LEGAL NOTES VOL 1/2022

Compiled by: Matthew Klein

EDITORIAL

This issue of the Legal Notes is dedicated to Judge Cassim Moosa!
As of today, he starts as a judge! (High Court, Johannesburg)
Not just an acting judge!
Well done! He walked the path of honesty and integrity. Joining the National Bar,some years ago, being an Executive member and a person who transpired wisdom and insight!
Hoping to see good judgments!

Matthew Klein
Editor: Legal Notes

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JE suffered severe traumatic head and brain injuries, leaving her severely and permanently disabled, when the top beam of a wooden swing structure she was

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

playing on collapsed on her at her playschool, a community organisation and 'place of care' under the Child Care Act 74 of 1983 (the Act).
BE, her father, on her behalf, instituted a delictual claim against the playschool and the Provincial Minister: Western Cape Department of Social Development (the MEC). The action against the playschool was settled and proceeded only against the MEC. The High Court held that delictual liability had been established, and that the MEC was liable for damages flowing from the accident. The Supreme Court of Appeal upheld the Minister's appeal against the High Court's decision, on the basis that wrongfulness had not been proven (see [9] and [26]).
In this case, BE's appeal to the Constitutional Court, the decisive issue was again wrongfulness — ie whether the Minister had a legal duty to prevent harm to children in Early Childhood Development Centres (ECD centres) and other places of care. The gist of BE's case was that such a duty existed in terms of the Act and the regulations promulgated under it, specifically s 30(3)*(b)* and reg 30(4) (quoted in full respectively at n24 and [20]).
Held
The nature of the public duty imposed by reg 30(4) was regulatory; it did not entail operational control of school premises, nor did it amount to a legal duty to ensure the day-to-day safety of children at ECD centres. And since there was no such public duty, the question whether a breach thereof translated into a private law duty did not arise. (See [11], [22], [26] and [32].)
The statement that harm-causing conduct was wrongful expressed the conclusion that public or legal policy considerations required that the conduct, if paired with fault, was actionable. And if conduct was not wrongful, the intention is to convey the converse, that public or legal policy considerations determine that there should be no liability, that the potential defendant should not be subjected to a claim for damages, notwithstanding their fault. (See [10].)
Public policy considerations did not favour holding the Minister liable for damages arising from JE's accident. Imposing a legal duty to ensure that each of the thousands of facilities throughout the country was safe, would be an impossible obligation on the provincial departments of social development, hampering their core function of supporting, financially and otherwise, and overseeing the operation of such facilities by third parties. A consideration of all the factors pointed away from the imposition of liability on the Minister. (See [25] – [26], [32] and [35].)

PREMIER, GAUTENG AND OTHERS v DEMOCRATIC ALLIANCE AND OTHERS 2022 (1) SA 16 (CC)

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In terms of s 139(1) of the Constitution, when 'a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including [those steps as specified in the subparas *(a)* – *(c)* that follow]'. The step in *(c)* describes 'dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step'. What gave rise to the present matter was a resolution by the Gauteng Executive Council, acting under s 139(1)*(c)*, to dissolve the City of Tshwane Metropolitan Municipal Council (the Municipal Council). The Democratic Alliance (the DA) was the ruling party in such council, and gave the council its speaker as well as mayor. The manner in which the speaker dealt with motions of no confidence in himself and the mayor led to dissatisfaction amongst the councillors representing opposition parties, the Economic Freedom Fighters (the EFF) and the African National Congress (the ANC). They gave voice to this dissatisfaction by staging walkouts during council meetings, depriving the Municipal Council of the necessary quorum to make decisions. Ultimately this led to a deadlock in the Municipal Council, and an inability to perform its public functions. This state of affairs led to the Gauteng Executive Council — after variously engaging through the MEC for Co-operative Governance and Traditional Affairs, Gauteng (the MEC), with the speaker in criticism of their conduct; issuing a directive under s 139(1)*(a)* describing the extent of the failure to fulfil its obligations and the steps required to meet its obligations; and sending an official to observe council meetings — to dissolve the Municipal Council. The dissolution notice that was presented to the Municipal Council set out nine key observations identifying the functions the Municipality had failed to perform (see [26]). The DA's response was to launch an urgent legality review application in the Pretoria High Court, against the Premier, Gauteng, seeking an order reversing the decision of the Gauteng Executive Council to dissolve the Municipal Council, on grounds that the province had acted unlawfully, in failing to satisfy the requirements of s 139(1)*(c)*, and irrationally, in failing to consult with the Municipal Council. The High Court ruled in favour of the DA, setting aside the decision of the Gauteng Executive Council to dissolve the Municipal Council, *on the ground that dissolution was inappropriate where there were less intrusive measures which the provincial executive could have taken to ensure the Municipal Council would fulfil its core responsibilities*, as well as ordering the ANC and EFF councillors in terms of the Code of Good Conduct of Councillors to attend and remain in attendance at all meetings of the Municipal Council unless they had lawful reason to be absent.

The present direct appeals were brought to the Constitutional Court, in the first application, by the Premier, the Gauteng Executive Council and the MEC; in the second application, by all Tshwane councillors who were members of the EFF, and the EFF. The DA was the first respondent. The primary question to be considered was whether the exercise of the Premier's power to dissolve the Municipal Council offended the principle of legality.

The majority court decision, per Mathopo AJ (Khampepe J, Majiedt J, Theron J and Victor AJ concurring)

The court held that, for a provincial government to dissolve a municipal council under s 139(1)*(c)* of the Constitution, the following jurisdictional facts had to be present

(see [69]): One, *a failure by a municipality to fulfil an executive obligation* (see discussion at [70] – [75]); two, *the taking of appropriate steps by the provincial executive* (see [76] – [89]), that is, steps that were *fitting and effective* for the purposes of fulfilling the executive obligations of a municipal council (see [80] and [81]), the assessment of which would depend on the circumstances in which the step was taken (see [84]); three, *the existence of exceptional circumstances that warranted the dissolution of the municipality* (see [90] – [98]).

Out of the key observations made in the notice of dissolution, in the court's view, only in respect of (1) 'the water crisis in Hammanskraal'; and (2) the leadership crisis that had left the council barely able to function and without mayor, mayoral committee or municipal manager, had the Municipal Council failed to fulfil its executive obligations (see [107] and [110]). As to (1), the court held that the Municipal Council's failure to provide sufficient water, as it was obliged to do in terms of the Local Government: Municipal Systems Act 32 of 2000, did not warrant dissolution of the municipality for two reasons: the water crisis has been an ongoing issue since 2004 and the municipality had put measures in place to address it. (See [110.)

As to (2), the court acknowledged that the leadership crisis that beset the Municipal Council and the councillor walkouts constituted exceptional circumstances. However, dissolution was not an appropriate step, and the circumstances did not warrant it. (See [107] and [124].): Section 139(1)*(c)*, the court held — properly interpreted against the constitutional scheme in which each sphere of government had to adhere to the principle of co-operative governance and intergovernmental relations, * and the province was obliged to 'support and strengthen the capacity' of the Municipal Council to 'manage [its] own affairs, to exercise [its] powers and to perform [its] functions' † (see [55], [60] – [62], and [118] – [120] and [122] — obliged the Executive Council to engage with the speaker and municipal council and consider prevailing circumstances prior to its decision to dissolve (see [118] – [120] and [122]). The Executive Council did not do so. It had failed to conform to the Constitution and had offended the principle of legality (see [120]). Furthermore, the *existence of less intrusive means* was relevant to the question of appropriateness. Resorting to dissolution, the court held, may well be inappropriate in circumstances where there was another step that could have been taken which was reasonably capable of resolving the issue and would have been less invasive of local government autonomy. (See [87] – [89].) Here, the province had not pursued any other means of addressing the political crisis, such as those available in the Systems Act aimed at addressing the truancy and deviant conduct of municipal councillors (see [123]). The court concluded that the provincial government misconstrued its powers and failed to apply itself to the issues faced by the Municipality. The dissolution had to be set aside, on the basis of offending the principles of lawfulness (see [125]).

By way of conclusion the court stressed that s 139(1)*(c)* of the Constitution had to be invoked sparingly, especially given the other options of intervention available to the provincial executive. Giving the provincial executive carte blanche to intervene, in the most drastic manner, where circumstances did not warrant such action, would be contrary to the spirit of co-operation between the provincial and local governments. It would also violate the core principle of the autonomy of local government. This was so because the Constitution required much more of them. It required that they cooperate with their counterparts and ensure that they fulfil executive obligations. Our democracy and municipal councils would prevail if elected officials put aside their differences to ensure the delivery of basic services. (See [126].)

As to the remedy to be granted, the court emphasised that the deadlock was caused by walkouts by councillors. An appropriate remedy, the court held, would be one compelling the MEC to invoke his powers in terms of item 14(4) of sch 1 to the Systems Act, appointing a person or a committee to investigate the cause of the deadlock of the Municipal Council and to make a recommendation as to an appropriate sanction (see [131]). (The court found the mandamus granted by the High Court to be an inappropriate award, being too far-reaching and one infringing on the separation of powers (see [130]).) The court accordingly dismissed the appeal, except in respect of the mandamus (see [132]).
Minority judgment, per Jafta J (Mhlantla J and Tshiqi J concurring): ‡
Jafta J disagreed with the finding of the majority, holding that he would have upheld the appeal (see [236]). He noted that the crux of the High Court's decision was that the dissolution decision was inappropriate because there were less intrusive measures which the provincial executive could have taken to address the root cause of the council's inability to fulfil its core responsibilities (see [154]). Jafta J, however, emphasised that the section required only that a dissolution be an appropriate step that was likely to fulfil the executive obligation and that exceptional circumstances had to warrant the dissolution. If these two conditions were met, a provincial executive may dissolve a municipal council. The fact that there may be other steps which were *also appropriate and less intrusive had no bearing on the propriety of the dissolution*. (See [194].) Jafta J held that the dysfunctionality of the Municipal Council was such as to constitute exceptional circumstances (see [198] and [201]), and that the circumstances warranted dissolution (see [206]). Furthermore, dissolution was an appropriate step to take (see [210]); in fact, in circumstances in which the Municipal Council was unable to take any decision, and was incapable of fulfilling all of its executive functions, no other form of intervention would have ensured the fulfilment of the council's obligations (see [227]).

AFGRI OPERATIONS LTD v HAMBS FLEET (PTY) LTD 2022 (1) SA 91 (SCA)
Company — Winding-up — Application for final order of liquidation — Discretion of court — Unpaid creditor having right, ex debito justitiae, for final winding-up order against company which fails to discharge debt — Court's discretion to refuse order very narrow and exercised only in special or unusual circumstances — Existence of counterclaim not in itself reason to refuse liquidation but may be factor — If considered to be one, then counterclaim must be 'genuine'.

Generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a respondent company which has not discharged that debt. The court's discretion to refuse an order is a very narrow one, exercised in special or unusual circumstances only. While the existence of a counterclaim by the company may be a factor, it is not in itself a reason for the court to refuse granting an order. (See [7], [12].) The question of onus is critically relevant: once the company's indebtedness to the creditor has been prima facie established, the onus is on the company to show that the indebtedness is disputed on bona fide and reasonable grounds. If it is accepted that a counterclaim is a factor, then the company would have to show that it is 'genuine'. (See [6], [17].)

CAPITEC BANK HOLDINGS LTD AND ANOTHER v CORAL LAGOON INVESTMENTS 194 (PTY) LTD AND OTHERS 2022 (1) SA 100 (SCA)

Contract — Interpretation — Reconciliation of expansive approach to interpretation with parol evidence rule — Good faith — Application of.

By an agreement first appellant (Capitec) had issued first respondent (Coral) with its shares, subject to the condition that its consent was required should Coral wish to dispose of them to a third party (see [1], [3] and [27]). At a point, such a wish arose on the part of Coral, yet Capitec refused to issue the consent sought (see [4]). This brought Coral to apply for orders that the withholding of consent was unreasonable and in breach of the good faith required by the agreement, or alternatively in dereliction of its duty under common law of contractual good faith (see [4]).
The High Court, finding for Coral, determined that the withholding of consent was indeed contrary to Capitec's duties at common law and contractually of good faith and reasonableness, and ordered it to consent to the sale concerned (see [7] and [23]).
When the High Court refused leave to appeal, such leave was granted by the Supreme Court of Appeal (see [8]).
The central issue on appeal was whether the agreement required Capitec's consent for Coral to sell its shares, and if it did, whether Capitec had unreasonably or in good faith failed to grant such (see [22]).
As to the requirement of consent, the court examined the provision concerned, and found that neither its text or the textual context, nor the agreement's purpose militated for any grant of consent (see [27], [29] and [30] – [31]); and that extratextual evidence as to the conduct of the parties that went to the meaning of the provision failed to displace the meaning derived from the aforementioned factors (see [54], [56] and [59]).
Coming to this conclusion, the court entered upon the relationship of the established expansive approach to interpretation which allows for the admission of extrinsic evidence to construe a contract's words, and the parol evidence rule which bars admission of extrinsic evidence to contradict, add to or modify a written agreement's words (see [38]).
To this end it surveyed recent Constitutional Court authority on this relationship, and its implications. (See [39] – [40] (the expansive approach to admissibility of extrinsic evidence); [41] (the Constitutional Court's reconciliation of the parol evidence rule and liberal admissibility of extrinsic evidence); [43] (application of the parol evidence rule when the meaning of a provision is clear); [44] (the rule as exclusory of evidence of earlier agreements, but not of material going to an agreement's meaning); [46] (non-primacy of the plain meaning of the text); [47] (likely consignment of the parol evidence rule to a residual role); [48] (limits to evidence that may be admitted as pertinent to context and purpose); and [58] (misuse of 'context is everything' as licence to contend for meanings unmoored from the text).)
As to good faith, the High Court had reasoned that Capitec was in breach of its contractual and common-law duties of good faith to Coral; justice could only be achieved if the agreement was taken to require Capitec's consent to Coral's sale of the shares; and withholding of this consent breached Capitec's duties of good faith and reasonable conduct (see [60]).

This reasoning the Supreme Court of Appeal dismissed: good faith could not be invoked to determine the terms of a contract; and nor could it justify imposing a duty to give such consent (see [64] – [67] and [70]).
Appeal upheld and the High Court's order set aside and substituted so as to dismiss Coral's application (see [72]).

CITY POWER SOC LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2022 (1) SA 121 (SCA)

Revenue — Income tax — Liability for — State-owned city electricity provider — While it does perform public and constitutional function normally provided by city, constituting autonomous entity — Not part of government — Must pay income tax — Income Tax Act 58 of 1962, s 10(1).

Revenue — Income tax — Exemptions — Exemption in respect of receipts and accruals of government — State-owned city electricity provider — Not part of government — Must pay income tax — Income Tax Act 58 of 1962, s 10(1).

Constitutional law — Organ of state — What is — State-owned city electricity provider — While it does perform public constitutional function which would ordinarily be performed by city, autonomous entity and not part of government.

While the appellant — a state-owned company that provides electricity to Johannesburg — performs a public and constitutional function, it is not a municipality or part of the government and is not exempt from income tax under s 10(1)*(a)* or *(b)* of the Income Tax Act 58 of 1962 (see [22] – [26]).

JONES v PRETORIUS NO 2022 (1) SA 132 (SCA)

Administration of estates — Executor — Powers — Recovery of assets — Executor mandating individual to administer estate — Executor dying but individual continuing with administration and causing estate to pay sums to him — New executor acting to recover moneys so appropriated — Utility of s 50*(b)* of Act — Common-law power of executor to recover estate assets — Administration of Estates Act 66 of 1965, s 50*(b)*.

After the death of a Mr Meyer his wife, Mrs Meyer, was, as per the terms of their will, appointed as the executor of his estate and in this capacity she mandated appellant to administer it, which he proceeded to do (see [3]). However shortly into the period of his administration Mrs Meyer died, so in law terminating the mandate (see [4] and [7]). However appellant continued to administer the estate and caused it to make several considerable payments to himself (see [4]).
Later on respondent, the daughter of Mr and Mrs Meyer, was appointed as executor and in this capacity she instituted proceedings against appellant for the recovery of the amounts he had caused the estate to pay him (see [1] and [6]). For her authority to bring the claim on behalf of the estate respondent relied on s 50*(b)* of the Administration of Estates Act 66 of 1965 which entitles an executor to recover from any person any distribution that an executor has erroneously made to that person (see [9] – [10]).

The judge concerned apparently accepted that s 50*(b)* was of application and accordingly ordered appellant to return the moneys concerned to the estate (see [9]). Here appellant appealed to the Supreme Court of Appeal, taking the point, which was accepted, that s 50*(b)* was not of application in this instance, in that appellant, not in any capacity as an executor (or agent thereof — his mandate having ended on Mrs Meyer's death), had caused the estate to make the payments to him (see [14]). However, it dismissed the appeal on the basis that the common law gave an executor the power (indeed obliged him or her to exercise it) to recover assets unlawfully appropriated and in the hands of a third party (see [15] – [16] and [18]). Thus respondent had been duly empowered to bring the present proceedings. Appeal as stated, dismissed (see [18]).

MUNICIPAL EMPLOYEES PENSION FUND AND OTHERS v CHRISAL INVESTMENTS (PTY) LTD AND OTHERS 2022 (1) SA 137 (SCA)

Ownership — Co-ownership — Bound and free — *Actio communi dividundo.*

By an agreement, first to third respondents sold a share in a business to first appellant (see [1] and [4]). The assets of the business were immovable properties and leases (see [4] and [8]). Separately, fourth respondent, the holding company of first to third respondents, concluded an agreement governing the co-ownership of the business (see [11]). The agreements were linked (see [1]).
One day later however, fourth respondent invoked the *actio communi dividundo* to demand the dissolution of the co-ownership of the immovables (see [8] – [9] and [16]). First appellant resisted the demand on the basis that the ownership agreement governed any termination of co-ownership (see [12] and [17]).
Fourth respondent then proceeded to court, which found for it on the premise that the action was available even where a contractual relationship governed co-ownership of property. When the High Court refused leave to appeal, first appellant obtained such from the Supreme Court of Appeal (see [18]).
It reversed the High Court's decision and, in so doing, considered the following:

- There were two forms of co-ownership: free and bound. In the former, the co-ownership was the sole legal relationship between the parties, while in the latter, the co-ownership arose from another legal relationship, as for example, marriage in community of property, or a partnership agreement (see [46]).
- Under free co-ownership each owner had a right at any time to dissolve the ownership relationship, while with bound co-ownership, dissolution was governed by the legal arrangement creating the co-ownership (see [20], [23] and [30] – [31]).
- There was no closed list of instances of bound co-ownership, and whether a particular relationship was bound or free was determined by the terms under which it was created (see [46] – [47]).
- Properly analysed, the co-ownership of the properties arose from the agreement regulating the co-ownership of the business, and that co-ownership was bound rather than free (see [49], [57], [61] and [63]). Accordingly the operation of the action was excluded, any dissolution of co-ownership being governed by the ownership agreement (see [63]).

The appeal upheld and the order of the High Court set aside and substituted with an order dismissing fourth respondent's application (see [64]).

BP SOUTHERN AFRICA (PTY) LTD v MEGA BURST OILS AND FUELS (PTY) LTD AND ANOTHER AND A SIMILAR MATTER 2022 (1) SA 162 (GJ)

Practice — Judgments and orders — Suspension of execution of court order — Application for suspension of order pending completion of petition for leave to appeal — Discretion of court — Factors to be considered.

Execution — Suspension pending appeal — Application for suspension of judgment pending outcome of petition for leave to appeal — Discretion of court — Factors to be considered.

The respondent in each of these matters had, in separate High Court applications, obtained money judgments against the applicant. On 31 January 2020 the applicant's applications for leave to appeal were dismissed by the same court. Immediately thereafter, the respondents requested the applicant to pay, and a few days later they issued writs of execution under which the sheriff, on 5 and 7 February 2020, attached equivalent funds in the applicant's bank account.

In the present matter the applicant sought an order suspending the execution of the judgments pending the outcome of a petition for leave to appeal that was yet to be delivered. It argued that its causes of action in each case was an interim interdict and an application under rule 45A of the Uniform Rules of Court. * It argued that it had a 'clear right' to an interdict suspending the High Court's order pending the finalisation of the appeal process. As to relief under rule 45A, the applicant argued that a stay was required to prevent an injustice. It also argued that the present court could not, in exercising its discretion under rule 45A, have regard to the merits of the underlying dispute.

Held

The principle that the judgment creditor was entitled to seek payment almost immediately after judgment has never been overturned. † In exercising its discretion to stay execution, it would weigh heavily with the court that the respondents were entitled to payment. (See [11], [27.2].)

The 'clear right' the applicant relied on did not exist: the law was not that execution could only be levied once the time periods for lodging an application or petition for leave to appeal had expired. Hence the applicant's contention that it had a 'right' to demand that execution be stayed until the right to petition lapsed was ill-founded and could not form the basis for an interim interdict. (See [14] – [15], [27.1].)

This left the interests of justice under rule 45A and the court's inherent jurisdiction. Rule 45A involved a discretionary indulgence based on an apprehension of injustice: the court had to ask if real and substantial justice required a stay, and this required, inter alia, an inquiry into the balance of harm and convenience (see [27.4]).

In exceptional circumstances a residual equitable discretion to stay execution could be exercised to prevent an injustice, even where a litigant had an enforceable judgment and was entitled to payment. The imminent service of a petition for leave to appeal was a potentially significant factor, and if an applicant undertook (as the present applicant did) that an application for leave to appeal would be delivered, the court ought to consider the prospects of success of this step as best it could. (See [21], [23] – [25].) ‡

This was not a matter in which the court would exercise its power to intervene in the normal execution process and respondents' rights: the respondents had enforceable claims for payment, the applicant had weak prospects of success on appeal, and the

balance of convenience favoured the respondents (see [32]). Both applications accordingly dismissed (see [35]).

DIAZ HOTEL AND RESORT (PTY) LTD v VISTA BONITA SECTIONAL TITLES SCHEME BODY CORPORATE AND ANOTHER 2022 (1) SA 175 (WCC)

Land — Deeds registry — Registration of deeds — Registration of title by other than ordinary procedure — Requirements — Ownership — Vesting of exclusive use areas in body corporate when developer ceasing to be member of former — Not amounting to ownership — Deeds Registries Act 47 of 1937, s 33(1); Sectional Titles Act 95 of 1986, s 27(1)*(a) a*nd s 27(4)*(b)*.

Sectional title — Common property — Exclusive use rights — Vesting of in body corporate when developer ceasing to be member of former — Whether applicable where last unit owned by developer in scheme validly sold but by mistake exclusive use areas not transferred — Nature of rights vesting in body corporate — Sectional Titles Act 95 of 1986, s 27(1)*(a)* and s 27(4)*(b)*.

In terms of s 2 of the Sectional Titles Schemes Management Act 8 of 2011, a developer ceases to be a member of a body corporate when it no longer has a share in the common property. Section 27(1)*(c)* of the Sectional Titles Act 95 of 1986 (the STA) provides that when a developer ceases to be a member of a body corporate, 'any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond'. (See [33].)

A developer (SDC) sold its last unit in a sectional title development to the applicant (Diaz Hotel), together with three exclusive areas. Registration of transfer of the unit was completed but not of the exclusive areas, three parking bays. These were not transferred because the notarially executed deeds of cession thereof were not registered, allegedly as a result of a deeds office mistake.

Unable to get the body corporate (Vista BC) to cooperate with it to achieve transfer of the exclusive use areas, Diaz Hotel brought this application to compel Vista BC to do so, together with certain declaratory relief. One of the opposing grounds was that by operation of s 27(1)*(c)* the parking bays now vested in Vista BC, so that SDC, no longer being the holder of any rights in and to the exclusive use areas, could not give transfer thereof to Diaz Hotel (see [17] and [25]). This raised the legal issues of the scope of s 27(1)*(c)*, ie whether it applied in these circumstances to vest the exclusive use areas in Vista BC (see [21] and [31]); and in view of the relief sought, what the nature of such rights was — also iro vesting of exclusive use areas in a body corporate under s 27(4)*(b)*, 'when an owner ceased to be a member of the body corporate' — more particularly whether such vesting amounted to ownership as contemplated in s 33 of the Deeds Registries Act (the DRA) so that it could be utilised to effect '(r)egistration of title by other than the ordinary procedure' (see [45], [49] – [50]).

Held

The steps taken by SDC to effect transfer of the exclusive use areas evinced an *animus transferendi domini* — the subjective element required for the passing of ownership — and resulted in Diaz Hotel acquiring personal rights which preceded the entitlement of the respondent to have the rights to the exclusive use areas vest in it in terms of s 27(1)*(c)*. That transfer of these exclusive use areas did not happen was an error which ought to be rectified to reflect the correct legal position. (See [38] – [39] and [41].)

Acquisition by a body corporate of any exclusive use rights in terms of s 27(1)*(c)* did not cover instances where a developer expressly, and in a binding agreement, intended its rights to be transferred to a purchaser, but where through a mistake, negligent or otherwise, these were not so transferred at the time when the last unit owned by the developer in the scheme was transferred. (See [42].)
The only rights which vested in a body corporate once the last unit which the developer owned was transferred, were rights of exclusive use, and not rights of ownership. In the circumstances Vista BC could not and did not obtain better rights over the exclusive use areas than those which SDC had, as these bays collectively belonged to all the owners of units in the scheme, as part of its common property. To hold that ss 27(1)*(c)* and 27(4)*(b)* had the effect of vesting ownership rights in respect of the parking bays in the body corporate, would amount to an unlawful and arbitrary expropriation of the property rights of all the owners in the scheme in respect of such bays, contrary to the provisions of s 25 of the Constitution. (See [58].)
When exclusive use rights in respect of common property vested in a body corporate in terms of ss 27(1)*(c)* or 27(4)*(b*), it did not have the right to do with them as it pleased; it held them and must administer and deal with them in the interests of and for the benefit of all owners in the scheme and not serve its own interests. An expansive interpretation of s 33 of the Deeds Registries Act such as to equate the holder of an exclusive use right in a sectional title scheme with the holder of ownership rights in immovable property, was not justified. Section 2*(e)* of the STA expressly empowered and authorised the Registrar of Deeds to register in the deeds registry a title deed whereby ownership and/or any lease of, or any other real right in or over a section or an undivided share or common property of the scheme was acquired. This section was therefore the operative one, allowing for the transfer of exclusive use rights in sectional title schemes generally and in circumstances such as in this case — and not s 33(1) of the DRA. (See [61] and [63] – [64].)
Consequently, Diaz Hotel was entitled to an order which would allow for the transfer to it of the exclusive use rights to the parking bays which were still registered in the name of SDC (see [65]).

FERREIRAS (PTY) LTD v NAIDOO AND ANOTHER 2022 (1) SA 201 (GJ)

Practice — Judgments and orders — Default judgment — Default — Meaning of term — Provision in Magistrates' Courts Rules that defendant not in default if absent but represented by legal practitioner not applicable in High Court — Failure by defendant to put its version to court constituting default even where practitioner present in court.

Practice — Applications and motions — Affidavits — Answering affidavit — Late filing — Effect — Whether pro non scripto if not accompanied by application for condonation — Uniform Rules of Court, rule 6(5)*(d)*.

The question for the court in this rule 30 application was whether a judgment the respondents wanted rescinded was a default judgment and hence capable of rescission. The judgment was handed down by Louw J in the Pretoria High Court in the presence of the respondents' counsel. Since the answering affidavit was served late without an application for condonation, Louw J had no regard to its contents and dealt with the matter as unopposed, granting the application for payment. When the respondents applied for the rescission of Louw J's order, the applicant launched the present rule 30 application, arguing that the respondents' rescission application was

an irregular step because the presence of their legal representative meant that the judgment was not a default judgment and could therefore not be rescinded.
The respondents referred the court to two cases dealing with the position in the magistrates' courts. In them the High Court, citing s 36*(a)* of the Magistrates' Courts Act 32 of 1944, held that a magistrates' court judgment was not given in the absence of the defendant, and hence by default, where the defendant's legal representative had been present in court.

Held

The present matter was distinguishable from the two cases referred to by the respondents because here the court was not dealing with the rescission of a judgment obtained in a magistrates' court. Moreover, in those cases the courts did not consider the effect of a failure to place the defendants' versions before court when the magistrates made their decisions. Under the common law relating to default judgment, courts were not only concerned with the presence of the parties. (See [7] – [8].)
At common law, default judgment may be given (i) in default of *opposition*; (ii) in default of *appearance* at the hearing; and (iii) in default of a party placing its *own version* before court. In motion proceedings default could occur in various ways:

- A party may elect not to oppose an application, the matter is placed on the unopposed motion roll and dealt with on the applicant's papers only (default in respect of *opposition*, *appearance* and *own version*).
- A party may elect to oppose an application, serve a notice of opposition, and —
  - do nothing more (default in respect of *own version* and *appearance*);
  - serve a notice in terms of rule 6(5)*(d)*(iii) and fail to appear at the hearing (default in respect of *own version* and *appearance*);
  - serve an answering affidavit timeously and fail to appear at the hearing (default in respect of *appearance*, but answering affidavit considered in summary judgment proceedings);
  - prepare an answering affidavit late and fail to appear at the hearing (default in respect of *own version* and *appearance*).
  - prepare an answering affidavit late and appear at the hearing seeking a postponement and/or leave to place an answering affidavit before court; if leave was refused, the judgment was granted on the applicant's papers only (default in respect of *own version*). (See [17].) (Whether such leave was even required was open to question — see [18].)

Louw J should not have treated the answering affidavit as *pro non scripto* for being late without a condonation application. There was authority for the view that no application for an extension of time or for condonation was necessary if an answering affidavit was served before the hearing. Judges should not take too technical an approach in such circumstances. (See [18].)
It was, however, irrelevant why Louw J had disregarded the answering affidavit: the judgment was a default judgment. The applicant should have removed the matter from the unopposed roll at the respondents' cost and delivered a replying affidavit, or else answered the rescission application. (See [20] – [21].) Application dismissed with costs (see [24]).

HEATHROW PROPERTY HOLDINGS NO 3 CC AND OTHERS v MANHATTAN PLACE BODY CORPORATE AND OTHERS 2022 (1) SA 211 (WCC)

Housing — Consumer protection — Community schemes ombud — Dispute falling within ambit of Act — Whether High Court may hear matter as forum of first instance — Community Schemes Ombud Services Act 9 of 2011.

Applicants were owners of sections in a sectional title scheme and first respondent was the body corporate (see [2]). The latter had adopted a conduct rule pertaining to short term rentals, and later the trustees had resolved and effected a replacement of the access control system (see [7] and [16]). These actions caused applicants to bring an urgent application to the High Court for declarators on the application of the conduct rule as well as in respect of access control (see [1], [28] and [33]).
Here the court dismissed the application on the basis that it was not urgent, indeed was an abuse of its process (see [20] and [26]); and that it was the wrong forum of first instance to adjudicate the dispute, the appropriate forum being that established under the Community Schemes Ombud Services Act 9 of 2011 for resolution of disputes associated with community schemes (see [29]).
Coming to this conclusion it considered that the law relating to a concurrency of jurisdiction between a magistrates' court and High Court was inapplicable to the relationship of the Ombud and a High Court in that the latter pair's jurisdictions were substantially non-concurrent (see [47]); properly interpreted, the legislature's intention with respect to the Act was that the Ombud should be the primary forum for the adjudication of sectional title scheme disputes, with the High Court retaining an appellate and review jurisdiction (see [56]); authority provided that a specialist adjudicative body should at first instance hear a dispute even where a court had jurisdiction to do so (see [57]); and allowing a court to be approached at the outset would undermine the process provided by the legislature and could eventuate in forum shopping (see [59]).
Thus, a dispute that fell within the ambit of the Act was at first instance to be referred to the Ombud, and a court was obliged to decline to hear it, save in exceptional circumstances (see [61]). What the exceptional circumstances would be that would allow a direct approach to the High Court would have to be determined on a case by case basis (see [62]). But such circumstances would not be convenience or alleged inefficiency or delay in the process provided by the Ombud Service (see [63]).

MINISTER OF POLICE v SHERIFF, MTHATHA AND ANOTHER 2022 (1) SA 229 (ECM)

State — Actions by and against — Actions against — Execution — Attachment of state assets — Steps to be taken before movable assets may be attached and removed — Sheriff attaching and removing state asset pending payment of execution fees — Failing to comply with procedure in State Liability Act — Retention unconstitutional and invalid — Rei vindicatio granted — State Liability Act 20 of 1957 as amended, s 3.

Vindication — Rei vindicatio — Action by state for return of property attached and removed by sheriff — Failure to comply with procedure in State Liability Act — Retention unconstitutional and invalid — Rei vindicatio granted — State Liability Act 20 of 1957 as amended, s 3.

The applicant (the Minister) was directed to pay the costs in an action that was postponed *sine die*. On 11 July 2019 the plaintiff's attorneys in the action demanded payment of the taxed costs from the applicant. On 27 November 2019 the deputy sheriff, acting on a writ of execution issued by the Registrar of the High Court, attached and removed a bakkie from a police station to sell in satisfaction of the taxed costs. The applicant settled the judgment debt on 21 February 2020 but its demand for the return of the bakkie was met with the argument that the sheriff had a creditor's lien over the bakkie due to unpaid sheriff's fees, storage charges and security charges, for which the sheriff instituted a counter-application.
On 17 August 2020 the Minister instituted a rei vindicatio against the sheriff in both his official and personal capacities, contending that the attachment, removal and retention of the bakkie was unconstitutional and unlawful because the sheriff did not comply with the formalities in s 3 of the State Liability Act 20 of 1957 (the Act), as amended. * The Minister argued that it was impermissible for the sheriff to have retained the bakkie on the basis of a creditor's lien and that any right to remove it was extinguished when the judgment debt was discharged. The Minister sought costs against the sheriff on attorney and client scale for abuse of power. The sheriff in turn contended that he had complied with the required formalities and in a counter-application sought an order directing the Minster to pay the execution fees.
Held
The rei vindicatio allowed an owner to recover property from possessors who had no enforceable right to it (see [28] – [29]). Since the Minster's ownership and sheriff's possession were common cause, the onus was on the sheriff to establish entitlement to retain possession of the bakkie (see [34], [36]). Since there was no contractual nexus between the parties, the sheriff was precluded from relying on a creditor's lien (see [39]).
The Act, which regulated the satisfaction of final court orders sounding in money against the state or against any property of the state, in s 3 detailed the stages for the satisfaction of judgment debts against the state, each one of which made provision for situations of non-payment until, finally, the stage that culminated in the attachment of the state's movable property. They were the following:

- The relevant department had to ensure that payment was satisfied within 30 days from the date the court order becomes final or within a time agreed on by the judgment creditor and the state accounting officer (s 3(3)).
- If payment is not made within 30 days or as agreed, the judgment creditor could, in order to enforce the judgment, serve the order on —
    - the executive authority;
    - the accounting officer of the relevant department;
    - the state attorney or other attorney acting for the department concerned;
    - the relevant treasury (s 3(4)).
- The relevant treasury had to ensure that the judgment debt was satisfied within 14 days of the court order (or, if there were insufficient funds, within the time frame agreed to with the judgment creditor) (s 3(5)).
- If payment is not made within 14 days or as agreed, then the judgment creditor may issue a writ or warrant of execution against the department, which can be made only against movable property owned by the state and used by the relevant department (s 3(6)).
- Once the writ or warrant is issued, the sheriff must attach the movable property but may not remove it (s 3(7)*(a)*). The sheriff and the accounting officer of the relevant department may agree on state property that may not be attached, removed

or sold in execution because it would severely disrupt service delivery, threaten life or put the security of the public at risk (s 3(7)*(b)*). Absent such an agreement, the sheriff could attach the movable property to satisfy the judgment debt (s 3(7)*(c)*).

- At the expiry of 30 days from the date of attachment, the sheriff may remove and sell the attached property in execution of the judgment debt, at which point the Uniform Rules of Court become applicable (s 3(8)).
- If a party with a direct or material interest in the matter is of the view that the attachment and removal would severely disrupt service delivery, threaten life, put the security of the public at risk, or would not be in the interests of justice, it may apply to court for a stay before the sale of the attached property (s 3(9)). (See [42].)

Since the sheriff did not comply with these requirements, the attachment and removal of the bakkie were contrary to the Act and liable to be set aside (see [43] – [47]). Since the attachment was unlawful, the retention was also unlawful. And, in any event, the sheriff had to sell the attached property or return it to the state. He was not entitled to retain property indefinitely or allow storage charges to accrue. These shortcomings rendered the continued retention of the bakkie unlawful and liable to be set aside (see [48] – [49]).

The nature of the dispute in the main application, coupled with the relief sought in the counter-application, justified the grant not only of the rei vindicatio, but also the detailed declaratory relief sought by the Minister. Not only was the sheriff's conduct unlawful, but he had also breached the principle of legality, which rendered his conduct unconstitutional (see [52]). And the corollary of the conclusion reached on the main application is that the counter-application had to fail (see [53]).

Hence the conduct of the sheriff was unconstitutional, unlawful and invalid insofar as he (i) attached and removed the vehicle without following the procedure in s 3 of the Act and for a purpose other than to sell it;

(ii) retained it on the basis of a creditor's lien and despite payment of the judgment debt; and (iii) imposed security charges and storage fees on it despite payment of the judgment debt (see [65]).

MINISTER OF FINANCE v PUBLIC PROTECTOR AND OTHERS 2022 (1) SA 244 (GP)

Practice — Pleadings — What are — Notice under rule 6(5)*(d)*(iii) of Uniform Rules of Court not constituting pleading as intended in rule 23(1) — Cannot be excepted to.

Practice — Applications and motions — Notice by respondent of intention to rely on point of law only — Not constituting pleading — Cannot be excepted to — Rule 6(5)*(d)*(iii) read with rule 23(1) of Uniform Rules of Court.

Under rule 6(5)*(d)*(iii) of the Uniform Rules of Court a respondent seeking to rely on points of law only in opposing the relief sought by the applicant must deliver a notice to that effect in lieu of an answering affidavit. Since such a notice is not a pleading as intended in rule 23, it may not be excepted to under the latter rule. (See [15] – [16].)

COUNCIL FOR THE ADVANCEMENT OF THE SA CONSTITUTION AND OTHERS v INGONYAMA TRUST AND OTHERS 2022 (1) SA 251 (KZP)

Land — Informal land rights — Deprivation — Conversion to leases — Conversion by Ingonyama Trust of informal land rights and permission to occupy rights in trust-held land, to lease agreements without informed consent of rights holders — Unlawful and unconstitutional — Constitution, s 25(1) and 25(6); Interim Protection of Informal Land Rights Act 31 of 1996, s 2.

Under the Ingonyama Trust Act 3KZ of 1994 (the Trust Act) all land held by the pre-democracy homeland of the Government of KwaZulu was transferred to the first respondent, the Ingonyama Trust (the Trust), with the Zulu King as the sole trustee, on behalf of the communities resident on the Trust-held land. The Trust Act — passed by the Legislative Assembly of the former homeland and later approved under the Self-Governing Territories Constitution Act 21 of 1971 — acquired the status of a national Act when it was amended by (inter alia) the KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997 (the Trust Amendment Act). Section 2A of the Amendment Act created the Ingonyama Trust Board (the Board) to administer the affairs of the Trust and the Trust-held land.

In 2007 the Board decided that statutory permission to occupy rights (PTO rights * should no longer be issued, and that existing PTO rights in land should be converted to lease agreements; occupants would have to pay rental to remain entitled to live on the land. The Board designated this project 'the PTO conversion project'. It advised National Assembly's Portfolio Committee on Agriculture and Land Affairs (the Portfolio Committee) thereof in its annual report for 2006/2007, referring to it again in a number of subsequent such annual reports. Then, in response to November 2017 media advertisements promoting residential leases as part of the PTO conversion project, the Portfolio Committee raised concerns and asked the Trust to explain the project. Ultimately, the Portfolio Committee instructed the Trust and the Board to stop issuing leases until the legality of the process was cleared up with the Department of Rural Development and Land Reform (DRDLR). The Board did not heed this instruction, nor concerns raised by the Office of the Premier of KwaZulu-Natal that housing-allowance applications for its employees could no longer be processed as the Board had ceased to issue PTOs. (See [45] – [55] and [86] – [89].)

Against this background, the Council for the Advancement of the South African Constitution (Casac), joined by the Rural Women's Movement and eight people entitled to PTO rights, approached the court for declaratory and interdictory relief against the Trust and the Board. They contended that requiring or inducing the residents of Trust-held land to conclude lease agreements and to 'convert' PTOs to leases was unlawful and unconstitutional — it unlawfully deprived the residents and occupiers of the Trust-held land of their customary-law rights, statutory PTO rights and/or informal rights, protected by the Constitution, the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) and the Trust Act.

It was common cause that the Trust and the Board had no authority to issue, withdraw or dispose of the rights vested in PTO holders. In KwaZulu-Natal, PTO rights were regulated by provincial legislation which vests the power to grant PTO rights and demarcate allotments on government land or land owned by the traditional authority — including Trust-held land — in the Minister of Land Affairs. In 1998 this power was delegated to the Member of the Executive Council for Co-Operative Governance and Traditional Affairs, KwaZulu-Natal (the MEC). (See [61] and [77].)

The applicants also alleged that the Minister, as well as the MEC, being the functionaries responsible for the administration of both the Land Affairs Act and the

Trust Act, failed to exercise effective oversight of the Trust and the Board to ensure that they act within their powers, and to protect the property rights and security of tenure of beneficiaries and residents of Trust-held land. The Trust and Board contended that the leases were sanctioned by s 2 of the Trust Act and were entered into with the informed consent of the lessees.

Held

The overwhelmingly major part of the land in question was being administered and occupied, as it had been since time immemorial and prior to 1994, in accordance with the tenets of customary or indigenous law, in terms of which no rental was paid for the right of occupation. Section 2(4) of the Trust Act required that Trust-held land be dealt with 'in accordance with Zulu indigenous law or any other applicable law'. The concept of a lease or leasehold was unknown to Zulu customary law. In context, the right to let land, which is implicit in ss 2(5) and 2A(2) of the Trust Act, must be read as being confined to circumstances where the right of occupation and use of land was not ordinarily governed by Zulu indigenous law or any other applicable law. (See [77] – [85] and [99].)

The Trust did not hold the land in its own interest or for its own benefit but for the members of Zulu communities and residents living on Trust-held land. The rights of persons to occupy or use Trust-held land were acquired through Zulu customary law, customs and usages, and such rights entitled the owner to occupy and use the land, to dispose of such land to another person, to erect a building or let it, and transfer it to another person, including bequeathing it to his or her children. In addition to the customary law of right to land, the beneficiaries and residents of the Trust-held land had informal rights and interests which were inherent in the land on which they lived. A comparison of the rights and obligations the residents have under customary law, on the one hand, and as lessees, on the other, revealed that the leases undermine rather than reinforce customary-law rights and security of tenure.

The actions of the Trust and the Board had the effect of depriving the holders of PTO rights, customary-law rights to land and/or other informal land rights or interests in the Trust-held land, of their security of tenure; and of infringing on property rights vested in them under statutory or customary law, and IPILRA. It placed the Trust-held land fully in the hands of the Trust, to the exclusion of the beneficiaries and residents, being the true and ultimate owners of the Trust-held land. The Trust became a lessor, and the beneficiaries and residents were reduced to mere tenants, having no rights beyond those of permissive occupation and use. In divesting community members and residents of security of tenure, the Trust and the Board could not have been acting in the interests of and for the benefit, material welfare and social wellbeing of the communities and residents concerned — as s 2(2) of the Trust Act directed — and therefore did not act lawfully. (See [93], [101], [106] and [129].)

The residents did not know what the differences between PTOs and leases were; they were not furnished with complete and accurate information on the nature and effect of the lease agreements on their existing land rights. Under the circumstances, it cannot be said that such residents could give genuine and informed consent to the taking-away of their land rights. The conduct of the Trust and the Board did not accord with the purpose to improve the land so that the owners of Trust-held land ultimately receive full ownership of the land. It amounted to an arbitrary deprivation of the beneficiaries' and residents' PTO rights, customary-law rights, and informal rights to or interests in Trust-held land — in violation of the provisions of the Trust

Act, of IPILRA and the Constitution — and also an 'arbitrary deprivation' within the meaning of s 25(1) of the Constitution. (See [149] and [162] – [164].)
At all material times the Minister had been fully aware of the fact that the Trust and the Board were engaged in the PTO conversion project and that, as a replacement thereof, lease agreements were being concluded with the beneficiaries and residents of Trust-held land. In the absence of any law authorising the Trust and the Board to replace PTOs with leases, the Minister would then be conscious of the arbitrariness and unlawfulness of their conduct, but had failed to exercise oversight of their conduct in the exercise of their powers and the execution of their duties under the Trust Act. He also failed to respect and protect the existing property rights and security of tenure of the residents of Trust-held land, as required by s 7(2) read with s 25(1) of the Constitution. (See [175] and [178].)
The court had a duty to protect PTO rights, customary-law rights and informal rights or interests of the true and ultimate owners of Trust-held land against the conduct of the Trust and the Board, which purported, in excess of their powers and authority, to deprive the beneficiaries and residents of the land in question of such rights. The applicants were entitled to appropriate relief under s 172(1) of the Constitution. The structural and interdictory relief sought in the draft order was an essential, necessary and appropriate remedy in the circumstances. (See [194] and [200].)

SA CRIMINAL LAW REPORTS JANUARY 2022

EX PARTE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2022 (1) SACR 1 (SCA)

Prevention of crime — Preservation of property order — Application for — Urgency — Application inherently urgent and applicant entitled to approach court ex parte, by way of notice provided for in rule 6(4)*(a)*, without specifically having to make case for such — Prevention of Organised Crime Act 121 of 1998, s 38; Uniform Rules of Court, rule 6(4)*(a)*.

After three men were found in a timber plantation with the carcasses of 17 wild animals in the vehicle of one of the men, they were arrested, charged in a magistrates' court with a number of offences and released on bail. Without the knowledge of the prosecution, a magistrate struck the matter from the criminal roll without providing any reasons for doing so. The same also ordered the police to return the vehicle to one of the accused, in violation of the Criminal Procedure Act 51 of 1977. This prompted the appellant to apply to the High Court for a preservation order in respect of the vehicle in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA). The judge struck the matter from the roll on the basis that urgency had not been established as required by a practice directive of the court. On appeal,
Held, that the High Court practice directives were incompatible with the nature of POCA applications and rule 6(4)*(a)* of the Uniform Rules of Court, and the misclassification of the applications in terms of s 38 as ordinary urgent applications was irregular. The High Court had therefore erred in not finding that an application for a preservation order was inherently urgent by its very nature, and that the appellant was entitled, as a matter of law, to approach the court ex parte, by way of

notice provided for in rule 6(4)*(a)*, without specifically having to make out a case for urgency. The court had also erred in treating the practice directive as if it had statutory force that overrode the provisions of POCA and the Uniform Rules. (See [17] and [20].) The appeal was upheld.

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v REGIONAL MAGISTRATE, WYNBERG AND OTHERS 2022 (1) SACR 8 (WCC)

Sexual offences — Proof of — Presumption against retrospectivity — Applicability of ss 58 – 60 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 to offences committed before coming into operation of Act.

The respondents were charged in a regional court with two counts of indecent assault, read with ss 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), committed between 1974 and 1980. The Act came into force on 16 December 2007. The defence objected to the charges on the basis that the provisions of the Act were not applicable at the time of the alleged commission of the offences and that the Act was not intended to apply retrospectively. The magistrate upheld the objections, which caused the applicant to seek a review and setting-aside of the regional magistrate's decision.
Held, that the procedural rules contemplated by ss 58, 59 and 60 of the Act did not have a fatal effect on any rights to a fair trial as envisaged by s 35(3) of the Constitution. First and foremost, s 58 made previous consistent statements by the complainant admissible in a criminal trial. There was nothing new about this, as it was the position, even before the commencement of the Act. The only new introduction was that 'the court may not draw any inference only from the absence of the previous consistent statement'. The section did not say that the court should not draw any inference from the absence of a previous consistent statement, it merely prohibited the court from drawing an inference solely from its absence. Similarly with s 59, the court was only disallowed by the Act from drawing any inference only from the length of any delay between the alleged commission of the offence and the reporting thereof. When it came to s 60, the very premise of differential treatment of a sexual-offence complainant was offensive, and the differential treatment of sexual-offence victims derogated from the Bill of Rights in the Constitution. (See [61] – [63].)
Held, further, that the determination by the regional magistrate only focused on the presumption against retrospectivity, and did not delve further into and interrogate the relevant sections. It was clear that those sections operated and applied retrospectively and consequently the order by the regional- court magistrate, for the deletion of the relevant sections from the charge-sheet, was irregular. The order of the magistrate was accordingly set aside. (See [69] – [70] and [75].)

S v COKO 2022 (1) SACR 24 (ECG)

Rape — Elements of — Absence of consent — Proof of — Standard of proof where complainant was virgin — Consent meaning same thing, regardless of whether victim was virgin or not — No different threshold applicable.
Rape — Elements of — Absence of consent — Proof of — Factual misdirections committed by trial court resulting in acquittal on appeal.

The appellant was convicted in a regional magistrate's court of rape and was sentenced to seven years' imprisonment. He appealed against the conviction. The principal issue was whether the complainant had granted consent to sexual penetration after the parties had started to engage in sexual intimacy. The complainant insisted that she had not so consented, although the parties had been indulging in oral sex during the course of the incident. It was common cause that the appellant and complainant had been in a relationship which was terminated by the complainant shortly after the incident.
Held, that the magistrate and the prosecutor had made much of the fact that the complainant was a virgin at the time and wished to preserve her virginity. It was suggested to the appellant that, bearing in mind that the complainant was a virgin, 'something more' was required to demonstrate her consent, and it was not sufficient for the appellant to rely solely on her conduct as illustrative of consent. This was a misdirection of law: there were no different standards applicable to women or men who were virgins and those who were not. Consent meant the same thing, regardless of whether the victim was a virgin or not. It would set an unfortunate precedent if the law applied a different threshold to consent in respect of persons who were not virgins. (See [80] and [82].)
Held, further, that the magistrate had committed factual misdirections in concluding, inter alia, that the appellant had conceded that, 'as they became engulfed in smooching and oral sex, she made plain once more that you cannot penetrate her vagina with your penis'. This misdirection manifestly played a crucial role in the overall assessment of the evidence, and influenced the findings of the magistrate that the appellant was guilty. (See [82].)
Held, further, that the only area where there was a dispute was after penetration. It was in this area where the complainant says she objected and said it was hurting. The appellant's evidence was that, when the complainant said it was hurting, he 'would stop and then continue'. This aspect was not taken up in cross-examination, nor was it weighed in the assessment of the probabilities by the magistrate. In the circumstances, the court could not uphold the findings of fact of the magistrate, which were unjustified when one had regard to the record, and could not hold that the state had proved that the version of the appellant, that he genuinely believed that there was at least tacit consent, was false beyond reasonable doubt. (See [88].) In the circumstances, the appeal had to succeed.

S v WILLEMSE 2022 (1) SACR 43 (WCC)

Sentence — Imprisonment — Cumulative effect of — Sentencing court must be acutely aware of cumulative effect of sentences — Failure to do so could constitute misdirection.

The appellant was convicted of two counts of housebreaking with intent to steal and theft. Count 1 was committed while the accused was on bail for count 2, and he was at the time in an area prohibited by his bail conditions. The court sentenced him to six years' imprisonment on each count and ordered that the sentences were not to run concurrently. On appeal, the main complaint of the appellant was that the lower court did not sufficiently take into account the cumulative effect of the consecutive sentences imposed upon him.

Held, that the aggravating circumstances surrounding the commission of the two offences outweighed the mitigating ones and the sentences imposed by the magistrate were appropriate. However, the cumulative effect of the sentences was an entirely different matter, which bore scrutiny. (See [20].)
Held, further, that the sole reason for the magistrate making an order that the sentences should not be served concurrently was because the offences were 'separate offences'. That was manifestly a misdirection, in that a sentencing court had to be acutely aware of any cumulative effect of the sentences imposed by it. Where such was not taken into account this could constitute a misdirection on its own. (See [23].)
Held, further, that it was the court's duty to take the cumulative effect into account as part of the sentencing decision as a whole, to prevent the offender undergoing an unjustifiably severe sentence. The court did not do this and may have attempted to visit upon the offender an 'additional punishment' by making an order that the sentences imposed were not to be served concurrently. At the very least, a portion of the sentence imposed in connection with count 1 should have been ordered to be served concurrently with the sentence imposed on count 2. (See [28].) The sentence was adjusted accordingly.

S v MUGERA AND ANOTHER 2022 (1) SACR 53 (LP)

Legal practitioner — Duties of — Priority of and knowledge of court procedures — Attorney intoxicated and admitting was conveyancer who knew nothing of court procedures — Accused not having had benefit of effective legal representation — Proceedings set aside.
Trial — Irregularity in — What constitutes — Attorney intoxicated and admitting was conveyancer who knew nothing of court procedures — Accused not having had benefit of effective legal representation — Proceedings set aside.

In a review of proceedings in a criminal trial, at the request of the magistrate before the conclusion of the trial of the two accused, it emerged that the attorney for the first accused had been behaving in a peculiar manner. After the magistrate questioned her, she admitted that she was very drunk, was a conveyancer, and knew nothing of court processes. On review,
Held, that the failure by the attorney for the first accused, to put the version of the accused in an articulate manner to the witness, had serious consequences for him. When he took the witness box and gave the version that had not been put to the state witnesses, it was like he was adjusting his evidence as the trial progressed. (See [13].) Taking into consideration that the first accused's counsel was very drunk and was a conveyancer who knew nothing about court processes, the first accused did not have the benefit of effective legal representation during his trial, and that tainted the whole proceedings. The proceedings were therefore not in accordance with justice and stood to be reviewed and set aside. (See [15].) The matter was remitted for trial de novo before another magistrate and the court ordered that a copy of the judgment be sent to the Legal Practice Council. (See [16].)

S v LIEBENBERG 2022 (1) SACR 58 (NCK)

Bail — Pending petition to Supreme Court of Appeal — Against order of High Court on appeal to that court — In which court application for bail to be made — High Court having jurisdiction — Criminal Procedure Act 51 of 1977, s 65; Superior Courts Act 10 of 2013, s 16(1)*(b)*.

The applicant applied for bail pending a petition to the Supreme Court of Appeal against an order of the High Court on appeal to that court, altering the conviction on counts of fraud, theft, forgery and uttering, and reducing her sentence to four years' imprisonment. The state contended that it was the Supreme Court of Appeal to which she should have directed her application for bail.
Held, that bail proceedings were criminal proceedings governed by the provisions of the Criminal Procedure Act 51 of 1977 (the CPA) and s 65 of the CPA made provision for an appeal to a High Court if bail was refused in a lower court. Because s 1 of the Superior Courts Act 10 of 2013 excluded an appeal in a matter regulated by the CPA, the provisions of s 16(1)*(b)* requesting special leave to appeal did not apply and the High Court had the jurisdiction to determine bail. (See [19].)
Held, on the facts, the applicant was entitled to bail pending her petition to the Supreme Court of Appeal. (See [21].)

S v KWAZA AND OTHERS 2022 (1) SACR 64 (WCC)

Trial — Delay — Unreasonable delay — Delay caused by legal representative — Court unable to make order re wasted costs under s 342A(3)*(e)*(ii) of Criminal Procedure Act 51 of 1977, as provision not yet in operation — Court referring matter to Legal Practice Council.
Words and phrases — 'State' — Meaning of in s 343A(3)*(e)*(ii) of Criminal Procedure Act 51 of 1977.

In a criminal trial in the High Court involving four accused where the matter was part heard, counsel for accused 3 and 4 asked for permission to withdraw due to a lack of financial instructions from his clients and a prior commitment to attend to a part-heard matter in the Eastern Cape. The court indicated that it was considering applying the provisions of s 342A of the Criminal Procedure Act 51 of 1977 (the CPA) to investigate whether there had been an unreasonable delay in the completion of the proceedings on the part of counsel in question, and, if so, whether any order should be made under s 342A(3). The matter had been subject to numerous delays, not all of which were caused by the counsel in question, but he had a habit of arriving at court late with various excuses, such absences amounting to the loss of trial time. The investigation revealed that counsel had lied about his medical condition in order to attend to a bail hearing in a country town. He was furthermore also responsible for the loss of nine court days when he produced a medical certificate that he needed to self-isolate, but had instead, in that time, travelled to the Eastern Cape on public transport.
The court held that counsel's conduct had to be deprecated in the strongest terms. A court took counsel at his or her word because counsel owed a duty of absolute honesty to the court. The putting-up of false explanations to explain absences from court was inimical to the professional duties of an advocate and warranted the attention of the Legal Practice Council. Furthermore, by not self-isolating and by freely mixing with members of the public, on public transport and in other court proceedings, counsel had showed callous disregard for the health of others and was

manifestly in breach of the State of Disaster Regulations applicable to the current level of lockdown under the Covid-19 restrictions. (See [19] and [23].) Counsel had also prejudiced his colleague who was unable to claim her fees for the full days when the case was postponed. (See [29].)
For the purposes of determining liability for payment by a legal representative for an unreasonable delay, the word 'State' in s 342A(3)*(e)*(ii) * had to be given a wide interpretation, as it was not limited by any definition in the CPA. Accordingly, the wasted costs of accommodation of the witness waiting to testify would fall under that rubric, and so too would any unnecessary and wasted costs incurred by the Legal Aid Board, which was an institution of, and funded by, the state. (See [30] – [31].)
However, the court could make no order under the section, as that provision in the CPA had not yet been brought into operation. The court could, however, make an order under ss (3)(f) referring the matter to the Legal Practice Council for consideration of appropriate steps against counsel in question, and it intended to do so, because his conduct in the matter fell woefully short of the standards of professional behaviour expected of someone of his standing. (See [34] – [35].)

S v SIGCAWU 2022 (1) SACR 77 (WCC)

Evidence — Admissibility — Hearsay evidence — Admissibility in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Dying declaration — Admitted in terms of common law and not provisions of Act — Absence of objection to introduction of evidence constituting consent for purposes of section, though to be distinguished from probative value — Declaration strengthened by strong circumstantial evidence — Evidence admissible — Law of Evidence Amendment Act 45 of 1998, s 3(1)*(a)*.

The appellant was convicted on the basis of a dying declaration by the deceased to his neighbour after he had been shot, to the effect that the person who had shot him was 'Kaizer who used to work at the municipality' and was in a relationship with Nana. The declaration was also repeated to a police sergeant who arrived at the scene. The sergeant knew the person known as Kaizer, as he had previously worked with him. The defence did not object to this evidence. It was accepted that Kaizer was the accused who left the town at the same time and was only traced to the Eastern Cape five years later. The appellant's former partner, who was known as Nana, testified that the appellant called her on the day after the shooting and he said that, if the police came to look for him, she must say that she did not know anything about 'the incident' to them, but he did not explain what the incident was. The court accepted the evidence without applying the provisions of s 3(1)*(a)* of the Law of Evidence Amendment Act 45 of 1988. On appeal against the conviction,
Held, that the magistrate was required to deal with the dying declaration and the admissibility thereof as hearsay evidence in terms of s 3(1), and not common law. However, in the absence of an objection to the introduction of the evidence, the admission thereof, as against the appellant, had been consented to in terms of s 3(1)*(a)* of the Act. But this had to be distinguished from the probative value of the evidence. Despite the failure to consider the section, the magistrate had nonetheless in her judgment approached the hearsay evidence with caution. (See [31].)
Held, further, that the direct evidence of the deceased, that it was the appellant who shot him, was strengthened by the strong surrounding evidence, such as that of

Nana, which corroborated the hearsay statements made by the deceased, and it could not be said that it was not in the interests of justice to admit the hearsay evidence. The weight and probative value of the evidence were so overwhelming that they could not be ignored. (See [37] and [40].)

S v PORRITT AND ANOTHER 2022 (1) SACR 88 (GJ)

Evidence — Admissibility — Documentary evidence — International Cooperation in Criminal Matters Act 75 of 1996 — Effect of — Documents obtained after letters of request under s 2(2) — Treatment of by court — Prejudice not concerned with whether accused examined documents and affidavits, but only with whether given opportunity to do so, but declined — Documents would be admitted into evidence as being what they purported to be, without further proof.

The court had to decide on the admissibility of a bundle of documents for which the state had to obtain letters of request under s 2(2) of the International Cooperation in Criminal Matters Act 75 of 1996 (the Act). The documents in question purported to be the trade and business records that were in each deponent's possession. In their affidavits the deponents described the basis under which the documents had come to be in their custody or control, or from which it appeared that they had a duty to record information from someone who had personal knowledge. The business records were in Hong Kong and were of certain entities ostensibly managed from there. The state alleged that the accused directed the actions of the entities, to the extent that such actions formed an integral part of the scheme and its consequences, in relation to the offences with which they were charged. It described the Hong Kong entities as the alter egos of the accused, utilised by them either individually or in the execution of a common purpose or conspiracy, for the purposes of committing the offences in counts 1 – 14. The sum of the documents was approximately 9000 pages. A few of them may have had one or other of the accused's signatures or initials or were despatched or received by them, or by a person identified as their personal assistant or secretary. A few appeared to be copies of documents already admitted into evidence. While the second accused was prepared to make admissions regarding certain documents where duplicates had already been tendered in evidence, the first accused was not prepared to make any such unequivocal admission. The accused contended that they had not examined or considered the documents, and they could not be expected to go through 9000 individual pages of documents. They had also relied on legal advice not to cooperate.
Held, that the documents themselves might indicate the involvement of either or both the accused, or they may not. However, the court was not prepared to go further than accept that, if they were admitted into evidence, they had the potential of advancing the state's case against the accused. At this stage they should only be admitted on the basis that they are what they purported to be, but not as to truth of content — leaving that determination to be made either when the state sought to have the individual document admitted, or leaving it for argument as to the inferences to be drawn from the content either individually or when considered against the totality of the evidence. (See [22].)
Held, further, that prejudice was not concerned with whether the accused did or did not examine and consider the documents and affidavits, but only with whether they

had been given an opportunity to do so, but declined. The accused had made the election, and certain correspondence to and from the National Prosecuting Authority and the accused's attorney revealed that, as far back as 2006, they were given an opportunity to examine and consider the documents and affidavits obtained under s 2(2) of the Act. It was also not for accused to say that they accepted the advice of their lawyers not to cooperate. For whatever ostensible reason, ultimately it was their decision whether to accept that advice or not. The manner in which they had handled the case and presented argument without legal assistance showed further that they could not be treated as ordinary lay litigant's, but rather intelligent and astute individuals who would have weighed up the advice they were given and considered the consequences. They had been given more than enough opportunity to go through the documents, and their election not to do so did not amount to prejudice. (See [33] – [34].)
Held, therefore, that, in this first stage of the enquiry into the admissibility of the documents and affidavits, the accused had been given sufficient opportunity to inspect them, but failed to do so, and none of their objections to the admissibility of the documents under s 5 of the Act could succeed. The documents would, however, be admitted into evidence as being what they purported to be, without further proof, subject to the accused's entitlement to challenge the admissibility of any such document and without prejudice to the state seeking to rely on the truth of the content of the document by reference to any other law identified in its various heads of argument filed of record, in which event the accused's right to challenge the admissibility of the content of such document for such purpose was preserved. (See [47] – [48].)

S v MANGENA 2022 (1) SACR 102 (LP)

Court — Judicial officer — Conduct of — Magistrate irregularly changing accused's plea of guilty to not guilty and fabricating version that trial had taken place in which accused acquitted — Record showing that no trial had taken place — Proceedings set aside on review.
Plea — Plea of guilty — Alteration of to one of not guilty in terms of s 113 of Criminal Procedure Act 51 of 1977 — Test for.

The accused was charged in a magistrates' court with the contravention of a protection order, to which he pleaded guilty. As the court was starting to explain the provisions of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA), the accused informed the court that he was seeking the appointment of a Legal Aid attorney. On hearing that, the magistrate informed the prosecution that the accused had decided to change his plea and that she was therefore recording a plea of not guilty in terms of s 113 of the CPA. Despite protestations by the prosecutor, the magistrate stated that she had to alter his plea because the accused was still to consult with his attorney. The matter was then postponed for this purpose. On 9 September 2019 the matter was postponed for confirmation of the Legal Aid representation, and there then followed a number of postponements until on 4 May 2020 it was postponed to 8 June 2020. However, on 26 May 2020 the matter was in court before the same magistrate without the accused being present, the prosecutor having been unsuccessful in getting him to court at the magistrate's request. The

magistrate then proceeded to deliver her judgment in the absence of the accused and found him not guilty. When the head of the court picked up this error, he requested comments from the magistrate and prosecutor, after which he placed the matter before the High Court on review. In response to questions posed by the reviewing judge, the magistrate said that her file notes had been mislaid and that the digital recording of the proceedings could not be obtained.
The court held on review that the prerequisite for a presiding officer to record a plea of not guilty in terms of s 113 was that there had to be doubt whether the accused was in law guilty of the offence; or it appeared to the court that the accused did not admit an allegation in the charge; or that the accused had incorrectly admitted any allegation; or that the accused had a valid defence to the charge; or if the court was of the opinion for any other reason that the accused's plea of guilty should not stand. Therefore, there had to be a basis for the presiding officer to record a plea of not guilty in terms of the section. The test applied by the magistrate was incorrect and she was pre-empting what might transpire after the accused consulted with his legal practitioner. She had invoked the provisions of the section based on her own speculation and in this respect had misdirected herself. (See [13] and [16].)
In the circumstances where the transcribed record was not adequate and the defects were so serious, as the entire evidence upon which the conviction had been based was missing, the proper remedy would be to set aside the proceedings in their entirety. (See [21].)
There had been a deliberate attempt by the presiding magistrate to mislead the court in trying to cover herself for the irregularity committed by her in the manner in which she had acquitted the accused. She had created imaginary proceedings for 9 September 2019, despite the transcribed record speaking for itself. Even if handwritten notes might have been misplaced as she claimed, the record of 9 September 2019 gave a full picture of what transpired on that date, and that record did not appear to be incomplete. The court viewed this in a serious light, since it came from a judicial officer who had taken an oath to uphold the Constitution and dispense justice without fear, favour or prejudice. A judicial officer was obliged to display the utmost honesty, integrity and honourable conduct at all material times when executing duties. The manner in which the magistrate had recorded the plea of not guilty in terms of s 113; in which the accused was acquitted in his absence; and in which she misled the court that the complainant was called to testify, whereas no evidence was ever led, amounted to gross irregularities which tainted the whole proceedings. The proceedings were therefore not in accordance with justice and stood to be reviewed and set aside. (See [25] and [29] – [30].)

Afriforum NPC v Minister of Tourism and others and a related matter [2022] 1 All SA 1 (SCA)

Constitutional and Administrative Law – Directive by Minister of Tourism – Setting of criteria for eligibility for financial assistance from Tourism Relief Fund to mitigate impact of Covid-19 – Inclusion amongst criteria of B-BBEE status level of applicants for funds as defined in B-BBEE Tourism Sector Code made in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 – Section 10(1)(e) of Broad-Based Black Economic Empowerment Act 53 of 2003 providing that every public entity must apply any relevant code of good practice issued in terms of Act in determining criteria for awarding of incentives and grants in support of broad-based black

economic empowerment – Scope of section 10(1)(e) not extending to awarding of grants from Tourism Relief Fund.

The appellants, Solidarity and Afriforum, brought separate applications to review and set aside what they described as race-based criteria for eligibility for financial assistance from the Tourism Relief Fund established by the Minister of Tourism under the Disaster Management Act 57 of 2002. The Minister specified the criteria for exempted micro enterprises in the tourism industry to qualify for financial relief to mitigate the economic impact of the Covid-19 pandemic.

As a result of the spread of the Covid-19 pandemic, a state of national disaster was declared on 15 March 2020 in terms of the Disaster Management Act. A lockdown was imposed on the populace in terms of which virtually everyone was restricted to their homes, subject to extremely limited exceptions. The lockdown had devastating effects on all aspects of life. Its economic impact, in particular, was severe. It shut down all businesses except those that were deemed to be providers of essential services. In order to mitigate some of these effects, the government put in place various measures to assist businesses that were adversely affected by the lockdown and its aftermath. The Fund was one such measure. In terms of this initiative, R200 million was allocated to provide once-off payments of up to a maximum of R50 000 to businesses in the tourism industry which were adversely affected.

Held – The Disaster Management Act was the legal regime that regulated and empowered the government's management of the pandemic. The court set out the purpose and provisions of the Act before turning to the application for review of the Minister's directive. The first issue that had to be determined was the jurisdictional basis for the review. As the making of the directive constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (the "PAJA"), the Minister's exercise of power was subject to review in terms of section 6(2) of that Act.

In her answering affidavit, the Minister stated that the directive did not impose a race-based eligibility criterion for access to assistance from the Fund, but provided instead for the distribution of funds on the basis of a scoring system in which one of the components was the B-BBEE status level of applicants for funds, as defined in the B-BBEE Tourism Sector Code made in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003. Considering the purpose and objects of the latter Act, the court focused on section 10(1) which is concerned with the application of codes of good practice. It provides in section 10(1)(e) that every Organ of State and public entity must apply any relevant code of good practice issued in terms of this Act in determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment. Examining the scope of operation of section 10(1)(e), the court held that that the inclusion of B-BBEE status level of applicants for assistance as a criterion for eligibility for grants from the Fund was invalid. The appeal was accordingly upheld.

eThekwini Municipality and another v Independent Schools Association of Southern Africa and others [2022] 1 All SA 17 (SCA)

Local Government – Municipality's power to impose rates – Regulation of power by national legislation – Local Governance Municipal Property Rates Act 6 of 2004, section 19 limiting rates that a municipality may levy on a category of non-residential property, and read with applicable regulations, determining a prescribed

ratio in respect of property owned by public benefit organisations – Municipalities not permitted to then impose rate exceeding prescribed ratio for public benefit organisations property.

Local Government – Municipality's power to impose rates – Regulation of power by national legislation – Local Governance Municipal Property Rates Act 6 of 2004, section 19(1)(b) – Constitutionality of limitation on municipality's power to levy rates – Power of municipalities to impose rates as established in sections 229(1) and (2) of the Constitution may be regulated by national legislation as provided for in section 229(2)(a).

An amendment in 2010 of national regulations promulgated under the Local Governance Municipal Property Rates Act 6 of 2004 (the "Act"), capped the rates that municipalities may levy on property owned by public benefit organisations ("PBO property").

The Independent Schools Association of Southern Africa ("ISASA") applied to the High Court to bar the first appellant ("eThekwini Municipality") from levying a rate in excess of 25% of the rate levied on residential property in respect of PBO property. ISASA owned PBO properties throughout South Africa. The Stellenbosch Municipality ("Stellenbosch") was later joined to the proceedings. The appellants now appealed against the High Court's granting of the order sought.

Held – Whether the 2010 amended regulations applied to eThekwini depended upon the interpretation of section 8(1) read with section 19(1)(b) of the Act. Section 19 limits the rates that a municipality may levy on a category of non-residential property, and read with the 2010 amended regulation, determines a prescribed ratio in respect of PBO property. Once that is so, municipalities may not impose a rate that exceeds the prescribed ratio for PBO property. A municipality cannot avoid that limitation by declining to recognise PBO property in its rates policy. Once a category of property exists within a municipality, rates may not be imposed upon such property in excess of the prescribed ratio. Whatever the scope of the municipality's competence to determine categories of property for the purposes of its rates policy, that competence cannot be exercised so as to avoid the obligatory limitations that arise from the exercise of powers under section 19.

eThekwini contended that section 19(1)(b) of the Act was unconstitutional to the extent that it limits a municipality's power to levy rates. At the heart of the constitutional challenge was the contention that the provision offended against the separation of powers doctrine, in that the Constitution accords autonomy to municipalities to set their own rates policies. Section 19(1)(b) was said to impermissibly offend against that autonomy by giving the Minister for Cooperative Governance and Traditional Affairs the power to prescribe a ratio that municipalities may not exceed in determining rates for categories of non-residential property. While sections 229(1) and (2) of the Constitution provides for the power of municipalities to impose rates, that power is made subject to limitation. It may not be exercised materially and unreasonably to prejudice various economic activities and policies stipulated in section 229(2)(a). And the power may be regulated by national legislation as laid down in section 229(2)(a). The constitutional challenge thus failed.

The appellants' challenge based on alleged lack of consultation as required by section 84(a) and (b) was held to be without merit.

The appeal was accordingly dismissed.

HAL obo MML v MEC for Health, Free State [2022] 1 All SA 28 (SCA)

Civil Procedure – Evidence – Joint minutes of expert witnesses – Where experts agree on a matter of fact in a joint minute, the parties are bound by the agreement and may not, without more, deviate from the agreement, without proper explanation and the consideration of prejudice.

Personal Injury/Delict – Medical negligence – Assessment of expert evidence – When dealing with the evidence of experts in a field where medical certainty is virtually impossible, a court must determine whether and to what extent their opinions advanced are founded on logical reasoning – Experts testimony based on speculative reasoning rejected by court.

In May 2005, the appellant gave birth to a baby boy ("MML") at a hospital falling under the care of the respondent (the "MEC"). Some time after the birth, MML showed signs of neurological regression and eventually was diagnosed with cerebral palsy. A scan of his brain taken over nine years later revealed that he had suffered a hypoxic ischemic encephalopathy ("HIE"), a brain injury caused by lack of oxygen and lack of blood flow in the brain. The appellant sued the MEC for damages, alleging that negligence of hospital staff during labour and the birth of her child was the cause of his suffering from cerebral palsy. The High Court's dismissal of the action led to the present appeal.

Held – In the face of missing hospital records relating to the appellant, the appellant asked the court to draw an adverse inference against the MEC for not calling the keeper of the key to the strong room where the records were stored. There was no indication of what the witness could say about the records other than that they were missing. No inference could be drawn from that.

The key issue in the appeal was the likely cause and timing of MML's brain injury. The Court examined the evidence and highlighted the problems in the appellant's version. The joint minutes of two sets of expert witnesses both disputed the timing of the brain injury. Where experts agree on a matter of fact in a joint minute, the parties are bound by the agreement and may not, without more, deviate from the agreement, without proper explanation and the consideration of prejudice. When dealing with the evidence of experts in a field where medical certainty is virtually impossible, a court must determine whether and to what extent their opinions advanced are founded on logical reasoning. The Court must be satisfied that such opinion has a logical basis, in that the expert has considered comparative risks and benefits and has reached a defensible conclusion. An opinion expressed without logical foundation can be rejected. In this case, the Court found the opinion and conclusions of an expert who was not a party to either of the joint minutes, to be the most cogent. The opinions expressed by the other experts on appellant's behalf were found by the High Court to be speculative. The presumption is that a trial court's factual findings are correct in the absence of demonstrable error. To overcome the presumption, an appellant must convince the appellate court on adequate grounds that the trial court's factual findings were plainly wrong. The High Court's conclusion that the appellant was not a reliable witness given the inconsistencies and contradictions in her version of events, was correct.

Finding that the appellant had failed to establish negligence, the court in the majority judgment, dismissed the appeal.

A dissenting judgment in the case took issue with the majority's acceptance of the High Court's analysis of the evidence and the credibility findings made.

Lötter NO and others v Minister of Water and Sanitation and others and related matters [2022] 1 All SA 98 (SCA)

Constitutional and Administrative Law – Regulation of water use – Water use entitlements – Whether water use entitlements in terms of the National Water Act 36 of 1998 may be transferred from an entitlement-holder to another person, and whether trading in water use entitlements is permitted – Interpretation of section 25 leading court to conclude that section 25(1) and (2) allow for transfer of water use entitlements from a holder to a third party and that trading in water use entitlements is permitted.

The issue in three cases heard together in the High Court, was whether water use entitlements in terms of the National Water Act 36 of 1998 may be transferred from an entitlement-holder to another person, and whether trading in water use entitlements is permitted.

After setting out the facts in each of the three cases before it, the court took note of the Full Bench's interpretation of section 25 of the National Water Act and the reasons for its conclusion that the transfer of water use entitlements was not permitted. The Full Bench dismissed the appellants' applications for declarators as to the meaning of section 25 without even interpreting it, because it considered the objective of the applications to be to justify water trade. The applications to review and set aside the decisions to refuse transfers of water use entitlements in two of the cases were also dismissed. Leave to appeal to the present Court was granted.

Held – On appeal that the National Water Act recognises the need to protect water as a scarce natural resource in South Africa. The court provided an outline of the regulatory system that is created by the Act, as it applied in this case, and an overview of its most important provisions relevant to the issues. Section 25 deals with the transfer of water use authorisations.

The Full Bench's dismissal of the applications for declarators on the basis of some or other unexplained abuse of process on the part of the appellants was a misdirection. In so doing, the Full Bench failed to answer the first question that was before it, namely whether section 25 allowed for the transfer of water use entitlements from one person to another.

In interpreting section 25, the correct approach to the interpretation of written documents requires an objective, unitary exercise that takes into account the language used, the context in which it is used and the purpose of the document concerned. Based on the words used in section 25, and the broader scheme of the Act, the court concluded that section 25(1) and (2) contemplate and allow for the transfer of water use entitlements, temporarily and permanently, from a holder to a third party.

The court then turned to the related issue of whether the trade in water use entitlements is lawful or not. It found the Full Bench's finding that trading in water use entitlements is unlawful to be incorrect.

As a decision to grant or refuse a licence constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000, the requirement of exhaustion of any internal remedy provided for prior to seeking review applied. The Full Bench only granted exemption in respect of the applications for declaratory orders, and not in respect of the review and setting aside of the decisions made. In the light of the close connection between the declaratory relief sought and the setting aside of the impugned decisions, the Full Bench erred in failing to grant unconditional exemptions from the obligation to exhaust internal remedies.

All three appeals were thus upheld.

In a dissenting judgment, the view was that it does not follow from the fact that the surrender of a water use entitlement envisaged in section 25(2) may be made to a third party, that a holder of a water use entitlement and a third party are entitled to conclude a private commercial agreement in terms of which they trade in water for compensation, and to have such agreement authorised by a water management institution.

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MV "MSC Susanna": Owners and Underwriters of the MV "MSC Susanna" and another v Transnet (SOC) Ltd – National Ports Authority of South Africa and others [2022] 1 All SA 126 (SCA)

Shipping – Damage caused by ship – Liability for damages – Section 261(1) of the Merchant Shipping Act 57 of 1951 – Limitation of liability – Whether excluded in respect of foreign naval vessels – Court interpreting section 261(1) to mean that limitation can be invoked by owner of merchant ship against owner of a ship owned by the defence force of South Africa or another country.

While moored in the port of Durban, the *MSC Susanna* broke loose in a storm and collided with a French naval vessel (the "Floreal") under the control of the Ministère des Armées (the "Ministry") of the French Republic. In response to a damages claim by the ports authority, appellants issued a writ of summons in a limitation action against the port authority, contending that their total liability for damages should be limited in terms of the provisions of section 261(1)(b) of the Merchant Shipping Act 57 of 1951 (the "Act"). They then launched the present proceedings seeking the joinder of the Ministry to the limitation action. The application was resisted by the Ministry on the grounds that, as the owner of a foreign naval vessel, the right to limit was excluded as against it by the provisions of section 3(6) of the Act. That point was upheld by the High Court, leading to the present appeal.

Held – The issue was one of the proper interpretation of sections 261(1)(b) and 3(6) of the Act. The Court found the terms of section 261(1)(b) to be clear and comprehensive. The right to limit is given to the owner of a vessel, an expression given an extended meaning in section 263(2), in respect of all loss or damage to any property or rights of any kind, whether movable or immovable. That language encompasses all types of property, without qualification. It is wide enough to include the loss or damage embodied in the claim by the Ministry. Section 3(6) excludes the bulk of the provisions of the Act from application to both South African and foreign vessels forming part of their country's defence forces.

Considering each of the Ministry's arguments, the court concluded that none of the conventions on limitation of liability exclude its invocation in respect of claims arising from damage to naval vessels. The incongruities arising from the Ministry's argument were highlighted before the Court held that the appellants were entitled to claim to limit their liability, if any, arising from the events in the harbour in respect of the claim by the Ministry under section 261(1)(b) of the Act.

The appeal was accordingly upheld with costs.

Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and another [2022] 1 All SA 138 (SCA)

Civil Procedure – Locus standi to bring review application – Party having substantial and direct interest in impugned decision, the subject-matter of the litigation, and a real and current interest is clothed with locus standi.

Property – Sectional title scheme – Decision of trustees of body corporate to prohibit an estate agency from operating within scheme – Reviewability – Decision of body corporate of sectional title scheme not administrative action which is subject to review in terms of Promotion of Administrative Justice Act 3 of 2000, but decision found to be reviewable at common law.

The first respondent ("Bae Estates") was an estate agency which procured a tenant for a unit in a sectional title scheme. The conduct of the tenants drew complaints from other residents, and the appellant, being trustees of the scheme's body corporate, took a decision to prohibit Bae Estates from operating within the scheme. Consequently, Bae Estates launched an application in the High Court, seeking an interim interdict against the trustees from implementing the decision, pending an application to review and set it aside. The High Court set aside that decision but granted the trustees leave to appeal.

Held – In order for the Promotion of Administrative Justice Act 3 of 2000 to apply, the trustees' decision had to amount to administrative action as defined in section 1 of the Act. The requirement that an impugned decision be of an administrative nature was determinative of whether a particular decision constitutes administrative action. A detailed analysis of the nature of the public power or public function in question must be undertaken to determine its true character. The High Court failed to properly analyse the relevant requirements of the definition of administrative action. The fact that bodies corporate derive their powers from statute, does not, without more, translate their decisions into the exercise of any public power or performance of a public function. The court identified three critical requirements in that regard. Those were whether the trustees' decision was of an administrative nature; whether the trustees exercised a public power or performed a public function; and whether the trustees acted in terms of any legislation or an empowering provision. None of those questions were answered in the affirmative and it was concluded that the trustees' decision was not administrative decision as envisaged in the Promotion of Administrative Justice Act, and not reviewable in terms thereof.

The trustees also argued that Bae Estates did not have an enforceable right against them to operate in the scheme. It was therefore contended that the trustees did not owe Bae Estates a duty to act fairly towards it before they terminated Bae Estates' ability to operate in the scheme, and that Bae Estates lacked *locus standi* to set aside

the trustees' decision. The Court held that Bae Estates had a substantial and direct interest in the decision of the trustees, the subject-matter of the litigation, and that such interest was real and current. Its *locus standi* in seeking review was thus confirmed.

Setting out the grounds on which a decision of a private body can be subjected to judicial review at common law, the Court confirmed that the trustees' decision was reviewable at common law.

Satisfied that the trustees' decision ought to be reviewed and set aside, the court dismissed the appeal.

Director of Public Prosecutions Western Cape v Regional Magistrate Wynberg and others [2022] 1 All SA 154 (WCC)

Criminal Law and Procedure – Charges – Competence of charges – Prohibition on retrospectivity in criminal matters – Exceptions to rule – Presumption against retrospectivity does not apply to procedural provisions of legislation, if they do not affect substantive rights – Sections 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, on which charges were based, being procedural in nature, do apply retrospectively.

Criminal Law and Procedure – Right to fair trial guaranteed in section 35(3)(l) of the Constitution – Includes right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed.

The second and third respondents were charged with indecent assault, alleged to have been committed from 1974 until 1980. The charge sheet referred to sections 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, causing the defence to object that the provisions of the Act were not applicable at the time of the alleged commission of the offences, and that the Act was not intended to apply retrospectively. The applicant (the "DPP") sought review of the upholding of the objection by the magistrate.

Held – The Act came into force on 16 December 2007, and only during April 2018 was the occurrence of the alleged crimes reported to the police. The State instituted proceedings in 2018.

Section 35(3)(l) of the Constitution guarantees an accused person a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. Section 35(3)(n) provides that an accused person has a right to the benefit of the least severe of the prescribed punishment if the prescribed punishments for the offence has been changed between the time that the offence was committed and the time of sentencing.

The prohibition on retrospectivity in criminal matters is pertinent to the right to a fair trial and seeks to guard against miscarriage of justice through arbitrary prosecution, conviction and penalties. There are however, exceptions to the rule against the prohibition on retrospectivity. Retrospective modifications affecting trial procedures would not ordinarily infringe on the prohibition; unless the retrospective application of procedural rule will impair substantive rights. Section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act puts in place transitional provisions and draws a distinction between criminal cases pending and those not pending at the

commencement of the Act. The Court considered whether sections 58, 59 and 60 are substantive or procedural in nature because the presumption against retrospectivity does not apply to procedural provisions of legislation, if they do not affect substantive rights. The sections were found to be procedural, having nothing to do with substantive law and therefore, they do apply retrospectively. The Court confirmed that in terms of section 69 of the Act, the applicable procedure to pending matters already before court or already investigated is the one which existed before the commencement of the Act. The corollary was that the procedure applicable for those offences under common law which were prosecuted and investigated after commencement of the Act would be the new legal procedures as contemplated by the Act. Although the Act generally is prospective, it does impose new rules in respect of past incidents which were only prosecuted or investigated after its commencement.

A declaration was issued, confirming that sections 58, 59 and 60 were applicable in the criminal proceedings.

Forestry South Africa v Minister of Human Settlements, Water and Sanitation and others [2022] 1 All SA 169 (WCC)

Agriculture and Animals – Forestry – Provisions of National Water Act 36 of 1998 regarding use of land for afforestation for commercial purposes – Provisions in section 35 that responsible authority, in order to verify lawfulness or extent of an existing water use, may require a person claiming entitlement to a water use to apply for verification of that use – Examination of determinations under section 35(4) of National Water Act in respect of extent and lawfulness of a water use – Court confirming that policy cannot override legislation.

Civil Procedure – Locus standi – Party acting as agent for others – Standing confirmed where as a role player in industry where it had a substantial membership, applicant not only had a real and substantial interest in its own right, but was also acting in the public interest and in the interest of its members.

The applicant, Forestry South Africa, represented 93% of all planted afforestation in South Africa, with corporate forestry companies, commercial timber farmers and emerging small-scale growers amongst its members.

Section 36(1) of the National Water Act 36 of 1998 (the “Water Act”) declared the use of land for afforestation for commercial purposes as a “stream flow reduction activity”. Section 32 in turn, included a “stream flow reduction activity” as an “existing lawful water use”. The present case concerned the interpretation of the concept “existing lawful water use” in the context of a “stream flow reduction activity” in relation to the use of land for commercial afforestation purposes. In terms of section 35, the responsible authority, in order to verify the lawfulness or extent of an existing water use, may require a person claiming entitlement to a water use to apply for verification of that use.

The applicant sought to interdict the respondents from making determinations under section 35(4) of the Water Act in respect of the extent and lawfulness of a water use.

Amongst the issues to be determined was whether the imposition of conditions or obligations by the responsible authorities where a forester wished to change from one

genus of trees to another was permissible. It also had to be determined whether the genus exchange constituted water use as contemplated under the Water Act and whether the responsible authorities could insist on a reduction of the extent of land used for afforestation as a result of genus exchange from a genus with a lower water consumption to a genus with a higher water consumption level.

Held – The respondents' challenge to the applicant's *locus standi* was unsustainable. The court confirmed the permissibility of a party acting as an agent of others in litigation. The applicant, as a role player in the forestry industry where it had a substantial membership, not only had a real and substantial interest in its own right, but was also acting in the public interest and in the interest of its members.

A second point *in limine* related to the failure by the applicant to exhaust internal remedies. The internal remedy provided in section 148 of the Water Act was available to "affected persons" and did not extend to the applicant. In the circumstances, the applicant should have been exempted in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 from the obligation to first exhaust internal remedies.

On the issue of the appropriateness of declaratory relief, the court held that such relief is discretionary. Finding that the relief sought had a real and substantial impact on the applicant and its members, the court dismissed the objection to the relief.

Various policies applied by the respondents were challenged by the applicant. Underlying the court's examination of those policies was the principle that policy cannot override legislation. The policy of "use it or lose it" in respect of afforestation failed to consider the acknowledgment in section 36(1)(a) that use of land for commercial afforestation includes periods where such land is in the process of being prepared for commercial afforestation. The applicant was granted the relief sought in respect of that policy.

The respondents' reliance on best available information and the precautionary principle in requiring that genus exchange from pine to eucalyptus trees be authorised was found to be reasonable and the court declined to grant relief in that respect. However, the respondents were not entitled to insist during the verification process, that the area of land authorised for commercial afforestation be reduced in extent.

Although the applicant was successful in all respects, it was substantially successful and was entitled to costs.

Grapentin and another v Sue McGuinness Communications CC (in liquidation) and others [2022] 1 All SA 228 (GJ)

Insolvency – Winding up of close corporation – Enquiry into winding up – Review of issue by Master of High Court of certificate in terms of section 70(4) of the Close Corporations Act 69 of 1984 – Where Master failed to observe procedural fairness or follow a rational process prior to issuing the certificate, his action constituted contravention of section 3 of the Promotion of Administrative Justice Act 3 of 2000 and fell to be set aside.

The applicants were equal members of the first respondent ("SMC") which conducted business as a medical conference organiser. SMC's sale of its business to the fourth respondent ("Scatterlings") was cancelled by Scatterlings due to breach of contract by

SMC. At arbitration, SMC was ordered to pay R2 500,000 to Scatterlings , and the latter was then to return the business to SMC.

SMC did not recover the business and the applicants' argued that the liquidators made no effort to retrieve the business for the benefit of SMC. As a result, it was unable to pay its debts on grant of the arbitration award and was wound up.

At the request of the second respondent, the Master was requested to issue a certificate in terms of section 70(4) of the Close Corporations Act 69 of 1984. The Master complied with the request, leading to a challenge by the applicants.

In the present application, the applicants sought the review of the certificate issued by the Master, and the setting aside of the civil judgement granted pursuant to such certificate. They also sought condonation in terms of sections 7 and 9 of the Promotion of Administrative Justice Act 3 of 2000, to the extent necessary, for bringing the review application outside the 180-day time limit. The issue of the certificate was said not to constitute fair procedure in terms of the Promotion of Administrative Justice Act 3 of 2000.

Held – The first stage of an enquiry into the winding up of a close corporation is an enquiry in terms of sections 414 and 415 of the 1973 Companies Act, which is then followed by the second stage in which the Master issues a certificate as to the amount payable by any member or former member of the close corporation in terms of section 70(4). On recordal by the clerk of the Magistrates Court, the certificate has the effect of a civil judgement against the member/s concerned.

Regarding the application for condonation, the court held that section 70(5) of the Close Corporations Act provides a procedure constituting an internal remedy which the applicants were justified in exhausting before approaching the court. The review application was thus not out of time.

In issuing the certificate, the Master did not notify the applicants of his intention to issue the certificate, the applicants were not informed of the case against them before judgment was entered, they were not afforded the opportunity to make submissions, call witnesses or the opportunity to present and dispute any of the information before judgment was entered against them. The Master's failure to observe procedural fairness or follow a rational process prior to issuing the certificate constituted a contravention of section 3 of the Promotion of Administrative Justice Act. The certificate was declared invalid and set aside.

Rafoneke v Minister of Justice and Correctional Services and others and a related matter (Free State Association of Advocates as *amicus curiae*)
[2022] 1 All SA 243 (FB)

Legal Practice – Admission of foreigners into legal profession – Constitutionality of section 24(2) and 24(2)(b) of the Legal Practice Act 28 of 2014 – Restricting admission as legal practitioner to South African citizens or permanent residents rationally connected to legitimate government objective, but indiscriminate and blanket bar against non-citizens being admitted in South Africa found to be irrational, and serving no governmental purpose.

In two applications heard simultaneously by the court, the applicants were citizens of Lesotho, who studied at the University of the Free State, where they obtained LLB

degrees. After completing their training and passing the practical examination for attorneys, they applied to be admitted and enrolled as attorneys of the High Court. However, their applications were dismissed because they were neither South African citizens nor lawfully admitted to this country as permanent residents. They therefore brought a challenge to the constitutionality of section 24(2)(b) read with 115 of the Legal Practice Act 28 of 2014, arguing that their right to equality was infringed upon. An order of constitutional invalidity was sought insofar as the impugned sections precluded persons who are neither citizens of nor permanent residents in South Africa (and not admitted as legal practitioners in foreign jurisdictions) from being admitted and enrolled as legal practitioners of the High Court.

Held – The right to equality before the law is entrenched in section 9 of the Constitution. Where an equality attack is mounted against a provision, it must be determined whether the provision differentiates between people or categories of people, and if it does, whether the differentiation bears a rational connection to a legitimate government purpose. It must then be determined whether the differentiation amounts to unfair discrimination.

In this case, the impugned provision had to be adjudged in light of the Constitution and in conjunction with the Immigration Act 13 of 2002 and the Employment Services Act 4 of 2014. The provisions of the latter Acts and the Legal Practice Act show that the government's policy position is to make sure that work which does not entail a scarce or critical skill should be preserved for South African citizens or permanent residents. The legal profession is not classified as a rare or critical skill.

Section 24(2)(b) allows for admission as a legal practitioner, anyone who is a South African citizen or permanent resident of South Africa. Noting the high unemployment rate in South Africa, and recognising a need to protect young South Africans or permanent residents to enter the legal profession without competition from foreigners from the rest of the world, there was therefore a rational connection between the prohibition in section 24(2)(b) and the government's objective.

However, drawing a distinction between admission as a legal practitioner and enrolment to practise, the court found that section 24(2) does not provide for situations where non-citizens may want to be admitted without practising in this country. It was held that an indiscriminate and blanket bar against non-citizens such as the applicants being admitted in this country was irrational, and served no governmental purpose. It did not take into consideration the circumstances of some non-citizens who would want to be admitted as non-practising legal practitioners. To that extent, section 24(2) was inconsistent with the Constitution and invalid. The order of invalidity was suspended to allow the legislature to cure the defect.

Williams and others v Director of Public Prosecutions: Western Cape
[2022] 1 All SA 269 (WCC)

Criminal Law and Procedure – Criminal trial involving charges related to gang activity – Application for separation of trials – In terms of section 157(2) of the Criminal Procedure Act 51 of 1977, an application for a separation of trials may be applied for before any evidence has been lead in respect of the charge; or at any time during the trial upon the application of the prosecutor or the accused – Such application to be dealt with by trial court in a criminal case and not a civil court in motion proceedings.

Criminal Law and Procedure – Criminal trial involving charges related to gang activity – Permissibility of joinder of all accused in one trial where charges related to gang activity, and whether such joinder impaired the right to a fair trial – As efficacy, impact and reach of legislation to combat proliferation of criminal gangs and gang activity will be rendered meaningless if prosecutions of members of a criminal gang are to be separated and staggered, single trial not impermissible.

The applicants were indicted, together with the other accused persons, on a total of 101 charges characterised as gang-related charges under the Prevention of Organised Crime Act 121 of 1998 (the "Act"). They sought an order, by way of notice of motion, that their respective trials be separated from the other accused persons mentioned in the indictment, in terms of the provisions of section 157(2) of the Criminal Procedure Act 51 of 1977.

All the applicants were charged with counts contravening section 9(1)(a), 9(2)(a) and 9(2)(b), characterised as gang related charges under the Act.

Confirming that an application for a separation of trials may be applied for before any evidence has been lead in respect of the charge; or at any time during the trial upon the application of the prosecutor or the accused, the court called for submissions on the question of whether the words "at any time during the trial" in section 157(2) means at any time during the trial before the court dealing with the criminal trial in terms of the Criminal Procedure Act.

Held – Section 157 falls within the parameters of Chapter 22 of the Criminal Procedure Act, which deals with the conduct of the proceedings in a criminal trial. It refers to aspects which only the trial court can deal with. The court found that an application such as the present should be brought when the trial has commenced before a judge or magistrate after an accused has pleaded. Consequently, the trial court in a criminal case must deal with such an application, and not a civil court in motion proceedings. The procedure that was therefore adopted to deal with this matter, in terms of rule 6 of the Uniform Rules of Court, was clearly wrong, because it is not civil proceedings. It is an application that must be dealt with in a criminal trial in terms of the provisions as laid down in the Criminal Procedure Act. Criminal court interlocutory applications being dealt with in a civil court is a practice which is foreign to criminal procedure. The present Court was therefore not the appropriate forum to decide whether an application for separation should be granted to the applicants.

The court then turned to consider the issue of permissibility of joinder of all the accused in one trial where the charges related to gang activity, and whether such joinder impaired the right to a fair trial. It was concluded that a single trial was not impermissible. The efficacy, impact and reach of the legislation to combat the proliferation of criminal gangs and gang activity, will be rendered meaningless if prosecutions of the members of a criminal gang are to be separated and staggered, where their separate criminal conduct was committed in furtherance of the pattern of gang activity and for the benefit, existence and survival of the gang. All the applicants allegedly contributed to a pattern of criminal gang activity.

The application for separation was dismissed.

END-FOR NOW