LEGAL NOTES VOL 2/2022

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CROMPTON STREET MOTORS CC t/a WALLERS GARAGE SERVICE STATION v BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS 2022 (1) SA 317 (CC)

Minerals and petroleum — Petroleum — Petroleum products — Purchase and sale of petroleum products — Unreasonable contractual practice — Arbitration — Referral to statutory arbitration — High Court's jurisdiction not ousted — Petroleum Products Act 120 of 1977, s 12B.

Minerals and petroleum — Petroleum — Purchase and sale of petroleum products — Unreasonable contractual practice — Arbitration — Referral to statutory arbitration — Stay of legal proceedings pending determination of dispute by arbitration — Application for — Need of applicant for stay to comply with requirements of s 6 of Arbitration Act — Court's discretion to decline stay — Factors to consider — Onus — Arbitration Act 42 of 1965, s 6; Petroleum Products Act 120 of 1977, s 12B.

Arbitration — Stay of legal proceedings — Two avenues to apply for stay of proceedings — By way of substantive application in terms of s 6 of Arbitration Act, or by way of special plea requesting stay of proceedings pending determination of dispute by arbitration — Arbitration Act 42 of 1965, s 6.

In terms of s 12B of the Petroleum Products Act 120 of 1977, the 'Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, *require . . . that the parties submit the matter to arbitration*'. The question in the present matter concerned broadly whether a High Court was entitled to refuse a request to stay legal proceedings instituted in respect of a matter already referred to arbitration under the above s 12B. The applicant, Crompton Street Motors CC t/a Wallers

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[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 January 2022 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!**

Garage Service Station, operated a service station on certain property under a franchise agreement incorporating a lease entered into in February 2003 with Chevron South Africa (Pty) Ltd. In December 2011 the latter ceded and assigned its rights and obligations to the respondent, Bright Idea Projects 66 (Pty) Ltd t/a All Fuels. The agreement was operative for a period of five years, with options to renew for two further 5-year periods. Both options were exercised. However, in August 2017 the respondent informed the applicant that it would not renew the agreement again, and that the agreement would accordingly terminate by effluxion of time on 28 February 2018, and that before such time the applicant would have to vacate the premises. The applicant provided no response to this communication until 14 February 2018, when, in answer to the respondent's queries regarding its intentions, it indicated that it would not vacate, but was in the process of drafting an application for arbitration. This prompted the respondent, on 16 February 2018, to launch an application in the Pietermaritzburg High Court for, inter alia, the ejectment of the applicant. The applicant filed a notice to oppose and then an answering affidavit, in which, in addition to setting out its defence — reliance was placed on an oral agreement to extend the agreement — it applied for a stay of the proceedings pending the conclusion of an arbitration process initiated under s 12B.
The High Court refused to grant the application for a stay. For one, the court held, the application was not properly before it, as the applicant had failed to meet the procedural requirements for a stay of legal proceedings pending arbitration set out in of s 6(1) of the Arbitration Act 42 of 1965. The court nevertheless went on to consider whether it could exercise the discretion granted it under s 6(2) of the Arbitration Act in favour of a stay. It held that sufficient reasons existed why the matter should *not be referred* to arbitration. It went on to uphold the application for eviction. The applicant was unsuccessful in its attempts to seek leave to appeal from the High Court and the Supreme Court of Appeal. So it applied to the Constitutional Court.
In addition to the preliminary issues of jurisdiction and leave to appeal, * the principal issues for determination were the following (see [16]): *(a)* Whether, as the applicant argued, a s 12B referral to the Controller had the effect of ousting the High Court's jurisdiction; *(b)* if not, whether the applicant's failure to comply with s 6(1) of the Arbitration Act rendered the stay application defective; *(c)* whether the High Court had the discretion to refuse a request to refer the matter to arbitration (see [36]), which in turn required an examination of the relationship between s 6 of the Arbitration Act and s 12B of the Petroleum Products Act (see [40]).
Held
As to *(a)*
The applicant's claim that the High Court's jurisdiction was ousted was unfounded and had to fail (see [28]): In light of the presumption against ouster and the wording of the Petroleum Products Act, there was no basis to find that the High Court's ability to hear disputes of this nature had been assigned by the Petroleum Products Act exclusively to the arbitrator (see [26]). Further, it had been confirmed before by the Constitutional Court that the just and equitable standard required by the Petroleum Products Act applied to High Court litigation. (See [27].) Clearly, the parties had a choice between the s 12B arbitration and High Court litigation, and both forums had to apply the fairness standard (see [28]).
As to *(b)*
The inclusion of the request for a stay of proceedings in the applicant's conditional counter-application and as part of the answering affidavit did not render the

application defective (see [14]). Non-compliance with s 6(1) of the Arbitration Act did not render the request for a stay invalid. There were two avenues to apply for a stay of proceedings: a substantive application in terms of s 6 of the Arbitration Act may be made, *or a special plea requesting a stay of the proceedings pending the determination of the dispute by arbitration*. (See [32].) (The court, however, rejected the applicant's assertion that s 6(1) was not applicable because it had relied on statutory arbitration and not contractual arbitration. In terms of s 40 of the Arbitration Act, the provisions of the Act were made applicable to arbitration proceedings under any legislation, unless the legislation explicitly excluded its applicability, or if the Arbitration Act was inconsistent with the procedure recognised by the relevant law. None of those conditions were met in the present case. (See [31].))

As to *(c)*

The language of s 6(2) directed a court acting under that section to stay proceedings where such an application was made, unless sufficient countervailing reasons existed for the dispute not to be referred to arbitration. The words 'no *sufficient* reason why the dispute *should not* be referred to arbitration' denoted that the standard position was that a stay should be granted upon request. The onus of satisfying the court that the matter *should not* be referred to arbitration and instead heard by the High Court was on the party who instituted the legal proceedings. The discretion to refuse arbitration should be exercised judicially and only when a very strong case had been made out. (See [41].)

Further, when the Arbitration Act was being applied in terms of a statutory right to arbitration as opposed to a contractual right, s 6(2) had to be read to require that a court may stay proceedings if there was no sufficient reason to refer the dispute to arbitration *in accordance with the applicable statute or legislation* (in this case s 12B) *as opposed to the terms of an agreement*. (See [43] and [62].) In the case of an application for a stay to which s 12B applied, a court in exercising its discretion had to engage with the purpose and benefits of s 12B (see [43] and [60] – [63]). In this regard, the arbitral mechanism was introduced by the Legislature in order to address the unequal bargaining power between wholesalers and retailers prevalent in the petroleum industry in South Africa (see [42], [60] and [62]); and with this in mind offered a forum for resolving disputes that was cheaper and quicker than litigation, *expedient, specialised and procedurally flexible* (see [44], [45] and [61]). A court confronted with a stay application of the present type also had to guard against treating the dispute as a regular contractual dispute: the equitable standard of fairness and reasonableness prevailed in petroleum contracts (see [62]).

In the circumstances of the present case, the High Court had exercised its discretion judicially when it refused to stay proceedings, and there was no basis for this court to intervene (see [59] and [64]). (In reaching this conclusion, the Constitutional Court held that the High Court had been entitled to consider, inter alia, the following factors in refusing to stay proceedings: (1) That it would be a waste of judicial resources to stay proceedings, as the merits of the applications were fully argued before it and the matter was on the opposed roll (see [49] and [50]). (2) That the applicant had failed to approach the Controller with undue delay once it suspected that there were unfair or unreasonable contractual practices, instead waiting until the lease was due to expire (see [53] – [55] and [64]). (3) That the respondent's refusal to extend the lapsed franchise and lease agreements or to conclude new ones did not amount to a 'contractual practice' that could be corrected by an arbitrator in terms of s 12B, and therefore rendered the section inapplicable (see [49] and [56] – [58]). Appeal accordingly dismissed (see [66]).

PUBLIC PROTECTOR v COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE AND OTHERS 2022 (1) SA 340 (CC)

Public Protector — Powers — Subpoena — Taxpayer information — Whether Public Protector's power of subpoena trumping proscription of disclosure of taxpayer information — Tax Administration Act 28 of 2011, s 69(1); Public Protector Act 23 of 1994, s 7(4)*(a)*.

Revenue — Tax administration — Confidentiality of taxpayer information — Whether Public Protector's power of subpoena trumping proscription of disclosure of taxpayer information — Tax Administration Act 28 of 2011, s 69(1); Public Protector Act 23 of 1994, s 7(4)*(a)*.

During an investigation the Public Protector (PP), exercising her subpoena power under s 7(4)*(a)* of the Public Protector Act 23 of 1994 (PPA), subpoenaed the first respondent (the Commissioner) to provide her with tax information of a third party (see [1]). The Commissioner refused and later applied for a declarator that the Tax Administration Act 28 of 2011 (TAA) (s 69(1)) fortified by the PPA precluded him making the disclosure (see [2] and [5]). The court granted the declarator and here the PP sought the Constitutional Court's leave to directly appeal to it (see [1], [9], [11] and [52]). It refused leave in respect of the declarator (see [2], [8] and [52]).

The Constitutional Court weighed, firstly, that its constitutional jurisdiction was engaged: the contended trumping of the TAA's disclosure prohibition by the PPA's subpoena power demanded interpretation of the Constitution (s 182) and its relation to the subpoena power; the PPA was, moreover, constitutional legislation; and the right to privacy was involved (see [14] – [15]). The Constitutional Court then weighed the interests of justice and found that the case was not urgent and lacked prospects of success (see [18] and [27]).

As to the latter, the PP had argued that her statutory subpoena power flowed directly from her constitutional power to investigate, and as a constitutional power could not be limited by the TAA's proscription of disclosure (see [19]). Indeed a fortiori the subpoena power was an 'additional' power contemplated by the Constitution (see [20]).

The PP urged that any bar of subpoena would be inconsonant with the constitutional duty to assist ch 9 institutions; and the exceptions to the disclosure prohibition were not a closed list (see [21] and [23]).

The Constitutional Court, beginning with the preceding assertion, considered it an untenable interpretation that was at odds with the unambiguous text of the TAA (see [24]).

As to the argument that the subpoena power, flowing as it did from the constitutional investigative power, could not be limited by the disclosure prohibition, the Constitutional Court *held* that its effect was to impermissibly invalidate the proscription without the requisite step of obtaining a declarator (s 172(1)*(a)* of the Constitution) to that effect (see [26]).

Leave to directly appeal the High Court's declarator was accordingly refused (the absence of prospects of success outweighing other factors — the saving of time etc — favouring the granting of leave) (see [28] and [52]).

The Constitutional Court, however, granted leave to appeal the High Court's award of personal costs and set it aside as unjustified (see [41] and [52]).

AFRIFORUM NPC v MINISTER OF TOURISM AND OTHERS, AND A SIMILAR MATTER 2022 (1) SA 359 (SCA)

State — Duties — Disaster management — Covid-19 lockdown — Funds to mitigate impact of Covid-19 — Validity of direction made by Minister of Tourism under DMA regulations for provision of funds from Tourism Relief Fund to defined types of business in tourism industry — Minister of Tourism not obliged to make eligibility criteria subject to Tourism Sector Code in terms of B-BBEE Act — Minister committed error of law — Race-based criteria for funding aid unlawful — Broad-Based Black Economic Empowerment Act 53 of 2003, s 10(1)*(e)*; Disaster Management Act 57 of 2002, s 27(2).

In response to the Covid-19 pandemic, a state of national disaster was declared in terms of the Disaster Management Act 57 of 2002 (the DMA) on 15 March 2020. Three days later the Minister of Co-operative Governance and Traditional Affairs, the designated minister in the national government, promulgated regulations in terms of s 27(2) of the DMA, delegating authority to ministers to issue directions within their functional areas 'to prevent the escalation of the disaster or to alleviate, contain and minimise [its] effects'.
This was followed on 26 March 2020 by the imposition of a 'lockdown', restricting people to their homes and shutting down all businesses except those deemed essential services. In order to mitigate the economic fallout, the government put in place various measures to assist adversely affected businesses — including allocating R200 million (the Fund) to provide one-off payments of up to a maximum of R50 000 to adversely affected businesses in the tourism industry.
The Minister of Tourism (the Minister) relied on the regulations to issue a direction stipulating criteria for access to grants from the Fund. In terms thereof preference was given to enterprises with the highest scores in respect of pre-qualification criteria, points awarded depending on the B-BBEE status level of an applicant as per the Tourism Broad-Based Black Economic Empowerment Codes of Good Practices (the Tourism Sector Code).
Solidarity Trade Union (Solidarity) and Afriforum NPC (Afriforum), in separate High Court cases in the same division, applied to review and set aside the Minister's 'race-based criteria' for financial-assistance eligibility as unlawful. The Minister argued that she was legally bound by s 10(1)*(e)* of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) to apply the Tourism Sector Code when determining criteria for awarding incentives, grants and investment schemes in support. The High Court agreed, dismissed Solidarity and Afriforum's (consolidated) cases and refused them leave to appeal.
Section 10(1)*(e)* of the B-BBEE Act provides that '(e)very 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*'. At issue in this case — Afriforum and Solidarity's appeal to the Supreme Court of Appeal, with its leave on petition — was the scope of s 10(1)*(e)*, ie whether the amounts paid from the Fund constituted 'grants . . . in support' of B-BBEE.

Held
After the funds had been made available for Covid-19 relief in the tourism industry, the Minister decided in the direction she issued how to distribute them. This decision was bureaucratic in nature and amounted to administrative action. The result was that the validity of the Minister's direction must be determined with reference to the grounds of review set out in s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (See [34] and [53].)
A statutory power may only be used for a valid statutory purpose, and a power given for a specific purpose may not be misused in order to secure an ulterior purpose. As the DMA's empowering provisions for the making of regulations and directions made no mention of B-BBEE objectives, the only way in which they could be imported into the Minister's empowerment would be if she was correct that s 10(1)*(e)* of the B-BBEE Act required her to include them in her direction. In the absence of that, their inclusion would appear to amount to the pursuit of an improper purpose — one not authorised by the empowering provision — no matter how laudable her intentions.
It was apparent that the purposes of the DMA and the B-BBEE Act were very different: the former aimed at preventing or limiting disasters, mitigating their impact and enabling post-disaster recovery; the latter at promoting black economic empowerment in order to enable black people to participate meaningfully in the economy. The empowering provisions in terms of the DMA for the Minister of Co-operative Governance and Traditional Affairs to make regulations and the applicable empowering provision that authorised the Minister to issue her direction were grants to further the purposes of the DMA and not grants in support of B-BBEE as contemplated by s 10(1)*(e)* of the B-BBEE Act. (See [44] – [48].)
The Minister therefore believed erroneously that she was bound by s 10(1)*(e)* of the B-BBEE Act to apply the Tourism Sector Code in her direction. Her error was material because it distorted her discretion. Section 6(2)*(d)* of PAJA provides for the review of an administrative action if 'the action was materially influenced by an error of law'. Her inclusion of the B-BBEE status level of applicants for assistance as a criterion for eligibility for grants from the Fund was therefore invalid, and would be declared unlawful. (See [53] – [54] and [56].)

LEWIS STORES (PTY) LTD v SUMMIT FINANCIAL PARTNERS (PTY) LTD AND OTHERS 2022 (1) SA 377 (SCA)

Credit agreement — Consumer credit agreement — National Consumer Tribunal — Leave to refer complaint directly to it when National Credit Regulator issued notice of non-referral — Decision to grant such leave not appealable to High Court — Nature of Tribunal proceedings granting leave — No formal application or public hearing required — Factors to be considered by Tribunal — Tribunal having wide discretion — National Credit Act 34 of 2005, s 141(1)*(b)* and s 148(2)*(b)*.

Section 141(1)*(b)* of the National Credit Act 34 of 2005 (the NCA) provides that '(i)f the National Credit Regulator issues a notice of non-referral in response to a complaint . . . the complainant concerned may refer the matter directly to the [National Consumer] Tribunal, with the leave of the Tribunal'. And s 148(2)*(b)* that 'a participant in a hearing before a full panel of the Tribunal may appeal to the High Court against the decision of the Tribunal in that matter . . .'.
Here the Tribunal gave leave to Summit Financial Partners (Pty) Ltd (Summit) for a direct referral to it in terms of s 141(1)*(b)*, after the National Credit Regulator's non-

referral of a complaint Summit had lodged against Lewis Stores (Pty) Ltd (Lewis)
Lewis, which had resisted the Tribunal giving leave for a direct referral, then appealed — purportedly under s 148(2)*(b)* — to the High Court against the Tribunal's decision to give such leave.
At issue in this case, Lewis' appeal to the Supreme Court of Appeal after it was unsuccessful in the High Court, was whether a decision of the Tribunal to permit a direct referral to it in terms of s 141(1)*(b)* of the NCA was appealable in terms of s 148(2) of the NCA; secondly, what test the Tribunal should have applied in assessing the application; and, thirdly, whether Summit had satisfied the test.
Held
Once a matter had been properly referred to the Tribunal in terms of s 141(1)*(b)*, the Tribunal was required to conduct a hearing into the matter referred to it. Section 141(1)*(b)* made no reference to an 'application' or a hearing when seeking leave to refer a complaint directly to the Tribunal. Section 141(1)*(b)* conferred on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA did not require a formal application to be made and it was not necessary for purposes of the present appeal, nor was it desirable, to circumscribe the factors to which the Tribunal should have regard. There was no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. Section 141(1)*(b)* merely contemplated a reconsideration of the Regulator's ruling, not a formal application or a public hearing. (See [12] – [16].)
The ruling which the Tribunal was required to make under s 141(1)*(b)* was not a 'decision', nor an 'order' referred to in s 150. Rather, it involves the exercise of its 'other powers' as contemplated in s 27 and s 150 of the NCA. Accordingly, on a proper construction of the NCA, the grant of leave to refer a complaint directly to the Tribunal was not a 'decision' which must be arrived at in a hearing, and was not susceptible to an appeal in terms of s 148 of the NCA.

LH v ZH 2022 (1) SA 384 (SCA)

Marriage — Divorce — Proprietary rights — Marriage in community of property — Interpretation of s 18 — Amount received by spouse as non-patrimonial delictual damages — Whether such amount, if received prior to marriage, falling into joint estate — Matrimonial Property Act 88 of 1984, s 18*(a)*.

The present matter concerned the interpretation of s 18*(a)* of the Matrimonial Property Act 88 of 1984, which provides that '(n)otwithstanding the fact that a spouse is married in community of property, any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, *does not fall into the joint estate but becomes his or her separate property'*. Did the provision apply to amounts received as non-patrimonial delictual damages *prior to marriage in community of property*, such that they did not form part of the joint estate?
The appellant and the respondent were married to each other in community of property, in 2015. Prior to such marriage, in 2011, the respondent was involved in a motor vehicle accident and was awarded non-patrimonial damages in the amount of R800 000. Of this she invested R550 000 with Standard Bank in an interest-bearing account. When the appellant instituted divorce proceedings against her in the

Mthatha Regional Court, the respondent in her plea submitted that the investment, being non-patrimonial damages received as a result of a delict committed against her, was excluded from the joint estate in terms of s 18*(a)* of the Matrimonial Property Act 88 of 1984. The regional magistrates' court, at the conclusion of the divorce proceedings, ordered division of the joint estate, but, agreeing with the respondent's position, excluded the investment from the division. The Mthatha High Court confirmed the order of the regional magistrate. On appeal to it, the Supreme Court of Appeal —

Held, that the context of s 18 had to be read in its entirety, and apparent therefrom was the plain language and words used. The section highlighted that delictual damages received by a spouse during the course of a marriage in community of property which were non-patrimonial in nature (s 18*(a)*);

and damages for bodily injuries owing to the fault of one's spouse in terms of s 18*(b)*, had to be excluded from the division of the joint estate on divorce. (See [9].)

Held, that the protection afforded by s 18*(a)* applied notwithstanding a marriage in community of property. In such a case damages recovered during such a marriage for non-patrimonial loss became the property of the injured spouse and did not form part of the joint estate. *It did not apply to damages recovered prior to such a marriage*. Consequently, the damages attained by the respondent which were received before the conclusion of the marriage between the parties were the property of the respondent. On being married in community of property, the property of each party to the marriage fell into the joint estate, inclusive of any damages for non-patrimonial losses recovered prior to the marriage. (See [10].)

Held, accordingly, that the respondent's contention that she was entitled to the protection afforded by s 18*(a)* was misplaced, absent the adoption of a different matrimonial property regime which excluded the investment by way, for example, of an antenuptial contract. Therefore, the appeal had to succeed. (See [11] and [12].)

LöTTER NO AND OTHERS v MINISTER OF WATER AND SANITATION AND OTHERS AND SIMILAR CASES 2022 (1) SA 392 (SCA)

Water — Water rights — Transfer of water use authorisations — Transfers with regulatory authority's approval of water use entitlements from holder thereof to third party — Trading in water use entitlements — Whether permitted — National Water Act 36 of 1998, s 25(1) and (2).

Section 25(2) of the National Water Act 36 of 1998 (the NWA) provides a person holding a water use entitlement 'may surrender' it or part of it, '*(a)* in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and *(b)* on condition that the surrender only becomes effective if and when such application is granted'.

In three separate cases, heard together by a High Court full bench, the same issue arose: whether it was competent for a person holding a water use entitlement to contractually undertake to surrender the entitlement — for consideration — in favour of another contracting party so that the latter could apply for a licence in respect of the entitlement. In two of the cases prospective holders of water use entitlements so surrendered sought to set aside the refusal by the Director-General of the Department of Water and Sanitation of their applications on the basis that s 25(2) of

the NWA did not allow for the transfer of water use entitlements from one person to another, and that trading in water rights was not permitted. In the third case, a declaratory order was sought as to the correct interpretation of s 25 of the NWA. This case concerned an appeal to the Supreme Court of Appeal against the High Court dismissal of all three applications. The High Court reasoned that the applicants sought 'to justify water trading', which it held was an impermissible objective because the NWA did not enable holders of water use entitlements to identify and choose whom the recipients of the transferred or surrendered entitlement should be; did not authorise or permit them to sell their entitlements; and that the sale thereof by private agreement discriminated against those who could not afford the compensation unilaterally determined by the holder (see [21] – [25]).

Held

The High Court misdirected itself. It failed to answer the questions before it, ie whether s 25 of the NWA allowed for the transfer of water use entitlements from one person to another, and if so, whether contractual arrangements may be put in place by parties for the effectual sale or leasing of water use entitlements. (See [42].)

The words used in s 25(1) in respect of the temporary transfer of water use entitlements must include transfers to third parties; it made no sense for the entitlement holder to seek the water management institution's approval to allow themself to use the water on another of their own properties. This also applied to mechanisms for permanent transfers under s 25(2). Viewed within the broader context of the NWA, this meaning was supported by both s 26 and s 29. Section 26(1)*(l)* empowered the Minister to make regulations 'relating to transactions in respect of authorisations to use water'. The use of 'transaction' meant that the involvement of more than one person was contemplated; one could not transact with oneself. And s 29(2) authorised the attaching of conditions to licences, one of which may be payment of compensation 'in terms of any arrangements to use water'. Payment of compensation must envisage a quid pro quo payable by one person to another in respect of a water use transaction, and that in turn could only refer to a transaction involving the transfer of water use entitlements pursuant to s 25. (See [46] – [49].)

This interpretation was also consistent with the purpose of the NWA, ie 'the efficient and beneficial use of water in the public interest'. The person to whom a water use entitlement was granted should use it optimally, and if they cannot or no longer wish to, or have excess water to their needs, rather than that water going to waste, as it were, a transfer to someone else who is going to use it beneficially contributed to the attainment of the purposes of the NWA. It was also consistent with comparable regulatory schemes iro mining rights, commercial fishing rights, the right to trade in liquor and rights to engage in road transportation, to name a few. And, it must be pointed out that the 1997 White Paper on a National Water Policy, that preceded and informed the content of the NWA, stated that while, in the new legislation, water use allocations would no longer be permanent as in the past, provision would be made to 'enable transfer or trade of these rights between users, with Ministerial consent'. It was therefore evident that both s 25(1) and s 25(2) contemplated and allowed for the transfer of water use entitlements, temporarily and permanently, respectively, from a holder to a third party. A declaratory order to this effect would accordingly be made. (See [50] – [51].)

As to whether the trade in water use entitlements was lawful or not, the full bench's approach that it was not authorised by the NWA, and therefore unlawful, was erroneous. Unlike a public body, a private individual may do anything that the law

does not forbid. Also erroneous was the assumption that trading in water use entitlements was discriminatory, a conclusion apparently based on the idea that many people could not afford to pay the commercial value of water use. This was an economic reality and could not amount to discrimination. The full bench ignored the regulatory framework that the NWA put in place to ensure that transfers of water use entitlements did not have such effects: If a particular application for transfer was indeed offensive to one or more of the purposes of the NWA, the responsible authority would not grant its approval for the transfer. When the entitlement-holder surrendered the entitlement to facilitate a transfer application, the entitlement went to the transferee if the transfer was approved by the responsible authority, and if not approved it remained with the entitlement-holder. At no stage in the process was the water use entitlement available for allocation to anyone else; the transaction, whether successful or not, deprived no one of access to water. The full bench accordingly erred in finding that trading in water use entitlements was unlawful.

TRUSTEES FOR THE TIME BEING OF THE LEGACY BODY CORPORATE v BAE ESTATES AND ESCAPES (PTY) LTD AND ANOTHER 2022 (1) SA 424 (SCA)

Administrative law — Administrative action — What constitutes — Decision of body corporate of sectional title scheme to prohibit estate agency from operating within its scheme — Not amounting to administrative action reviewable under PAJA — Promotion of Administrative Justice Act 3 of 2000.

Sectional title — Body corporate — Decisions of trustees — Review — Whether trustees' decision to prohibit estate agency from operating within its scheme amounting to administrative action reviewable under PAJA — If PAJA not applicable, whether decision subject to judicial review in terms of common law — Promotion of Administrative Justice Act 3 of 2000.

Bae Estates and Escapes (Pty) Ltd, an estate agency, was appointed by the owner of a sectional title unit to find a tenant for the unit, which it did. The resulting lease agreement allowed the tenant to sublet the unit for short-term holiday rental. Subsequently, some owners of units in the scheme complained about some of the subtenants' conduct, including unruly behaviour and excessive noise. The trustees of the sectional title scheme's body corporate took the view that Bae Estates had failed to properly vet these subtenants, and under the body corporate's conduct rules resolved to restrict them from operating within the scheme with immediate effect. Bae Estates objected and advised the body corporate's managing agent that subletting was done by the tenant himself, without reference to Bae Estates, and threatened legal action if the resolution were not revoked.
When the trustees would not yield, Bae Estates launched an urgent application in the High Court for an interim interdict against the trustees' implementing the said resolution pending an application for the review and setting-aside thereof. The High Court nevertheless treated the application as one for the review of the trustees' resolution, and set it aside on two alternative grounds. The first was that Bae Estates had established review grounds for administrative action, the resolution having been of a 'public character' and having 'a direct external legal effect' as per the definition of administrative action in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The alternative ground was a review under the common law, the High Court exercising its inherent power to develop the common law and reviewing and setting

aside the resolution 'against the standards of lawfulness, reasonableness and procedural fairness'.
The present case concerned the trustees' appeal to the Supreme Court of Appeal. Before the SCA they conceded that their decision amounted to a total prohibition on Bae Estates to operate in the scheme; that it was taken without affording it any hearing; that Bae Estates was not responsible for the subletting which culminated in the complaints; and that Bae Estates became involved only after the problems arose. The trustees, however, contended that their decision was neither administrative action reviewable under PAJA, nor was it reviewable under common law because, absent a contractual nexus between the body corporate and Bae Estates, 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, so that Bae Estates lacked locus standi.
The main issues were, (1) whether the resolution constituted administrative action under PAJA; and (2) whether it was reviewable under the common law.
Held as to (1)
The gateway to determining whether a particular decision constituted administrative action was the requirement that the decision be of an administrative nature. That the High Court did not consider whether this requirement was met, amounted to a misdirection, for if conduct was not of an administrative nature, a fortiori it could not constitute administrative action envisaged in PAJA. Conduct of an administrative nature was generally understood as that of the bureaucracy in carrying out the daily functions of the state and which necessarily involved the application of policy. There was nothing bureaucratic about the trustees' decision; it was more commercial and managerial in nature. Their decision was therefore not of an administrative nature. (See [14] – [15] and [18] – [19].)
The High Court also failed to properly engage in an analysis of two further relevant requirements of the definition of administrative action, ie 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. (See [17].)
The fact that bodies corporate derived their powers from statute, did not, without more, translate their decisions into the exercise of any public power or performance of a public function. Government's involvement in relevant statutory provisions was confined to particular matters, none of which concerned or governed the relationship between bodies corporate and estate agents. Also, none of the relevant features of exercising a public power were met, neither did it affect the public at large. The trustees therefore did not exercise a public power or perform a public function when making their decision. (See [15], [23] – [26].)
There was no provision in the Sectional Titles Schemes Management Act 8 of 2011 (the Act) which empowered the trustees to prohibit an estate agent from operating in the scheme. Similarly, none of the regulations promulgated in terms of the Act concerned the relationship between bodies corporate and estate agents.
And, while the scheme's conduct rules qualified as 'an empowering provision' as defined in PAJA, it did not have any provision empowering the trustees to prohibit an estate agent from operating in the scheme. Accordingly, there was no 'empowering provision' in terms of which the trustees were entitled to take a decision to prohibit Bae Estates from operating in the scheme. (See [27], [29] – [31].)
It followed that the High Court erred: the trustees' decision was not an administrative decision envisaged in PAJA and was thus not reviewable in terms thereof (see [32]).

Held as to (2)
At common law, a person who approached a court for relief was required to have an interest, in the sense of being personally adversely affected by the wrong alleged; and ito s 38 of the Constitution the class of persons who may approach a court included 'anyone acting in their own interest.' It was clear that Bae Estates had substantial and direct interest and was sufficiently and directly affected in its rights and legal interests by the trustees' decision.
Therefore, at both common law and in terms of the Constitution, Bae Estates had established the required locus standi to challenge the validity of the decision. (See [37] – [38].)
Decisions of private bodies were not immune from judicial review. The identity or form of the decision-maker was immaterial; what was important was the effect of its decision and its implications on the subject to whom it was directed. There was no rational and justifiable basis why the rules of natural justice should not apply to the trustees' decision. It was well established that common-law review applied also to cases where the decision under review was taken without a hearing having taken place; and where the duty or power was created not by statute but consensually as in relation to domestic tribunals. Bae Estates held a well-founded belief and expectation that its continued ability to operate in the scheme and service its clients there would not be arbitrarily terminated by the trustees. Therefore, the duty on the trustees to act fairly in accordance with the tenets of natural justice came about consensually when Bae Estates was allowed to practise its occupation or profession in the scheme for over a year without hindrance. (See [39] – [40]; [42] – [43].)
The trustees' decision was admittedly procedurally unfair and unreasonable, without any justifiable basis and thus irrational, in breach of the principles of natural justice; and, most importantly, unjust. Courts must endeavour to do simple justice between parties. In our constitutional order, private entities were not enclaves of power, immune from the obligation to act fairly, lawfully and reasonably. In the present case it was not necessary to develop the common law, as the High Court purported to do. The common law — which now yielded to the Constitution — was adequate to meet the ends of justice. It followed that the trustees' decision was reviewable at common law. The trustees' decision ought to be reviewed and set aside; to hold otherwise would give an imprimatur to an injustice, totally inimical to our constitutional order and values. Accordingly, the appeal would not succeed. (See [46], [48], [50] and [52].)

DE BRUYN v STEINHOFF INTERNATIONAL HOLDINGS NV AND OTHERS 2022 (1) SA 442 (GJ)

Accountant — Auditor — Duty of care during audit — Claim by shareholders against company's auditors for share-value loss — Auditor owing duty of care to company, not shareholders.

Company — Directors and officers — Directors — Liability — To shareholders for breach of duties under Companies Act — Section 218(2) not imposing general liability — Shareholders must prove breach of duty under substantive provision of Act — Section not imposing common-law liability for such breach — Companies Act 71 of 2008, s 218(2).

Company — Directors and officers — Directors — Liability — To shareholders for breach of duties under Companies Act — Section 20(6) imposing liability on company

officers, not company itself — Conferring no cause of action against company — Companies Act 71 of 2008, s 20(6).

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action under common law against directors for breach of duty resulting in drop in value of shares — Directors liable to company, not shareholders — In absence of special relationship between shareholder and company, directors not liable to shareholders or prospective shareholders for loss in share value.

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action under s 218(2) against directors for breach of duty — Section 218(2) not itself providing cause of action but imposing liability only if duty under substantive provision of Act breached — Not imposing separate common-law liability for such breach — Shareholder's claim depending on wording of provision breached — Companies Act 71 of 2008, s 218(2).

Practice — Class action — Certification — In absence of cause of action raising triable issue, no certification possible — Trumping all other factors — Since they have definitive answer, no reason to refer true questions of law to trial court.

Practice — Class action — Funding — Third-party funding arrangements — Acceptable parameters proposed.

Practice — Class action — Representation — Class representative — Suitability — Capacity to conduct litigation on behalf of class.

On 5 December 2017 the value of shares in the Steinhoff companies * crashed after Steinhoff issued a press release disclosing accounting irregularities. The applicant (De Bruyn), a Steinhoff shareholder, sought authorisation to institute a class action on behalf of various groups of Steinhoff shareholders. The respondents opposed certification on several grounds.

In the class action De Bruyn intended holding the Steinhoff companies, their directors and their auditors, Deloitte (who allegedly failed to conduct a proper audit), liable for the shareholders' losses caused by the fall in value of their shares. † De Bruyn's application was the first shareholder class action brought for certification in South Africa. The parties disagreed, inter alia, on the proper way to decide whether a triable issue was raised; the sufficiency of the class definitions proposed by De Bruyn; whether De Bruyn was a suitable representative plaintiff; the acceptability of the third-party funding arrangements; ‡ and, crucially, whether the proposed class action indeed raised triable issues.

De Bruyn alleged (i) that the directors had incurred *common-law delictual liability* by breaching their duty of care to shareholders by making loss-causing negligent misstatements in the companies' financials; and (ii) that the directors and Deloitte had incurred *statutory liability* to shareholders by breaching various provisions of the Companies Act 71 of 2008 (the Act), including s 22 (reckless trading), ss 28 – 30 (financial information), and s 76 (directors' standards of conduct).

De Bruyn's statutory claims were based principally on (i) s 218(2) of the Act, which provides that '(a)ny person who contravenes any provision of [the Act] is liable to any other person for any loss or damage suffered by that person as a result of that contravention'; and (ii) s 20(6) of the Act, which confers on each shareholder a claim for damages against 'anyone' who 'intentionally, fraudulently or due to gross negligence' causes the company to do anything inconsistent with the Act or ultra vires the powers of the company.

The claims against Deloitte were also based on both common law and statute. De Bruyn claimed that Deloitte owed shareholders a common-law duty of care not to make negligent misstatements causing loss, while the statutory claim was based on s 46(3) of the Auditing Profession Act 26 of 2005 (APA), which provides that auditors incur liability to third parties who relied to their detriment on financial statements maliciously, fraudulently of negligently made by the auditors.

Held

Triable issue?

The common-law claims: Liability for negligent misstatements causing pure economic loss required proof of wrongfulness in the sense of an infringement of a right or legally recognised interest. Directors owed their fiduciary duties to the company, not the shareholders, except where there was a special relationship between directors and shareholders (see [134] – [141], [151]). Since no such relationship was pleaded, there was no foundation for the proposition the Steinhoff directors owed a fiduciary duty to the shareholders or prospective shareholders (see [143] – [146]). Given that the requirement of wrongfulness was thus absent, there was no cognisable common-law claim in delict against the directors (see [160]). As to Deloitte, it owed its duty of care to the company, not its shareholders (see [167]).

The statutory claims: Section 218(2) should not be interpreted literally but to chime with the common law and the limitations it imposed on liability. The specific requirements of liability under s 218(2) resided in the substantive provisions of the Act. Since the common law did not hold that company directors owed fiduciary duties to shareholders, the specific contraventions of the Act relied on by De Bruyn did not accord the shareholders a right of action against Steinhoff or the directors. (See [186] – [203].)

Section 20(6) imposed liability on persons who caused the company to act (in particular, its directors), and not on the company itself. It would be discordant with the common law and the rest of s 20 if s 20(6) were to be interpreted to provide shareholders with a claim for pure economic loss caused by the actions of directors. Properly interpreted, s 20(6) required those who caused the company to act ultra vires or unlawfully to make good *to the company*, not its shareholders, the loss caused. In casu, therefore, the shareholders had no claim under s 20(6) for losses suffered because of the conduct of Steinhoff or its directors. (See [225], [230], [232], [236], [246].)

The common-law claim against Deloitte: Since the duty of care of auditors was owed to the company, not its shareholders, the pleadings failed to disclose a common-law cause of action against Deloitte. There was no proximate or special relationship that would extend to any subset of shareholders a duty of care owed by Deloitte. (See [172], [174].)

The statutory claims against Deloitte: The problem here was that De Bruyn did not plead causation in the form of detrimental reliance required by APA, s 46(3): instead, she relied on the allegation that class members bought shares at inflated prices or held on to shares because of their inflated prices. That being the case, the particulars did not disclose a cause of action against Deloitte. (See [250] – [251], [256].)

Other matters

Certification of class action based on novel point of law: Whether a triable issue was raised was best assessed by the certification court itself on the standard of whether the proposed cause of action was tenable in law. This in turn would be important in

deciding whether there were triable issues that warranted a class action. (See [18] – [19].)

Class commonality: Class definition should permit class membership to be determined by recourse to objective criteria. The revised class definitions proposed by De Bruyn adequately cured the concerns raised by the respondents. Despite the multiplicity of claims against different defendants, there was sufficient class commonality for the purposes of certification. (See [27], [37], [45], [257] – [274], [293].)
Suitable representative: While De Bruyn lacked the technical expertise required of an optimal class representative, she was nevertheless a Steinhoff shareholder who had suffered a loss reflecting an identity of interest with the proposed classes she intended to represent. Even in complex cases, ordinary litigants, properly guided by their legal representatives, could make decisions in their own interests and those of their class. While not ideal, De Bruyn was a suitable representative for the proposed classes. (See [61], [64], [291].)
Funding arrangements: The requirements for the acceptance of the third-party funding arrangements were that they (i) were necessary to provide access to justice; (ii) fair and reasonable; (iii) would not overcompensate the funders; (iv) would not interfere with the duty of the class lawyers to act in the best interests of their clients; and (v) would enable class representatives to exercise control over the litigation in the best interests of class members. Here the proposed funding arrangements, being fair, reasonable and in the interests of justice, ought to be permitted to support the proposed class action. (See [80, [83], [86] – [87], [120].)
In closing, the court pointed out that while there was much to be said in favour of the certification of a class action to compensate buyers of Steinhoff shares that suffered losses, the fact that none of the component parts of the proposed cause of action against the Steinhoff companies, their directors or Deloitte had any basis in law meant that there was nothing to take to trial. Without a cause of action, the application for certification would fail. This did not, however, mean that the shareholders had no remedy: it was for the Steinhoff companies to hold the directors and Deloitte liable for loss resulting from the breach of their duties to the companies, and if they reneged, the shareholders could compel them to act by invoking s 165 of the Act. (See [288] – [289], [298] – [301].)

EJ AND OTHERS v HAUPT 2022 (1) SA 514 (GP)

Children — Conception and birth — Artificial insemination — Female same-sex couple A and B — A and B partners in civil union — Friend C providing semen with which A inseminated using home insemination kit — Whether s 40 applying to A and B — Children's Act 38 of 2005, s 40.

First and second applicants were a female same-sex couple and partners in a civil partnership (see [15] and [28.2]). A male friend of the couple, third applicant, supplied first applicant with semen, with which, using a home insemination kit, she impregnated herself (see [18] and [20]). Some months into the pregnancy, first, second and third applicants applied for a declarator that s 40 of the Children's Act 38 of 2005 was of application to same-sex couples (see [4] and [29]).

Held, on interpretation of the section, that it did so apply (see [58] – [59], [64] and [71]).
The resultant order provided that the child was considered the child of first and second applicants from the moment of birth; that they would have full parental rights and responsibilities from the aforementioned moment; that the birth register should reflect first and second applicants as the child's parents; that no adoption procedure was required; that third applicant was a gamete donor and no obligations would arise between him and the child and that he would obtain no right of guardianship, parenthood, care or contact; that the child would have no claim for maintenance or in succession against third applicant or his relatives (see [55], [73] – [74] and [80]).

MINERALS COUNCIL OF SOUTH AFRICA v MINISTER OF MINERAL RESOURCES AND ENERGY AND OTHERS 2022 (1) SA 535 (GP)

Minerals and petroleum — Mining and prospecting rights — Charter contemplated in s 100 of MPRDA — Legal status of — 2018 Charter published in form of legislative instrument binding upon all holders of mining rights, with consequences and penalties for breach thereof as provided for in MPRDA — Charter not authorised as subordinate legislation but as instrument of policy — Set aside on review as unlawful administrative action — Mineral and Petroleum Resources Development Act, s 100(2).

Section 100(2) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) provides that the Minister of Minerals and Energy (the Minister) 'must . . . develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans in the mining industry . . .'. (Quoted in full at [15].)
In 2018 the Minister published a Charter (the 2018 Charter) in the form of subordinate legislation binding upon all holders of mining rights, with consequences and penalties for breach thereof as provided for in the MPRDA.
This case concerned an application by the Minerals Council (the Council) for the review and setting-aside of this Charter, on the basis that s 100(2) only contemplated a charter as a policy instrument and did not empower the Minister (the first respondent) to make law in the form of subordinate legislation directly binding on holders of mining rights. At issue was whether the 2018 Charter constituted law or policy. A related issue was the jurisdictional basis of the review, ie whether the development of the 2018 Charter constituted administrative action to be reviewed under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or whether it stood to be reviewed under the principle of legality.
Held
The Charter, as it was intended to facilitate the implementation of the MPRDA, constituted administrative action. (See [32].)
The singularly unusual word 'charter' was indicative that subordinate legislation had not been intended. This because the words 'law' and 'regulation' were mentioned in various other sections of the MPRDA; s 107 expressly authorised the Minister to make regulations; the definition of the term 'Act' in s 1 of the MPRDA did not include the term 'charter' (see [23]). Also, the concept of the 'charter' was customarily intended and understood as a pact between government and the mining industry (see [24] – [27]); and the background of the MPRDA as espoused in the White Paper was inconsistent with an interpretation of the Charter as subordinate legislation (see

[28] – [30]). The use of the term 'develop' (as opposed to 'make') was a further indicator; it was often used with reference to the formulation of policy but never used to describe the making of laws (see [31] and [33]). And the use of the word 'can' (as opposed to 'must') was, on its ordinary grammatical meaning, permissive and not peremptory.
As to the purpose and context of s 100(2), the achievement of the MPRDA's transformational objectives did not require that the Charter take the form of subordinate legislation, because the MPRDA had its own enforcement structure. Nothing in the context in which s 100(2) appeared suggested that it should not be given its ordinary grammatical meaning (see [37] – [40] and [55]).
In the light of its language, ordinary meaning, the context in which it appeared and its apparent purpose, s 100(2) did not empower the Minister of Mineral Resources to make law. Therefore, the 2018 Mining Charter was not binding subordinate legislation but an instrument of policy (see [59]). Accordingly, the impugned clauses of the Charter would be set aside on review under PAJA (see [68]).

PE v DR BEYERS NAUDE LOCAL MUNICIPALITY AND ANOTHER 2022 (1) SA 560 (ECG)

Damages — Mitigation — Loss of earnings — Job offer by municipality (retrospective reinstatement) to mitigate future loss of earnings in claim by former employee who resigned after sexual assault by boss — Plaintiff traumatised by assault — Continued employment of plaintiff rendered intolerable — Offer unlawful and correctly rejected by plaintiff.

Labour law — Employer — Duties — Organ of state — Duty to protect and aid employee who was victim of sexual assault at workplace — Employer's conduct in allowing light sanction (two-week suspension) to stand without challenge and subsequently permitting assailant to roam free with easy access to victim deprecated — Untenable to expect victim to 'mitigate her damages' by accepting offer of reinstatement after resignation — Court awarding victim R4 million damages.

Labour law — Sexual assault — Vicarious liability of employer — Liability of municipality for sexual assault of employee by boss — Plaintiff traumatised by assault — Continued employment rendered intolerable — Job offer by municipality to mitigate plaintiff's future loss of earnings unlawful and correctly rejected by plaintiff — R4 million awarded.

The plaintiff, an employee of the first defendant municipality, was sexually assaulted * at the workplace during working hours by her immediate supervisor, one J (the second defendant). The plaintiff informed her superiors and, six months later, disciplinary proceedings resulting in a two-week suspension were instituted against J. Meanwhile the plaintiff had, despite the efforts of municipal officials to keep them apart, run into J at work several times, causing her additional distress. Traumatised by events and finding continued employment with the municipality intolerable, she resigned a year later.
Instead of suing for constructive dismissal under the Labour Relations Act 66 of 1995, the plaintiff elected to sue for damages in delict, challenging the lawfulness, not the fairness, of the municipality's conduct. She claimed R4 million from the municipality on the basis of its vicarious liability. Liability and quantum were

separated and the trial court found in favour of the plaintiff, holding the defendants jointly and severally liable for the plaintiff's proved damages.
On 10 July 2020 the municipality made what amounted to an offer of retrospective reinstatement 'in lieu of an offer of damages and in order to assist the plaintiff in mitigating her damages'. The plaintiff declined it. This obliged the present court to investigate whether the municipality had discharged the onus of proving that it was unreasonable for the plaintiff to have refused the offer. The court investigated the conduct of the municipality toward the plaintiff after the assault and before and after her resignation; the effect of the assault on the plaintiff; whether she had been obliged to accept the offer; whether the offer was reasonable; and whether the state could offer employment to settle a claim.
Held
The plaintiff had been entitled to refuse the offer: she had left the municipality because it had made her continued employment intolerable. The municipality should, as an organ of state, have challenged the disciplinary finding, protected her from the second defendant instead of allowing him to roam free with unfettered access to the plaintiff, and provided her with support in the form of counselling or other assistance (see [32], [34], [38] – [41]). Its failure to do so had catastrophic consequences for her emotional and psychological wellbeing, making her employment unendurable (see [44]). And the municipality's stance at the trial demonstrated a lack of appreciation for its legal obligation to provide the plaintiff with a safe working environment. It gave the impression of colluding with the second defendant to protect its reputation and shielding it from liability. Instead of attempting to avoid liability through legal argument and compelling her to testify, it should have given the plaintiff an apology for the harm suffered by her. (See [51] – [54].)
To expect someone in the position of the plaintiff to return to the workplace where she had been sexually assaulted, in order to mitigate her losses, was outrageous and contrary to legal principle, which stated that where employment relationships break down, reinstatement would not be ordered (see [75] – [76]). Given this, and the fact that the offer was a thinly veiled attempt at damage control, the plaintiff was entitled to have rejected it out of hand (see [85]). Nor did the municipality acquit itself of the onus to show that the refusal was unreasonable in the circumstances, particularly in view of the risk that J might disobey an instruction to stay away from the plaintiff (see [89]). It was, in addition, not clear how any agreement that J relocate could be enforced against him (see [90]).
There was no statutory authority for a job offer for the purpose of extinguishing the future loss of earnings portion of the plaintiff's delictual claim, and an agreement concluded pursuant to such an offer would not pass constitutional muster. The court would not endorse such an agreement. (See [107] – [110].)
The plaintiff's claim for future loss of earnings would be subject to a 55% contingency deduction to reflect the chance that she would obtain work in the open labour market (see [154]). Total damages of R3,99 million awarded.

RAFONEKE v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2022 (1) SA 610 (FB)

Legal practitioner — Admission and enrolment — Prohibition on admission and enrolment of foreigners — Constitutionality — Prohibition mostly in order, being in line with government policy and attendant legislation — Unconstitutional only to extent that it prevents admission and enrolment of foreigners as 'non-practising practitioners' —

Declaration of invalidity suspended pending rectification by Parliament — Legal Practice Act 28 of 2014, s 24(2) and s 115.

The applicants — both citizens of Lesotho who had obtained LLB degrees, completed their articles of clerkship and passed their attorneys' admissions exams in South Africa — challenged the constitutionality of s 24(2)*(b)* and s 115 of the Legal Practice Act 28 of 2014 (the Act) after their applications for admission as legal practitioners were refused in the light of those provisions. In addition to the justice minister, the respondents were the Legal Practice Council and the trade, labour and home affairs ministers.

Section 24(2)*(b)* states that to practise at and be admitted to the High Court as a legal practitioner, the applicant must be 'a South African citizen' or 'a permanent resident' of the country, thus differentiating between citizens and permanent residents on the one hand and non-citizens on the other. Section 115 preserves the entitlement of foreign advocates, attorneys and solicitors from certain countries to be admitted and enrolled as legal practitioners in South Africa, thus differentiating between them and foreigners in the position of the applicants.

According to the applicants, the differentiations in s 24(2)*(b)* and s 115 were contrary to s 9 of the Constitution. They denied, moreover, that there was a rational connection between the differentiation and a legitimate government purpose, and argued that even if there was one, it was still discriminatory and unconstitutional.

The respondent ministers and the Free State Association of Advocates, as amicus, argued that the contested provisions served the rational and legitimate government purpose of protecting citizens and residents' access to articles of clerkship, and that the applicants were bent on circumventing local employment and immigration statutes enacted to achieve this purpose.

Held

It was reasonable for the Act to ensure that the legal profession broadly reflected the demographics of the country by regulating access to it (see [42]). Allowing foreigners to practise without due regard to government policy (to protect jobs for South Africans) and attendant labour and immigration laws (visa and work-permit requirements for foreigners) would render them nugatory (see [48]). Hence there was a rational connection between the prohibition in s 24(2)*(b)* and the government's policy objective (see [49]). The differentiation in s 115 between foreign lawyers who could practise here and persons in the position of the applicants was not arbitrary but similarly served a legitimate government purpose (see [57] – [64]).

As to the applicants' argument that there was, despite the abovementioned rational connection, nevertheless unfair discrimination, that, while they were indeed discriminated against on the basis of their nationality, the discrimination was, in the light of the economic and unemployment realities of South Africa and the government's attempts to address them, fair (see [97], [100], [104], [115]).

But it was different for those who wanted to be admitted but not to work here, ie to be admitted and enrolled as non-practising legal practitioners (see [72]). Nothing in the rules proscribed this. Under s 33 of the Act such persons would not be able to legally work or be paid as practising legal practitioners and they would not threaten South African jobs (see [82] – [86]). The upshot was that an indiscriminate bar against the admission of non-citizens like the applicants served no government purpose and was irrational (see [88]). Hence s 24 did not pass constitutional muster to the extent that it prohibited non-citizens from being admitted and enrolled as non-practising legal practitioners (see [90]).

The appropriate remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect (see **Order** for details).

SA CRIMINAL LAW REPORTS FEBRUARY 2022

KOUWENHOVEN v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND OTHERS 2022 (1) SACR 115 (SCA)

Extradition — Application for — Nature of proceedings — Extradition enquiry constituting criminal proceedings for purposes of s 310 of Criminal Procedure Act 51 of 1977.
Appeal — By Director of Public Prosecutions, or other prosecutor, in terms of s 310(1) of Criminal Procedure Act 51 of 1977, on question of law — Participation by accused — Accused having no role to play in formulation of question to be reserved, and no basis for accused to receive notice or have any input in preparation of stated case.
Extradition — Application for — Warrant of arrest — Validity of — Meaning of 'within the jurisdiction' in s 3(1) of Extradition Act 67 of 1962 — Such not constrained by considerations of whether alleged criminal conduct occurred within territorial boundaries of requesting state.
Words and phrases — 'Within the jurisdiction' — Meaning of in s 3(1) of Extradition Act 67 of 1962.

The appellant, a Dutch citizen, was arrested pursuant to a warrant of arrest issued in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act). At the extradition enquiry before a magistrate, the appellant contended that he was not subject to extradition in terms of s 3(1) because the crimes of which he had been convicted in the Netherlands had been committed in Liberia and not within the territorial area of jurisdiction of the Netherlands itself.The magistrate upheld this point and discharged the appellant. The Director of Public Prosecutions (the DPP) asked the magistrate to state a case for consideration of the High Court in terms of s 310(1) of the Criminal Procedure Act 51 of 1977 (the CPA) (set out in full in [5]), read together with rule 67(12) of the Magistrates' Courts Rules.
The magistrate duly stated a case and the DPP lodged a notice of appeal to the High Court. This prompted the appellant to launch an application for review on the basis that s 310(1) was not available to challenge the outcome of an extradition enquiry, alternatively that the statement of case prepared by the magistrate was invalid and fell to be set aside because he had not been given notice of the request to state a case, nor given an opportunity to make representations to the magistrate in regard to its preparation. The High Court held that the magistrate had erred in construing the expression 'committed within the jurisdiction' in s 3(1) as restricted to the territorial jurisdiction of the court of a requesting state, and the review failed. The matter was then remitted to the magistrate to finalise the extradition enquiry in accordance with the answers given to the questions posed in the stated case.
In the present matter what was before the court was an appeal against the upholding of the DPP's appeal and one against the dismissal of the review.
Held, that it was the nature and character of the proceedings that determined whether they were criminal proceedings. An extradition enquiry shared many common features with criminal proceedings and was such for the purposes of s 310

of the CPA. The decision by the magistrate was therefore appealable in terms of the provision. (See [38] and [40].)
Held, further, as to the appellant's rights in terms of the stated case, that neither the DPP nor the accused played any part in the magistrate's formulation of the findings of fact. The court on appeal was not bound by those facts, although they would usually be regarded as correct. The language of s 310(1) did not suggest that the magistrate had a discretion either to state a case or to refuse to do so, or to determine the terms of the questions of law that the DPP wished to have stated. The purpose of stating a case was to enable the DPP to decide whether to appeal on a question of law, and the questions of law were determined by the DPP. The accused, or person whose extradition was being sought, had no role to play in the formulation of the question to be reserved and, when the DPP invoked the section, there was no basis for the accused to receive notice or have any input in the preparation of the stated case. The result was therefore that the appeal against the dismissal of the review application had to fail. (See [44] – [50].)
Held, further, that in the various sections of the Act in which it appeared, the expression 'within the jurisdiction' meant that the alleged crime was one in relation to which the requesting state was entitled to exercise its criminal jurisdiction to prosecute the person whose extradition was requested, determine whether they were guilty, and if so to impose a sanction. It was not constrained by issues of territoriality or considerations of whether the conduct alleged to constitute a crime occurred within or outside the territorial boundaries of the requesting state. So long as its courts were vested with authority to determine the question of criminality, it was within the requesting state's jurisdiction for the purposes of those sections. (See [69].) The appeal against the High Court's order was accordingly dis-missed, but for the sake of clarity the court added the words 'under its domestic law' to the court's order.

S v TM 2022 (1) SACR 151 (LP)

Rape — Proof of — Duty of court — Generally — Presiding officers expected to play substantial role in reducing level of crime through judicial activism and not try to find unconvincing reasons to disbelieve complainants in rape cases.

In a matter that came before the court on automatic review, a child offender had been convicted in a regional court on a charge of robbery with aggravating circumstances pursuant to his plea of guilty. He was sentenced to three years' imprisonment which was wholly suspended for a period of five years. He was acquitted on a further charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The court was satisfied that the conviction and sentence were in accordance with justice, but that the acquittal had not been justified on the evidence. It held that the trial court was at pains to find grounds on which it could rely to acquit the child offender, and that this was concerning if regard was had to the prevalence of gender-based violent crimes in the country. Further, it was disheartening to find presiding officers, who were expected to play a substantial role in reducing this level of crime through judicial activism, instead trying to find unconvincing reasons to disbelieve complainants in rape cases. (See [23].) However, the court had no statutory nor inherent review powers to set aside an acquittal of an accused person by the magistrate and

substitute it with a conviction. (See [24].) Section 310 of the Criminal Procedure Act 51 of 1977 had expressly created a mechanism in which the prosecution could correct judicial misdirection which may have resulted in an acquittal. On that basis the court found that its jurisdiction to set aside an acquittal on review was, by implication, excluded. (See [25].) The conviction and sentence on the charge of robbery with aggravating circumstances were confirmed. (See [21].)

S v WC AND ANOTHER 2022 (1) SACR 159 (GJ)

Bail — Pending trial — Second application on new facts and exceptional circumstances — What constitutes — Mental health of child of first applicant constituting new ground, as well as fact that investigation finalised — Applicants admitted to bail.

The two applicants, both employed by South African Police Service, were detained on a charge of murder, a bail application in the magistrates' court having been refused on the grounds of the interests of the community who were angered by the alleged killing by the first applicant of a young boy by shooting him. When the case was referred to the High Court, the applicants again applied for bail. The application was opposed by the state, which contended that the facts placed by the applicants before the court were not new and, even if they were, they did not constitute exceptional circumstances that justified their release on bail. The first applicant alleged that her child was suffering with debilitating nightmares and was being severely prejudiced by her peers. She was suffering anxiety and struggling emotionally, affecting her school progress, and the first applicant said she needed to be with her child. The second applicant alleged that his child had been born whilst he was incarcerated and that he had not seen him.
Held, the first applicant successfully raised three issues which constituted new facts, namely that the police investigations had been finalised; the deterioration of the mental health of her child; and her suspension from work without pay and its impact on her medical aid, which her child would no longer have access to, necessitated her release on bail so that she was able to see how best she could organise funds to assist her child. These new facts constituted exceptional circumstances and, despite the fact that the state had a strong case against her, that factor was not sufficient to prevent her release on bail. Similarly, the argument raised by the second applicant regarding the birth of his child constituted a new exceptional circumstance that justified his release on bail. (See [8], [12] – [13] and [17].)

KOUWENHOVEN v MINISTER OF POLICE AND OTHERS 2022 (1) SACR 164 (SCA)

Extradition — Warrant of arrest in terms of s 5(1)*(b)* of Extradition Act 67 of 1962 — Validity of — Alleged breach of undertaking by police officer that appellant would not be arrested — Inconceivable that experienced officer would have agreed to such undertaking or had authority to do so.
Extradition — Warrant of arrest in terms of s 5(1)*(b)* of Extradition Act 67 of 1962 — Validity of — Validity of affidavit on which arrest based — Attestation of affidavit — Such attested to before police officer employed in same office as deponent but having no involvement in extradition matters and not involved in proceedings —

Affidavit not irregular — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, s 10 read with regs 7(1) and (2) of regulations promulgated thereunder.
Extradition — Warrant of arrest in terms of s 5(1)*(b)* of Extradition Act 67 of 1962 — Validity of — Decision of magistrate to issue warrant — No indications that magistrate had merely 'rubber-stamped' warrant without applying her mind.
Extradition — Warrant of arrest in terms of s 5(1)*(b)* of Extradition Act 67 of 1962 — Validity of — Magistrate failing to furnish Minister with particulars of issue of warrant as required by s 8(2) of Act — Such failure not invalidating warrant.
Evidence — Affidavit — Attestation of — Prohibition on person attesting affidavit having interest in matter — Extent of prohibition — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, s 10 read with regs 7(1) and (2) of regulations promulgated thereunder.

The appellant appealed against the dismissal by the High Court of an application for the review and setting-aside of a warrant of arrest for the appellant issued in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act) at the request of the Netherlands government after the conviction of the appellant there of complicity in war crimes, and after the court had sentenced him to 19 years' imprisonment. He contended, inter alia, that the arrest was in contravention of an undertaking given by a police officer to the appellant's attorney that the appellant would not be arrested; that an affidavit by a warrant officer of the Pretoria Central Bureau of Interpol was invalidly attested, in that the attesting officer was employed in the same office as the warrant officer; that the magistrate who had authorised the warrant of arrest had merely 'rubber-stamped' it without considering it; and that the warrant of arrest was invalid, in that the magistrate had not furnished the Minister with particulars of the issue of the warrant of arrest, as required by s 8(1) of the Act. It appeared that the alleged undertaking was given at the stage when an Interpol red notice had been issued in respect of the appellant.
Held, that a request by the appellant's attorney, that the warrant officer would not act upon a proper request by the Dutch extradition authorities for the appellant's provisional arrest in terms of the European Convention on Extradition, would have been extremely far-reaching. It was inconceivable that an experienced police officer would agree to such a thing in a telephone conversation with an attorney who was unknown to him. Furthermore, it was an unlikely proposition that an official such as the warrant officer had authority to conclude such an agreement or give such an undertaking. (See [19] – [20].)
Held, further, as to the complaint that the attesting officer was employed in the same office as the deponent and was therefore disqualified from attesting the affidavit by reg 7(1) of the regulations in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, in terms of reg 7(2) the prohibition did not apply to an affidavit attested to before a commissioner of oaths who was not an attorney and whose only other interest arose out of his employment and in the course of his duty. The attesting officer was not involved in extradition matters and had not been involved at all in the proceedings, and the argument that she had an interest in the matter, disqualifying her, was without merit. (See [28] and [36].)
Held, further, that the decision to issue a warrant was a judicial decision and there was no reason to think that it was taken other than properly. There was no reason for the magistrate to deliver an affidavit justifying her decision and saying that she applied her mind to the matter before issuing the warrant. There was no merit in the 'rubber-stamping' point. (See [47].)

Held, further*,* that it was common cause that the magistrate had not furnished the Minister with particulars of the issue of the warrant and the Minister did not consider whether to exercise his powers under s 8(2). However, were a consequence as drastic as the invalidity and lapsing of the warrant been intended, one would have expected s 8(2) to be specific as to the period that would constitute furnishing particulars 'forthwith', and to state explicitly the consequences flowing from non-compliance. The magistrate's failure to comply with s 8(2) did not invalidate the warrant. (See [49] and [52].)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v GALLANT 2022 (1) SACR 189 (ECP)

Search and seizure — Forfeiture order in terms of ch 6 of Prevention of Organised Crime Act 121 of 1998 — Application for order of civil forfeiture — Which property liable to forfeiture — 'Instrumentality of an offence' — What constitutes — Property's role had to be functional to commission of crime in real substantial sense and bit part would not suffice.

The applicant claimed forfeiture of a motor vehicle to the state in terms of s 48 read with s 50 of the Prevention of Organised Crime Act 121 of 1998. It alleged that the property constituted an instrumentality of an offence, namely contraventions of s 3(1) and 3(2) of the Marine Living Resources Act 18 of 1998 by harvesting and/or being in possession of abalone without the requisite permit. The respondent contended that he and a friend had given a lift after a braai to a man who sat on the back seat of the respondent's vehicle and placed a bag, which he had brought with him, between his feet. They were stopped at a roadblock where the bag was searched and was found to contain abalone. All three men were charged for the possession of abalone, but after the person who was in possession of the bag pleaded guilty, the respondent and his friend were discharged. The court was required to determine whether the vehicle was an instrumentality of the offence.
Held, that there was no clear, direct reference in the applicant's papers, or in the statement by the convicted man in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, linking the abalone to conveyance, let alone to the regulation made in terms of Act 18 of 1998 which constituted the actual offence. Property owners had to be told clearly what scheduled offence or offences the prosecution relied on to establish forfeiture. (See [15].)
Held, further, that, for forfeiture to be appropriate, the focus had to be on the property and its correlation to an applicable offence, and the link between the crime committed and the property had to be reasonably direct. The property's role, in other words, had to be functional to the commission of the crime in a real substantial sense, and a bit part role could not suffice. On the evidence, the property was only being used to transport the abalone on a single journey. Its use in the offences of harvesting and possession of abalone was neither deliberate nor planned, and, on a balance of probabilities, was merely incidental and fortuitous to the offences. While the property might appear at first glance to have been important to the success of the abalone remaining undetected, a deeper enquiry suggested that this was not necessarily the case. A finding that it constituted an 'instrumentality of an offence' was in the circumstances therefore inapposite. (See [17] – [19].) The application for forfeiture was accordingly dismissed.

S v HALL 2022 (1) SACR 202 (WCC)

Traffic offences — Alcohol-related driving offences — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Proof of — Calibration of gas chromatograph — Proof did not have to be by way of affidavit and could be by way of certificate.

On appeal against a conviction for a contravention of s 65(2)*(a)* of the National Road Traffic Act (the Act) the appellant contended, inter alia, that the additional information in the certificate in terms of s 212(4) of the Criminal Procedure Act 51 of 1977 (the CPA), confirming the calibration and accuracy of the gas chromatograph, was inadmissible evidence and that only an affidavit in terms of s 212(10) of the CPA could be adduced as documentary proof of such fact.
Held, that proof of the calibration of the gas chromatograph did not have to be by way of affidavit and could be by way of certificate. (See [48] – [49].)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v BOOYSEN AND OTHERS 2022 (1) SACR 215 (WCC)

Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Application for variation or discharge in terms of s 26 of Act — Assessment of evidence — Use of hearsay evidence by way of summary of transcripts of intercepted telephone calls — Nothing objectionable about use of hearsay evidence which fell to be evaluated in context of case assessed as whole.
Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Tender of different property for purposes of restraint order — Applicant seemingly involved in dealings in narcotics worth between R7,8 million and R10 million, whereas property tendered much lower in value — Indications that applicant's dealings conceivably extended well beyond transactions identified by authorities — Provisional order confirmed.

The first defendant applied on an urgent basis for the discharge or variation of a restraint order in terms of s 26(3)*(c)* of the Prevention of Organised Crime Act 121 of 1998 (POCA). The restraint order in question was an 'uncapped order' in that it prohibited the defendants from dealing with any of their property, as distinct from one relating to specified items of property. Eighteen properties were identified in the supporting affidavits as being owned by the first defendant. A senior police officer testified that the first defendant was engaged in drug-dealing from a property in the northern suburbs of Cape Town, and surveillance had been maintained over certain properties registered in his name. Subsequent raids found considerable quantities of drug-manufacturing material at three of these properties. The first defendant claimed that he had acquired the properties after he had resigned as a building inspector and had used his pension money as security for the loans to buy the properties. The National Director of Public Prosecutions indicated that it would make use of the transcripts of authorised telephone intercepts that had taken place over a period of more than two years, and focused its attention on the incriminating nature of telephone conversations bearing on an alleged transaction involving the sale of illicit drugs by the second defendant in a transaction for an amount of R95 000. The

relevant summaries showed that there were communications between the first and second defendants concerning what the second defendant should give as his explanation for having such a large sum in cash on his person. The summary also indicated that the first defendant was interested in obtaining release of the money impounded by the police. The first defendant complained about the hearsay nature of the telephone intercepts and contended that it amounted to opinion evidence founded on edited and translated versions of hearsay evidence. He made a contingent tender to submit an immovable property in Wellington, that was owned by a company that he controlled, to the restraint order which had a municipal valuation of R2,9 million.
Held, that there was nothing objectionable about the applicant's use of hearsay evidence which fell to be evaluated in the context of the case assessed as a whole, and the weight to be attached to it determined accordingly. (See [20].)
Held, further, that the evidence identified by the applicant in her supporting papers was of a nature that might support the first defendant's conviction on at least some of the charges that he faced in the criminal proceedings. The circumstances also supported the likelihood that, if he were convicted, a confiscation order might be granted after due enquiry in terms of s 18 of POCA. (See [22].)
Held, further, in respect of the tender of the property in Wellington, that the evidence suggested that the first defendant might be shown at the criminal trial to have been involved in dealings involving narcotics worth an estimated value of between R7,8 million and R10 million, and his tender was based on too narrow a view of the effect of the evidence. The fact that three of his properties were found to be places at which illicit drugs were manufactured on a commercial scale indicated that the dealings in which he may have been involved, and from which he might have benefited, very conceivably extended well beyond the transactions identified by the applicant. (See [25].)
Held, further, that, having regard to the evidence, the balance of considerations weighed in favour of confirming the provisional order.

<u>ALL SA LAW REPORTS FEBRUARY 2022</u>

Clicks Group Ltd and others v Independent Community Pharmacy Association and others [2022] 1 All SA 297 (SCA)

Pharmaceutical and Health – Retail and manufacturing pharmaceutical licences – Alleged contravention of regulation 6(d) of Regulations relating to Ownership and Licencing of Pharmacies, promulgated under section 22A of Pharmacy Act 53 of 1974 – Regulation 6(d) prohibiting ownership by any person of a beneficial interest in a community pharmacy, if such person is owner or holder of any direct or indirect beneficial interest in a manufacturing pharmacy – Where corporate structure of retail group involved separate and different juristic persons, group having no beneficial interest in pharmaceutical manufacturing companies owned by separate entities in group.

The Independent Community Pharmacy Association ("ICPA") lodged a complaint with the Department of Health against the first to fifth appellants (the "Clicks Group"), seeking revocation of retail and manufacturing licences held within the Clicks Group on the basis that the group had contravened regulation 6(d) of the Regulations relating to the Ownership and Licencing of Pharmacies (the "Regulations"), promulgated under section 22A of the Pharmacy Act 53 of 1974.

Regulation 6(d) prohibits *ownership by any person of a* beneficial interest in a community pharmacy in the Republic, if such a person is the owner or holder of any direct or indirect beneficial interest in a manufacturing pharmacy.

The Clicks Group operated over 500 community (retail) pharmacies, while the third appellant ("Unicorn") was a manufacturing pharmacy. The fifth appellant ("Clicks Retailers") operated approximately 470 licensed community pharmacies throughout the country. The Clicks Group corporate structure was such that it was the holding company, holding all the shares in the second appellant ("New Clicks") which in turn held all the shares in Unicorn and the fourth appellant ("Clicks Investments"). Clicks Investments held all the shares in Retailers. Unicorn owned a licenced manufacturing pharmacy and Retailers owned licenced community pharmacies countrywide.

The High Court found that the Clicks Group had a beneficial interest in Unicorn as a result of its shareholding in various entities within the Group, and that New Clicks and Investments held a beneficial interest in the manufacturing pharmacy owned by Unicorn and the community pharmacies owned by Retailers. That resulted in the present appeal.

Held – The concept of beneficial interest connotes someone who is not the legal owner of a thing but has a legal right to the benefits of ownership. The court considered whether it could be said that because the holding company (New Clicks) held shares in Unicorn and Retailers, they had beneficial interests in the underlying pharmacies owned by the two entities.

The majority view was that the structure of the Clicks Group represented separate and different juristic persons. New Clicks had no beneficial interest or control of the assets of Retailers, which assets were mainly Clicks pharmacies. Consequently, New Clicks could not exercise the rights deriving from Retailers' community pharmacy licence. The court also held it to be not true that because New Clicks held shares in Unicorn or Retailers, they had a beneficial interest in the underlying pharmacies owned by them. New Clicks and the Clicks Group did not own a community pharmacy or retail pharmacy and thus did not contravene regulation 6(d). A shareholder of a company does not have a beneficial interest in its underlying assets. The Court reiterated the legal principle that a shareholder has a real interest in a company in which he or she holds shares and some array of rights, but those rights are in relation to the company and not its assets.

A constitutional challenge by the ICPA against section 22A of the Pharmacy Act was found to lack merit if the impugned provisions were properly interpreted.

In a dissenting judgment, the point of departure was the view that the fact that the assets of a company do not belong to the shareholders does not necessarily mean that the shareholders do not have an interest in them.

Magistrates' Commission and others v Lawrence and another (Helen Suzman Foundation as amicus curiae) [2022] 1 All SA 321 (SCA)

Constitutional and Administrative Law – Appointment of magistrates – Criteria to be adopted – Exclusion based on race – Appointments Committee of Magistrates Commission erring in adopting rigid, inflexible and quota-driven approach to selection of candidates, in conflict with section 174 of the Constitution.

The respondent ("Mr Lawrence"), an acting magistrate, applied for the position of a permanent magistrate in response to advertisements for such positions in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg. He was not shortlisted for any of the posts. He approached the High Court for relief, and the shortlisting proceedings were declared unlawful and unconstitutional. That led to an appeal by the Magistrates Commission and others.

The court first considered two ancillary issues. First, the respondent contended that in terms of section 5(2), read with section 6(7), of the Magistrates Act 90 of 1993 (the "Act"), the Appointments Committee (the "Committee") was not quorate when candidates were shortlisted for appointment to Bloemfontein. Second, the appellants contended, *in limine*, that, as all of the other shortlisted candidates had a direct and substantial interest in the outcome of the proceedings, the respondent's failure to join them precluded the court from granting the relief sought by the respondent until they had been joined as parties to the proceedings. However, the non-joinder point was later abandoned.

Held – The Committee was not quorate with the result that the decisions taken at that meeting, including the shortlisting of candidates for Bloemfontein, could not stand and accordingly had be set aside.

On the merits, the court set out the provisions of section 174(1) and 174(2) of the Constitution regarding the appointment of judicial officers. The qualifications, experience and suitability of Mr Lawrence for the post could not be faulted. The Committee nevertheless appeared to adopt a targeted exclusion of white candidates and was consequently not prepared to consider any of the other criteria in relation to Mr Lawrence. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race. There should not have been any fixed order or sequence of prioritisation of the listed criteria, but rather a consideration of all of the relevant criteria and, where necessary a balancing of the one against the other. Insofar as the process was rigid, inflexible and quota-driven, it was fundamentally flawed. The Committee's rigid approach was inconsistent with a proper interpretation and application of section 174 of the Constitution. The appeal was dismissed with costs.

National Prosecuting Authority v Public Servants Association obo Meintjies and others and a related matter [2022] 1 All SA 353 (SCA)

Labour and Employment – Practice and procedure – Employment-related matter – Jurisdiction – Whether High Court and Labour Court enjoying concurrent jurisdiction – On proper analysis of legal basis of claim, majority finding that insofar as claim related to an unfair labour practice, it fell within exclusive jurisdiction of Labour Court.

The Public Servants Association ("PSA") approached the High Court for relief in a dispute regarding the applicability of the Occupational Specific Dispensation ("OSD") structure of remuneration to posts held by Deputy Directors of Public Prosecution and Chief Prosecutors in the National Prosecuting Authority ("NPA"). The PSA relied on certain collective agreements regarding implementation of the OSD for qualifying categories of employees. It contended that the NPA was guilty of an unfair labour practice in not implementing the collective agreements.

In the High Court, the appellants contended that that court did not have the jurisdiction to adjudicate the matter because the PSA's application was a quintessential labour dispute which was to be processed through the mandatory dispute resolution procedures set out in the Labour Relations Act 66 of 1995. They also contended that the High Court could not exercise jurisdiction over the dispute within the contemplation of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 because the various collective agreements relied upon by the PSA were inapplicable to them. Dismissing the jurisdictional point, the court went on to hold that the PSA was entitled to the relief of specific performance, and declared that the NDPP's approval regarding the implementation of the OSD was lawful and enforceable and had to be complied with. That resulted in the present appeal.

Held – The majority ruling that the High Court should have struck the matter from its roll for want of jurisdiction. The Court confirmed that the Labour Court and other tribunals created under the Labour Relations Act 66 of 1995 are uniquely qualified to handle labour-related disputes, and referred to the statutory provisions dealing with concurrent jurisdiction of the Labour Court and High Court.

In its application, the PSA sought the implementation of a determination. The High Court could only have been clothed with jurisdiction if the outcome had been claimed on the ground that the terms of the individual employment contracts between the DDDPs and CPs and the NPA obliged the NPA to act accordingly. Consequently, the notice of motion and founding affidavit had to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing that exercise, substance had to prevail over form and proper regard be had to context. The notice of motion did not convey a reliance on employment contracts. Instead, the PSA claimed specific performance of obligations that had allegedly arisen from certain other documents. The founding affidavit showed reliance on the fact that the failure to implement the OSD in respect of the DDPPs and CPs had constituted an unfair labour practice relating to promotion and benefits, as defined in section 186 of the Labour Relations Act. In terms of section 191 of the latter Act, such unfair labour practice disputes must be dealt with in terms of that Act. As such, the High Court did not have jurisdiction to hear the matter, had no power or authority to determine the disputes and should have struck the matter from its roll.

A dissenting opinion was that the matter engaged the concurrent jurisdiction of the High Court and the Labour Court.

Santam Limited, a division of which is Hospitality and Leisure Insurance v Ma-Afrika Hotels (Pty) Ltd and another [2022] 1 All SA 376 (SCA)

Insurance – Business interruption indemnity – Extension of indemnity to losses caused by notifiable disease – Interpretation of indemnity clauses – Approach in interpreting insurance contracts is that language, context and purpose must be considered in a unitary exercise, and a commercially sensible meaning is to be adopted – Words used in light of document as a whole and of factual matrix within which parties concluded contract, pointing to intention of parties that indemnity period in relation to claims for loss of revenue due to business interruption would be 18 months.

The first respondent ("Ma-Afrika") operated hotels and businesses in the Western Cape, and the second respondent ("The Kitchen") was a restaurant that operated on the premises of one of those hotels. In terms of insurance policies with the appellant ("Santam"), infectious disease indemnity cover was provided to the respondents. The policies also offered business interruption cover, and the respondents were indemnified for loss of revenue. The insurable event was the outbreak of a "notifiable disease" at or within a 40km radius of each of the establishments.

Upon the outbreak of the Covid-19 pandemic in South Africa, the respondents claimed for business interruption losses under insurance policies. Santam upheld only one of five claims, in respect of the hotel and only for the period 15 to 27 March 2020, due to the outbreak at that establishment, causing revenue losses only for that period. The remaining claims were rejected on the basis that none of the losses claimed were caused by a notifiable disease occurring within a 40km radius of the premises. Santam contended further that the losses suffered were because of a government lockdown and general concern or fear instead of a local outbreak of the notifiable disease. The respondents sought a declaration in the High Court that the indemnity period for the loss of revenue claim was 18 months.

The High Court granted declaratory relief confirming Santam's liability to indemnify the businesses. Santam's appeal focused on the applicable indemnity period in relation to business interruption losses under the policies.

Held – The issue on appeal required a consideration of the period during which, according to the policy, the indemnity operated.

Undertaking an interpretation of the policy and the Schedules, thereto, the court restated the approach in interpreting insurance contracts. Language, context and purpose must be considered in a unitary exercise. A commercially sensible meaning is to be adopted. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.

Applying that approach, the court concluded that the indemnity period in relation to claims for loss of revenue due to business interruption was 18 months.

The appeal was dismissed with costs.

Body Corporate of Nautica v Mispha CC [2022] 1 All SA 399 (WCC)

Civil Procedure – Claim for payment plus interest – Quantum of interest claimed – In duplum rule – Interest runs anew from date that judgment debt is due and payable, and runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

Property – Sectional title scheme – Body corporate – Claim for payment of arrear levies and interest – Locus standi – Section 2(7) of the Sectional Title Schemes Management Act 8 of 2011 confers standing upon the body corporate to sue.

The defendant was owner of two units in a sectional title scheme, with the plaintiff as the scheme's body corporate. The defendant's units were a residential unit with a balcony and a garage unit. In keeping with South African law, the participation quota allotted to the units in the scheme determined the contribution or liability of owners towards the incurred expenses of the scheme.

On the ground that the defendant failed to pay levies for the period of March 2008 up to May 2021, the plaintiff brought the present proceedings against the defendant for payment of R1 826 366,86 in respect of outstanding levies, electricity charges and interest on the arrear levies. While not denying not having paid levies due, the defendant denied that it was obliged to make payments as demanded by plaintiff, denied that any valid resolution was taken by trustees to adjust the participation quota, and to add compound interest at the rate of 3% per annum on all arrear levies.

Held – The plaintiff's claim simply arose, factually, from a failure to pay overdue levies. The defendant's attempt to the body corporate trustees' adopting and retracting a resolution did not assist him in any way. He provided no acceptable justification for withholding payment of his levies. Unable to identify any tenable argument raised by the defendant, the court regarded him to be merely grasping at straws.

The next question addressed was whether the plaintiff had the necessary *locus standi* to institute the current proceedings. There was no basis for defendant's contention that there was nothing to indicate that the party described as the body corporate of the scheme was in fact a body corporate in terms of the Sectional Title Act 95 of 1986. Section 2(7) of the Sectional Title Schemes Management Act 8 of 2011 confers standing upon the body corporate to sue. That was exactly what the plaintiff was doing in this case. There was overwhelming evidence to show that it had the necessary legal standing to institute action for monies owed to it by the defendant. The *locus standi* objection was accordingly dismissed.

Regarding the claim for interest, the court stated that the plaintiff, over and above the owed debt on arrear levies, was also entitled to the interest borne by the debt. Interest charges on arrear amounts are intended to mitigate the depreciation or decline in value of the currency, which is ordinarily occasioned by inflation. The parties in this case were in dispute regarding the quantum of interest charged in respect of the outstanding levies. The Court confirmed that the plaintiff was entitled to levy compound interest on arrears. In respect of the claim for *mora* interest, it is established that the *in duplum rule* permits interest to run anew from the date that the judgment debt is due and payable. Interest runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

The defendant was ordered to pay the capital amount plus interest at the rate of 9,5 % per annum from date of judgment to date of payment, limited to the amount of the capital debt.

Body Corporate of Nautica v Mispha CC [2022] 1 All SA 399 (WCC)

Civil Procedure – Claim for payment plus interest – Quantum of interest claimed – In duplum rule – Interest runs anew from date that judgment debt is due and payable, and runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

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The defendant was ordered to pay the capital amount plus interest at the rate of 9,5 % per annum from date of judgment to date of payment, limited to the amount of the capital debt.

Da Cruz v Bernardo [2022] 1 All SA 414 (GJ)

Civil Procedure – Interest awarded on judgment debt – Whether the in duplum rule applied to limit interest payable – Prescribed Rate of Interest Act 55 of 1975 does not impose a ceiling on interest liability and does not expressly incorporate an in duplum principle – The law does not preclude a plaintiff from recovering mora interest on its liquidated debt in an amount that exceeds the capital amount of the original debt.

As an investment in the respondent's business, the applicant paid an amount of R903 500 into the account of an entity controlled by the respondent. When the deal collapsed, the applicant claimed repayment of his investment. Only R91 000 was repaid to him, leading to his instituting action to recover the balance. Although the applicant had transacted with a trust in which the respondent was a trustee, the trust was found to have no bank account and no funds. The applicant consequently pursued the respondent in his personal capacity. Judgment was granted in his favour, for payment by the respondent of R812 500 plus interest. Demand was then made of the respondent for payment of the capital amount of R812 500 plus interest in the amount of R1,590,952,91.

The respondent disputed the calculation of the interest amount and contended that the *in duplum* rule applied to limit the interest payable by the respondent to R812 500.

In the present application, the applicant sought an order declaring that the *in duplum* rule did not apply to the interest awarded in the judgment.

Held – The first question was whether the *in duplum* rule applies to limit *mora* interest payable on a claim for a liquidated amount. The Court referred to various cases, confirming that the *in duplum* rule provides that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital sum. The question in the current matter was whether the rule applies where *mora* interest is claimed on a liquidated amount and there is no agreement on the rate to be applied.

The Court highlighted the distinction between *mora* interest and interest determined by an agreement. In the former, the interest recoverable is accessory to the main debt as fair compensation for the delay. It is not a separate obligation and cannot be recovered in separate proceedings. In the latter, the obligation to pay interest is a separate and distinct contractual obligation and, although it ordinarily would be claimed in the same action, could be claimed in separate actions. The rate of interest payable on a contractual debt is ordinarily stipulated in the agreement. The rate for *mora* interest is determined with reference to the Prescribed Rate of Interest Act 55 of 1975, and can be applicable to a contractual debt where the contract does not prescribe the rate. There is also a difference between *mora* interest on liquidated debts and *mora* interest on unliquidated debts.

The Prescribed Rate of Interest Act does not impose a ceiling on interest liability and does not expressly incorporate an *in duplum* principle.

Based on case law, the following emerged. Where interest is calculated with reference to a rate stipulated in an agreement, the interest which accrues on the debt cannot exceed the capital sum of the debt. From the date of judgment, the capital and interest awarded is consolidated and interest runs afresh on the consolidated amount from date of judgment. The obligation to pay *mora* interest is accessory to the primary obligation and cannot be recovered separately from the primary debt.

The Court found no basis for concluding that the *in duplum* rule should be implied into the award of interest in the order handed down against the respondent. The law

does not preclude the plaintiff from recovering *mora* interest on its liquidated debt in an amount that exceeds the capital amount of the original debt. The order made against the respondent in this case was unequivocal and did not provide for an interest ceiling. As such, the judgment had to be enforced on its terms, which included payment by the defendant of the additional interest amount, in addition to any outstanding interest owed on the judgment debt.

Department of Agriculture, Forestry and Fisheries and another v B Xulu and Partners Incorporated and others [2022] 1 All SA 434 (WCC)

Corporate and Commercial – Company law – Piercing the corporate veil – Section 20(9) of the Companies Act 71 of 2008 providing statutory basis for piercing the corporate veil, requiring an unconscionable abuse of the company's juristic personality – Where controller of company uses company for improper purpose, and in that process, treats the entity such that there is no distinction between the separate juristic personality of the entity and those controlling it, that would constitute the required unconscionable abuse.

The first respondent ("BXI") was a firm of attorneys, whose principal member was the fifth respondent ("BX"). Protracted litigation between the applicants and BXI resulted in a judgment in which BXI and BX were held jointly liable to repay over R20m to the applicants, from whose bank accounts the money had been taken. In the wake of that judgment, BX contested his liability to pay the money jointly and severally with BXI.

Held – The fact that BX was the sole director of BXI did not inevitably lead to a piercing of the corporate veil and holding him jointly and severally liable. Lifting the corporate veil entails ignoring the distinction between the company and the natural person behind it, and will happen where it is shown that the natural person has abused the corporate personality of the corporate entity. Section 20(9) of the Companies Act 71 of 2008 is the statutory basis for piercing the corporate veil, requiring an unconscionable abuse of the company's juristic personality. It broadens the basis on which relief may be granted, so courts will now resort to the remedy where justice requires it and not just where there is no alternative remedy.

Case law shows that where controllers of companies use the companies for improper purpose, and in that process, treat the entity such that there is no distinction between the separate juristic personality of the entity and those controlling it, that would constitute the required unconscionable abuse.

Applying the above principles to the facts of the case at hand, the court found the conduct of BX to satisfy all the requirements for piercing the corporate veil and holding him jointly and severally liable with BXI. The facts showed that he had, under guise of settling BXI's liabilities, appropriated funds from BXI, channelling it to himself, friends, family and entities under his control. In application of the alter ego doctrine, the court found that BX acted not as agent of BXI, but as the company's actual persona. A proper case had thus been made for piercing the corporate veil and for holding BX jointly and severally liable with BXI or repayment of the funds. The Court found further that BX acted wrongfully, with the requisite *dolus*, to warrant being held personally liable with BXI under the *actio ad exhibendum*.

Setting out the principles applicable to applications for joinder, the court also ordered that the sixth to ninth respondents be joined as parties to the proceedings. The fifth to

seventh respondents were held jointly and severally liable with BXI for payment of the money to the second applicant.

Land and Agricultural Development Bank of South Africa and another v Van den Berg and others [2022] 1 All SA 457 (FB)

Civil Procedure – Leave to appeal – Requirements – Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act 10 of 2013 – Leave to appeal may only be granted if there is a reasonable prospect that the appeal will succeed.

The first to fifth defendants in the main matter between the parties, had brought an application to compel compliance by the plaintiffs with a request for discovery made in terms of rule 35(3). The Court dismissed the application, finding that the information and documents that were not furnished did not have any bearing on the issues in the trial, and that the application was overly broad and would lead to ineffective orders.

In terms of rule 49 of the Uniform Rules of Court read with sections 16 and 17 of the Superior Courts Act 10 of 2013, leave to appeal was sought against the findings of fact and law, as well as the whole of the order and judgment of the court.

Held – Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act. The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal.

Turning to the grounds of appeal, the court found them to be framed in diffuse and ambiguous sweeping terms. The Court agreed with the plaintiffs' contentions that the application was vague, ambiguous and confusing to the extent that the plaintiffs were not properly informed of the case which the defendants sought to make out and which the plaintiffs had to meet in opposing the application for leave to appeal. The grounds of appeal did not comply with the requirements of rule 49, and were thus fatally flawed.

Amongst the grounds advanced, were that the trial was not fair, with allegations of bias made against the presiding officer. Not only was that issue not raised at the material time, but the onus of establishing bias was not discharged. The defendants did not specify what acts formed the basis of their complaint.

The grounds of appeal seeking to challenge the order refusing to compel discovery were also unsustainable. There was no room for interference with that order, which was not shown to be wrong.

Concluding that there were no prospects of success on appeal, the court refused leave to appeal.

Mbhamali v S [2022] 1 All SA 488 (KZD)

Criminal Law and Procedure – Sexual intercourse with underage child – It is not a valid defence to contend that child consented, or that a marital or other relationship existed with the child – Court dismissing such defences, and rejecting appellant's allegation that he was unaware that the complainant was underage.

Convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the appellant was sentenced to 18 years' imprisonment. The trial court granted leave to appeal against conviction.

The complainant was a 14-year-old who was introduced to the appellant by a fellow member of his church as a prospective wife. The church member responsible for the introduction, Mrs Phakathi, was the second accused in the trial court. The complainant's father was unaware of the situation until later. His intervention led to the arrest of the appellant.

In response to the charges against him, the appellant attempted to state that he was not aware that the complainant was underage. However, he could not convince the trial court that he could reasonably not have known that the complainant was a child.

Held – Sections 15 and 16 of Act 32 of 2007 create a prohibition of any act of sexual penetration or sexual violation with a child who is 12 years or older but under the age of 16 years. The fact that such child might have consented to such an act is no defence. In the context of child marriages, section 56(1) of the Act stipulates that when an accused person is charged with an offence under section 3, 4, 5, 6 or 7, it is not a valid defence to contend that a marital or other relationship existed with the complainant. In terms of section 12(1) of the Children's Act 38 of 2005, "every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being".

The trial court, upon an evaluation of the totality of the evidence, was satisfied beyond reasonable doubt that the complainant did not consent to sexual intercourse with the appellant and that there was no reasonable possibility that the appellant believed that she had consented. It also found that the evidence of the appellant that he reasonably believed that the complainant was 16 years, could not be reasonably, possibly true. On appeal, those findings by the court below could not be faulted. There being no misdirection in the trial court's reasoning and evaluation of the evidence, its conclusion regarding the appellant's guilt had to be confirmed. The court specifically addressed the sanction by certain churches of the practice of child marriages. It was held that the appellant's church's beliefs and practices could not supersede the laws and the Constitution of the country, which forbids sexual intercourse with underage girls.

Rohde v S [2022] 1 All SA 504 (WCC)

Criminal law and procedure – Application for bail pending appeal – Interim order suspending order to report for imprisonment – Absence of return date – Legal effect of interim order without return date shown to be undesirable – Court exercising discretion to extend suspension and bail, in line with specified time frame.

Criminal law and procedure – Application for recusal of presiding judge from bail application – Impartiality of judiciary is assumed, which assumption is only disturbed by weighty evidence – Applicant bearing onus of shifting assumption and rebutting it by showing a reasonable apprehension of bias.

After the Supreme Court of Appeal ("SCA"") dismissed his appeal against conviction and sentence for the murder of his wife, the applicant sought bail pending his application to the Constitutional Court for special leave to appeal. Pending finalisation of his appeal, the applicant had been granted bail, but on dismissal of the appeal, he had 48 hours to hand himself over to a police station to undergo his imprisonment. In addition to the bail application, the applicant sought the recusal of the presiding judge from the hearing of the bail application and for the bail application to be postponed *sine dies*.

Held – Application for recusal was premised on ten grounds. The first was that the matter had been allocated to the judge in a manner which formed the subject of a Judicial Service Commission ("JSC"), relating to the allocation process of the matter at inception. The Court found the complaint to have been based on misleading and incorrect facts, and pointed out that after a thorough investigation, the JSC had dismissed the complaint.

Irregularities alleged to have been committed by the presiding judge during the trial had been considered by the SCA and dismissed. Significantly, irregularities form the subject of an appeal and not the basis of a recusal application. The applicant claimed to have an apprehension that the judge might make an adverse finding in a further bail application. However, an apprehension or fear of an adverse order is not the basis for recusal.

Other grounds advanced in support of recusal were equally without merit.

It was stated that the impartiality of the judiciary is assumed, which assumption is only disturbed by weighty evidence, rather than imputations and aspersions. The applicant bore the onus of shifting that assumption and rebutting it by showing a reasonable apprehension of bias. The grounds relied on by the applicant, individually or cumulatively, did not meet the threshold for recusal.

At the time of hearing of the recusal application, the order that the applicant report to undergo a 15-year period of imprisonment had been suspended. The court explained the effect of suspension of the order. The order (by agreement) was effectively an interim order without a return day. The legal effect of an interim order without a return date was considered, and the court exercised its power to order that the suspension and applicant's bail be extended on the same terms and conditions as previously granted pending the hearing of his bail application but in line with a specified time frame. Consequently, the suspension of the notice to report was made subject to a return date specified in the present court's order.

S v Zuma and another [2022] 1 All SA 533 (KZP)

Criminal Law and Procedure – Special plea in criminal trial – Section 106(1)(h) of the Criminal Procedure Act 51 of 1977 – Whether lead prosecutor representing the State lacked title to prosecute as contemplated in section 106(1)(h), and should be removed as prosecutor – Lack of title to prosecute confined to instances of a lack of standing in the sense of a legally recognised interest, or the required authority, which a particular prosecutor requires to entitle him to prosecute an accused.

After both accused in this matter pleaded not guilty to an array of charges, the first accused ("Mr Zuma") raised a special plea in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977, contending that the lead prosecutor of the prosecuting team representing the State, Mr Downer, had no title to prosecute as contemplated in section 106(1)(h), and should be removed as the prosecutor in the case.

Held – The procedure for the adjudication of the special plea had to be addressed. The interests of justice demanded that the special plea be dealt with as expeditiously as possible. It made good sense for the special plea be tried by the exchange of affidavits. An oral hearing was not required, neither on the wording of section 106(1)(h), section 108, or the law generally.

Before dealing with the interpretation of the phrase "title to prosecute", the Court considered the numerous complaints raised by Mr Zuma in support of his special plea. Emphasising that a judgment must be confined to the issues properly before the court, the court confirmed that the issue for determination was the special plea that Mr Downer allegedly lacked title to prosecute, as provided in section 106(1)(h) of the Criminal Procedure Act, and nothing more.

Mr Zuma's argument was that the word "title" should be given a wider meaning than a prosecutor's standing or authority to prosecute, so as to include lack of objectivity and independence, bias, and whether the prosecutor acted in a manner which might violate Mr Zuma's rights to a fair trial.

The Court endorsed case authority, by which it was in any event bound, stating that the word "prosecutor" in section 106(1)(h) refers not to the State, but to the person who acts as prosecutor in the Court. The Court interpreted "title to prosecute" as being a plea relating to the standing of the prosecutor, and nothing wider.

In adversarial criminal proceedings, such as ours, it is inevitable that prosecutors will be partisan. Their role in criminal prosecutions makes it inevitable that they will be perceived to be biased. The test in respect of the apprehension of bias of a prosecutor is not that which applies to a judicial officer. It is not a given that a perception of bias held against a prosecutor will lead to an accused not having a fair trial. If an accused believes the prosecutor assigned to his case will not exercise, carry out or perform their powers, duties and functions in good faith, impartially and without fear, favour or prejudice, or that the prosecutor is an essential witness in the case, then the accused may bring a substantive application to the court for an order that the prosecutor be removed and replaced. What the accused cannot achieve, however, is to seek such removal by the device of entering a special plea in terms of section 106(1)(h) of the Act.

Mr Zuma having not established that Mr Downer lacked title to prosecute, the special plea was dismissed.

END-FOR-NOW