was not of assistance in the present dispute, which turned on the question of distribution rather than allocation (see [44]). The issues to be decided were the circumstances brought about by the pandemic, which appeared to confer market power on the appellant, whether the appellant was a dominant firm with market power, whether the increased prices were reasonable in the light of the appellant's conduct and explanation, and whether there was detriment to consumers (see [45]). In a pandemic, even small firms, 'lucky monopolists', could be propelled to positions of dominance without incurring any costs (see [47]). The appellant, who was able to massively increase its prices without a corresponding increase in costs or constraints imposed on it by customers or competitors, was such a lucky monopolist (see [43], [50]). While the durability of the increase mattered, so did context. Here the pandemic had altered market conditions to confer on the appellant market power that allowed it to act like a monopolist for six weeks, extracting the maximum price it was able to obtain from anxious customers. Though sourced in unprecedented market

conditions, its ability to price in this manner was reflective of market power. (See [51] – [56].)
Dominance established, the gateway was now open for the respondent to bring a case under s 8(1) by showing that the price charged was excessive (s 8(2)). Here the scale of the increase and the fact that it was incrementally imposed without constraint meant that it was prima facie excessive, thus shifting the evidential burden to show that it was not unreasonable, onto the appellant (s 8(3)). (See [57] – [58].)
The price charged by the appellant was far higher than the yardstick price, that is, the price charged in the relatively competitive pre-pandemic market (see [58]). The appellant did not seek to justify the increase with reference to the conduct of its competitors, but to an expected future rise in its acquisition costs, but the evidence adduced by it was unconvincing (see [59] – [64]). Finally, the high price of a necessity like masks was also clearly to the detriment of consumers (see [66]).
This case stood to be classified as a de minimis breach of s 8(1) by a small firm which sold very few masks at an excessive price. In view of the costs incurred by the appellant in defending itself against the full force of the respondent's litigation, justice would be best served by a decision not to impose a penalty on the appellant. (See [78] – [79].) Appeal dismissed.

FREESTONE PROPERTY INVESTMENTS (PTY) LTD v REMAKE CONSULTANTS AND ANOTHER 2021 (6) SA 470 (GJ)

Contract — Discharge — Impossibility of performance — Specific instances — Lease — Inability due to Covid-19 regulations of both parties to perform respective obligations as lessor and lessee — Lessor's potential impossibility of performance in being unable to tender lawful occupation must be taken into account alongside lessee's inability to take up lawful occupation, irrespective of lessee's commercial means.

In November 2020 the plaintiff (FPI), as lessor of commercial premises in a shopping centre, terminated two lease agreements between it and the first respondent (Remake), for non-payment of rental and other charges. This case concerned FPI's summary judgment application for Remake's ejectment, and payment of the arrears (also against second respondent as surety).
As to payment of the arrears, Remake's primary defence was that their respective obligations as lessor and lessee were suspended for the period March to June 2020 — FPI being excused from tendering occupation of the premises and Remake from paying rentals — on basis of supervening impossibility of performance This in that these became incapable of performance, the declaration of the state of disaster arising from the Covid-19 pandemic, with its associated regulations (the 'hard lockdown') having made performance thereof unlawful. And so, it was argued, FPI was not entitled to rentals for that period, nor to terminate the lease agreements because of Remake's failure to pay those rentals.
The court assumed in favour of Remake that during 'hard lockdown' FPI was unable to trade as a shopping centre and so was unable to tender lawful occupation of the leased premises; and that Remake was unable to conduct trade and so was unable to take up lawful occupation of the leased premises. (See [19] – [20] and [25].)
Held
Whatever the defence Remake may have that it was excused from paying rentals for the period of the 'hard lockdown', that impossibility of performance did not relate to

the full period for which it did not make payment. And FPI was entitled to the ejectment of Remake as its continued occupation after the termination of the lease agreements was unlawful. (See [32] and [36].)
As to the arrears, the implementation of the 'hard lockdown' gave rise to a more nuanced situation than where only one party was unable to perform. A consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster should be approached from the perspective of its effect on the performance of the respective obligations of *both* the lessor and the lessee, rather than solely from the perspective of whether the lessee was able to perform, particularly to pay rentals. Impossibility of performance should not be approached from the narrow perspective that performance in the form of payment always remained possible, and therefore there was no room for the operation of the doctrine. A lessor's potential impossibility of performance in the form of being unable to tender lawful occupation must also be taken into account, alongside the lessee's inability to take up lawful occupation, irrespective of the lessee's commercial means. (See [12], [22] and [24].)
Adopting this approach, at least for purposes of resisting summary judgment, the defence that Remake was excused from making payment of rentals for the 'hard lockdown' was arguable, as the plaintiff as lessor too may not have been able to perform its obligations to tender lawful occupation for that period. Summary judgment would accordingly not be granted iro the arrears claimed. (See [24], [37], [44] and [46].)

MS v EXECUTOR, ESTATE LATE NS AND OTHERS 2021 (6) SA 483 (FB)

Marriage — Putative marriage — Proprietary consequences — Valid community of property already existing — Subsequent bigamous marriage, also in community of property — Second wife mistakenly but bona fide believing that her marriage valid — Court declining to follow previous case authority to effect that, in case of civil marriage in community of property entered into by person who was already spouse in civil marriage in community of property with someone else, no new community of property regime could be created between common spouse and his second wife.

The applicant and the late NS (the deceased) entered into a marriage in community of property in December 1983. They lived together as husband and wife until NS's death in December 2019. Subsequent to the deceased's death, the applicant learnt the marriage was in fact null and void: the deceased had never divorced the woman (the second respondent) he had previously married, in community of property, in November 1972, rendering the applicant's marriage to the deceased bigamous. In the present application in the Free State High Court — resisted by the biological son (third respondent) of the deceased, born of his marriage to the second respondent — the applicant sought an order declaring the 1983 marriage contract to have given rise to a putative marriage between herself and the deceased; and that the property making up the joint estate that was amassed during the subsistence of the matrimonial union between the applicant and the deceased be divided as though a marriage in community of property had been concluded between them.
The court considered the putative marriage doctrine applicable in South Africa. Generally, a void marriage had no legal consequences; but, where one or both of the parties to an otherwise void marriage had mistakenly, but bona fide, believed there to be a valid marriage, the putative marriage doctrine operated to temper its harsh

results. For instance, if both parties were bona fide at the time of entering into the putative marriage, and the marriage was without an antenuptial contract in which community of property was excluded, the marriage would be considered in community of property; if only one party was innocent, the marriage would also be considered to be in community of property if such dispensation was to the advantage of the innocent spouse. (See [11] and [13] – [14].)

Considering the merits of the present case, the court first noted the existence of case law to the effect that, in the case of a civil marriage in community of property entered into by a person who was already a spouse in a civil marriage in community of property with someone else, no new community of property regime could be created between the common spouse and his second wife. This, because a joint estate still existed between the common spouse and his first spouse (See [14].) The court however expressed itself in agreement with academic criticism of this approach, that 'it [flew] in the face of the well-entrenched *raison d'être* of the putative marriage by in fact penalising the innocent spouse for the actions of the party who was not only fully aware of the fact that he was already married, but moreover, . . . was fully aware of the unlawfulness of his second marriage'. This criticism, the court added, was especially apt given the present facts. The applicant was bona fide in her belief that her marriage to the deceased was valid, and the deceased must have known that his marriage to the applicant was unlawful. Moreover, the undisputed facts of the matter were to the effect that, de facto, the community of property between the deceased and his first wife came to an end when they began living separately before the marriage between the applicant and the deceased. There was no evidence of any other assets or property forming part of the first marriage in community, or what happened to it. On the other hand, the applicant spent most of her life contributing directly or indirectly to the growth in the 'joint estate' with the deceased. (See [17].) In such circumstances, the court held, it would be unjust, unfair and contrary to the interests of justice to deprive the applicant of the half-share to which she was certainly entitled. To argue otherwise would be to ignore the established legal principle that a putative marriage existed as a common-law qualification to the general rule that a void marriage had no legal consequences. (See [18].) Further, the court continued, this approach was consistent with the values and the norms written into the Constitution. A court was enjoined by s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights provided in s 25 that no one may be deprived of property except in terms of law of general application. Should this court decide against the applicant, then she would be deprived of property in which she had shown a half-share. (See [19].)

The court accordingly granted the order sought by the applicant (see order at [20]).

NM OBO IM v MEC FOR HEALTH, EASTERN CAPE 2021 (6) SA 490 (ECM)

Medicine — Negligence — Claim — Prescription — Commencement — Discovery of harm — Deemed discovery — Sufficiency of information at claimant's disposal — Belated cerebral palsy claim by mother — Effect of illiteracy — Opinion of legal representative not qualifying as 'facts' — Prescription Act 68 of 1969, s 12(3).

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Medical negligence claim — Sufficiency of information at claimant's disposal — Cerebral palsy claim by mother on behalf of child — Deemed knowledge of condition — Sufficiency of information at claimant's disposal — Reasonable prospects of

success — Effect of illiteracy — Opinion by legal representative not qualifying as 'facts' — Prescription Act 68 of 1969, s 12(3).

State — Actions by and against — Actions against — Notice — Failure to give notice — Condonation — Cerebral palsy claim by mother on behalf of child — Deemed knowledge of condition, good cause for failure to notify and unreasonable prejudice to state — Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4).

This case required the court to apply two pieces of related legislation: s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Proceedings Act) and s 12(3) of the Prescription Act 68 of 1969 (the Prescription Act).

Section 3 of the Proceedings Act stipulates that state organs may not be sued unless the plaintiff (the 'creditor') provides written notice of his or her suit. The notice, which must set out the facts giving rise to the claim (the 'debt'), must be served on the state defendant within six months from when the debt 'became due', which would not happen until the creditor 'has knowledge of the identity of [the relevant state organ] and the facts giving rise to the debt'. The creditor 'must be regarded as having acquired such knowledge as soon as [the creditor] could have acquired it by exercising reasonable care'. Section 3(4) states that the plaintiff may apply for condonation of the late filing of the notice if (i) the debt had not been extinguished by prescription; (ii) there was a good reason for the creditor's failure to comply with the notice requirements; and (iii) the state organ was not unreasonably prejudiced by that failure.

Section 12(3) of the Prescription Act stipulates that prescription begins running when 'the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises'. A creditor 'shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

In the present case the court had to decide whether to grant the applicant's request for condonation under s 3(4) of the Proceedings Act.

The facts were that the applicant's child (her fifth) had contracted cerebral palsy during birth, in July 2016, at a hospital administered by the respondent. But it was only some years later, on 29 January 2020, that an attorney advised the applicant that she should sue the respondent for medical negligence. Acting through the attorney, the applicant served a s 3 notice on the respondent on 20 July 2020. An opinion obtained in September 2020 from Dr Murray, an obstetrician, subsequently confirmed the attorney's advice. Her suit was met with two special pleas: that her claim had prescribed and that she had failed to comply with s 3 of the Proceedings Act. The second special plea was what prompted the present application.

The applicant explained that she was illiterate, having been to school only up to grade 6, and that she had assumed her child's abnormality was due to an unavoidable event at birth.

In addition to prescription, the respondent alleged that the applicant had shown no good cause for her failure to comply with the notice requirements and that it was unreasonably prejudiced by the failure because neither the records nor the witnesses were any longer available. Regarding prescription, the respondent argued that the debt became due when the applicant became aware of her child's condition at birth, when she also became aware of the identity of the respondent as debtor. Since the child was the applicant's fifth and the first four were born normal, and her Apgar score * at birth was low, the applicant had had sufficient facts at her disposal

that, had she exercised reasonable care, she would have had knowledge of the identity of the debtor and the facts from which the debt arose as early as 26 July 2016, or soon thereafter.

Held

As to whether the debt had been extinguished by prescription (s 3(4)*(b)*(i) of the Proceedings Act)

Even though it was for the applicant to set out the basis for her claim that the debt should not be regarded as due under s 3(4)*(b)*(i), the onus was on the respondent to establish that the applicant was aware or must be regarded as having acquired the knowledge envisaged in s 12(3) of the Prescription Act (see [24]).

The respondent failed to establish that the applicant had acquired knowledge of the identity of the debtor and of the facts giving rise to the debt on 26 July 2016 or soon thereafter. It sought to draw inferences which were not consistent with the proved or undisputed facts (see [25]).

As to the question of whether the applicant should have acquired such knowledge by the exercise of reasonable care, that the fact that the applicant had earlier given birth to four healthy children did not mean that she was placed in a position of knowing the facts giving rise to the child's condition (see [28]). And to suggest that someone with a grade 6 education should be able to read and understand an Apgar score without providing evidence that it was explained to her also fell to be rejected (see [30]).

If applicant became aware through her attorney that the condition of the child was caused by the negligence of the hospital staff only on 29 January 2020, then the service on 20 July 2020 fell within the six months prescribed by s 3(2)*(a)* of the Proceedings Act. And in any event, an opinion by a legal representative was not 'facts' for the purpose of s 12(3), especially without the benefit of medical records (see [36]). In the circumstances it could not be said that the debt had prescribed (see [41]).

As to whether there was good cause for the failure to serve the notice (s 3(4)*(b)*(ii) of the Proceedings Act)

Based on Dr Murray's expert opinion, the applicant had reasonable prospects of success in the action proceedings. She was, on uncontested facts, not aware of the child's condition or the probable cause of it (see [42], [47] – [48]). While there might be reservations about the applicant's lack of action before 29 January 2020, to expect her to have acted when she thought everything was normal and before she knew of the problem with the child, would be to expect too much of a layperson with a grade 6 education. Her explanation for the delay, had there been one, was satisfactory. Hence the applicant had shown good cause for her failure to serve the notice. (See [50] – [52].)

As to whether the respondent was unreasonably prejudiced by the applicant's failure (s 3(4)*(b)*(iii) of the Proceedings Act)

The respondent failed to show when and how the records were lost or how their non-availability related to the applicant's failure to serve the notice timeously, and the same applied to the alleged non-availability of the witnesses. There was therefore no basis for the court to conclude that the respondent was unreasonably prejudiced by the applicant's failure to serve the notice timeously. (See [54] – [55].)

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v MSUNDUZI LOCAL MUNICIPALITY AND OTHERS 2021 (6) SA 500 (KZP)

Environmental law — Waste management — Waste management licence — Operation by municipality of landfill site contrary to conditions set out in waste management licence — Non-compliance with compliance notices issued by Provincial Department of Economic Development, Tourism and Environmental Affairs — Disposal of hazardous materials; fires on site; inadequate access control to site; seeping of leachate into environment — Municipality compromising health and wellbeing, and negatively impacting livelihood, of some of its citizens, and negatively affecting environment within its area of jurisdiction — Breach of s 24 of Constitution, international law and provisions of various environmental legislation — Constitution, s 24; National Environmental Management Act 107 of 1998, ss 31L and 28(1) and (3); National Environmental Management: Waste Act 59 of 2008, ss 16 and 20*(b)*; and National Water Act 36 of 1998, s 19(1).

Constitutional law — Human rights — Right to protection of the environment — Operation by municipality of landfill site contrary to conditions set out in waste management licence — Non-compliance with compliance notices issued by Provincial Department of Economic Development, Tourism and Environmental Affairs — Disposal of hazardous materials; fires on site; inadequate access control to site; seeping of leachate into environment — Municipality compromising health and wellbeing, and negatively impacting livelihood, of some of its citizens, and negatively affecting environment within its area of jurisdiction — Breach of constitutional right to protection of environment — Constitution, s 24.

The first respondent, the Msunduzi Local Municipality (the municipality), since September 2000, had been the owner of the New England Road Landfill Site in Pietermaritzburg. It was presently operating the landfill under a waste management licence (WML) granted it in July 2017 under the National Environmental Management: Waste Act 59 of 2008, which itself varied the previous permit regulating the landfill's operation granted, in 1998, under s 20 of the Waste Act's predecessor, the Environmental Conservation Act 73 of 1989 (ECA). In the present application, brought before the Pietermaritzburg High Court, the applicant, the South African Human Rights Commission (the Commission), complained that the manner in which the municipality operated the landfill site caused harm to the health and wellbeing of the citizens of Pietermaritzburg and surrounding areas. It sought various declaratory relief to the effect that the municipality had breached the conditions imposed on it by its WML; failed to comply with various compliance notices issued to it by the Department of Economic Development, Tourism and Environmental Affairs, Province of KwaZulu-Natal (the Department), under s 31L of the National Environmental Management Act 107 of 1998 (NEMA); violated the right, secured under s 24 of the Constitution, to a safe environment and to have it protected; and breached provisions of various environmental legislation. The Commission also sought a structural interdict to secure some form of supervisory jurisdiction over the municipality to ensure that the order was implemented.

In considering the Commission's application, the court focused on the operation of the landfill site, since 2015, although the conduct complained of stretched back 15 years. It took account of the following undisputed facts, amongst others: In 2015, the Department, following a comprehensive audit of the municipality's operation of the landfill site, reported of, and warned the municipality of, numerous instances of non-

compliance by it with its s 20 permit. These included, inter alia, the disposal of hazardous materials indicative of an inadequate waste assessment and classification system; inadequate or no access control to the site; and the seeping of leachate into the environment owing to a dysfunctional leachate management system. According to the Department, the municipality subsequently did take steps leading to improvements in the management of the site, but abandoned them in around mid-2017. A further departmental audit followed in October 2017, reporting again of non-compliance by the municipality with its WML. Numerous engagements between the Department and the municipality followed; nevertheless, the state of the site deteriorated further. A series of fires at the site prompted the Department to issue, in May 2019, a compliance notice in terms of s 31L of NEMA, notifying the municipality of its failure to comply with its licence, and calling upon it to take steps to remedy the situation. That compliance notice, as well as further ones in October 2019, and February 2020, was answered with action plans that either failed to deal with the concerns raised, or were inadequately implemented. Up until the institution of the present application, fires continued to occur on the site, some of which were major, lasting for days, causing the closure of schools in the surrounding area due to health and safety concerns, and the closing of freeways.

The court found that the municipality's operation of the landfill site compromised the health and wellbeing, and negatively impacted the livelihoods, of some of its citizens, and also negatively affected the environment within its area of jurisdiction (see [91] and [92]). The court held that the municipality had failed, dismally, to comply with the compliance notices issued to it by the Department (see [89]), in breach of the clear obligation to do so imposed upon it by s 31L(4) of NEMA (see [89]). The municipality's conduct, the court held, rendered the power granted to authorities under s 31L to issue compliance notices — described by the court as one of the most important protective measures forming part of the legislative framework designed to give effect to the environmental rights enshrined in s 24 of the Constitution — futile (see [90]). The municipality's 'dismal and blatant failure' had resulted in a complete violation of, inter alia, the following (see [90]):

- The municipality's WML, in breach of its obligation in terms of s 20(b) of the Waste Act (see [90] – [92] and [109]);
- s 16 of the Waste Act, which set out general duties on the part of a holder of waste in respect of waste management, including the obligation to take all reasonable measures within its power to 'manage the waste in a manner that did not endanger health or the environment or cause a nuisance through noise, odour or visual impacts' (see [31], [90] and [109]);
- s 28(1) and (3) of NEMA, in terms of which a duty of care was imposed, such that every person who 'causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, insofar as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment' (see [24] – [25], [90] and [109]);
- section 19(1) of the National Water Act 36 of 1998, which, inter alia, required an owner of land on which any activity took place that causes, has caused or is likely to cause pollution of a water resource 'to take all reasonable measures to prevent any such pollution' (see [31], [90] and [109]).

The above violations, the court held, ultimately constituted a breach of s 24 of the Constitution (see [90]). The court further found that the municipality had violated

obligations imposed on it by the environmental provisions of various binding international instruments (see [98]). (Those instruments are set out at [81] – [84].)
The court described as most concerning the flagrant disregard by the municipality of its constitutional obligations (see [93]). The municipality had sought to resist the declaratory order on the ground that the shortcomings in its operation of the landfill site were due to huge budgetary and procurement challenges. It was trying its level best, it insisted, to comply with its constitutional obligations, and had recently taken substantial steps towards compliance (see [60]). This was not good enough, was the court's response, adding in explanation that citizens of Pietermaritzburg may well excuse the municipality's conduct where it struggled to comply with its constitutional obligation for a short period of time, but, where this had persisted and continued unabated, as here, for more than 15 years, it was unacceptable. (See [93].) What the municipality forgot, the court held, was that its operation of the landfill site was a highly regulated activity and, as such, was part of a regulated community. It was therefore expected that the municipality would act in an exemplary manner at all times by complying strictly with the relevant legislation and permits which regulated its conduct. (See [94].) The court further emphasised that organs of state (such as the municipality herein) needed to be exemplary in the manner in which they complied with their constitutional obligations (see [95]); this case, the court added, highlighted the vulnerability of citizens when their municipality failed to meet this standard (see [96]).
The court accordingly granted the declarator in the terms sought by the Commission (see [102]). It further deemed it appropriate to grant a structural interdict (in the form set out at [109]) in terms of which it would exercise some supervisory jurisdiction over the municipality, seeing it as effective relief that would ensure compliance by the municipality with its constitutional obligations (see [103]).

SMITH v MEC FOR HEALTH, MPUMALANGA 2021 (6) SA 532 (ML)

Costs — Taxation — Taxing master — Mero motu discretionary powers of — Whether once settlement reached, taxing master may intervene to alter or change contractual items — Uniform rules 70(1) and 70(5A)*(d)*.

A taxing master/mistress may, where a party or their attorneys or both misbehave at a taxation, 'adjourn the taxation and refer it to a judge in chambers for directions with regard to finalisation of the taxation' (Uniform Rule 70(5A)*(d)*(ii)).
Here, in such a referral, the cited misbehaviour were complaints lodged by an attorney with the court's complaints officer relating to the taxing mistress' insistence that, due to the size of the bill of costs, the matter be set down for physical taxation — despite 847 of the 882 items in the bill of costs having been settled. The attorney was of the opinion that settlement had been reached, that the taxing mistress could not intervene to change the contractual items; she only had to concern herself with the remaining 35 contested items, and so no physical taxation was required.
Held
Any notion that parties can agree on fees and on their own consider the reasonableness thereof and then approach the taxing master (or mistress) to give an order in the form of stamping the allocatur — without exercising his discretionary power — made a mockery of the taxation process and the applicable rules. In terms of rule 70(1) the taxing master is 'competent to tax *any* bill for services actually rendered by an attorney'. This disposed of any suggestion that settled items in the

bill of costs were exempted from scrutiny by the taxing master. Otherwise, the taxing master would be denied their discretionary authority to keep an eye on whether fees charged as per a particular item were 'for services actually rendered'. The taxing master may mero motu disallow any item or part thereof; it did not have to be objected to before it could be disallowed mero motu. (See [18] and [25].)

WILLIAMS AND OTHERS v HENDRICKS AND ANOTHER 2021 (6) SA 551 (WCC)

Will — Validity — Acceptance of document as will — Instruction to bank to draft will — While it reflected testator's testamentary wishes, she did not intend document to be her will — Application for acceptance of document as will dismissed — Wills Act 7 of 1953, s 2(3).

On the day before she died Ms EH signed a proforma document entitled 'Will application' in which she gave instructions to a bank on the desired contents of a will that the bank was to draft for her. She indicated that she wanted everything to go to her son, to be administered in a trust until he was 21.
The application form specified that '(t)hese instructions should not be construed as a valid will as the requirements of the Wills Act, 1953, must still be met'. EH passed away before the instructions were carried out. Her close relations sought an order directing the Master to accept the instructions as her will under s 2(3) of the Wills Act, which provides that a court could order the Master to accept a document drafted by a since deceased person as his or her will if the Master was 'satisfied' that the document 'was intended to be his will'. The application was resisted by the first respondent, EH's surviving spouse, to whom she had been married in community of property. Counsel for the applicants, relying, inter alia, on *Mabika and Others v Mabika and Another* [2011] ZAGPJHC 109, submitted that a liberal approach should be adopted in the application of s 2(3). In *Makiba* the court in circumstances analogous to the present ones declared the instruction document to be the deceased's will, since not to do so 'would be greatly unjust'.
Held
It was evident from the wording of s 2(3) that an applicant needed to establish that the deceased intended the document in question to be his or her will. In the present case the contents of the document and the circumstances surroundings its execution clearly indicated that the deceased had not intended it to be anything other than a drafting instruction (see [12], [15]). The judge in *Mabika* was guided by the equities of the case rather than the prescripts of s 2(3): while there was no doubt that in that case the document in question reflected the deceased's testamentary wishes, there was no evidence that she intended it to be her will, which was an essential requirement of s 2(3). *Mabika* was 'a hard case which made bad law' (see [14]). Application accordingly dismissed (see [19]).

ZINGWAZI CONTRACTORS CC v EASTERN CAPE DEPARTMENT OF HUMAN SETTLEMENTS AND OTHERS 2021 (6) SA 557 (ECG)

Engineering and construction law — Building contract — Dispute resolution — Constitutionality of adjudication process in standard construction contract — JBCC contract and rules of adjudication — Intended to facilitate speedy resolution of disputes — As such, not contrary to s 34 of Constitution, public policy or rules of natural justice — JBCC Principal Building Contract (6.1 ed).

In 2014 Zingwazi and the EC Department of Human Settlements (the Department) concluded a principal building contract, specifically a JBCC Principal Building Contract (6.1 ed). These contracts make provision for various forms of dispute resolution, including adjudication, and provide that adjudication has to be conducted in terms of JBCC Rules for Adjudication. The adjudicator's determination is immediately binding (clause 30.6.3) and remains in force until overturned by an arbitration award (clause 30.7.1 read with rule 6.1.4 of the JBCC Rules).
A dispute arose between the parties to the contract, and the appointed adjudicator (the tenth respondent) made a determination in favour of Zingwazi, directing the Department to pay Zingwazi over R12,7 million. The Department elected to refer the matter for arbitration and refused to pay over the money. Zingwazi instituted urgent motion proceedings against the Department and six other respondents for an order directing them to prosecute the arbitration to finality and to pay in terms of the adjudicator's determination.
In a counter-application the second respondent sought an order declaring clauses 30.6.3 and 30.7.1 of the contract and rule 6.1.4 of the JBCC rules (the impugned provisions) to be contrary to s 34 of the Constitution (access to courts) and invalid. Counsel also complained that the impugned provisions were contrary to public policy (as informed by constitutional principles) insofar as they made the adjudicator's decision immediately binding and enforceable, which clashed with the default rule that judgments were suspended pending appeals and reviews. The second respondent also contended that the process did not adhere to the principles of natural justice because the adjudicator could adopt an inquisitorial procedure and was not obliged to comply with the rules of evidence (rule 5.5.4); the parties are not entitled to be represented by lawyers (5.5.4); the adjudicator was not obliged to conduct a hearing (rule 5.5.1); the adjudicator's determination, being immediately enforceable, could result in irreparable damage to a party even if it was eventually successful in the arbitration; and there was no provision in the Adjudication Rules for security to be provided. It was conceded on behalf of the second respondent that the merits of the adjudication were not relevant to the counter-application.
In an answering affidavit the JBCC (the eighth respondent) emphasised that its dispute resolution system was intended to quickly and inexpensively resolve conflicts. The adjudication process was fair, internationally recognised and preferable to arbitration or court litigation, which by its adversarial nature could sour the relationship between the parties.

Held

The fact that adjudication was, like arbitration, consensual and a private dispute resolution in which the parties agreed on the identity of the adjudicator, removed it from the direct application of s 34 of the Constitution (see [26]). As to its indirect application via public policy, the immediate enforceability of the adjudicator's determination was not in conflict with s 34: if the adjudicator breached his contract of appointment and deviated from his mandate, the aggrieved party could oppose an application for enforcement and proceed to arbitration for a fair hearing. In addition, the provisional enforceability of the adjudicator's decision is similar to the enforceability of a High Court judgment pending appeal. (See [29] – [30].) In the final analysis, none of the impugned provisions infringed either s 34 or public policy.
As to the rules of natural justice, that is, *audi alteram partem* and *nemo iudex in causa sua*: The Adjudication Rules complied with them by requiring that both sides be heard in an impartial forum (see [45]). And since the procedures were determined

by the parties, they could be inquisitorial and dispense with hearings and the rules of evidence. Neither the damage to an eventually successful party nor the lack of a provision for the furnishing of security was a factor that went to the heart of the constitutional challenge. The parties had, after all, agreed to this manner of adjudication, and if courts were quick to find fault with agreed procedure, the goals of private adjudication would be defeated. (See [36], [47] – [50].)
As to the lack of entitlement to legal representation: This sort of hearing was quite common, and it did not, in view of the requirement that adjudication be a fast and cost-effective resolution of disputes, in itself exclude procedural fairness (see [52]). Overall, the problem with second respondent's various grounds for a constitutional challenge was that if the procedure was struck down, the purpose of a speedy resolution of disputes would be negated (see [53]). In short, it could not be found that, on any of the grounds raised by the second respondent, the procedure prescribed in the Adjudication Rules was in conflict with s 34 of the Constitution (see [54]). Counter-application dismissed with costs.

QWELANE v SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND ANOTHER 2021 (6) SA 579 (CC)

Constitutional law — Legislation — Validity — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1) — Prohibition of speech 'that could reasonably be construed to demonstrate a clear intention to *(a)* be hurtful; *(b)* be harmful or to incite harm; *(c)* promote or propagate hatred' on prohibited ground — Overbroad and vague insofar as it included 'hurtful' speech — Overbreadth inconsistent with right to freedom of expression and amounting to unjustified limitation thereof — Vagueness inconsistent with rule of law — Constitution, ss 1*(c)* and 16(2)*(c)*.

Equality legislation — Hate speech — Prohibition in Equality Act of speech 'that could reasonably be construed to demonstrate clear intention *(a)* be hurtful; *(b)* be harmful or to incite harm; *(c)* promote or propagate hatred' on prohibited ground — Interpretation of — Objective standard to be applied to what could reasonably be construed to demonstrate clear intention — Conjunctive reading of categories *(a)* – *(c)* appropriate — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1)*(a)* – *(c)*.

Equality legislation — Hate speech — Statement comparing homosexuality to bestiality — Harmful and inciting hatred on prohibited ground of sexual orientation — Amounting to hate speech — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 1 sv 'prohibited grounds' and s 10(1).

Section 16 of the Constitution guarantees freedom of all forms of expression, except for those set out in ss (2), which includes (in ss (2)*(c)*) the 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.
Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) promotes equality by prohibiting hate speech; it provides that, subject to the proviso in s 12, 'no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person, that could reasonably be construed to demonstrate a clear

intention to *(a)* be hurtful; *(b)* be harmful or to incite harm; *(c)* promote or propagate hatred'.
The 'prohibited grounds' referred to are defined in s 1 of the Equality Act and include 'sexual orientation'. (See [8] – [11].)

Litigation background

The impugned statements were made in a newspaper article written by Mr Qwelane and published in 2008, in which he inter alia likened homosexual conduct to bestiality (see [3]). Following a public outcry, the South African Human Rights Commission (the SAHRC) referred a hate speech complaint to the Equality Court. Mr Qwelane responded by instituting a High Court application challenging the constitutionality of s 10(1) of the Equality Act on the bases that it was overbroad and so unjustifiably limited the constitutional right to freedom of expression (s 16), and was so vague as to infringe the rule of law (s 1*(c)*).
These proceedings were consolidated for hearing before a single judge, sitting as both the Equality Court and the High Court. It held that, on a correct interpretation of the section, speech ought to be assessed objectively in its factual and social contexts; and dismissing his constitutional challenge, held that s 10(1) was not overbroad because read conjunctively — so that each of s 10(1)*(a)* – *(c)* had to be met — it was consistent with s 16(2)*(c)*, nor was it vague because s 10(1) was qualified by the proviso in s 12. It found Mr Qwelane liable for hate speech. (See [19] – [22].)
Mr Qwelane's appeal to the Supreme Court of Appeal (the SCA) was partly successful. It reversed the High Court's hate speech finding against Mr Qwelane, but only partly upheld his constitutional challenge; reversing the High Court's decision with regard to the overbreadth challenge but declaring s 10(1) unconstitutionally vague to the extent that it included 'hurtful' speech as a prohibited ground. The SCA interpreted s 10(1)*(a)* – *(c)* disjunctively, and the words 'reasonably construed as to demonstrate a clear intention' as introducing a subjective standard for the assessment of hate speech. (See [23] – [28].)

Issues

Here, in the application for the Constitutional Court's confirmation of the Supreme Court of Appeal's declaration, and the SAHRC's appeal against the SCA's hate speech finding, the issues were:

- ***Whether the impugned provision entailed a subjective or objective test***

Held, that the wording plainly implied an objective-reasonable-person test that considered the facts and circumstances surrounding the expression, and not mere inferences or assumptions that were made by the targeted group. If it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on hypersensitive reactions; and if based on the subjective intention of the speaker, the threshold would be considerably higher. An objective approach, accounting for general circumstances and context, was appropriate for what hate speech laws aimed to prohibit. (See [96] and [99] – [100].)

- ***Whether s 10(1)(a) – (c) must be read disjunctively or conjunctively***

Held, that a disjunctive reading would render the impugned section unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could constitute prohibited hate speech. This would be an impermissible infringement of freedom of expression, as it would bar speech that disturbed, offended and shocked. The section was reasonably capable of a conjunctive reading. Interpreting the section in

the constitutionally compliant manner required, was called for. A conjunctive reading of the section would therefore be endorsed. (See [104] – [105].)

- ***Whether the term 'hurtful' as it appeared in s 10(1) was impermissibly vague***

Held, that s 10(1)*(a)* was irredeemably vague and undermined the rule of law as enshrined in s 1*(c)* of the Constitution. The use of 'hurtful', on a conjunctive reading, appeared to be redundant, contributing to a lack of clarity, because 'harmful' could be understood as emotional and psychological harm that severely undermined the dignity of the targeted group, as well as physical harm. And, due to the conjunctive reading, a claimant would have to show that, in addition to being emotionally harmed, they were also hurt. It may be so that harmful communication was always hurtful. The removal of the word 'hurtful' due to its vagueness avoided any redundancy that could lead to a lack of clarity. (See [152], [155] and [157].)

- ***Whether the impugned provision and the prohibited ground of 'sexual orientation' lead to an unjustifiable limitation of s 16 of the Constitution***

Held, that the term 'hurtful' and the inclusion of 'sexual orientation' extended the regulation of expression beyond expression envisaged in s 16(2). The inclusion of 'sexual orientation' as a prohibited ground was proportional to its purpose — it would not be possible to protect the rights of the LGBT+ community without prohibiting hate speech based on sexual orientation — and was therefore a justifiable limitation of s 16(1). However, hurtful speech did not necessarily seek to spread hatred against a person because of their membership of a particular group, and it was that which was being targeted by s 10. Therefore, the relationship between the limitation and its purpose was not proportionate, and so it could not be justified under s 36 of the Constitution. Accordingly, s 10(1) of the Equality Act was unconstitutional to the extent of the inclusion of the term 'hurtful'. (See [136], [139] and [145].)

- ***Appropriate remedy***

Held, that the unconstitutionality could be cured through the excision of that term, but that the declaration of constitutional invalidity should be suspended for 24 months to afford Parliament an opportunity to remedy the constitutional defect. In the interim, s 10 should be read to refer exclusively to speech that was harmful and incited hatred. (See [158] – [162).]

- ***Whether Mr Qwelane's statement constituted hate speech***

Held, that it did; it was clearly harmful and incited hatred on the prohibited ground of sexual orientation (see [184] – [186]).

SA CRIMINAL LAW REPORTS DECEMBER 2021

S v ROHDE 2021 (2) SACR 565 (SCA)

Evidence — Assessment of — Court's own observations of exhibit — Except in exceptional circumstances, where observation clear for all to see (including appeal court), such observations not to be relied upon unless put to relevant witnesses and accused person afforded opportunity to respond thereto.

Murder — Sentence — Murder by husband of wife — Gender-based violence — Misdirection by High Court in making findings of aggravated and sustained assault on deceased — Appellant to be sentenced on basis that killed deceased by manual strangulation, but not that assaulted her in any other way — Nonetheless acted in brutal and callous manner — Sentence of 20 years' imprisonment reduced on appeal to 15 years' imprisonment.

Sentence — Factors to be taken into account — Gender-based violence — Murder by husband of wife — Violence against women and children pervasive phenomenon internationally and increasing to unacceptable proportions in this country — Sentence had to reflect abhorrence of society in this regard.

The appellant appealed against his conviction in the High Court, of having murdered his wife, and the sentence of 20 years' imprisonment imposed upon him for that conviction. He challenged the conviction on various grounds, including the court having ruled inadmissible the evidence of the psychiatrist, called by him, who had testified that the deceased was depressed and suicidal before her death.
Held, that the evidence of the psychiatrist, as to whether the deceased had been depressed and a suicide risk, was relevant and admissible and the appellant was entitled to lead this evidence, at least to counter the contrary evidence of the state. The court a quo had therefore erred in not allowing this part of the evidence of the psychiatrist. This irregularity did not, however, result in an unfair trial. (See [68] – [69].)
Held, further, that the trial court had erred in finding that the deceased had been smothered. This conclusion had been arrived at from the judge's own observations in respect of an exhibit before the court. Except in exceptional circumstances where the observation was clear for all to see (including an appeal court), such observations should not be relied upon unless they were put to the relevant witnesses and/or the accused person to afford them an opportunity to respond thereto. In the present matter the far-reaching observations of the trial court in respect of the photograph of the pillowcase were not put to any witnesses or to the appellant, and could by no means be said to be clear. The trial court's reliance on its own observations was wholly unjustified. (See [83].)
Held, further, that the court was nevertheless satisfied that the respondent had proved beyond reasonable doubt that the deceased had been killed by manual strangulation and that the ligature was only thereafter applied to her neck. It followed that the court a quo correctly convicted the appellant. It regrettably had to be said, however, that, save for the findings that the appellant strangled the deceased and attempted to stage her suicide, the court a quo's 'vivid picture' constituted speculation in respect of both content and sequence. There was no evidential basis for the finding that the appellant had punched the deceased with his ring-bearing fist. It was also reasonably possible that the deceased was not smothered and that the right-rib fractures had been caused by attempted CPR. There was no injury to the appellant's hands shortly after the incident. These matters needed mentioning because they impacted on the question of an appropriate sentence. (See [86] – [87].)
Held, further, as to sentence, that the court a quo's findings, that the appellant had inflicted injuries on the deceased that were 'successive and incremental' until they were fatal, did not withstand scrutiny. The appellant had to be sentenced on the basis that he unlawfully and intentionally killed the deceased by manual strangulation, but had not assaulted her in any other way. The court therefore needed to consider sentence afresh. (See [88] – [89].)
Held, further, that the appellant had committed a very serious crime in a brutal and callous manner, and her death must have been devastating to her daughters, and those who loved her. Regrettably, violence against women and children had become a pervasive phenomenon internationally, and this country had in recent times seen gender-based violence increase to intolerable and unacceptable proportions. The sentence of the court had to reflect the abhorrence of society with regard to violence

against women. Furthermore, it was important to bear in mind that the appellant was unrepentant and took no responsibility for his crimes. The sentence of 20 years' imprisonment had to be reduced because of the incorrect findings of the court a quo, and a sentence of 15 years' imprisonment, being the minimum prescribed sentence, would be appropriate. (See [92] – [93].)

MARAIS v HEUVEL 2021 (2) SACR 588 (GP)

Harassment — Proof of — Onus — No requirement that appellant prove incident would not happen again in future — Evidence in casu pointing to one-off incident in which respondent actual instigator — Final protection order granted in error — Protection from Harassment Act 17 of 2011, s 2(1).

During the course of a body-corporate meeting an altercation developed between the appellant and the respondent, which subsequently became physical, and the respondent subsequently applied for an interim protection order against the appellant in terms of s 2(1) of the Protection from Harassment Act 17 of 2011. The court issued an interim protection order which it later made final. The appellant appealed against the final order and contended that the trial court had rejected his version without any justifiable grounds; failed to take cognisance of the evidence under oath of four eyewitnesses who were present at the body-corporate meeting and who corroborated his version of the altercation; and in failing to find that this was an isolated incident which would not be repeated. The objective evidence of the video footage further conflicted with the respondent's version of having been assaulted, and exposed him as the instigator.
Held, that the magistrate had erred in placing an onus on the appellant to prove that the incident would not happen in future, and in saying that 'it is not crystal clear what steps the [appellant] has taken that this will not happen again'. The mere presence of the appellant's so-called associates outside the business premises did not inspire the reasonable belief that harm might be caused to the respondent. The incident was an isolated event and there was no evidence to suggest any repetitive conduct on the part of the appellant thereafter. Furthermore, it could not be said that the alleged threat (if any) was of such an overwhelming, objective, oppressive nature which tormented and inculcated serious fear or distress in the respondent. The magistrate had erred on the facts and the law, and the appeal had to be upheld. (See [28] – [34].)

MAHLANGU AND ANOTHER v MINISTER OF POLICE 2021 (2) SACR 595 (CC)

Arrest — Unlawful arrest — Period of detention — Further detention after court appearance in which prosecutor opposed bail — Police having failed to inform prosecutor that arrest of one of applicants based on inadmissible confession — No onus on applicants for damages to prove that would probably have been denied bail, even if bail applications had been made.
Damages — For unlawful arrest and detention — For period after appearance in court — Applicants detained for period of eight months and 10 days on basis of inadmissible confession extracted from one of applicants — Police not disclosing to prosecutor that confession inadmissible — Obligation on police, to disclose all relevant facts to prosecutor, remaining for as long as information withheld relevant to detention — Minister liable.

Damages — Measure of—For unlawful arrest and detention — After appearance in court — Applicants detained for period of eight months and 10 days on basis of inadmissible confession extracted by torture — Applicants awarded R550 000 and R500 000, respectively.

The present application for leave to appeal arose from a decision of the Supreme Court of Appeal in which it upheld in part an appeal by the applicants, that the respondent was liable to compensate them for unlawful detention, only until their second appearance in the magistrates' court, after they had been in detention for approximately two weeks. They were not released until some eight months and 10 days since they were arrested. The second applicant was in fact the executor in the estate of the deceased, who was the second accused in the matter and who had been arrested on the basis of a confession extracted from the first applicant by torture by members of the South African Police Service, in which he had implicated the second accused. Their claim for damages was based on the false confession which they alleged had caused the prosecutor to oppose bail. The Supreme Court of Appeal (the SCA) held that, had the applicants applied for bail, the magistrate would have had no difficulty in concluding that the confession was inadmissible, and reasoned that neither of the two accused was ever prevented from applying to be released on bail. It concluded that the inclusion of the inadmissible confession in the docket was not the legal cause of the detention beyond the 14-day period of their incarceration, and their claim accordingly had to be limited to that period. On further appeal,
Held, that the finding by the SCA that the onus was on the applicants to prove that, even if bail applications had been made, they would probably not have been granted bail, had introduced a new test, contrary to the one applicable. The appeal also turned on the conclusion by the SCA that the applicants' failure to apply for bail constituted a new intervening act. It was therefore in the interests of justice that the applicants be granted leave to appeal. (See [23].)
Held, further, that, in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff had to establish was that an interference had occurred. Once this had been established, the deprivation was prima facie unlawful, and the defendant bore an onus to prove that there was a justification for the interference. (See [32].)
Held, further, that the decision of the SCA, to relieve the Minister of liability for damages suffered by the applicants after a further remand after 14 days, implied that the obligation on members of the police, to make proper and complete disclosure to the prosecutor of the facts relevant to the further detention of the applicants, did not exist on the second court appearance. The obligation on the police to disclose all relevant facts to the prosecutor was to be regarded as a duty that remained, for as long as the information withheld was relevant to the detention. (See [37].)
Held, further, that, if the court were to give meaning to freedom as a foundational value of our Constitution, and to the right to freedom and security of the person, it could not allow the police to deprive people of their freedom by so simple a stratagem as behaving in the egregious manner in which they did in the present case, and then lying low and keeping quiet to see if anything came to the rescue of victims of their nefarious deeds. The SCA had adopted a novel approach to determine liability on this basis, one which had not been pleaded by the Minister. It followed that the approach adopted by the SCA, in shifting the onus onto the applicants, constituted an error in law. (See [44] and [46].)

The court held that the SCA had erred in refusing to award damages for the full period of eight months and 10 days of the applicants' detention, and awarded damages of R550 000 to the first applicant and an amount of R500 000 to the second applicant. (See [56].)

S v ZK 2021 (2) SACR 616 (KZP)

Trial — Presiding officer — Conduct of — Attitude towards accused — Court's utterances suggestive of judicial officer who was impatient, curt and had compromised impartiality — Magistrate not only violating oath of office, but also accused's right to fair trial and to be treated with dignity.

In an appeal against convictions of three counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and a sentence of life imprisonment, the court noted that the medical examination of the complainants did not accord with the probabilities of their evidence. Given that the incidents of rape, as testified to, had taken place over a period of time and on multiple occasions, there would have been some medical evidence of injuries to those complainants. In the circumstances the court held that the magistrate would have been fully justified in drawing an adverse inference against the state in failing to call the doctor to testify to elucidate and expand on his clinical examination in respect of the complainants. (See [17] – [19].) The court held further that the conduct and behaviour of the regional magistrate were deserving of censure, in that he was clearly not fair in his treatment of the appellant during the trial, and his utterances to the appellant were suggestive of a judicial officer who was impatient, curt and had compromised his impartiality. (See [34] – [35].) He had not only violated his oath of office, but also the appellant's right to a fair trial and to be treated with dignity in our courts. Restraint and patience on the bench were the hallmarks of keeping an open mind when adjudicating in our courts. Ultimately the court held that the evidence adduced by the state did not reach the threshold required for its acceptability to constitute proof beyond reasonable doubt. (See [50] – [52].) The appeal against both convictions and sentence was upheld, and a copy of the judgment was to be forwarded to the secretary of the Magistrates' Commission.

S v SEROKA 2021 (2) SACR 622 (LP)

Bail — Application for — To which court — Accused referred for trial in regional court where he applied for bail — There being only one regional magistrate at seat, court referring matter back to district court, which also declined jurisdiction — In such circumstances transferring court having necessary jurisdiction to entertain bail application — District-court magistrate accordingly required to hear bail application.

The accused was referred for trial in the regional court where he applied for bail. Since there was only one regional magistrate at that seat of the court, the regional-court magistrate referred the matter back to the district court for the bail application. The magistrate, however, declined to hear the bail application, being of the opinion that he was precluded from doing so.

Held, that, once an accused has appeared in another court, pursuant to a transfer of such person from the transferring court for sentencing or trial purposes, the receiving court was vested to the exclusion of the transferring court with exclusive jurisdiction in respect of bail-application proceedings, unless the receiving court referred the

matter back to the transferring court for a bail application. In such instance, where the matter had been referred back to the transferring court, such transferring court would have the necessary jurisdiction to entertain the bail application. In the circumstances the district-court magistrate's refusal to hear the bail application was declared invalid and set aside. (See [19].)

S v JB 2021 (2) SACR 627 (KZD)

Child — Rape of — Arranged child marriage — Generally — Duty of court to act as buffer between young women and their families, and religious sects they belong to — Courts to be relentless and continue cracking whip until law against such marriages entrenched.

The appellant appealed against his conviction for rape after the complainant, who was 14 years of age, had been given in an arranged-marriage proposal to him, a 32-year-old man, by the woman in whose care she had been placed to ensure that she took her medications for TB. The appellant was sentenced to 18 years' imprisonment and the woman who had arranged the 'marriage' was sentenced to three years in terms of the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.
On appeal the court held that there had been no misdirection by the trial court and the conviction was in order. The court, however, remarked that forced child marriages were a huge problem in southern Africa and that it was sad that, in most instances of these marriages, the families of the young brides were complicit in having their underage children sold in marriage. The patriarchal structure of the families played a prominent role. The unwillingness of the concerned countries to put in place and legislate on enabling instruments to protect these young girls, was worrisome. It suggested that, as long as the powers that be were reluctant to implement the legislation that was available to them, despite all the conventions that were in place, child marriages were going to continue unabated. In the circumstances it was clear that the courts, especially those with higher jurisdictions, had to be the buffer between the young women and their families, and the religious sects that they belonged to. The courts had to be relentless and should continue cracking the whip until the law against those marriages was entrenched. (See [62] – [65].) The appeal was accordingly dismissed.

S v JACOBS 2021 (2) SACR 644 (WCC)

Sentence — Recidivism — Minor offences — Shoplifting to sustain drug dependency — Recommendation in probation officer's report ignored and accused sentenced to six months' imprisonment, effectively 30 months' imprisonment with previous suspended sentences — Court a quo not availing itself of numerous options available for vulnerable and compromised accused persons — Sentence replaced with committal to treatment centre — Prevention of and Treatment for Substance Abuse Act 70 of 2008, ss 33(1) and 36(1).

The accused, a 32-year-old single mother of four minor children, pleaded guilty in a magistrates' court to the theft of one container of baby milk and one item of ladies' clothing. She had nine previous convictions for theft, mostly shoplifting. She had never served any sentence or correctional supervision and had always been given

suspended sentences or fines. The presentence report stated that there was no evidence that the accused had stopped using illicit substances and that she committed acts of theft to sustain her dependency. As a result of her substance addiction and destructive lifestyle, she had also relinquished her parental responsibility, to the detriment of her children. The probation officer indicated that the sentence of direct imprisonment would not address the root cause of the accused's offending behaviour, and that it would be in the best interest of the accused, as well as her family and community, that she undergo inpatient drug treatment. In sentencing the accused, the magistrate did not specifically deal with the accused's personal circumstances, and appeared to have simply disregarded the probation officer's report in respect of her drug addiction. What the magistrate did was to simply read out the recommendation of the probation officer's report and add that, because the recommendation did not indicate a drug-treatment centre for the accused to receive treatment, she could not sentence the accused indefinitely until a treatment facility became available. She therefore sentenced the accused to six months' imprisonment, which would resuscitate previous suspended sentences, resulting in the accused serving an effective 30-month sentence. On review,
Held, after noting that our courts had often emphasised that there was a limit to the aggravating effect of previous convictions (see [16]), the court a quo had not availed itself of the numerous options which would address the underlying issue. The legislature had purposefully included provisions to deal with vulnerable and compromised accused persons in situations such as the present, and courts would be failing in their duty by not utilising such for the benefit of the accused, and ultimately society as a whole. The proceedings were therefore not in accordance with justice and the sentence had to be set aside. (See [34].) The court imposed a sentence of three months' imprisonment antedated to the date of incarceration, and ordered that the accused be declared a person contemplated in s 33(1) of the Prevention of and Treatment for Substance Abuse Act 70 of 2008, and, in terms of s 36(1) of that Act, it was therefore ordered that the accused be committed to a treatment centre designated by the Director-General, to receive the necessary treatment, rehabilitation and skills development for a period not exceeding 12 months. (See [35] – [36].)

S v NGOMANE AND ANOTHER 2021 (2) SACR 654 (GP)

Trial — Assessors — Absence of — Accused legally represented — Magistrate on two occasions having raised issue of assessors, and legal representatives conveying that assessors not required — No need in such circumstances for presiding officer to explain relevant provisions of Act to accused, or what rights were in that regard — No misdirection having occurred — Magistrates' Courts Act 32 of 1944, s 93*ter*(1).

The appellants contended on appeal that there had been a fatal misdirection in their trial in a regional court and their conviction on a count of murder, in that there had not been compliance with the requirements of s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944, in that no assessors had been appointed.
Held, that the magistrate had on two occasions raised the matter of assessors with the legal representatives of the appellants who had conveyed that they did not require assessors. There was no need, when the accused was represented, for the regional magistrate to explain in minute detail to the accused what the Act provided in respect of assessors, and what his rights in that regard were. (See [23].)

LETHOKO AND ANOTHER v MINISTER OF DEFENCE AND OTHERS 2021 (2) SACR 661 (FB)

Trial — Delay in prosecution of — Unreasonable delay — Egregious delays in prosecution over many years caused by presiding officers, applicants and first respondent — Effect of — Court expressing displeasure at situation but delay not causing applicants trial-related prejudice, and inappropriate management of criminal cases by individuals could not be allowed to cause rule of law to fail country — Application for stay of prosecution dismissed.

The two applicants, both soldiers in the South African National Defence Force, were caught red-handed in 2006 stealing fuel to the value of R1715, and were convicted in a military court of theft. They were sentenced to fines, detention and demotion, the detention and demotion being suspended. Their convictions were subsequently overturned in a military review process in 2010. The case was re-enrolled in November 2011, but was postponed on many occasions, some of which were caused by the applicants' legal representative. In September 2019 the applicants served notice of motion in an application for the permanent stay of their prosecution.
Held
The history of the matter showed beyond doubt that the cause of the shocking delay from 2006 – 2021 in the finalisation of the case lay at the door of the presiding officers, the applicants and the first respondent. They brought the administration of justice into disrepute and could have done much better to uphold the duty to ensure the expeditious finalisation of the matter. The charges against the applicants were serious. They were committed against their employer, and the theft was blatantly committed in relation to the property of the taxpayer and citizens of the country. The evidence against the applicants was strong, but they were represented by sturdy and experienced counsel and faced no trial prejudice. Prejudice in respect of things such as training, and promotion opportunities, could be addressed on other points of law. It was high time for the matter to go on trial and for justice to take its course. A healthy democracy and the protection of the citizen in general demanded that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals must not cause the rule of law to fail the country. (See [32].) The application for a stay of prosecution was dismissed.

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Kouwenhoven v Director of Public Prosecutions (Western Cape) and others [2021] 4 All SA 619 (SCA)

Criminal Law and Procedure – Extradition – Discharge of person whose extradition is requested – Appeal against dismissal of review – Section 310(1) of the Criminal Procedure Act 51 of 1977 conferring right of appeal on Director of Public Prosecutions where a magistrate has given a decision in criminal proceedings in favour of an accused, on any question of law

Criminal Law and Procedure – Extradition – In terms of meaning of “committed within the jurisdiction” in section 3(1) of the Extradition Act 67 of 1962, underlying criminal

activity not intended to be confined to territorial jurisdiction of court of the requesting State.

The appellant, Mr Kouwenhoven, was a Dutch citizen who was arrested pursuant to a warrant of arrest issued in terms of section 5(1)(b) of the Extradition Act 67 of 1962 (the "Act"). He unsuccessfully challenged his arrest in review proceedings before the High Court and his appeal against that decision was dismissed. An extradition enquiry was held before the fourth respondent, and Mr Kouwenhoven contended that he was not subject to extradition in terms of section 3(1) of the Extradition Act because the crimes of which he had been convicted in the Netherlands had been committed in Liberia and not within the territorial area of jurisdiction of the Netherlands itself. The magistrate upheld the point and held that Mr Kouwenhoven was not a person liable to be extradited in terms of the provisions of section 3(1) of the Act. Following from that conclusion he was discharged in terms of section 10(3).

The National Director of Public Prosecutions, Western Cape (the "DPP"), then asked the magistrate to state a case for consideration of the High Court in terms of section 310(1) of the Criminal Procedure Act 51 of 1977, as read with rule 67(12) of the Magistrates' Court Rules. The magistrate stated a case and the DPP lodged a notice of appeal in the High Court. Mr Kouwenhoven launched a fresh application for review against the DPP, the State and the Minister of Justice and Correctional Services. The basis of the review was that section 310(1) of the Criminal Procedure Act was not available to challenge the outcome of an extradition enquiry. Alternatively it was alleged that the statement of case prepared by the magistrate was invalid and fell to be set aside because Mr Kouwenhoven had not been afforded notice of the request to state a case, nor given an opportunity to make representations to the magistrate in regard to its preparation.

The upholding of the DPP's appeal, the dismissal of Mr Kouwenhoven's review, led to the two appeals before the present court.

Held – Section 310(1) of the Criminal Procedure Act confers a right of appeal on the DPP where a magistrate has given a decision (a) in criminal proceedings; (b) in favour of an "accused"; (c) on "any question of law". The magistrate's decision to discharge Mr Kouwenhoven was undoubtedly a decision based on a question of law. Noting that the decision was given in criminal proceedings and, for the purposes of those proceedings, Mr Kouwenhoven was an accused, the court confirmed that it was open to the DPP, to challenge, by way of an appeal on a case stated, a magistrate's decision to discharge an accused at the end of a preparatory examination on the basis of a conclusion on a question of law.

The Court then examined the nature of extradition proceedings and held that they were criminal proceeding for the purposes of section 310 of the Criminal Procedure Act. The decision by the magistrate was appealable in terms of section 310.

Setting out the procedure for stating a case, the court dismissed the appeal in respect of the procedure followed in this case.

Turning to section 3(1) of the Extradition Act, the Court considered the meaning of "committed within the jurisdiction" and found that the criminal activity was not intended to be confined to territorial jurisdiction of court of the requesting State.

None of Mr Kouwenhoven's arguments being sustainable, the Court dismissed the appeals.

NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd [2021] 4 All SA 652 (SCA)

Civil Procedure – Remedy for alleged defamation – Whether remedy sought is damages, an apology or a retraction, such relief cannot be claimed in motion proceedings where there are disputes of fact – Damages in such circumstances can only be determined in proceedings by way of action, or possibly in special circumstances after hearing oral evidence in application proceedings.

The appellant ("NBC") and respondent ("Akani") were competing pension fund administrators. When Akani was set to replace NBC as administrator of a certain fund, some trustees, supported by NBC, obtained an interdict preventing the transfer of the fund's administration from NBC to Akani for a limited time, to allow review proceedings to be brought. NBC, however, wrote to employers participating in the fund, informing them of the interim interdict, and stating that the court had found strong evidence of corruption. The publication of the letter led to Akani approaching the court for relief, claiming that the letter was defamatory. The court found that NBC's statement was a material distortion of the judgment granting the interdict and was defamatory, wrongful and unlawful.

NBC appealed against the court's finding.

Held – NBC's statement was *prima facie* defamatory and it bore the onus of showing either that it was not published unlawfully, or that it was not published with the intent to injure (*animo injuriandi*).

Significant in this case was the fact that Akani sought relief by way of urgent motion proceedings and not by way of action. Akani maintained that an award of damages would not be an adequate remedy for the commercial harm it had suffered. The ostensible aim in seeking an interdict was to prevent future publication of the same or additional defamatory statements. The interdict was directed at preventing future unlawful conduct and needed to be based on a reasonable apprehension of future harm. In the absence of evidence of the possibility of further publication of defamatory matter by NBC, interdictory relief was not warranted.

That left the remaining issue regarding the remedy of compensation for the harm already done by the publication. A successful claimant in a defamation action is entitled to an award of general damages to compensate for the damage to its reputation. It is also entitled to claim special damages in the form of financial loss occasioned by the defamatory publication. Akani was only entitled to a single global remedy against NBC to remedy all the harm occasioned to it by the publication. Generally, the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law offers.

The court's ability to determine an appropriate remedy was hindered by the fact that it did not know what harm had been caused by the publication and its impact on Akani's reputation. A claim for damages for defamation, whether general or special, was always unliquidated and the damages could only be determined in proceedings by way of action, or possibly in special circumstances after hearing oral evidence in

application proceedings. Where in proceedings by way of application, damage to the applicant's reputation has been placed in issue, no relief can be granted if there is a dispute of fact on the papers. It was thus inappropriate for the High Court to grant the order it made.

Interpreting NBC's letter, the Court found that proof of corruption was central to NBC's defence but required leading of evidence. No order can be made in motion proceedings where a respondent produces evidence in support of the existence of a defence.

The appeal was upheld.

Nimble Investments (Pty) Ltd (formerly known as Tadvest Industrial (Pty) Ltd and Old Abland (Pty) Ltd) v Malan and others [2021] 4 All SA 672 (SCA)

Property – Lawfulness of eviction order – For a lawful eviction, section 8 of the Extension of Security of Tenure Act 62 of 1997 requires just and equitable termination of the right of residence – An "occupier" under section 8(4) of Act, cannot have right of residence terminated unless having committed a breach contemplated in section 10(1)(c).

The appellant ("Nimble") appealed against the setting aside by the Land Claims Court ("LCC") of an order for the eviction of the respondents.

The first respondent, Mrs Malan, was a long-term occupier living in a cottage on a farm owned by Nimble. When Nimble required her to move to another cottage on the farm, meetings were held with the first respondent, to get her to agree to relocate to the alternative cottage. She and her family eventually moved but during the relocation process the fourth respondent (the son of the first respondent) and some unidentified members of the first respondent's household removed the roof tiles, roof sheets and trusses (building material) from the cottage they had first occupied, and erected an illegal structure next to the new cottage using such building material. That led to termination of her right of residence and her being required to vacate the property.

Held – The two issues on appeal were whether the termination of the right of residence was just and equitable both in substance and in procedure, and if so, whether the eviction would be just and equitable.

The Extension of Security of Tenure Act 62 of 1997 envisages a two-stage eviction procedure: first, a notice of termination of the right of residence in terms of section 8, and second the notice of eviction in terms of section 9(2)(d). If found that the termination of the right of residence was not just and equitable due to non-compliance with section 8(1)(e), then there would be no need to determine the second issue. Eviction proceedings can only commence after the right of residence is terminated.

The basis on which the appellant terminated the first respondent's right of residence was that she had committed a fundamental breach of trust as contemplated in section 10(1)(c) of the Act by allowing the building materials to be removed.

Section 9(2) sets out four requirements which must be met in order for an eviction application to be granted.

In considering whether the termination of the right of residence was just and equitable, both procedurally and in substance, the court had regard to section 8(1) of the Act. Section 8(1)(e) provides that "the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence".

As Mrs Malan had lived on the farm for at least ten years and had reached the age of 60 years, she qualifies as an "occupier" under section 8(4) of the Act, and her right of residence could not be terminated unless she committed a breach contemplated in section 10(1)(c). Allowing unauthorised persons to occupy the farm by erecting an illegal structure on it and refusing to demolish the illegal structure and return the building materials, constituted a breach as contemplated in section 10(1)(c).

The court interpreted section 8(1)(e) and held that an opportunity for representations was not required in the circumstances of this case.

The appeal was upheld and the eviction order confirmed.

Pride Milling Company (Pty) Ltd v Bekker NO and another [2021] 4 All SA 696 (SCA)

Corporate and Commercial – Company law – Winding up of company – Validity of dispositions made by company being wound-up – Whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order – Default position in terms of section 341(2) of the Companies Act 61 of 1973 is that all dispositions by a company being wound up have no force and effect in the eyes of the law – Court's discretion to order the contrary only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order.

Four payments for goods sold and delivered were made to the appellant (Pride Milling) by a company which was in the process of being liquidated. As joint liquidators of the company, the respondents contended that the payments were void and prohibited in terms of section 341(2) of the Companies Act 61 of 1973. They maintained that the payments were liable to be set aside because they were made after the effective date of the winding-up application. The High Court upheld the respondents' contentions, leading to Pride Milling's appeal.

Held – The appeal hinged on the proper interpretation of section 341(2), read with section 348. The text, context and purpose of the legislation must be considered together when interpreting a statutory provision. The predominant purpose of section 341(2) is to decree that all dispositions made by a company being wound-up are void. That provision had to be read with section 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render section 341(2) operative.

The question for determination was whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order.

Once a court grants a provisional order a *concursus creditorum* is established. The effect thereof is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted.

Regarding the High Court's discretion in such applications, the court confirmed that a court exercising such a discretion may properly come to different decisions having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion. An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.

The provisions of section 341(2) decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. A rider in section 341(2) aims to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the Legislature. That discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order.

Finding no reason to interfere on appeal with the manner in which the High Court exercised its discretion, the court dismissed the appeal with costs.

Rohde v S [2021] 4 All SA 710 (SCA)

Criminal law and procedure – Appeal against conviction on charges of murder and obstructing course of justice – Whether State had proved beyond reasonable doubt that the deceased had been killed or whether there was a reasonable possibility that she might have committed suicide – Expert evidence – Court having to make determination of whether and to what extent expert opinions were founded on logical reasoning or were otherwise valid – Acceptable expert evidence showing that trial court had erred in its finding on actual cause of death.

The appellant was convicted of the murder of his wife and obstructing the course of justice, and was sentenced to an effective term of imprisonment of 20 years' imprisonment. On appeal, the central question was whether the State had proved beyond reasonable doubt that the deceased had been killed or whether there was a reasonable possibility that she might have committed suicide. The deceased was found dead in the bathroom of the hotel room she was staying at with the appellant.

Four specialist pathologists testified at the trial, explaining to the court the nature and likely cause of the injuries found on the deceased. The trial court concluded that the appellant and deceased had had a physical altercation in which the appellant had struck the deceased, smothered her to death and then set it up to look like she had committed suicide.

Held – In evaluating the divergent opinions of the pathologists, the court had to make a determination of whether and to what extent their opinions were founded on logical reasoning or were otherwise valid. The Court found that the acceptable expert evidence showed that the trial court had erred in its finding of smothering of the

deceased. It was concluded instead that the deceased's neck injuries were caused by manual strangulation and that the ligature found around her neck was applied post mortem.

Based on the conclusion that the appellant had unlawfully and intentionally killed the deceased by manual strangulation but did not assault her in any other way (as suggested by the trial court), the court had to reconsider sentence on the first count. Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment in respect of murder, unless there are substantial and compelling circumstances that justify a departure from the prescribed sentence. There were no such circumstances to depart from the prescribed minimum sentence, and the Court imposed a sentence of 3 years' imprisonment on the second count, which was to run concurrently with the sentence on the murder count.

Somali Association of South Africa and others v Refugee Appeal Board and others [2021] 4 All SA 731 (SCA)

Immigration – Refusal of applications for refugee status – Duties of Refugee Status Determination Officers and Refugee Appeal Board – An asylum seeker should be assisted to present as full a picture as circumstances permit – Failure to comply with duties and to correctly apply provisions of Refugees Act 130 of 1998 rendering decision of officials reviewable.

The first appellant was a registered non-profit organisation, which had amongst its objectives, defending the rights and advancing the welfare of the Somali community in South Africa. The second to ninth appellants were asylum seekers. They brought appeals against the refusal of refugee status by Refugee Status Determination Officers ("RSDO's"). Their appeals were dismissed by the Refugee Appeal Board ("RAB"), and the High Court then dismissed their application for review of the Board's decision.

On appeal, the appellants challenged the legality and fairness of the process adopted by the Board. The issues were whether the Board had complied with its duty to assist an asylum seeker to procure evidence and information on which the decisions were to be based. It was also alleged that the Board misapplied the statutory requirements for refugee status.

Held – The Refugees Act 130 of 1998, as it stood at the time of this matter being decided, deals with the State's interests to ensure that refugee status is granted to only those who qualify. In dealing with such applications, State authorities are required to ensure that constitutional values, including those that embrace international human rights standards, are maintained. Section 2 of the Act, in recognition of the aforesaid values, entrenches the international principle of *non-refoulement*.

The Court took note of the conditions in Somalia leading up to the flight by the eight asylum seekers from that country before turning to consider the refugee status determination process that each had been subjected to. The RSDOs, the RAB and the High Court were mistaken in their view of how the statutory process leading up to the adjudication of an application for refugee status or an appeal was designed to unfold. In terms of section 21(2)(b) of the Act, a Refugee Reception Officer ("RRO") must, at source, in accepting an application form from an asylum seeker, see to it that the application form is properly completed, and, where necessary, must assist the

applicant in that regard. In terms of section 21(2)(c) a RRO may conduct such enquiry as he deems necessary in order to verify the information furnished in the application. Section 24(1)(a) requires, that upon receipt of an application for asylum, the RSDO, in order to make a decision, may request any information or clarification he deems necessary from an applicant or RRO. Section 24 provides that the RSDOs must, in dealing with an application, bear in mind the provisions of the Promotion of Administrative Justice Act 3 of 2000, and ensure that an applicant fully understands the procedures, his responsibilities, and the evidence presented.

While the High Court was correct about an asylum seeker having to ultimately show that he meets the statutory standard, it erred in holding that the RAB was confined to the record before it and to the evidence thus presented. An asylum seeker should be assisted to present as full a picture as the circumstances permit. The High Court ought to have concluded that the RSDOs and RAB failed in that duty. There was also a failure to afford the asylum seekers an opportunity to respond to what the Board considered adverse to their case.

The appeal was upheld.

Coko v S [2021] 4 All SA 768 (ECG)

Criminal law and procedure – Appeal against conviction and sentence on count of rape – Onus of proof – State bearing onus of proving beyond reasonable doubt that the appellant had unlawfully, and with intention, sexually penetrated the complainant without her consent – Based on evidence, court unable to find that State had proved that the version of the appellant that he genuinely believed there was at least tacit consent, was false beyond reasonable doubt.

Convicted on one count of rape and sentenced to 7 years' imprisonment, the appellant appealed against his conviction and sentence, submitting that the State failed to prove beyond reasonable doubt the elements of the crime of rape and that the sentence was unduly harsh, ignored interests of society, and induced a sense of shock.

It was common cause that the appellant and the complainant were in a relationship, which had been terminated by the complainant shortly after the alleged rape. On the night of the incident, they were together, and ended up having unprotected sexual intercourse. The complainant alleged that she had not consented to that. She did confirm that she had gone to the appellant's home, with the intention of spending the night, and that they had got into bed to watch a movie. She did not object to intimacy with the appellant, but stated that she had let him know that she did not want to engage in actual intercourse.

The appellant's defence was that he had no intention of having sex with the complainant without her consent. He admitted that consent was not explicitly given, but maintained that he genuinely believed that consent had been indicated by the conduct of the complainant.

Held – The State bore the onus of proving beyond reasonable doubt that the appellant had unlawfully, and with intention, sexually penetrated the complainant without her consent. There was no onus on the appellant to prove his innocence. In order to be acquitted, the version of an accused need only be reasonably possible true.

As section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 punishes the unlawful, intentional sexual penetration without consent, rape is a statutory offence. Section 1(2) deals with consent and provides *inter alia* that for the purposes of the offence of rape, consent means "voluntary or uncoerced agreement". Section 1(3) provides for the circumstances in which a complainant does not voluntarily or without coercion give consent to sexual penetration.

In convicting the appellant, the trial court appeared to place a higher standard on him due to the fact that the complainant was a virgin. That was a misdirection of law. There are no different standards applicable to women (or men) who are virgins and those who are not. Consent means the same thing regardless of whether the victim is a virgin or not.

The Court highlighted various factual misdirections committed by the trial court. It then explored the issue of how consent is to be ascertained. Based on the evidence, it could find that the State had proved that the version of the appellant that he genuinely believed there was at least tacit consent, was false beyond reasonable doubt.

A final aspect addressed by the court on appeal related to the manner in which the conduct of the trial adversely affected the rights of the appellant to a fair trial.

The appeal was upheld and the conviction and sentence of the appellant set aside.

Diaz Hotel and Resort (Proprietary) Limited v Body Corporate of the Vista Bonita Sectional Titles Scheme and another [2021] 4 All SA 786 (WCC)

Property – Sectional title scheme – Rights of exclusive use of parts of common property – Section 27(1)(c) of the Sectional Titles Act 95 of 1986 providing that a body corporate would acquire rights to exclusive use areas if the developer ceases to be a member of the body corporate by ceasing to have a share in the common property – Purchaser of unit in scheme entitled to transfer of exclusive use rights of common property allocated to unit, but not transfer of ownership thereof.

In terms of a sale agreement entered into between the applicant and a third party in 2015, the applicant purchased all the rights and assets of a business owned by a company in liquidation. Included in the *merx* purchased was a unit in the sectional title scheme in which the respondent was the body corporate. There were two exclusive use areas allocated to the unit, namely, parking bays P73 and P74. The applicant submitted that it was entitled to obtain transfer of parking bay P64 as well as the two exclusive use areas. It therefore brought an application for declaratory relief and to compel the first respondent to cooperate with it to achieve transfer of the three exclusive use areas. After the conclusion of the sale transaction, the agreement and related transfer documents were lodged in the Deeds Office to transfer the immovable property into the name of the applicant. However, the applicant was informed that the Deeds Office had rejected the transfer of the three exclusive use areas as they were not expressly cited in the sale agreement. That led to conclusion of an addendum to amend the agreement so that it expressly included the three exclusive use areas as part of the assets sold under the agreement. Upon re-lodging, the Deeds office registered the transfer of the unit into the applicant's name, but failed to register the transfer of the exclusive use areas. The applicant submitted that it required the

respondent's cooperation to rectify the error in the Deeds Office but the latter had failed and/or refused to provide the necessary information to effect such transfer.

Held – The legal question was whether any right to the exclusive use areas which were registered in the seller's name vested in the respondent in terms of section 27(1)(c) of the Sectional Titles Act 95 of 1986, when the seller ceased to be a member of the respondent, and if not whether they could still be transferred to the applicant. Assuming that they could still be transferred to the applicant, it had to be determined whether section 33(1) of the Deeds Registries Act 47 of 1937 could be utilised for that purpose.

Section 27(1)(c) deals with rights of exclusive use of parts of common property. A body corporate would acquire rights in terms of section 27(1)(c) if the developer ceases to be a member of the body corporate as contemplated in section 2(2) of the Sectional Title Schemes Management Act 8 of 2011 (ie the developer ceases to be a member of the body corporate when he ceases to have a share in the common property). The body corporate must then apply to the Registrar for the issuing of a certificate of real rights in its favour.

The conclusion of the addendum in order to ensure that transfer of rights to the exclusive use areas was effected resulted in applicant acquiring personal rights in that regard. That transfer of the exclusive use areas rights did not happen was an error requiring rectification to reflect the correct legal position. However, section 33(1) of the Deeds Registries Act could not be used to transfer the rights to the applicant, as transfer of ownership rights were not being dealt with. It was concluded that the applicant was entitled to transfer of the exclusive use rights to the parking bays, but not of ownership of the bays.

Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV (Markus Johannes Jooste and another as third parties) [2021] 4 All SA 810 (WCC)

Civil Procedure – Legal proceedings by company – Challenge to authority to act – Rule 7, Uniform Rules of Court – The authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed – Late filing of notice condoned in interests of justice.

Corporate and Commercial – Company law – Resolution of company granting director authority to institute legal proceedings – Section 75(5) of the Companies Act 71 of 2008 providing that if a director has a personal interest in respect of a matter to be considered at a meeting of the board, he must disclose the interest before the matter is considered at the meeting – Failure to disclose resulting in resolution being invalid.

In 2019, the applicant ("Lancaster") brought proceedings against the respondent ("Steinhoff") for rescission of a share subscription agreement which Lancaster concluded with Steinhoff in September 2016. In the present proceedings, the court was asked to decide an application in which Steinhoff challenged a resolution adopted by Lancaster, purporting to grant its director ("Naidoo") authority to institute legal proceedings against Steinhoff and its affiliates.

A Rule 7 Notice was served on Lancaster and Steinhoff sought condonation for the late delivery of the notice.

Held – Rule 7(1) provides that the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed. Such person may then no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or the application. Rule 27(3) provides that the court may, on good cause shown, condone any non-compliance with the rules. The court noted that a litigant is entitled, despite the 10-day limit contained in rule 7(1), to challenge a party's authority at any stage before judgment, and found that it was in the interest of justice that condonation be granted, given the implications and importance of the matter.

Steinhoff's challenge was based on section 75 of the Companies Act 71 of 2008, which relates to a company director's personal financial interests. Section 75(5) provides that if a director has a personal interest in respect of a matter to be considered at a meeting of the board, he must disclose the interest before the matter is considered at the meeting; must disclose at the meeting any material information relating to the matter and known to the director; and must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c). The Court accepted that Naidoo had a personal financial interest as contemplated. It then turned to consider whether Lancaster had adduced sufficient evidence to show that it had duly resolved to institute the proceedings and that the proceedings were instituted at its instance. The wording of the resolution did not specifically state that Naidoo had disclosed his personal financial interest as required. Consequently, the resolution was invalid and the automatic consequence was that Naidoo failed to show that he was authorised to act. In the absence of his authority to act, then any instruction that he had given to any legal representative to act on Lancaster's behalf in the proceedings was similarly invalid.

Finally, the Court considered whether it should, in terms of section 75(8), declare the decision valid despite the failure to disclose. It emphasised that the setting aside of the subscription agreement would result in Lancaster and Naidoo having to repay significant sums of money. Naidoo therefore had a direct interest of a financial monetary or economic nature in the decision, that was significant in the determination whether to institute a claim against Steinhoff. His conduct was in breach of his fiduciary duties and the Court declined to declare the relevant resolution valid.

Minerals Council of South Africa v Minister of Mineral Resources and Energy and others [2021] 4 All SA 836 (GP)

Mining, Minerals and Energy – Mining Charter – Whether 2018 Mining Charter was a formal policy document setting out a policy developed by the Minister of Mineral Resources in terms of section 100(2) of the Minerals and Petroleum Resources Development Act 28 of 2002, or a sui generis form of subordinate legislation – Interpretation of section 100(2) of the Minerals and Petroleum Resources Development Act 28 of 2002 – Language of section 100(2) in light of ordinary meaning, context in which it appeared and apparent purpose for which it was directed, leading to conclusion that the section does not empower the Minister to make law – Charter confirmed as being policy instrument.

The Minerals Council of South Africa sought to review and set aside certain clauses of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018. Alternatively, it sought a declaration that the challenged clauses were inconsistent with the principle of legality and should be set aside. At issue in the application was whether the 2018 Mining Charter was a formal policy document setting out a policy developed by the first respondent, the Minister of Mineral Resources (the "Minister"), in terms of section 100(2) of the Minerals and Petroleum Resources Development Act 28 of 2002 (the Act), or a *sui generis* form of subordinate legislation.

Held – Section 100(2) enjoins the Minister to develop a charter that will set the framework for targets and a timetable for attaining the object in section 2(d) of the Act, which is essentially to expand opportunities for historically disadvantaged South Africans to enter into and actively participate in the mining industry, and to benefit from the exploitation of the mining and beneficiation of mineral resources. Section 100(2)(b) adds that the charter must set out how the objects referred to in sections 2(c), (d), (e), (f) and (i) of the Act can be achieved.

Section 4(1) of the Act provides that when interpreting its provisions, a court must prefer a reasonable interpretation which is consistent with its objects over any other interpretation which is inconsistent with such objects. The Legislature specifically chose to use the term "charter" in section 100(2)(a). That on its own was not determinative of whether the Legislature intended it to be an instrument of law or policy. The use of the term "charter" in section 100(2) had to be viewed in the context of the statutory provision in which it is used, as well as the context of the legislation as a whole. The terms used in the Act led the court to conclude that the charter was not subordinate legislation but a policy document.

It was also confirmed that the interpretation that the charter was not enforceable law was consistent with the values of the Constitution.

Having considered the language of section 100(2) in light of its ordinary meaning, the context in which it appeared and the apparent purpose for which it was directed, the court concluded that the section does not empower the Minister to make law. The Minerals Council was therefore entitled to the relief sought.

S v Booysen and others [2021] 4 All SA 859 (WCC)

Criminal Law and Procedure – Application for discharge in terms of section 174 of Criminal Procedure Act 51 of 1977 – A court seized of the question of the possible discharge of an accused at the close of the State's case is concerned with whether there is prima facie evidence that could, not would, sustain a conviction – Where there is eyewitness testimony identifying accused, that evidence could not be rejected out of hand without the need to properly weigh its credibility.

Criminal Law and Procedure – Evidence – Assessment of evidence required in alibi cases – Proper approach is that the court's judgment must be founded on a holistic consideration in an integrated manner of all the evidence adduced at the trial.

Criminal Law and Procedure – Evidence – Identification evidence – Court required to assess evidence with caution, due to the danger of honest but mistaken identification.

Criminal Law and Procedure – Murder, attempted murder and unlawful possession of firearms and ammunition – Gang-related crimes – Prevention of Organised Crime Act 121 of 1998, section 9 – A person charged with section 9(2)(a) must be shown to have intended their act to cause, bring about, promote or contribute towards a pattern of criminal gang activity.

A shooting incident that took place in Atlantis, Cape Town, led to the accused being charged with murder, attempted murder, and contravention of the Prevention of Organised Crime Act 121 of 1998 and the Firearms Control Act 60 of 2000. They pleaded not guilty on all counts.

After the State closed its case, the accused applied to be discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977. The court refused the applications and provides its reason for doing so in the judgment.

Held – An accused is entitled to his discharge at the close of the prosecution's case if at that stage there is no evidence upon which a reasonable court could convict him. A court seized of the question of the possible discharge of an accused at the close of the State's case is concerned with whether there is *prima facie* evidence that could, not would, sustain a conviction. As there was eyewitness testimony identifying all accused as having been involved in the gang-related shooting incidents that gave rise to the charges brought against them, that evidence could not be rejected out of hand without the need to properly weigh its credibility.

After the dismissal of the applications in terms of section 174, the accused chose to adduce evidence in their defence, with each maintaining that they were somewhere else when the shootings happened.

The fundamental issues to be weighed in determining whether the State had proved its case against the accused beyond reasonable doubt were whether their identification by the eyewitnesses who gave evidence for the prosecution was credible and reliable and whether there was a reasonable possibility that their alibi defences could be true. There is nothing exceptional or special in the assessment of the evidence required in alibi cases, and the proper approach is that the court's judgment must be founded on a holistic consideration in an integrated manner of all the evidence adduced at the trial.

Identification evidence must always be weighed with some caution, due to the danger of honest but mistaken identification. The court was satisfied with the reliability of the identification evidence adduced in this case.

Despite it being unclear who exactly had fired the shots causing the deaths and injuries, the evidence established the requirements for the doctrine of common purpose to apply. The evidence also established so-called *dolus indeterminatus* or general intention to kill.

Turning to the charges brought under section 9 of the Prevention of Organised Crime Act, regarding gang-related criminal activity, the Court held that a person charged with section 9(2)(a) must be shown to have intended their act to cause, bring about, promote or contribute towards a pattern of criminal gang activity. That could not be said to be the case in this instance, and the accused could be found guilty of contravening section 9(2).

Based on the above findings, the second and third accused were acquitted on all counts due to insufficient evidence against them. The first accused was however, convicted of two counts of murder, two counts of attempted murder, and of unlawful possession of a firearm and ammunition.

S v Kwaza and others [2021] 4 All SA 906 (WCC)

Criminal Law and Procedure – Criminal proceedings – Unreasonable delay in finalising of proceedings – Section 342A of the Criminal Procedure Act 51 of 1977 – Court conducting inquiry into unreasonable delay caused by Counsel's tardiness and double booking – Conduct of Counsel referred to Legal Practice Council in terms of section 342A(3)(f), for consideration of appropriate steps.

A trial which had been set down to run from 3 August 2021 until 31 August 2021, was plagued by postponements and was still not complete by 9 September 2021. After the court had heard only three witnesses, Counsel for the third and fourth accused, Mr Gladile, requested the court's permission to withdraw from the matter. He relied on alleged lack of financial instructions from the clients, and a prior commitment to attend a part-heard matter in the Eastern Cape Circuit Court.

The Court decided to conduct an inquiry in terms of section 342A of the Criminal Procedure Act 51 of 1977 to investigate whether there had been an unreasonable delay on the part of Mr Gladile in the completion of the proceedings.

In accordance with section 342A(2), the court listed the various postponements in the matter, the causes therefor, and the explanations furnished in relation thereto.

Held – The Court harboured serious reservations about the *bona fides* of the application. However, it was of the view that allowing Mr Gladile to withdraw was likely to significantly enhance the pace at which the trial progressed, which would be to the benefit of the court and the accused. Leave to withdraw was thus granted.

In terms of section 342A(1), a court before which criminal proceedings are pending, shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his legal advisor, the State or a witness. In considering whether any delay is unreasonable, the court shall consider the factors set out in section 342A(2).

Mr Gladile was found to have been responsible for a significant part of the delays in this matter. The Court referred to the time lost due to his poor timekeeping, and to delays which were entirely attributable to Mr Gladile's misconduct and blatant dishonesty in advancing false explanations to explain absences from court. Emphasising duty of absolute honesty which Counsel owes to the court, the court held that Mr Gladile's behaviour warranted the attention of the Legal Practice Council.

Having regard to the criteria set out in section 342A(2), the court found that there had been an unreasonable delay in the proceedings caused by Mr Gladile's unauthorised absences, and that the wasted costs to the State occasioned by such delays amounted to an aggregate of not less than R4 551,24. An order was made under section 342A(3)(f), referring the matter to the Legal Practice Council for consideration of appropriate steps to be taken against Mr Gladile.

END-FOR-NOW