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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

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Richard Spoor Attorneys, an environmental law firm and the Legal Resources Centre representing Sustaining The Wild Coast, Mashona Wetu Dlamini, Dwesa-Cwebe Communal property Association, Ntshindisk Nongcavu, Sazise Maxwell Pekayo, Cameron Thorpe, All Rise Attorneys for Climate and the Environment NPC, delivered the certificate of urgency to the Court Registrar this week and the papers were delivered to Shell electronically.

The respondents on the matter are the Minister of Mineral Resources and Energy, Minister of Forestry, Fisheries and Environment, Shell Exploration and Production South Africa LTD, Impact Africa Ltd and BG International Limited.

In a founding affidavit by Reinford Sinegugu Zukulu, the group argues that none of the applicants have been consulted regarding the exploration right or its impact.

The papers indicate that it is not clear if the blasting was already underway or not.

“After receiving an exploration right without any meaningful community engagement eight years ago, Shell is now rushing to blast our seas without any environmental authorisation under the National Environmental Management Act (Nema) on a month’s notice. They do so without even an environmental impact assessment. They do so even though they were told nearly a decade ago to seek Nema approval,” Zukulu said.

The affidavit states that Shell’s conduct is literally criminal under both the Nema and the Mineral and Petroleum Resources Development Act (MPRDA).

“We ask this honourable court to protect Wild Coast communities, the environment, and our Constitution by stopping them from proceeding — first on an interim basis, and then on a final basis,” said Zukulu.

According to the affidavit, the Environmental Management Programme (EMPr) says very little about communities on the Wild Coast.

“We are described merely as subsistence fishers who have been forced to adopt a subsistence lifestyle. I note that we reject this characterisation. The Dwesa-Cweba community fought to compel the State to recognise and support customary fishing rights. We are fishing communities. If Shell had bothered to consult with us, they would know this,” read the affidavit.

The affidavit states that there is some discussion of the seafood that we harvest in the EMPr, but no discussion whatsoever about traditional healing or any cultural or spiritual issues relating to the sea.

“The only heritage concerns mentioned in the EMPr relate to shipwrecks. The only meaningful attempt to consult with traditional communities was a single meeting with

two traditional monarchs and a certain Mr Richard Stephenson who was purportedly mandated to represent four Transkei Kingdoms. I note that the relevant footnote only notes three Kings engaged with, and excludes the Kingship of Eastern Mpondoland, the Kingship with jurisdiction over my community," said the affidavit.

The affidavit states that Shell does not have an environmental authorisation in terms of the Nema.

"In terms of both section 5A of the MPRDA and 24F of the Nema Shell may not commence using its exploration right. Both the MPRDA and Nema make it an offence for Shell to commence its activities without an environmental authorisation. The fact that Shell was not involved from the beginning is neither here nor there. They knew that the right was first granted in 2013 and had barely been exercised since. They knew or ought to have known a Nema environmental authorisation was required to exercise their right," read the affidavit.

The affidavit said the EMPr acknowledges that the East Coast, particularly the Transkei coastal area, is home to a large poor rural community that is directly reliant on the coast/marine resources to supplement their livelihoods.

"Despite this acknowledgment, the EMPr, on the basis of limited study on the impact of the intensity of the proposed seismic surveys on fish, concludes that the impact is deemed negligible or low because of the short-term duration of the surveys. Our right to culture under section 30 of the Constitution will be adversely affected by the proposed seismic surveys, as will our section 24 right to environmental protection. It is also inarguable that the proposed seismic surveys will have an adverse effect on the environment," added the affidavit.

According to the affidavit, the EMPr also does not adequately address the risk of serious impacts to zooplankton from the proposed seismic surveys, which pose potential risks to the increasingly fragile marine food chains in the exploration areas.

"Nor does it explain and address the challenges that it itself alludes to with respect to assessing risk to highly sound-sensitive cetaceans," said the affidavit.

The affidavit states that should an interim interdict not be granted and should the blasting go ahead in the absence of an environmental authorisation as planned, there will be irreparable harm.

“Once the blasting of the sea commences, damage will be irreversible,” added the affidavit.

It adds that there is simply no alternative remedy to an interim interdict or a final interdict available to the Applicants.

“The relevant state regulators have been asked to intervene. They have declined. We are not able to prevent the companies from commencing as we have had to do with mining companies because the activities are not on our land. Subsequent criminal prosecution — even a private prosecution — will not cure the damage done. Especially where Shell will have a credible defence that it lacked *mens rea* in committing the offence if their criminal conduct is not stopped by this honourable court,” said the affidavit.

The affidavit states that the matter is urgent as Shell is about to start firing incredibly loud air guns in our sea every ten seconds, or has started already.

“This conduct is harmful and plainly unlawful.

Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (3491/2021) [2021] ZAECGHC 118 (28 December 2021)

Interdict against Shell- one court says no another court says yes, same division of High Court –see Border Deep Sea Angling Association and Others v Minister of Mineral Resources and Energy and Others (3865/2021) [2021] ZAECGHC 111 (3 December 2021) where interdict was not granted

[1] This is an application for an interim interdict. The application has two parts. In Part A the applicants seek an order interdicting the third, fourth and fifth respondents from proceeding with a seismic survey pending the finalisation of the relief sought under Part B. In Part B they seek an interdict prohibiting the same respondents from

proceeding with the seismic survey unless and until an environmental authorisation has been granted under the National Environmental Management Act[1] (NEMA).

The parties

[2] The applicants are non-profit companies, natural persons and a communal property association. The first applicant, Sustaining the Wild Coast NPC, works to promote sustainable livelihoods that construct, rehabilitate and protect the natural environment on the Wild Coast. The second applicant is Mashona Dlamini, a traditional healer and a member of the iNkosana's (headwoman's) council, a body established in terms of customary law. He acts on his own behalf and on behalf of traditional healers along the Wild Coast and on behalf of the Umgungundlovu community. The third applicant is the Dwesa-Cwebe Communal Property Association. The fourth applicant is Ntsindiso Nongcavu, a fisher from Port St Johns who acts on his own behalf as well as on behalf of fellow Wild Coast fishers. The fifth and sixth applicants are Sazise Pekayo and Cameron Thorpe respectively, who are both fishers from Kei Mouth and members of a local cooperative, the Kei Mouth Fisheries. They act on their own behalf and on behalf of their community as well as on behalf of fellow Wild Coast fishers. The seventh applicant is All Rise Attorneys for Climate and Environmental Justice NPC, a law clinic representing communities fighting against and affected by climate change. It is not in dispute that all the applicants act in the public interest and in the interest of protecting the environment.

[3] The first respondent is the Minister of Mineral Resources and Energy. The second respondent is the Minister of Environment, Forestry and Fisheries. The third respondent is Shell Exploration and Production South Africa BV, the fourth respondent is Impact Africa Limited (Impact Africa) and the fifth respondent is BG International Limited. Hloniphizwe Mtolo, the deponent of the main answering affidavit that was filed on behalf of the third, fourth and fifth respondents, stated that the fifth respondent is the Shell entity which owns the project in question and that the third respondent has nothing to do with the project.

[4] The second respondent does not oppose the application insofar as the relief sought under Part A is concerned. Soon after the founding application papers were served on the respondents, a notice was delivered on behalf of the first respondent, the Minister of Mineral Resources and Energy (the Minister), indicating that he did not

intend opposing Part A of the application. However, on 15 December 2021 a notice to oppose was delivered on behalf of the Minister. Later on that day an affidavit was delivered on his behalf wherein his stance to these proceedings was set out. The change of heart was not explained. The third, fourth and fifth respondents (to which I shall collectively refer as Shell) oppose the application.

Introduction

[5] In 2013 Impact Africa submitted an application to the Petroleum Agency of South Africa (PASA) for an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act**[2]** to explore for oil and gas in the Transkei and Algoa exploration areas. PASA accepted the application on 1 March 2013. A draft environmental management programme was made available for interested and affected parties to raise issues and concerns that they may have had with the proposed exploration activities. The issues and concerns were required to have been raised between 22 March and 12 April 2013. Advertisements were placed in The Times, Die Burger (Eastern Cape), The Herald and The Daily Dispatch newspapers, notifying the public of the proposed project and providing details of the consultation process and information on how members of the public could provide input into the environmental management programme process and inviting comment. A final environmental management programme was produced during June 2013. PASA approved it on 9 September 2013, with a few conditions. The Deputy Director-General of the Department of Mineral Resources and Energy approved the environmental management programme and on 29 April 2014 the exploration right was granted.

[6] Shell is currently conducting a seismic survey off the eastern coast of South Africa. The total survey area size is 6 011 square kms. It covers almost the entire Eastern Cape coastline. According to Shell the survey will take between 110 and 140 days, from December 2021 until April 2022, depending on the weather, currents and the sea conditions. The purpose of the seismic survey is to provide imaging of the subsurface to determine whether there might be energy reserves below the sea floor.**[3]** Shell will use the seismic vessel, the Amazon Warrior, from which it will conduct the seismic survey. It is not in dispute that during the survey the Amazon Warrior will discharge pressurised air from its airgun arrays to generate sound waves.

[7] I have to decide whether or not the applicants are entitled to an interim interdict. To secure such an interdict, they were required to satisfy the court that they have established: (i) at least a *prima facie* right even if it is open to some doubt; (ii) a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict is not granted; (iii) that the balance of convenience favours the granting of the interim interdict; and (iv) that they have no other satisfactory remedy.**[4]** Shell contended that the application should be dismissed because, so it contended, the applicants failed to establish any one of the above requirements.

Linde v First Rand Bank Limited (3394/2020) [2021] ZAFSHC 316 (2 December 2021)

Locus standi-authority to act on behalf of Respondent

[1] It is common cause that Judgment was granted against the Applicant on the 15 October 2020 ("the Judgement"). The Applicant now applies for rescission of the Judgment granted as well as condonation for the late filing of the application for rescission of judgment together with ancillary relief.

[2] The Applicant raised two points *in limine*: The Court is of the view that the points *in limine* are equally applicable to both the application for condonation as well as the application for rescission of the Judgment. The Court will firstly deal with the points *in limine*.

FIRST POINT *IN LIMINE*: AUTHORITY TO ACT ON BEHALF OF THE RESPONDENT:

[3] It is averred that the deponent for the Respondent, Maryna Jooste has failed to attach any form of resolution confirming her authority to in fact depose to the affidavit on behalf of the Respondent. It is averred that the deponent has not been mandated by resolution of the Respondent, which is a company, to depose to the affidavit. It is evenly stated that the deponent is not a director.

[4] The Court deems it fit to refer to the matter of **<u>Ganes and Another v Telkom Namibia Ltd</u>** **<u>2004 (3) SA 615</u>** **(SCA) at para [19]** the following is stated:

"*There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the Respondent Hancke said that he was duly authorised to depose to the affidavit. In his answering affidavit the First Appellant stated that he had no knowledge as to whether Hancke was duly authorised to depose to the founding affidavit on behalf of the Respondent, that he did not admit that Hancke was so authorised and that he put the Respondent to the proof thereof.* In my view it is irrelevant whether Hancke had been authorised to depose to the affidavit. ***The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit.*** *It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the Respondent. In an affidavit filed together with the Notice of Motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the Respondent and that such firm of attorneys was duly appointed to represent the Respondent. The statement has not been challenged by the Appellants. It must therefore be accepted that the institution of proceedings was duly authorised.* ***In any event Rule 7 provides that the procedure to be followed by Respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an Applicant****. Appellants did not avail them of the procedure so provided (<u>See</u>: <u>Eskom v Soweto City Council</u>* **<u>1992 (2) SA 703</u>** *(W) at 705 C – J).* (My emphasis).

[5] With due regard to the aforesaid case law, this Court is of the view that the attorney acting for the Respondent needs to be authorised. The deponent as

witness to the affidavit need not be additionally authorised. The authority of the Respondent's attorney has not been challenged in these proceedings.

[6] The first point *in limine* is therefore dismissed.

Scharrighuisen N.O and Others v Black Rock Property Management and Another (74701/2018) [2021] ZAGPPHC 831 (2 December 2021)

Withdrawing proceedings-paying the costs of the proceedings. Rule 41(1) provides that a person withdrawing proceedings (particularly after it has been set down and who does so without consent of the other party or leave of the court), should consent to paying the costs of the proceedings.

[1] Introduction

This is the judgment in an opposed application for costs launched by the defendants in an action pursuant to the plaintiffs' withdrawal of that action without a tender for costs. The parties shall be referred to as in the main action.

[2] Applicable principles

2.1 Rule 41(1) provides that a person withdrawing proceedings (particularly after it has been set down and who does so without consent of the other party or leave of the court), should consent to paying the costs of the proceedings. Should such consent not be "embodied" in the notice of withdrawal, "*the other party may apply to court on notice for an order for costs*".

2.2 The general principle is that a plaintiff who withdraws its action, finds itself in the position of an unsuccessful litigant. See: *Germishuis v Douglas Besproeiingsraad* **1973 (3) SA 299** (NC) at 300D – E.

2.3 The further principle of general application that, unless there are good grounds to find otherwise, costs should follow the event. See the discussion of this rule in Van Loggenberg, *Erasmus – Superior Court Practice*, Vol 2 at D5 – 7.

4.4 The reasonable conduct of litigants in the position of the defendants would have been to give a collective sigh of relief upon learning that the litigation against them will not be continuing. To, however claim their costs and even on

an attorney and client scale is, in these circumstances unreasonable. I will, however, accept that, all other things being equal, they had procedurally been entitled to rely on Rule 41(1)(c). Costs should therefore not be awarded against them for not having been successful in that application.

4.5 However, I find that circumstances constitute sufficient grounds to deprive the notionally successful defendants of their costs of the action.

[5] <u>Order</u>

1. The application is refused.

2. The parties shall each bear their own costs of both the application and the withdrawn action.

Masako v Masako and Another (724/2020) [2021] ZASCA 168 (3 December 2021)

Locus standi – whether an attorney requires authority from client to depose to an affidavit – distinction between right to institute proceedings, authority to act on behalf of client and the basis for deposing to an affidavit – attorney's founding affidavit based on facts known to her – inquiry into attorney's legal standing irrelevant – appeal upheld.

[1] This appeal concerns a narrow question of whether an attorney who deposed to an affidavit in support of a rescission application was required to obtain authorisation from her client to do so. The Regional Court in Garankuwa (regional court), whose decision was confirmed by the North West Division of the High Court, Mahikeng (high court), held that she did. The appeal is with the leave of this Court and is unopposed. It was determined without hearing oral argument, in terms of **<u>s 19</u>***(a)* of the **<u>Superior Courts Act 10 of 2013</u>**, by agreement with the parties.

[2] The appellant and the first respondent were previously married, and their marriage was dissolved by a decree of divorce incorporating a settlement agreement on 13 February 2013. One of the terms of the agreement was that each party would 'retain those assets presently in their respective possession and/or under their respective

control in settlement of their respective claims in the joint estate.' According to the appellant, both parties retained immovable properties registered in their names. She retained the immovable property described as Erf 477, Winterveld JR, North West, which was registered in her name and was under her control and possession.

[3] Despite this agreement, on 24 May 2016, the first respondent launched an application in the regional court seeking an order, inter alia, '[a]ppointing a Receiver and Liquidator of the assets of the joint estate subsisting between the [first respondent] and the [appellant].' The Liquidator would, among other things, be vested with the right to 'determine the value of the assets of the communal estate as at date of Divorce and ascertain which party retained which of the assets when the [first respondent] left communal home and thereafter divide the assets on [an] equal basis between the parties taking into consideration all outstanding debts as at date of Divorce.'

[4] The appellant appointed Ms Nkagiseng Moduka, an attorney, to act on her behalf in opposing the application, and an answering affidavit was delivered. The application was set down for hearing on 17 April 2018. That day an order was granted in favour of the first respondent in the absence of the appellant. This led to the appellant bringing an application for the rescission of the order on 21 May 2018. Ms Moduka deposed to the founding affidavit in support of the application for rescission. She alleged that an administrative error in her office had led to the rescission application being incorrectly diarised for 17 May 2018 instead of 17 April 2018.

[5] The rescission application was opposed by the first respondent, who raised a point in limine challenging Ms Moduka's 'locus standi' on the basis that, as the attorney for the appellant, she was not the person affected by the judgment sought to be rescinded. He contended that she did not have a 'direct and substantial interest in the main application', which would entitle her to bring the rescission application. In reply the appellant filed a confirmatory affidavit in which she attested to having instructed her attorney to represent her in all proceedings brought by the first respondent in the matter.

Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station and Another v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels (1140/2020) [2021] ZASCA 175 (14 December 2021)

Contempt of court – requisites for contempt satisfied – wilful disregard of the order and mala fides proved on the part of the appellants – duty to comply with court orders – appeal dismissed.

[1] On 22 April 2020, the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) declared the first appellant, Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station, to be in contempt of court. The second appellant, Mr Lee Bentz, as the controlling mind of the first appellant, was committed to prison for that contempt for a period of 30 days wholly suspended on certain conditions. Aggrieved by these orders, the appellants appealed to this Court with the leave of the high court.

[2] The background of the matter is as follows. The respondent, Bright Idea Projects 66 (Pty) Ltd t/a All Fuels and the first appellant, became parties to a franchise agreement. In terms thereof, the first appellant operated a Caltex filling station at premises owned by the respondent and with fuel products supplied to it by the respondent. At all times relevant hereto, the second appellant was the sole shareholder and director of the first appellant. During 2017, however, a dispute arose between the parties to the franchise agreement. The respondent took the stance that the franchise agreement would come to an end on 31 December 2017. The first appellant, on the other hand, alleged that a new franchise agreement had been entered into, which conferred on it the right to continue to conduct business on the premises for a period of five years from 1 March 2015, with a right of renewal.

[3] The respondent consequently launched an application in the high court for the eviction of the first appellant from the premises. The first appellant, in turn, filed a counter-application in which it sought an order enforcing the alleged new franchise agreement, alternatively a stay of the application pending an arbitration that the first appellant had initiated. The main application and counter-application came before Poyo-Dlwati J on 22 January 2018. Both the litigants were represented by senior counsel. The parties managed to reach an agreement. By consent Poyo-Dlwati J made that agreement an order of court (the consent order). It provided for the postponement of the main application and counter-application and for the filing of further affidavits.

[4] Paragraphs 6 and 7 of the consent order provided as follows:

'6. Pending final determination of the main application and the counter-application:

(a) the parties shall conduct themselves as if the franchise agreement remains of full force and effect and comply with their respective obligations as defined in the franchise agreement;

(b) the Respondent shall source all of its petroleum products from the Applicant, who shall, in turn, supply same to the Respondent.

(It is recorded that the Respondent had placed a further order with Fueltech, on 19 January 2018, and agreed that the aforegoing shall not apply to the execution of that order).

7. It is recorded that the Respondent's consent to this order is granted without prejudice to the Respondent's defences raised in its answering affidavits, including its claim to a stay of these proceedings pending determination by arbitration either in terms of **Section 12B** of the **Petroleum Products Act, 1977**, and/or the franchise agreement.'

[5] For the period commencing on 22 January 2018 to 27 July 2019, the appellants complied with the terms of the consent order. On 24 July 2019, the attorneys for the appellants addressed a letter to the respondent's attorneys stating that whilst being aware of the pending litigation and arbitration proceedings between the parties, the first appellant was aggrieved by the alleged gross overcharging for supplies and failure by the respondent to follow the industry guidelines in respect of pricing. The appellants' attorneys intimated that the first appellant would source supplies at better prices elsewhere and that they had advised their client to go ahead and do so. They further stated that the respondent must by no later than the close of business on Friday, 26 July 2019 table to them and for their client's consideration a decent proposal.

[6] On 24 July 2019, in reply to their letter the respondent's attorneys reminded the appellants' attorneys that the consent order obliged the first appellant to procure all petroleum products from the respondent and attached a copy of the order for their

attention. The respondent's attorneys further pointed out that the first appellant's intended course of action would amount to contempt of court.

Chairperson of the North West Gambling Board & Another v Sun International (SA) Limited (1214/2019) [2021] ZASCA 176 (14 December 2021)

Appeal – condonation for late filing of appeal record and reinstatement of appeal and condonation for late filing of heads of argument – prospects of success assumed – whether good cause shown – dilatory conduct of the appellants – failure to explain blatant disregard of rules and inordinate delays – condonation and reinstatement refused.

[1] After hearing counsel for the appellants on 5 November 2021, we made the order set out above and indicated that reasons for the order would follow. These are the reasons.

[2] The appellants, the Chairperson of the North West Gambling Board and the North West Gambling Board (herein collectively referred to as the Board) and the respondent, Sun International (SA) Limited (herein referred to as SISA), were in dispute over whether Free Play, which was a credit given by SISA to its most valuable customers, ought to be included or excluded from the calculation of gross gaming revenue. This issue has a bearing on the calculation of the correct amount of levy which a casino was obliged to pay for the benefit of the provincial revenue fund. SISA's view was that such credits ought to be excluded, whilst the Board's view was that they should be included. The North West High Court (Gutta AJ) found in favour of SISA. The Board brought this appeal with the leave of the court a quo.

[3] Before this Court were two applications for condonation brought by the Board. They related, firstly, to its failure to file the record of appeal timeously, and secondly, to the late filing of the heads of argument, practice note and certificate (the heads of argument), in terms of Rule 10 of this Court's Rules (the Rules), six months after they were due. It was common cause that the appeal had lapsed upon the failure of the Board to file the record on the extended date of 14 April 2020. The Board thus

sought condonation in respect of both breaches of the Rules, as well as the reinstatement of its appeal. SISA initially opposed the applications for condonation and the reinstatement of the appeal. It withdrew its opposition shortly before the hearing. This did not, of course, relieve the Board of the duty to make out a proper case for condonation and reinstatement.

The applicable Rules

[4] In terms of Rule 8(1) of this Court's Rules, an appellant is required to lodge with this Court's Registrar (the Registrar) six copies of the record of the proceedings in the court below within three months of the lodging of the notice of appeal. In terms of Rule 8(2), this period may be extended either by the written agreement of the parties or by the Registrar following a request by the appellant, with notice of the request being given to the other parties. Rule 8(3) provides that if the record is not lodged within the period prescribed by Rule 8(1), or an extended period in terms of Rule 8(2), the appeal shall lapse.

[5] Rule 10 provides that heads of argument must be filed within six weeks from the lodging of the record; if the appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse.

The late filing of the appeal record

[6] In order to properly assess the Board's submissions regarding the delays and its failure to comply with the Rules, it was necessary to traverse the chronology of events in this matter. The Board's attorney, Ms Makhetha, of Maponya Inc, Bloemfontein, deposed to the Board's application for condonation.

Samancor Chrome Ltd v North West Chrome Mining (Pty) Ltd and Others (30/2020) [2021] ZASCA 183 (23 December 2021)

Interdict – Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) – mining activities conducted in an area not covered by mining permits but within area of applicant's prospecting right – court erroneously dismissing

application on the basis of issue not before it – joinder of Minister of Mineral Resources not necessary – s 47 of the MPRDA not precluding relief – application to adduce further evidence on appeal – requirements therefor not established.

[1] This is an application by the applicant, Samancor Chrome Limited (Samancor), for leave to appeal against the judgment of Leeuw JP in the North West Division of the High Court, Mahikeng, (high court) and, if successful, the determination of the appeal itself. The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (Superior Courts Act). In addition, Samancor sought leave to introduce new evidence on appeal in terms of **s 19***(b)* of the **Superior Courts Act.**

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[2] On 10 December 2018, Samancor had launched an urgent application in terms of rule 6(12) of the Uniform Rules in the high court for an order, inter alia, interdicting and restraining the first respondent, North West Chrome Mining Proprietary Limited (Chrome Mining) and the second respondent, Monageng Family Mining Services Proprietary Limited (Monageng) from:

‘2.1 conducting, facilitating or being involved in any manner whatsoever in mining activities on, or the removal of any material from [Samancor]’s prospecting area situated on the remaining extent of portion 1, portion 5 and a portion of Portion 3 of farm Tweelaagte 175 JP, situated in North West Province, in the Magisterial District of Mankwe, as depicted by the co-ordinates and boundaries in the attached plan marked as “A” (“Samancor’s Prospecting Area”);

2.2 entering Samancor’s Prospecting Area without [Samancor]’s written consent;

2.3 preventing [Samancor] from accessing [its] prospecting area.’

[3] The high court dismissed the application and the subsequent application for leave to appeal. It also refused to grant Samancor's application for leave to adduce further evidence for purposes of the envisaged appeal. Only Chrome Mining and Monageng resisted the proceedings from the beginning, as they still did before us. For

convenience, I refer to them collectively as the respondents for the purposes of this judgment. The following, briefly, are the facts that precipitated the dispute between the parties.

Facts

[4] On 11 December 2017, Samancor was granted a prospecting right in respect of the chrome mineral by the Deputy Director-General (DDG): Mineral Regulation of the Department of Mineral Resources (Department), in terms of s 17(1)**[1]** of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), and by virtue of the powers delegated to him by the Minister of Mineral Resources (Minister).**[2]** The prospecting right was notarially executed on 16 May 2018 and registered in the Mineral and Petroleum Titles Registration Office on 29 August 2018. It was to endure for a period of five years ending on 10 December 2022.

[5] Clause 1 of the prospecting right described the prospecting area in the following terms:

'The Prospecting Area shall comprise of the following:

Certain: remaining extent of *portion 1, portion 5, 7, 8 and 9* of the farm Tweelaagte 175 JP

Situated: North West Magisterial/administrative district Mankwe

Measuring: 1089.4138 hectares in extent.

…

Which Prospecting Area is described in detail on the attached diagram/plan marked Annexure B.' (My emphasis.)

[6] Annexure B is a plan prepared in terms of regulation 2(2) of the Regulations promulgated in terms of the MPRDA. It depicts a Figure A to P that represents the area as described in the prospecting right, with the coordinates of each point provided in the table which forms part of the plan. The plan was certified by a professional land surveyor, Mr Christopher Kirchhoff, and approved by the third respondent, the

Regional Manager North West Province, Department of Mineral Resources (Regional Manager) on 11 June 2018.

Barrisford Brent Petersen Law Incorporated and Another v Donald Robert Mitchell trading as Mitchell & Co (A194/2021) [2021] ZAWCHC 251 (3 December 2021)

Attorneys-Professional negligence- Upon receipt of the summons, the second defendant sent an email to one of the first defendants professional employees[4], with the specific instruction to enter an appearance to defend the action on behalf of the defendants- prudent attorney would have followed up as to what had transpired during the (4) month intervening period after the summons was served: that the summons was issued out in his personal capacity and that the rules

[1] This is a civil appeal from the lower court. For the purposes of convenience and clarity, the parties will be referred to as they were cited in the proceedings in the lower court. The defendants seek to set aside the order of the judicial officer in the lower court in terms of which the lower court refused to rescind a judgment granted by default against the defendants, jointly and severally, the one paying the other to be absolved. This for alleged professional fees owed by the defendants to the plaintiff.

[2] The first defendant is a law firm and the second defendant is a practising attorney. The plaintiff is also a practising attorney. The grounds of appeal as set out in the defendant's notice of appeal are as follows, namely: that the lower court erred in finding that the application to rescind the judgment was piloted under the incorrect section of the Act[1], read with the incorrect applicable rule[2]: that the plaintiff's claim had in any event prescribed in law due to the effluxion of time: that the plaintiff had been incorrectly and defectively cited and that the defendants further enjoyed a *bona fide* defence to the plaintiff's claims for professional fees as claimed by him against them.

THE RELEVANT BACKGROUND FACTS

[3] During September 2020[3], the plaintiff issued out a summons in connection with a joint and several claim against the defendants for professional fees due owing and payable, together with interest and costs. Upon receipt of the summons, the second defendant sent an email to one of the first defendants professional employees[4], with the specific instruction to enter an appearance to defend the action on behalf of the defendants.

[4] At this time, the said professional employee, who was and is a practising attorney was working from home because of the pandemic.[5] Some further issues were encountered during this time, due to the alleged partial destruction of one of the first defendant's branch offices. According to the said employee, he only physically returned to this branch office on the 5th of October 2020.

[5] It is indicated that because of these peculiar circumstances no office file was opened and the matter was accordingly left wholly unattended. The second defendant assumed that the matter had been defended. Thereafter, on the 4th of February 2021, the second defendant contacted his delegated employee to inform him that the sheriff of the court was in the process of attaching some movable property, at his residence. This, because a judgment had been granted against the defendants, jointly and severally, by default. No doubt, this triggered the application for the rescission of the default judgment which was launched on the 8th of February 2021.

[29] Most interestingly, the defendants seem to place some weight on the fact that the plaintiff did not give them notice of the application for default judgment and the application for a warrant of execution. Reliance on this is totally misplaced. In my view, the defendants did not have any defences whatsoever to the claims advanced by the plaintiff and did not exhibit the required ‘good cause’ to rescind the judgment. Besides, there was no good reason to rescind the default judgment. I say this also because the object of rescinding a judgment is to restore an opportunity to litigate a real dispute.[14]

[30] Further, the judgment was not erroneously granted and was not tainted by any fraud, mistake or error. Patently, there was no mistake common to both parties. Further, in any event, there was no causative link between the alleged mistake and the grant of the order by default.**[15]** In addition, the judgment was not granted by any sort of fraud.

[31] What we are left with in essence is a application for rescission of judgment in accordance with rule 49 (1), (2) and (3). As a matter of logic, a case for condonation must be made out as the first hurdle to cross.**[16]** The defendants also face the second hurdle of the provision in the rules that they were 'deemed' to have knowledge of the default judgment within (10) days of the granting of the order. No reasonable and plausible explanation has been given for the (4) month delay that occurred in this case.**[17]**

[32] In my view, taking into account the circumstances of this case, with specific reference to the attempts made by the plaintiff to obtain the legitimate amounts owed to him, as compared to the inaction on behalf of the defendants, the judicial officer in the lower court correctly refused to rescind the judgment.**[18]** No real plausible or reasonable explanation has been preferred by the defendants as to why nothing was done about this matter for a period of approximately (4) months.

[33] In all the circumstances of the matter, I hold the view that there is accordingly no room to interfere with the judgment of the lower court on appeal. In the result, I propose an order in the following terms, namely:

1. That the appeal is dismissed.

2. That the defendants (the appellants), be ordered to pay the costs of and incidental to this appeal (jointly and severally), the one paying the other to be absolved, on the scale as between party and party, as taxed or agreed.

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

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

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

The present matter dealt with a dispute concerning a pre-trial inspection in loco that took place on a number of farms on land constituting the subject-matter of a land claim brought by the plaintiff under the Restitution of Land Act. Participating in the inspection were, amongst others, the present appointed judge, Spilg ADP, and his assessor; the plaintiff claimant and its counsel, Mr *Whittington*, and expert; and the landowner defendants and their counsel, Mr *Havenga*, and expert. Prior to the inspection the parties listed the structure and features they wished to point out. During the course of the inspection, each party would point out the structure or feature they had previously listed, describe its physical characteristics they wished to have observed, and then give an indication of its basic significance, after which the opposing party and court would be given an opportunity to make their own observations. Counsel recorded their clients' comments with a Dictaphone. It was agreed that Mr *Havenga* would prepare a minute of the inspection from the contemporaneous audio recordings, and in the case of disagreement, the court would make a ruling on the final version of the minute. Such a dispute between the parties did arise. Inter alia, the plaintiff wished to have removed from the minute various voluntary statements made by a party or their counsel, going beyond physical observations, in which they explained the significance of a structure or feature that was being pointed out, or made various contentions in respect thereof. The basis for such a claim was the plaintiff's view that the minute should not include opinion evidence and the conclusions of the parties (see [6]).

In resolving the dispute, the court considered the nature and import of statements made during an inspection in loco. One of the purposes of an inspection in loco, the court held, was to enable a court to better understand the oral evidence that would be led. The purpose, the court held, ultimately, of a party's pointing-out of a structure or a feature during an inspection, was to advance a particular position or negate that taken by the other party. Where an inspection took place before evidence was led, some contextualising of the relevance of the structure or feature being pointed out

was necessary. In practice, the respective legal teams would place on record the significance of each observation they had requested. (See [15].)

The court acknowledged that a statement made at an inspection did not constitute testimony before the court, and, having not been under oath, carried no weight in favour of the person who uttered it until it was testified to during the trial hearing itself. It could not be said, however, that such a statement had no consequences and could be ignored (see [16], [17], [18] and [20]). Statements deliberately made before a judge during an inspection constituted allegations on record by the person who made the statement, and formed part of the material which could be introduced during the course of the trial, and which the other party could use in cross-examination in the ordinary way, such as to test veracity and reliability or, in the case of opinion evidence, the underlying premises. Such statements could also sometimes qualify as judicial admissions. (See [17] – [21].) The court noted the untenable situation that would arise were a relevant statement made by a party at an inspection not recorded and a dispute came about as to what was actually said (see [22]).

The court accordingly declined to remove those statements from the minute constituting contentions or explanations. The court did, however, instruct the parties to co-operate to clearly distinguish such statements from other common-cause facts, and who would adduce such statements in evidence. (See [27] – [29].)

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

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

The present appeal concerned the correct application of the respondent's (Brummer's) plea of res judicata in the form of issue estoppel. * The appellant political party (the DA), acting in terms of clause 3.5.1.9 of its federal constitution, † had terminated Brummer's membership for not paying his fees. As a result, Brummer, a career politician, lost his seat as municipal councillor.

Brummer sought to interdict the Independent Electoral Commission from filling the resulting vacancy. The matter ended up in the fast lane of the Western Cape High Court motion court, where counsel for Brummer informed the presiding judge (Traverso DJP) that his client wished to challenge the constitutionality of clause 3.5.1.9 for being contrary to public policy. Traverso DJP refused to entertain the challenge on the ground that no constitutional relief was sought in the notice of motion. She found that clause 3.5.1.9 was unambiguous: failure to pay the fees meant automatic termination of membership. Brummer's attempt to procure the reinstatement of his membership and the retention of his job therefore failed in that court.

Brummer did not appeal Traverso DJP's judgment. Instead, he commenced action proceedings against the DA in the Western Cape High Court for delictual, contractual and constitutional damages for the unlawful termination of his party membership. Just before trial was to commence, the DA sought to introduce a special plea of issue estoppel, insisting on its separate determination in limine. The court dismissed the special plea with costs and the DA launched the present appeal. The DA argued that the issue before Traverso DJP had been whether the DA had lawfully terminated Brummer's membership and that her judgment thus constituted res judicata in respect of Brummer's subsequent damages claims. In an appeal to a full bench of the Western Cape High Court —

Held per Gamble J for the majority

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

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

in relation to the damages to finality, it would be unjust and inequitable to uphold the special plea of issue estoppel. (See [83] – [85].)

Held per Wille J dissenting

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

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

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

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

In the absence of authorisation by his client, a legal practitioner lacks locus standi to bring an application in a magistrates' court for the rescission of a default judgment against his client. This is because the legal representative lacks a direct and substantial interest in the matter and is thus neither a 'person affected' nor a 'party' as intended in s 36(1) of the Magistrates' Courts Act 32 of 1944 and rule 49 of the Magistrates' Courts Rules.

The fact that rule 2(1) of the rules defines 'party' as including an attorney or advocate appearing for a party, does not affect the substantive law on locus standi for rescission set out in s 36(1). Rule 2(1) includes legal representatives for the purposes of the granting of judgment, which would not be by default if a party's legal representative was present in court. This was entirely different from rescission, which was governed by s 36(1) and which magistrates were bound to apply. (See [7] – [15].)

The appellant had applied for the rescission of a default judgment under rule 49(1). The respondents argued in limine that the deponent to the founding affidavit, the appellant's attorney, lacked locus standi. The magistrate, applying s 36(1), upheld the point in limine and dismissed the application. The appellant appealed to the present court on the ground that the magistrate should have applied rule 49 read with rule 2(1), which clothed the attorney with the necessary locus standi. The court, stressing the appellant's failure to file an affidavit confirming that she had authorised the attorney to bring the application on her behalf notwithstanding the respondents' objection, dismissed the appeal. (See [14] – [16].)

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

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

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

The Road Accident Fund (the RAF) applied — under rule 45A of the Uniform Rules of Court or the common law or s 173 of the Constitution — for the suspension of all writs of execution and attachments against it based on court orders already granted or settlements already reached with claimants for a period of 180 days, so that it could make payment of the oldest claims first by date of court order or date of settlement agreement *a priore tempore*. This was intended as a short-term solution to stabilise the RAF's precarious financial position and to prevent the imminent danger that attachments against its essential assets (including its bank account) would render it unable to comply with its constitutional obligation to pay compensation to traffic accident victims, and also trigger s 21(2)*(a)* of the RAF Act. * The court, exercising its inherent power to regulate its procedures under the common law and s 173 of the Constitution —

Held

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

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

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

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

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

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

The applicant sought the restoration of its 'possession' of information housed on communal servers and a system hosted by the first respondent. Alternatively it sought an interim interdict to restore its access to the servers and system pending the institution of contractual proceedings. The applicant had accessed the servers and system at its Cape Town premises, which was also where its 'possession' was disturbed by the respondents, who had their offices in Gauteng.

The applicant argued that its alleged breach of contract was irrelevant because spoliation proceedings were aimed at redressing unlawful self-help and restoring the status quo before all else (ante omnia). The respondents in turn (i) argued that the court lacked jurisdiction because the cause of action arose outside the court's geographical area; (ii) argued that a spoliation order was incompetent because the applicant had exercised a mere personal right under the arrangement; and (iii) denied that the applicant was entitled to an interdict.

Held

It was permissible for the court to have jurisdiction to grant the interim relief sought and for an appropriate order to be executed at the first respondent's offices in Gauteng. Part performance of a contract within the court's jurisdictional area constituted a sufficient jurisdictional connecting factor for it to have jurisdiction, even if the contract was concluded elsewhere. In addition, a court could assume jurisdiction to grant an interdict, even where the act in question would be performed or restrained outside that area: rapidly developing information technology required courts to adapt their practices to ensure that their orders were resistant to technical arguments of a jurisdictional nature. (See [18] – [20].)

The applicant did not make out a case for spoliatory relief. For the *mandament van spolie* to be available, actual physical possession was critical. Here the applicant was laying claim only to undisturbed access based on reciprocal payment for the use of the services, and it could not seriously contend that it was ever in possession or quasi-possession of either the servers or the system. (See [21], [24] – [26].)

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

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

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

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

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

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

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

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

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

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

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

Civil Procedure – Particulars of claim in claim for payment – Exception to claim – Prescription – Because prescription must be invoked by the party wishing to rely on it,

it is not necessary for particulars of claim to pre-emptively plead a basis to defeat a possible plea of prescription.

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

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

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

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

Prescription is fact driven and various factors may rebut the defence. Noting that prescription must be invoked by the party wishing to rely on it, it was not necessary for appellant's particulars of claim to pre-emptively plead a basis to defeat a possible plea of prescription. However, MTN made two submissions in support of the High Court's judgment. It contended that because an exception is a pleading, the delivery of the exception was an effective way of invoking prescription under section 17(2). The second contention was that because prescription was invoked by the delivery of the

exception, the appellant was required to plead a basis on which the claim had not prescribed. MTN argued that because the appellant did not amend the particulars of claim to do so, they no longer disclosed a cause of action and the exception was correctly upheld. Neither of those submissions found favour with the court.

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

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

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

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

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

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

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

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

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

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

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

Having regard to the statutory powers of the Board, it was clear that it was empowered to grant a licence holder exclusivity to operate a casino within a specific area and period. Therefore, the geographic exclusivity regime created by the Policy breached the careful allocation of powers to the Board as it impermissibly usurped the Board's powers to make a determination. The exclusivity regime imposed by the Executive Council in the Policy was thus unlawful and invalid. The Court also held that the Board has the powers in terms of the Act to consider and determine an application

by any of the applicants to relocate an outlying casino to the Cape Metropole; and that a casino operator licence is not a premises licence.

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

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

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

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

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

Held – Section 6 of Promotion of Administrative Justice Act 3 of 2000, as well as common law, clearly stipulates the instances in which administrative action taken by an organ of State can be taken on review and be set aside. The issue to be determined was therefore what exactly was ordered by the court order, in order to determine

whether or not the respondents' issuing of the tender bid without the alleged consultation was non-compliant with the terms of the order, justifying the setting aside thereof.

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

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

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

The application for setting aside of the tender was dismissed.

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

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

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

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

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

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

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

The respondents contended that the applicants' reliance on section 45 was misplaced because the transactions sought to be impugned related to the provision of financial assistance to a foreign company within the meaning of the Companies Act whereas section 45 does not apply to a foreign company. The court examined the Act's definitions of "company" and "corporation"; and discussed the approach to statutory interpretation and the presumption against superfluity. It concluded that the Legislature intended that foreign companies would fall within the class of persons to whom financial assistance could only be extended by local companies upon

compliance by the latter with the provisions of section 45(3). The question of whether SIHPL satisfied the requirements of section 45 before issuing the guarantee was however, answered against the applicants.

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

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 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]).

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]).

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]).

by a decision not to impose a penalty on the appellant. (See [78] – [79].) Appeal dismissed.

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].)

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].)

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.

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.

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.

Greenhill v Discovery Preservation Pension Fund Administered by: Discovery Life Investments Services Ltd and another [2021] JOL 51735 (GJ)
CASE NO: 28609/2020

Execution order-pension benefits-Whether a warrant of execution issued by the High Court, pursuant to an order to pay maintenance in a Rule 43 application can be issued to attach a pension benefit or whether same can only be done if a warrant is issued by a maintenance court. Provisions of the Pensions Act and section 26(4) of the

Maintenance Act considered. The court adopted a textual, contextual, and purposive approach to the legislation.
As a result of the second respondent's failure to comply with an interim maintenance order, the applicant had a warrant of execution issued to attach second respondent's pension benefits in the first respondent pension fund ("Discovery").

Manoim, J identifying essential question as to whether warrants of execution issued out of the High Court may be used to attach pension fund assets arising in maintenance proceedings between spouses.

Section of 37A(1) of Pensions Funds Act 24 of 1956 provides that pension fund benefits are not liable to be attached except to extent permitted in terms of the Income Tax Act and the Maintenance Act [para 30]. Section 37D deals with relationship to orders made in terms of the Divorce Act and the Maintenance Act.

Court's textual analysis of section 26(4) of the Maintenance Act leading to conclusion that High Court orders in terms of Rule 43 can be executed against pension assets by way of a warrant execution issued by High Court [paras 64 - 65].

Stewarts and Lloyds Holdings (Pty) Ltd v Solid Steel Construction (Pty) Ltd [2021] JOL 51736 (GJ)

CASE NO: A3070/2021

Legal position regarding interest payable where debtor fails to perform timeously as set out in contract

In granting default judgment as requested by the appellant, the Magistrates Court granted interest at its own discretion at the rate of 8.75% per annum as from date of demand, as opposed to the rate sought by the appellant, being the contractually agreed rate of 2% per month (24% per annum) a tempore morae as from the date that the debt became overdue for payment.

Aggrieved by the order as to interest, the appellant appealed.

Maier-Frawley, J establishing date from which defendant was in mora and refers to legal position that prevails when a debtor fails to make timeous performance in circumstances where time for performance is set by contract [para 14]. Based on common law principle of pacta sunt servanda, magistrate not at liberty to impose interest rate contrary to that agreed upon by the parties. Magistrate also not entitled to exercise discretion for purposes of deviating from rate expressly sanctioned by National Credit Act 34 of 2005 which was applicable to the parties' agreement.

ORDER:

1. The appeal is upheld with costs on the scale as between attorney and client.

2. The order of the court below in respect of interest is set aside and replaced with the following order:

" Interest at the rate of 2% per month on the reducing capital balance a tempore morae as from 1 September 2019 to date of final payment, both days inclusive."

Hlophe v Freedom Under Law; In re: Freedom Under Law v Hlophe and a related matter [2021] JOL 51750 (GJ)
CASE NO: 2021/43482
Joinder-applicability of rule 18 to affidavits, and test for joinder
A finding of the Judicial Service Commission (JSC) of gross misconduct by Hlophe J was the subject of a review application. In the first of two interlocutory applications in that matter, Freedom Under Law (FUL) sought to be joined as a party, and in the second Hlophe JP, in terms of Rule 30, sought an order setting aside FUL's replying affidavit due to alleged non-compliance with Rule 18(5).

Sutherland, DJP explains provisions of Rule 18 and considers whether the rule applies to affidavits, finding no authority for proposition that the word "pleading" in Rule 18 includes an affidavit.

Test for joinder discussed, with court confirming that a legal interest in the matter is required. As a public interest organisation, FUL established proper grounds to be joined.

END-FOR NOW