LEGAL NOTES VOL 3/2022

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INDEX[1]

SOUTH AFRICAN LAW REPORTS MARCH 2022

SA CRIMINAL LAW REPORTS MARCH 2022

ALL SOUTH AFRICAN LAW REPORTS MARCH 2022

SA LAW REPORTS MARCH 2022

CHAIRPERSON, COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA AND OTHERS v AFRIFORUM NPC 2022 (2) SA 1 (CC)

Education — University — Language policy — Constitutionality of discontinuing Afrikaans as medium of instruction at country's principal distance-learning university — Constitution, s 29(2).

Before 2006 all undergraduate courses at the University of South Africa (Unisa) were in English with an Afrikaans component that ranged in its extent. Such courses could be fully bilingual in their teaching and materials or could provide for Afrikaans in lesser degree such as in materials only (see [27]).
In 2016 this changed, with adoption by Unisa's senate and council of a policy phasing out Afrikaans as a language of instruction (see [24] and [28] – [29]).
AfriForum approached the Pretoria High Court for the review and setting aside of the determination on the bases that it infringed Afrikaans speaking students' right to receive education in the language of their choice, that it was irrational, and that it was unlawful (see [30] and [47]).
The High Court ruled against AfriForum, finding that there was no violation of the right and that the decision was a sound balancing of the interests of practicability, equity and redress when seen against the background of declining demand for Afrikaans teaching and a need to devote resources to other official languages (see [32] – [33]). The High Court also found that the decision was a rational employment of Unisa's powers under the Higher Education Act 101 of 1997 and the National Language Policy, and that despite procedural shortcomings, it met the standard of legality (see [33]).
With the High Court's leave, AfriForum appealed to the Supreme Court of Appeal, which ruled that Unisa had not established that practicability, redress and equity

[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!**

militated for Afrikaans' removal. Factors bearing on this were the diminishment of a presently enjoyed right, the insufficiency of resources, and the absence of risk that continued instruction in Afrikaans could foment the racially based ills that it had at two other universities (see [34] – [35]). The SCA consequently ordered the reinstatement of Afrikaans modules on the back of a declaration that the language policy was unconstitutional (see [35]).

Unisa then sought leave to appeal from the Constitutional Court, which was granted, though the court ultimately dismissed the appeal. In essence, the Constitutional Court found that Unisa had taken insufficient cognisance of the factors listed in s 29(2) (practicability, redress, equity, alternatives) before taking its decision, and that in any event, assessment of these factors weighed against the discontinuation of Afrikaans tuition (see [47], [54], [58] and [78]). Specifically:

- As correctly noted by the Supreme Court of Appeal, continuation of Afrikaans did not pose the threat it had in the previous university cases (segregation, marginalisation, access), in large part because the students did not attend the Unisa campus for teaching (see [62] – [63]).
- There was no evidence that Afrikaans teaching was or would be a retardant of the development of other African languages (see [66]).
- Cost considerations had not been raised at all in the meetings before the language policy was adopted and the argument that continuing with Afrikaans favoured the historically privileged was fallacious because it was based on an inaccurate picture of who Afrikaans speakers were, it was unsupported by evidence, and because it went contra the commitment to heal societal divisions (see [23] and [68] – [69]).

As far as remedy was concerned, the court, mindful of overreach and the need to afford leeway to the university to determine the language policy going forward, ordered as follows: the Supreme Court of Appeal's order was suspended (it had inter alia declared the language policy unconstitutional, set aside the decisions adopting it, and ordered the presentation in Afrikaans of courses that had been in that language) (see [36]); that were the university to continue with the policy, it was to be adapted to so as to comply with s 29(2) (see [88]); and that were the university to adopt a new policy the Supreme Court of Appeal's order would fall away (see [88]).

DERBY DOWNS MANAGEMENT ASSOCIATION v ASSEGAAI RIVER PROPERTIES (PTY) LTD AND ANOTHER 2022 (2) SA 71 (KZP)

Company — Memorandum of incorporation — Resolution to amend — Validity — Ratification of director's misconduct — Companies Act 71 of 2008, s 20(2).

In 2007 Derby Downs Management Association (Derby), an office-park management company, passed a special resolution to alter its articles of association so as to allow for levies owing by property owners to be calculated on a different basis than before. In litigation relating to the implementation of this resolution — between Derby and an owner of property in the office park, Assegaai River Properties (Pty) Ltd (Assegaai) — the High Court had held that the 2007 special resolution had lapsed and was void because it was not registered as required by s 202 of the Companies Act, 1973. In response Derby passed two special resolutions in 2017: the first sought to ratify the 2007 special resolution; the second that levies so calculated and charged 'be and are hereby approved and ratified'.

Assegaai, arguing that the 2017 resolutions did not have the effect of regularising the levy-distribution system adopted in the 2007 resolution, subsequently applied under the Community Schemes Ombud Service Act 9 of 2011 for an order that the levies which had been raised between 2007 and 2017 be adjusted to reflect an apportionment on the pre-2007 resolution basis. The adjudicator (the second respondent here) dismissed Assegaai's application, holding that under s 20(2) of the Companies Act 71 of 2008 shareholders could ratify what had been wrongly done, and that they had done so. Assegaai next successfully appealed the adjudicator's ruling, the High Court holding that the 2007 resolution could not be ratified since it had been declared void by the court.
This case concerned Derby's appeal to the full court. At issue was the validity of two 2017 special resolutions.
Held
Resolution No 1 had two components. One was an express act of amendment; the other implied — that, despite the fact that the amendment was only effected in 2017, it operated retroactively from 2007. This implied component was plainly in conflict with s 16(9) of the Act — that an amendment of a company's memorandum of incorporation takes effect 'on the later of the date on, and time at, which the notice of amendment is filed, or the date, if any, set out in the notice of amendment'. Special resolution No 1 of 2017 therefore did not validly bring about changes to the company's memorandum of incorporation during the period 2007 – 2017. (See [31] and [32].)
As to special resolution No 2: The provisions of the appellant's original articles of association limited and restricted the power of the appellant to the regime based on land area when raising levies against its members. As a consequence, the directors had no authority to authorise the appellant to do otherwise. There was accordingly 'misconduct' of the type contemplated by s 20(2) of the Act between 2007 and 2017, which according to the plain wording of that section the members could ratify, as they did, by special resolution. Accordingly, the appeal against the adjudicator's decision ought not to have been upheld by the court a quo, and the appeal against its decision would be upheld. (See [41], [43] and [44].)

MV *MSC SUSANNA***:**
OWNERS AND UNDERWRITERS, MV MSC SUSANNA AND ANOTHER v TRANSNET SOC LTD AND OTHERS 2022 (2) SA 85 (SCA)

Shipping — General maritime law — Ship — Owner — Limitation of liability — Collision in local port between merchant ship and foreign warship — Application of tonnage limitation in s 261(1) of Merchant Shipping Act 57 of 1951 — Whether limitation may be invoked by owner of merchant ship against foreign defence ministry as owner of warship — Merchant Shipping Act 57 of 1951, s 3(6) and s 261(1)*(b)*.

It is an ancient principle of maritime law that shipowners have the right to limit their liability for damages arising from the operation of the ship to the value of the ship. In South Africa this limitation is embodied in ch V part 4 s 261(1)*(b)* of the Merchant Shipping Act 57 of 1951: 'Collisions, Accidents at Sea, and Limitation of Liability — (w)hen owner [of harm-causing vessel] not liable for whole damage'. The present case dealt with the interpretation of s 261(1)*(b)* in the light of s 3(6) of the Act, which states that the Act 'shall not apply to ships belonging to the defence forces of the Republic or of any other country'.

The facts were that, during a severe storm in October 2017, *MSC Susanna* broke its moorings in the port of Durban and collided with the frigate *Floreal* of the French Navy (represented by the second respondent — the Ministère des Armées), as well as with port infrastructure belonging to Transnet (the first respondent in the guise of the National Ports Authority of South Africa (the NPA)). The NPA sued the appellants — the owners and underwriters, and the demise charterer of *Susanna* — for damages of R23 million. The appellants applied for a declaration of non-liability in relation to the damages to *Floreal*, for which the Ministère had lodged a counterclaim for €10 million.

In November 2019 the appellants, invoking s 261(1)*(b)*, instituted a limitation action against the NPA in the Durban High Court, seeking to join the Ministère to the action. The Ministère resisted, arguing that the limitation in s 261(1)*(b)* did not apply to warships like *Floreal* by virtue of s 3(6) of the Act.

The appellants on the other hand argued the limitation *did* apply against the Ministère, as the party making the claim against them, as opposed to *Floreal* itself. They submitted that s 261(1)*(b)* conferred a wide right that could not be restricted in the way the Ministère wanted, that is, by inserting after the words 'any property of any kind' in s 261(1)*(b)* the words 'save a naval vessel owned by the defence force of any nation'. The Durban High Court refused to join the Ministère.

In an appeal to the Supreme Court of Appeal the parties agreed that the issue was 'whether the owners and demise charterers of a merchant ship may, in circumstances where a merchant ship causes damage to a ship belonging to a defence force as contemplated in s 3(6) . . . seek a limitation of liability in terms of s 261 . . . in respect of the claim of that defence force'. It was common cause that if the answer favoured the appellants, the High Court should have ordered the joinder of the Ministère.

Held

The terms of s 261(1)*(b)* were clear and comprehensive: the right to limit was given to the owner of the ship in respect of all loss or damage to any property or rights of any kind, without qualification, and would include the loss or damage embodied in the Ministère's claim. The focus, therefore, had to be on the effect of s 3(6), which excluded the bulk of the provisions of the Act from application to both South African and foreign vessels forming part of their country's defence forces. But ch V part 4 (where s 261 was located) differed from the rest of these provisions since it was focused on the legal liability of owners and its limitation. This was important because s 3(6) did not say that the Act did not apply to owners of ships. It would, moreover, be linguistically inapt to exclude the invocation of limitation by the owners of *Susanna.* (See [7] – [8], [10] – [12], [14].)

The Ministère's argument that the Act was not concerned with warships (naval vessels) had to fail: *Susanna* was a merchant ship that was engaged in merchant shipping at the time of the incident giving rise to the claims against the appellants; the appellants were invoking a provision they were plainly entitled to invoke; and allowing them to limit their liability was clearly incidental to merchant shipping. (See [17.)

No discernible reason of policy supported a different construction of s 261(1)*(b)*. Limitation of liability existed as a matter of policy and none of the international conventions on limitation excluded its invocation in respect of claims arising from damage done to or by naval vessels. An exemption from the right to invoke limitation in respect of claims by naval vessels would also be inconsistent with international practice. (See [25].)

There were also incongruities arising from the Ministère's argument: s 261 dealt with three situations, an occurrence causing loss of life or personal injury; an occurrence causing loss or damage to property or rights; and an occurrence causing both loss of life or personal injury and loss or damage to property or rights. Had the incident giving rise to this case resulted in loss of life or injury to naval personnel on board *Floreal*, they and the dependants of any who were killed could have brought actions against the appellants to recover damages. Any such claims would have been subject to limitation, and nothing in s 3(6) suggested that the officers and crew of *Floreal* would enjoy some special exemption from the application of limitation. It would be incongruous in such circumstances for the Ministère to escape the application of limitation. (See [26].)
Appeal upheld and the Ministère joined as defendant in the action instituted by the appellants. (See [28].)

TRUSTEES, BYMYAM TRUST v BUTCHER SHOP & GRILL CC 2022 (2) SA 99 (WCC)

Lease — Rental — Remission — Vis maior — Loss of beneficial occupation by subtenant due to Covid-19 lockdown regulations — Whether tenant may claim remission from landlord — Tenant not entitled to avail itself of common-law claim for remission where not in physical occupation of leased premises.

The respondent (BSG) leased premises from the applicant (BT), on which it, inter alia, ran a restaurant business. BSG, however, later sublet the premises to a closely related entity, Apoldo Trade (Pty) Ltd (Apoldo), which continued the business, 'trading as' BSG. This arrangement was formalised in August 2019 by way of an addendum to the lease recording BT's consent. On 15 March 2020 a national disaster was declared in response to the Covid-19 pandemic and a 21-day lockdown period imposed in terms of the Disaster Management Act 57 of 2002 (the DMA). Various regulations published under the DMA followed, limiting contact between people and the operation of certain businesses. These included limiting the maximum seating capacity of restaurants, negatively affecting their turnover.
BSG stopped paying BT rental and resisted BT's application to collect outstanding rental — in arrears since the initial lockdown period — on the basis that the regulations constituted vis maior or casus fortuitus, so that it did not have beneficial occupation of the leased premises, and therefore that it was exempt from paying the full rental. BSG also brought a counter-application for a stay (and dismissal) of the main application and for a declaratory order that it was entitled to a remission of rental on the same basis for the period April – August 2020.
At issue was whether a lessee may claim rental remission based on loss of beneficial occupation by the sublessee which occupied the leased premises, ie where the lessee was not in beneficial occupation or physical control of the leased premises.
Held
A sublease entailed two contracts: the lease between landlord and tenant (lessor and lessee); and the sublease between tenant and subtenant (sublessee). The lessor's obligations were toward the lessee and not the sublessee. The addendum concluded between the parties in terms of which the applicant consented to the respondent subletting the premises in no way created an agreement in terms of which BT was obliged to provide beneficial occupation to the sublessee (Apoldo), nor

did it create obligations and rights between them. Here, BSG was not occupying the leased premises, nor was it in physical possession or control thereof. A lessee cannot avail itself of the common-law claim for an abatement or remission of rent in circumstances where its use, enjoyment and beneficial occupation were not denied or disturbed. BSG's lack of physical occupation of the leased premises had the result that it was not entitled to claim rental remission from the applicant. Its counter-application would therefore be dismissed. BSG, still bound by the lease agreement, would therefore be required to comply with its terms and pay the full rental. (See [106] – [108].)

CENTRE FOR CHILD LAW v DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS AND OTHERS 2022 (2) SA 131 (CC)

Constitutional law — Legislation — Validity — Births and Deaths Registration Act 51 of 1992, s 10 — Section not allowing unmarried father to give notice of birth of child under own surname in absence of mother — Constitutional Court confirming order of High Court declaring provision to be constitutionally invalid — Appropriate remedy.

Births and deaths — Birth — Registration — Births and Deaths Registration Act 51 of 1992, s 10 — Section not allowing unmarried father to give notice of birth of child under own surname in absence of mother — Constitutional Court confirming order of High Court declaring such section to be constitutionally invalid — Appropriate remedy.

Sections 9 and 10 of the Births and Deaths Registration Act 51 of 1992 (the BDRA) concerned the giving of notice of birth of a child by their parents. Section 9(1) provided that '(i)n the case of any child born alive'*, any one of their parents shall give notice of the birth*. Section 9(2) provided that notice shall be given *'under the surname* of *either the father or the mother of the child* concerned or the surnames of both the father and mother joined together as a double barrelled surname'; this, however, was made '(s)ubject to the provisions of section 10', which specifically addressed the case of *children born out of wedlock*. The effect of s 10(1) and (2) was that the mother of a child born out of wedlock was fully entitled to give notice of the child's birth under her name (ito s 10(1)*(a)*); but the father's entitlement to give notice under his surname was contingent on the existence of a joint request with the mother (ito s 10(1)*(b)*), or the consent of the mother (ito s 10(2)). The full court of the Grahamstown High Court declared s 10 of the Act inconsistent with the Constitution and invalid to the extent that it did not allow unmarried fathers to give notice of the births of their children under their surname in the absence of the mothers of such children. The Constitutional Court was faced with an application to confirm such declaration of invalidity.

The court in considering a proper interpretation, confirmed that, contrary to the assertions of the applicant, based on a plain reading of s 9(1) either parent of the child, irrespective of their marital status, was allowed to give notice of the birth (see [29], [30], [31] and [35]). The only limitation imposed by s 10 (in its entirety) related to the unmarried father's capacity *to confer his surname on the newborn child* (see [35]): he was not able to do so without the mother's presence or consent (see [35] and [52]).

The court went on to consider the impact on the right to equality and non-discrimination, applying the *Harksen* enquiry in doing so. It held that it was clear that the impugned law differentiated between married and unmarried fathers in relation to their capacity to confer their surname onto their newborn child when giving notice of

their child's birth; and too between mothers (irrespective of their marital status) and unmarried fathers (as a category) (see [41]). No legitimate government purpose was served, the court held, by such differentiation. As such, even at the first stage of the *Harksen* enquiry, the impugned law would be liable to be declared unconstitutional and invalid. (See [42].) Did the differentiation further amount to unfair discrimination?

The court held that the impugned law established a prejudicial distinction between married and unmarried fathers. The impact on unmarried fathers — who, along with their children, was a vulnerable group affected by discrimination — was clear. They could not register the birth of their child with their surname without the mother's consent or presence. They were stripped of the rights that married fathers had to register children in their own name as these rights were made conditional and dependent on their relationship with the mother. This was a barrier to their full participation as parents and perpetuated gendered narratives about men's caregiving (the assumption being made that childcare was inherently a mother's duty (see [46])). It was a primordial need for some parents to want to name their child and register their birth, and this should be a right for both biological parents. (See [52].) The unmarried father was also subjected to the indignity of having his child registered as being born out of wedlock (see [53]). The court concluded that the differentiation amounted to unfair discrimination against unmarried fathers on the basis of sex, gender and marital status. The court further held that the discrimination could not be justified. In the result, the invalidity of s 10 had to follow. (See [56].)

The court further held that s 10 was an injury to an unmarried father's dignity, and perpetuated the societal stigma attached to unmarried couples and their children. It deemed his bond with his child as less worthy, merely on account of his marital status. Furthermore, in doing so, it demeaned this particular class of individuals (unmarried fathers and their children). For all these reasons, the court held, the impugned provision was clearly inconsistent with our fundamental constitutional right to human dignity, and the value of *ubuntu* which that right embraced. (See [67].)

The court went on to consider the impact of s 10 on children. It held that s 10 was manifestly inconsistent with the best interests of the child, as well as her rights to dignity and equality and her right to a name and nationality from birth. Historically, children born out of wedlock had been discriminated against under the law, and social attitudes had also historically led to active prejudice towards children born out of wedlock. Keeping the category of separate registration for children born out of wedlock on the statute book further reinforced these perceptions. The vulnerability of this group also went to the family affiliation where the child was that of one parent, as opposed to married parents. Children may see themselves as being of inferior status, as they did not have a proper family, and this could cause stresses such as social isolation and social stigma. The court added that s 10 cemented the long-held distinction between 'legitimate' and 'illegitimate' children in our law, which was abhorrent to our constitutional values of human dignity, *ubuntu* and substantive equality. (See [79] – [81].)

The court declared s 10 to be unconstitutional. Severance of the section was the appropriate remedy. Section 9(2), the court added, too had to be severed (given the proviso 'subject to the provisions of section 10'). The rest of s 9 could, however, remain intact (which provision, the court held, could be read to mean that the notice and registration of the surname could be given by either parent, regardless of the parent's marital status and without any prescription in terms of the manner of selection of the surname). (See [86] – [89].)

Mogoeng CJ (with Mathopo AJ concurring) in a dissenting judgment disagreed that s 10 was unconstitutional. Mogoeng CJ accepted for present purposes that s 10 of the Act, in creating a bifurcated child-registration regime, did discriminate against unmarried fathers, on the basis, for instance, of marital status (see [113]). The question was whether such discrimination was indeed reasonable, justifiable or fair (see [113]). He held that it was (see [127]): A rational basis existed for the difference in approach between unmarried fathers and married fathers (see [121]). In respect of a person claiming to be the father of a child born out of wedlock, one could not simply presume the truth of such claim and that such person was indeed committed to the welfare of such child, given the undocumented, informal and unevidenced nature of relationships other than marriage. In such a case, the mother was best placed to verify who the father was and whether it would be in the best interests of the child for him to be part of their life. Such unregulated relationships could be contrasted with marriages where fatherhood was easily ascertainable, marriage being often a public or semi-public, formalised, documented and an evidenced affair; and out of which arose predictable reciprocal rights and obligations between spouses and a shared duty of care and support for children. (See [115] – [123] and [127].)
Mogoeng CJ went on to consider whether the unmarried father's right to dignity was infringed by s 10. He held that it was not. The dignity of an unmarried father did not get enhanced or impermissibly limited by the child registration requirements. For they amounted to nothing more than a regulatory framework that reasonably and rightly demanded certain assurances from the child's mother about whether a particular man was the father, and, if he was, whether it was appropriate for him to have any role in registering the child, and even under his surname. (See [129].) Furthermore, the differentiation was aimed at a worthy and important societal goal of pre-emptively cutting out some of the potentially irresponsible, abusive or merely overzealous men from being so meaningfully introduced into the life of a child with consequences that might prove difficult or impossible to reverse. (See [132].) This was, therefore, not manifestly directed at discriminating unfairly against an unmarried father, but precisely so that the best interests of a child and the paramountcy of their importance may be safeguarded (see [133]).

COETZER v WESBANK t/a FIRSTRAND BANK LTD 2022 (2) SA 178 (GJ)

Practice — Judgments and orders — Default judgment — Abandonment — Effect — Judgment remaining in force until varied or rescinded by court — Party cannot usurp court's role by resorting to abandonment — Res judicata applying — Uniform Rules of Court, rule 41(2).

Default judgment was erroneously granted against three defendants instead of just two. The plaintiff, Wesbank (the present respondent), filed a notice under rule 41(2) of the Uniform Rules of Court stating that it abandoned the default against the third defendant (the present applicant). Wesbank, being of the view that its partial abandonment obviated any obstacle to the advancement of the main action, requested the applicant to urgently enrol two interlocutory applications to compel, to avoid postponement of the trial. The applicant replied that the main action could not proceed to trial while the default judgment stood. The issue before court was whether Wesbank's partial abandonment of the default judgment meant that it was entitled to proceed with the main action.

Counsel for the applicant argued that no further action could be taken with the trial since the default judgment rendered the main action res judicata and the court was functus officio. The judgment would have to be rescinded for the trial to proceed. Counsel for Wesbank argued that it was for the trial court to decide the effect of the default judgment and its subsequent partial abandonment. He asked the court to proceed with the hearing of the applications to compel on the merits, arguing that, notwithstanding the court order, the applications were validly brought before court for consideration.

Held

Abandonment was an election available to Wesbank whether to enforce the rights obtained in terms of the judgment and did not extinguish the existence of the default judgment against the applicant. The default judgment was final in its effect, and stood until varied, rescinded or set aside by a court, and Wesbank could not usurp the court's role by invoking rule 41(2). The present court could therefore not adjudicate the applications to compel, which fell to be dismissed. (See [26] – [29].)

DA CRUZ v BERNARDO 2022 (2) SA 185 (GJ)

Interest — In duplum rule — Whether in duplum rule applies to mora interest claimed on liquidated debt as contemplated in s 1(1) of Prescribed Rate of Interest Act — Prescribed Rate of Interest Act 55 of 1975, s 1(1).

In previous proceedings in the Johannesburg High Court before Foulkes-Jones AJ, the applicant had successfully brought a claim, based in delict, against the respondent for the repayment of moneys invested by the applicant in one of the respondent's businesses (after the deal in terms of which such investment had been made had collapsed). The respondent was ordered to pay the capital sum of R812 500, as well as interest on the amount *a tempore morae* calculated from 3 December 2007 (being the date on which the applicant had initially claimed repayment) to date of payment. Subsequent to the judgment, the applicant sent a letter to the respondent demanding payment of the capital sum, of R812 500, plus the interest owing at that stage, in the amount of R1 590 952,91. The respondent in answer disputed the calculation of the interest amount, contending that the *in duplum* rule applied to limit the interest payable by the respondent to R812 500. The respondent subsequently paid the capital amount outstanding and made a further payment of R812 500. This prompted the applicant, in the present matter, to apply to the Johannesburg High Court again to seek, inter alia, an order declaring that the *in duplum* rule did not apply to the moratory interest awarded in the judgment by Foulkes-Jones AJ; declaring that the respondent remained indebted to the applicant in the amount of R785 008,56, being the balance due in respect of moratory interest awarded in the judgment; and seeking interest on the aforesaid amount of R785 008,56 *a tempore morae* to date of final payment, both days inclusive.

The *in duplum* rule, broadly speaking, provided that arrear interest ceased to accrue once the sum of the unpaid interest equalled the amount of the outstanding capital. The question in the present matter was whether the rule applied to liquidated debts — like the present one — in respect of which *there was no law or agreement governing the calculation of the rate of interest*, but which, instead, in terms of the common law, bore *mora interest*, and accordingly fell within the purview of s 1(1) of the Prescribed Rate of Interest Act 55 of 1975. That section provided that the type of debt in question attracted interest as calculated 'at the rate contemplated in

subsection (2)*(a)* as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise'. After a thorough review of the operation of the rule in South Africa (see [17] – [43] and [57]), the court held that the *in duplum* rule *did not apply* to limit mora interest claimable on a liquidated debt (see[58], [62] and [66]). The plaintiff was therefore not precluded from recovering mora interest on its liquidated debt in an amount that exceeded the capital amount of the original debt (see [62]).

In reaching such a finding, the court had regard to the following:

- All of the cases and the examples in the old authorities in which the *in duplum* rule was discussed and applied involved contractual claims *where the interest rate was fixed by agreement between the parties* (see [43] and [57.1]). The rule has been stated to apply to arrears interest ('agterstallige rente') on all contracts in which a capital sum owing was subject to a stipulated exchange rate (see [59]). The purpose of the rule was, from Roman times, to prevent lenders from exploiting borrowers in respect of debt agreements (see [59]).
- However, mora interest was fundamentally different to contractual interest. It was not payable in terms of an agreement, but constituted compensation for loss or damage resulting from default (see [45.1], [55], [57.3] and [60]). The circumstances in which a liquidated debt giving rise to mora interest may be recoverable covered a broad territory and may cover circumstances as broad as theft, to goods sold and delivered. Further, a court had some flexibility in determining a defendant's liability for mora interest in terms of the Prescribed Rate of Interest Act and so, like with an unliquidated claim, the defendant's liability for interest was not certain until the court had delivered its judgment. (See [60].)
- Delays in litigation may run longer than it took for the interest to equal the capital at the applicable mora interest rate. In these circumstances it was preferable, as a matter of public policy and in the interests of justice, for the court to retain a discretion on how interest should be awarded, exercised on the facts of each case. Where the court had such a discretion, it could exercise that discretion to limit interest payable to a dilatory plaintiff or to allow that interest where the defendant was the reason for the delay. Section 1(1) of the Prescribed Rate of Interest Act provides the court with that discretion. The 'special circumstances' which give a court the discretion set out in s 1(1) of the Prescribed Rate of Interest Act would include circumstances where a plaintiff had been dilatory or where delay ought not to be visited on one of the parties.
- The Prescribed Rate of Interest Act did not impose a ceiling on interest liability and did not expressly incorporate an *in duplum* principle (where it could easily have done so) (see [56] and [57.4]).

In the circumstances the court granted the applicant the relief in the terms sought (see [71]).

KOSMOS RIDGE HOMEOWNERS' ASSOCIATION v MADIBENG LOCAL MUNICIPALITY AND OTHERS 2022 (2) SA 207 (GP)

Constitutional law — Local government — Autonomy — Dysfunctional municipality — Applicant seeking order to compel Minister of Finance to ensure that funds allocated to failing municipality disbursed in accordance with earlier court order — Contrary to doctrine of separation of powers — Court lacking authority to make such order — Constitution, s 41(1)*(g)*, s 151, s 216; Local Government: Municipal Finance Management Act 56 of 2003, s 5(2)*(e)* and s 5(2)*(f)*.

The applicant contended that the persistent failure of the first defendant municipality to comply with its statutory duties and court orders to construct a sewage plant meant that it had forfeited its autonomy under s 151(3) of the Constitution, empowering the court to interfere with its executive functions by compelling the Minister of Finance (the ninth respondent) to ringfence the funds allocated or required for the construction of the plant and to release them to the municipality only for that purpose. The applicant, conceding that the relief sought was novel, argued that it was acting out of necessity and that it was not specifically precluded by the Constitution or other legislation. In support of its application the applicant invoked (i) s 5(2)*(e)* and *(f)* of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), which allowed the treasury to 'take appropriate steps' if a municipality breached the MFMA or failed to perform its functions; and (ii) the Minister of Finance's power, under the (annual) Division of Revenue Act, to make 'conditional grants' to municipalities for the delivery of a service on behalf of the national government. The court, having referred to the constitutional principle of separation of powers and the autonomy that s 41(1)*(g)* and s 151(3) and (4) of the Constitution conferred on municipalities (see [17]) —

Held

While s 139 of the Constitution provided mechanisms to deal with errant municipalities, it was not applicable in the present matter (see [17.6] and [19.2]).

While s 155(6) and (7) of the Constitution gave the national and provincial spheres of government oversight over municipalities, they did not contemplate or authorise the ministerial intervention sought by the applicant (see [17.3] and [19.1]).

Moreover, *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) (2018 (8) BCLR 881; [2018] ZACC 15) para 26 made it clear that the Constitution did not permit cabinet ministers 'to intervene in the exercise of constitutional powers by municipalities', which would be 'at odds with the separation of powers'.

The national treasury's role under s 216 of the Constitution and s 5(1) and (2) of the MFMA was limited to the monitoring and assessment of municipalities' fiscal management and budgeting. Section 5(2)*(e)* and *(f)*, relied on by the applicant, did not extend the treasury's normal functions and powers, and its obligation to 'monitor' municipalities did not confer on it a right to interfere in their executive functions. (See [16], [20] – [23].)

Lastly, while conditional grants to municipalities under the Division of Revenue Act could be directed at specific projects, it was for the municipality to determine which project to earmark, the treasury making its allocation based on the municipality's direction. Once this was done, neither the Minister of Finance nor the treasury could repurpose the funds. Conditional grants were not determined on an ad hoc basis but included in the annual Division of Revenue Act. The relief sought by the applicant not only ignored this but also sought to rely on future or past Acts, which was impermissible. (See [27], [29].)

The relief sought could not, in the light of the above, be granted (see [30]).

Application dismissed.

MOODLIAR NO AND OTHERS v LAWSON TOOL DISTRIBUTORS (PTY) LTD 2022 (2) SA 220 (WCC)

Insolvency — Unlawful alienations and preferences — Voidable disposition — Preferring one creditor over others — What preferred creditor must show to stave off

voidance — Distinction between intent to prefer, and underlying reasons or motive, not useful — Series of purchases from creditor to enable insolvent to carry on trading — Not made with intention to prefer — Not constituting voidable dispositions — Insolvency Act 24 of 1936, s 29(1).

Company — Winding-up — Unlawful alienations and preferences — Voidable disposition — Preferring one creditor over others — What preferred creditor must show to stave off voidance — Distinction between intent to prefer, and underlying reasons or motive, not useful — Series of purchases from creditor to enable insolvent to carry on trading — Not made with intention to prefer — Not constituting voidable dispositions — Insolvency Act 24 of 1936, s 29(1).

Section 29(1) of the Insolvency Act 24 of 1936 allows the court to set aside a disposition made by an insolvent within six months of sequestration if it preferred one creditor over another. It also provides the beneficiary with a defence if it can show that the disposition was made (i) in the ordinary course of business; and (ii) without an intention to prefer one creditor over another.

The facts were that the plaintiffs, the liquidators of construction company V Co, invoked s 29 to claim back R1,3 million V Co had paid the defendant, a supplier of construction materials, in the six months before V Co's liquidation. They were regular arm's-length payments on account over a four-month period, the last of which was made some two months prior to V Co's liquidation. The plaintiffs claimed that they were voidable dispositions under s 29 because they preferred the defendant over V Co's other creditors. The defendant admitted as much but pleaded that the payments were made in the ordinary course of V Co's business and were not intended to prefer one creditor above another. This was contested by the plaintiffs, who argued that the making of regular payments to the defendant while V Co's other creditors remained unpaid could not have been payments made in the ordinary course of business.

In the absence of evidence of any reason save commercial survival why V Co would favour the defendant over its other creditors, the plaintiffs sought to rely on the distinction between purpose or motive (to obtain supplies) and intention (to prefer defendant) in *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) ([2003] 4 All SA 370).

Held

The 'ordinary course' enquiry should focus on whether, in the context of the business relationship between V Co and the defendant, the dispositions would appear anomalous or unbusinesslike to the ordinary person of business. V Co purchased supplies (which it presumably required to carry on its own business as a major builder) from the defendant and duly paid for them on a regular basis within the stipulated period. In these circumstances there was no basis for any finding that such dispositions were made other than in the ordinary course of business. Accordingly, the defendant discharged the onus of proving the first element of its defence to the claim. (See [21] – [22].)

As to the second element of the defence (intent), the nature of the parties' respective businesses was an important consideration. V Co needed construction materials to trade its way out of the difficulties in which it found itself, and a belief that it could do so could negate an inference of intention to prefer a particular creditor. (See [26] – [28].)

Distinguishing between reason and intent was of limited value and potentially misleading. Correctly viewed, the act that was accompanied by an intent or intention in the strict sense was that of making the disposition. This act was accompanied or

impelled by reasons, motive or intent, and where this was predominantly to favour a particular creditor over another, such a disposition was voidable. In a civil-law context distinctions between motive, intent and underlying reasons were not always clear and risked undermining the settled test of seeking the dominant, operative or effectual intention and of concentrating unduly on the effect of the payment vis-à-vis other creditors rather than the subjective intention of the payer. (See [32] – [35].)
It would in the present circumstances be strained to relegate to a secondary role what appeared on the probabilities to have been V Co's primary concern, to continue trading as a builder, and to view its dominant intent as being to favour a supplier with whom it had an entirely regular customer/supplier relationship going back years. The most plausible inference from the evidence was that V Co's dominant intention for making the impugned dispositions was not to prefer the defendant over other creditors, but simply to obtain building supplies to keep its business afloat and with some prospect of surviving its financial activities. (See [36].) Claim accordingly dismissed (see [37] – [38]).

NEDBANK LTD v YACOOB 2022 (2) SA 230 (GJ)

Practice — Pleadings — Generally — Reliance on written contract — Requirement that true copy be annexed to pleadings — Where impossible for plaintiff to produce written contract — Substantive law allowing him/her to plead and prove conclusion of contract and its terms by way of secondary evidence — Magistrates' Courts Rule 6(6), which requires that contract be attached to pleading, cannot be construed to deprive plaintiff of their cause of action or of his/her right to prove contract by means of secondary evidence of contract — Magistrates' Rules of Court, rule 6(6).

Practice — Pleadings — Generally — Reliance on written contract — Requirement that true copy be annexed to pleadings — Where impossible for plaintiff to produce written contract — Processes and principles applicable in such circumstances — Whether application for condonation required in order for matter to proceed — Magistrates' Rules of Court, rule 6(6).

The Magistrates' Courts Rule 6(6) required a party relying upon a written contract in its pleadings to annex such contract, or the part relied upon. In the present matter, the appellant bank, in respect of its claim for moneys lent and advanced to the respondent debtor, had not attached to its pleadings a copy of the actual credit agreement it sought to rely on; instead, explaining that it could not locate the original agreement, it attached its pro forma standard terms, and pleaded the salient terms thereof. The magistrates' court a quo dismissed the application for default judgment brought in respect of such claim. The basis of its decision was its finding, based on the above rule 6, that the appellant's claim, in light of the failure to attach a true copy of the relied-upon agreement, was not capable of proper proof or pleading, absent condonation. The appellant appealed to the Johannesburg High Court. Key questions to be considered were whether a plaintiff in the predicament of the appellant may still proceed to claim under the missing contract; and if so, what processes and principles applied to the making of such a claim, including whether an application for condonation was necessary.
Held, that the substantive law of evidence prescribed that the original signed contract was the best evidence that a valid contract was concluded and the general rule was thus that the original had to be produced. But, if it was impossible for the plaintiff to produce the written contract or a copy thereof, substantive law allowed them to plead

and prove the conclusion of the contract and its terms by way of secondary evidence. A rule of procedure such as Magistrates' Courts Rule 6(6) (or the equivalent High Court rule 18(6)) could not be construed to deprive the plaintiff of their cause of action or of their right to adduce secondary evidence of the contract. (See [20].)
Held, further, provided a plaintiff pleaded the conclusion of the contract and the material terms, the particulars of claim would disclose a cause of action. The failure to attach a contract would, in the absence of a properly pleaded explanation for such failure, be in breach of the procedural rules pertaining to pleadings — but this did not deprive the pleader of a cause of action. In the present case, the appellant had pleaded a cause of action (see [23]).
Held, further, that the process to be adopted where the pleader was unable to attach the contract on which the claim was founded was fact-specific. At the very least, the reason for this inability should be fully pleaded. The date, place, parties and circumstances of the conclusion of the contract should also be properly set out to the extent possible as these were procedural requirements. It was important also that the salient terms relied on be properly pleaded. The manner in which the plaintiff would seek to establish the terms was also required to be fully pleaded. If this was not properly done, the pleadings may be attacked as excipiable for being vague or irregular. (See [25].) It was not necessary for condonation to be applied for and granted for the matter to proceed (see [27] – [29]). (The court held that the responsibility for the loss of the document was only relevant to the extent that it impacted ultimately on the proof of the contract (see [29]).)
Held, applying the relevant legal principles to the facts, that the appeal should be upheld (see [33] and [35]).

STELLENBOSCH UNIVERSITY LAW CLINIC AND OTHERS v LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD AND OTHERS 2022 (2) SA 237 (WCC)

Practice — Class action — Administration — Appointment of 'special master' — Appropriateness of.

Practice — Class action — Availability — Opt-in or opt-out — Relevant considerations.

Practice — Class action — Certification — Application — Requirements — Commonality — Not required that every member of class have identical cause of action or put forward identical facts and seek identical relief — Sufficient that there be some issues of fact, or some issues of law (or combination thereof), that were common to all members of class and could appropriately be determined in one action.

Practice — Class action — Certification — Application — Requirements — Discussion of.

The present matter in the Western Cape High Court concerned an application for the certification of an 'opt-out' class action. The first applicant, the Stellenbosch University Law Clinic, which undertook to act as class representative in these proceedings, alleged that the 1st – 17th respondent corporate entities, as well as their effective owners, the 18th and 19th respondent individuals, operated a number of websites which misled innocent, often poor, consumers into believing that, when they completed an online application form, they were applying for loans, when

instead, through the operation of terms buried in the terms of service, they were unwittingly contracting for the provision of unrelated legal advice services for which they would be charged on a monthly basis, via debit order. Consumers' attempts to cancel such legal advice contracts would be met with threats of legal action and blacklisting. The class the first applicant sought to represent was 'all persons who [had] had any moneys debited from their bank accounts and/or who [had] been harassed and/or threatened in connection with any demand for or collection of payment by any of the respondents at any time from [the date of registration of the websites] to date on the basis of them having concluded purported agreements with any of the respondents through any of the websites [listed]'. In the class action the applicants would ask for an order against the respondents to reverse the agreements concluded by class members through the websites, as well as the various transactions concluded pursuant thereto, and to compensate members for losses they had incurred. The applicants would rely on various causes of action (see [44] – [48]), including, inter alia, that the agreements in question were prima facie unconscionable, unjust and/or unreasonable, in terms of the Consumer Protection Act 68 of 2008, and accordingly unenforceable; in the alternative, that the agreements were unlawful at common law on the basis of fraudulent misrepresentation, entitling members to restitution and damages.
The High Court noted that there was much common ground between the parties and that the only real issues for determination (see [12]) were whether the following two requirements for certification of a class action had been met: *(a)* commonality, ie that the relief in question depended upon the determination of issues of fact, or law, or both, common to all members of the class; and *(b)* appropriateness of the remedy, ie that given the composition of the class and the nature of the proposed action, a class action was the most appropriate means of determining the claims of class members. (See [19].)

Held, as to *(a)*

There were a number of common issues of fact and of law (see [53]) that could be determined by the adducing of evidence and the presentation of argument at one hearing. The argument that, since the individual causes of action were delictual, there were issues unique to each prospective plaintiff that were not capable of class-wide resolution — such as the question relating to causation, whether a particular consumer was indeed 'duped' by the website they had visited — missed the point (see [55] and [56]). The primary issue was whether the respondents' modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not. That state of affairs could be factually determined with reference to an objective assessment of the individual websites concerned and, in particular, whether they were designed to mislead. The enquiry, ultimately, was whether the respondents created a trap for consumers through which the respondents intended to benefit themselves. (See [56].)
Similarly, the proposed enquiry under the CPA as to whether an agreement into which a consumer was misled was unconscionable, unjust and/or unreasonable, and thus not enforceable, was capable of being made on an objective assessment of the wording of the agreement itself, read in its contextual setting. That was an assessment that could be made on behalf of a class as a whole without the necessity of having to resort to an individualised approach through the presentation of case-specific evidence. (See [57].)

Further, even if there were areas where the concept of commonality was perhaps somewhat stretched, this would not be a reason to refuse certification. Such issues as may well be found to be lacking in commonality could be dealt with in due course through the directions of the trial judge and the judicial manager (the so-called 'special master' referred to below) appointed to oversee the class action. After all the overriding consideration in certifying any class action was the interests of justice, and this purpose was served by such an approach. (See [58].)

Further, a class action did not require every member of the class to have an identical cause of action or to put forward identical facts and seek identical relief. Nor did such an action need to dispose of every aspect of a claim for certification to be granted. It was sufficient that there be some issues of fact, or some issues of law (or a combination thereof), that were common to all members of the class and could appropriately be determined in one action. (See [51] and [59].)

Held, as to *(b)*

As to the appropriateness of the envisaged procedure in respect of the claims in the present matter, one had to first consider the definition of the class sought to be represented. (See [60].) Here, having regard to the proposed class, membership was determined by way of objective criteria (see [65]): it was determined by an objective connection to one (or more) of the respondents; the alleged unlawful conduct of the respondents in question; and a defined time frame. This rendered certification appropriate. (See [66].)

The appropriateness of the certification was confirmed by the fact that the class was a large one and the claims relatively small — some so low that they might conceivably be recoverable in the Small Claims Courts. Added to that was the fact that the claims were spread over a multitude of geographical jurisdictions, such that for each to be brought individually would not only place strain on the litigants (and the respondents in particular), but the courts as well, where there was the risk of multiple findings at variance with each other. Such an outcome was clearly not in the interests of justice. (See [67].)

The present matter was well suited to an *opt-out class action*. The envisaged class was large and the individual claims were relatively small. Given that there was no evidence that any of the affected consumers had commenced legal proceedings against any of the respondents, it was reasonable to infer that there was little likelihood of independent litigation ensuing. Lastly, the cost of individual litigation in relation to the sums intended to be recovered was likely to be high and thus a deterrent to the pursuit of individual claims. The interests of justice would, in such circumstances, favour the extension of collective litigation to all members of the class without more, so as to render such consumer-based claims affordable. (See [70].)

Further, the appointment of a special master, as requested by the applicants, was also appropriate. It would provide an effective procedural mechanism in this matter to oversee the administration of the consequences of the class action (if successful). It was, however, best left to the trial court to determine the precise parameters of the special master's functions and duties. (See [74].)

In the circumstances, and mindful of the built-in safeguards contained in the order proposed by the Law Clinic, the certification of a class action on the terms and conditions proposed should be granted (see [75] and order at [97]).

WDL AND OTHERS v GUNDELFINGER AND OTHERS 2022 (2) SA 272 (GJ)

Legal practitioner — Attorney — Rights and duties — Duties — Former clients — Confidential information — What constitutes — Husband's former attorney in divorce proceedings joining firm representing wife in same pending divorce proceedings — Application by husband to interdict former attorney and/or any associates of firm she joined from acting for wife — Whether information imparted to former attorney remained confidential — Degree of specificity required iro information claimed to be confidential — Whether 'inherent jurisdiction approach' to be applied.

One of the three attorneys who dealt with Mr L's divorce matter at the firm that previously represented him, Ms Steyn (the second respondent), joined the first-respondent firm of attorneys (Gundelfinger Attorneys) which represented his wife (Mrs L) in the same pending divorce proceedings. When this came to Mr L's attention, his new attorneys, citing a conflict of interest, demanded that first respondent withdraw as Mrs L's attorneys. The demand was not acceded to, and Mr L (and his new attorneys as second applicant) brought the present application for a final interdict against, inter alia, the first and second respondent and/or any of its associates representing Mrs L in the divorce proceedings. This on the basis that it was the only available remedy for protection of Mr L's unqualified right to the confidential information imparted to Ms Steyn when she represented him and that he had a well-founded apprehension of harm that the confidential information had been or would be compromised by virtue of Ms Steyn's employment with Gundelfinger Attorneys.
Mr L further submitted that if the court found that he had failed to meet the standard of proof required for such interdict, the court must, as a matter of public policy, exercise its inherent jurisdiction to control the conduct of its own officers, as the basis for such an interdict so as to ensure the due administration of justice and the integrity of the judicial process.
The respondents did not dispute that Ms Steyn received confidential information from Mr L but contended that the applicants failed to furnish particularity and specificity of the confidential information sought to be protected, and as a result failed to establish that the confidential information alleged to have been imparted, or reasonably apprehended to have been imparted, to Ms Steyn remained confidential and relevant to the issues in the divorce proceedings. (See [13].)
Held
The only duty that survived the termination of the legal representative's mandate was the duty to preserve the confidentiality of information imparted to them through their professional relationship with a former client. In order to obtain an interdict to preclude a former representative from acting against a former client, the latter must, inter alia, prove that the information remained confidential, relevant and that the interests of the present client were adverse to theirs (see [6]).
The degree of particularity required depended on the facts of a particular case. It was generally not sufficient for an applicant to make a general allegation that the attorney was in possession of relevant confidential information if this was at issue. The more general the description of the information which an applicant sought to protect, the more difficult it was for the court to satisfy itself as to the relevant confidential information that should be protected. This requirement must be insisted on, even though it may necessitate disclosing to the court the very information sought to be protected. The applicants did not make the slightest attempt to identify,

with the necessary degree of specificity, the information which they contended was confidential. In the specific circumstances of this case, it was a fatal deficiency. Moreover, the applicants did not attempt to demonstrate that the information imparted to Ms Steyn remained confidential and, if so, might legitimately be said to be memorable and not forgettable. The failure to do so, in the specific circumstances of this case, was also fatal to their application. The application for a final interdict must therefore fail at the most fundamental level: the right foundational to the relief sought had not been established to have been extant at the time Ms Steyn entered the employ of Mr Gundelfinger. (See [6], [52] and [56] – [57].)
As a matter of public policy and in the interest of the administration of justice, the facts in the present matter justified the recognition of the 'inherent jurisdiction approach' in our law. The inherent jurisdiction of the court to grant such relief was discretionary and should be exercised only in exceptional circumstances and with caution. The test was whether a reasonably minded person in possession of all the relevant facts would consider the judicial process and due administration of justice to be threatened if Mr Gundelfinger continued to act for Mrs L in the divorce proceedings. This was not established, and in the circumstances it was not in the public interest to disqualify Mr Gundelfinger from continuing his services to Mrs L. Consequently, the application would be dismissed. (See [77], [84] and [89].)

ZIKALALA v BODY CORPORATE, SELMA COURT AND ANOTHER 2022 (2) SA 305 (KZP)
Sectional title — Body corporate — Trustees — Duties — Collection of levies, interest and costs — Compromise — Not competent to accept settlement offer having effect of compromising body corporate's claim for arrear levies, interest and costs — Sectional Title Schemes Management Act 8 of 2011, s 10.

Trustees may not conclude an agreement outside the ambit of the powers given in terms of the Sectional Title Schemes Management Act 8 of 2011 (the STSMA). Neither the STSMA nor the Management Rules permitted a body corporate to compromise its obligation to collect levies or contributions. Absent any express or implied provision in the STSMA, trustees are not empowered to accept a settlement offer of a lesser amount than what is owing to the body corporate.
The statutory obligation imposed on the body corporate is to collect the full amount of levies and contributions due, together with interest and legal costs. No latitude is afforded to trustees to deviate from this obligation. (See [23] and [26].)

S v SENWEDI 2022 (1) SACR 229 (CC)

Sentence — Imprisonment — Term of — Non-parole period — Introduction of 25-year non-parole period by s 276B of Criminal Procedure Act 57 of 1977 — Effect of — Offence committed before coming into operation of provision — Fixing of non-parole period constituting increased sentence and could not operate retrospectively — Prisoner entitled to be released after 20 years.

The applicant was convicted on 2 May 2002 and sentenced on 14 May 2002 for offences that were committed on 2 April 2001. Those dates preceded the enactment of s 276B of the Criminal Procedure Act 51 of 1977 (the CPA), operative as of 1 October 2004, which introduced a maximum of two-thirds of the term of imprisonment imposed, or 25 years, whichever was the shorter, for a non-parole period. He was sentenced to life imprisonment, and it was ordered that he not be released on parole until he had served a sentence of 25 years' imprisonment. In an application for leave to appeal to the Constitutional Court, he contested the order of the High Court on the basis that the imposition of a non-parole period of 25 years' imprisonment prior to the enactment of s 276B of the CPA infringed his constitutional rights. He submitted that when he was sentenced to life imprisonment, individuals serving life sentences were required to serve a minimum period of 20 years' imprisonment before they became eligible for parole. The effect of the imposition of the non-parole period was that he had to serve five years more than fellow inmates sentenced to life imprisonment prior to 1 October 2004, and that the stipulation of a non-parole period in respect of an offence committed prior to the coming into operation of s 276B was impermissible.
Held, that the fixing of a non-parole period constituted an increased sentence. In accordance with the general principle, it could not operate retrospectively. Absent any legally recognised special circumstances, no departure from this principle was warranted and the fixing of a non-parole period that purported to operate retrospectively was impermissible in law. Consequently, the High Court fatally misdirected itself in fixing a non-parole period of that length in respect of the sentence of life imprisonment for the murder conviction. At the time of sentencing, individuals serving life sentences were required to serve a minimum period of 20 years' imprisonment before they became eligible for parole. (See [24] – [25].)
Held, further, that our courts had to defend and uphold the Constitution and the rights entrenched in it. One of the most important rights was unquestionably the deprivation of an individual's liberty. The part of the order imposing 25 years as a non-parole period therefore had to be set aside. (See [27].)
Held, further, that the High Court had also committed a fatal misdirection in failing to afford the parties an opportunity to address the court concerning the possible fixing of a non-parole period. (See [28].)

S v LIFMAN 2022 (1) SACR 241 (WCC)

Bail — Conditions — Amendment of — Applicant facing nine charges, including murder, conspiracy to commit murder, and charges under Prevention of Organised Crime Act 121 of 1998 — Applicant seeking return of passport to allow him to take up employment in Turkey — State experiencing difficulty in extraditing suspect in same case from Turkey — Conditions suggested by applicant not practically feasible to allow close supervision of him — Application for amendment of conditions refused.

The applicant was facing trial in the High Court on nine charges, including murder, conspiracy to commit murder, and charges under the Prevention of Organised Crime Act 121 of 1998. He was granted bail in an amount of R100 000 and had to surrender his passport. He was also required to report at a local police station once a week. When the case was transferred to the High Court, he applied for an amendment of his bail conditions to allow him to travel abroad to take up a job offer in Turkey. He tendered an additional R100 000 in bail; offered to report to the investigating officer twice a week by WhatsApp; report to the South African Honorary Consul in Istanbul once a week; and restrict his travels to Dubai, in which case he would report to the South African Embassy on his arrival.
Held, that it appeared that the applicant was intensely focused on being outside of the borders of South Africa and particularly in Turkey, and his application was made on the strength of facts to which the court could not attach a high degree of persuasiveness. In fact, his request conflicted with him relying on family ties in South Africa — he was asking the court to allow him to go to another country and start, to a degree, a new life. If travelling internationally was, indeed, so paramount then the surrendering of his passport would have been a contentious issue that arose before the bail court. There was furthermore the possibility that he could take advantage of the fact that there was no effective cooperation from the Turkish authorities to extradite criminal suspects, and the state was currently having difficulty in obtaining cooperation from the Turkish authorities to secure the extradition of another person who was implicated in the same crimes with the applicant. It was not inconceivable that Mr Lifman would take advantage of such a situation if the opportunity presented itself. (See [29] – [35].)
Held, further, that the conditions suggested by the applicant were not practically feasible and failed to satisfy the objective that for an accused out on bail, the conditions had to be such that the police were able to supervise him sufficiently closely. If he were granted the opportunity to live in another country and travel extensively, the ability of the state to closely supervise him would be impeded. The applicant had failed to convince the court that the probabilities compelled a conclusion that the amendment of the bail conditions would be in the interests of justice. The application was accordingly dismissed. (See [36] – [37].)

JOHNSTONE v SHEBAB 2022 (1) SACR 250 (GJ)

Domestic violence — Protection order — Final order — Meaning of 'harm' in DVA — Domestic Violence Act 116 of 1998.
Domestic violence — Protection order — Consideration of — Factual disputes on papers — Courts to be cautious in deciding probabilities in circumstances where

affidavits settled by legal advisors with varying degrees of experience, skill and diligence.

The appellant appealed against a final protection order made against him in terms of the Domestic Violence Act 116 of 1998 (the DVA) in respect of the respondent, his former girlfriend. The evidence revealed obsessive behaviour on the part of the appellant, with him sending her over 700 WhatsApp messages over a single weekend. The respondent complained that, after she ended her relationship with the appellant in May 2017, he continued to incessantly message and phone her, despite her requests that he stop doing so. In September 2017 he told the respondent that he would ruin her life. A few days later a fake Instagram account was opened in her name, using photographs that originated from the appellant's phone. False adverts were placed on Gumtree for boilermakers and technical assistants with her name and telephone number, and in October 2017 the principal at a school, attended by a boy she was looking after, received an email from a 'mom' complaining that the respondent was hitting the boy. This message included the respondent's full name and particulars of the motor vehicle she drove. The respondent's parents were also suddenly investigated by the police for the possession of unlicensed firearms, and she suspected that the appellant was the one who had called the police. The court a quo only took into consideration the WhatsApp messages after the break-up, and issued a final protection order for the appellant not to stalk, harass or engage in controlling and/or abusive behaviour towards the respondent, and not to communicate with her directly or indirectly in any way whatsoever.
Held, that there was no definition for the word 'harm' in the DVA, but the Protection from Harassment Act 17 of 2011 defined it as 'any mental, psychological, physical or economic harm'. There was no reason why 'harm' in the DVA should mean anything different. It was a court's task to objectively view each case on its own merits and determine whether a specific conduct complained of induced any such mental, psychological or emotional harm to a complainant. (See [21].)
Held, further, that, despite the rule relating to the evaluation of factual disputes on application papers, a court always had to be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits were settled by legal advisors with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an advisor's shortcomings. Judgment on the credibility of the deponent, without direct and obvious contradictions, should be left open. It remained then to establish whether the averments in the answering affidavit were such that they were clearly untenable and could be rejected outright on the papers, or whether they gave rise to a genuine factual dispute relating to the subsequent events. (See [28].)
Held, further, that, if regard were had to the extracts of the WhatsApp messages, coupled with the events after September 2017, it was apparent that the appellant, over an extended period, committed numerous acts of domestic violence, including emotionally and psychologically abusing the respondent, as well as harassing her. If the text messages and facts were taken as a whole, and taking into consideration the great lengths the appellant would go to to control and abuse the respondent, the grant of a final protection order was warranted. The appeal was dismissed. (See [40].)

MOROE v DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE AND ANOTHER 2022 (1) SACR 264 (FB)

Sentence — Suspended sentence — Putting into operation of — Correct procedure to be followed.

The applicant appeared before a regional magistrate for the purpose of putting into operation a suspended sentence of eight years' imprisonment imposed for crimes of dishonesty. The sentence was suspended in October 2017 for five years on condition, inter alia, that the accused repay the complainant an amount of R167 000 before 2 July 2018. He did not comply with that condition and the suspended sentence was put into operation. In the present proceedings the applicant sought the review of the magistrate's decision to put the suspended sentence into operation. It appeared that an amount of R70 000 of the initial compensation ordered had been paid, and that as at 5 October 2020, when the sentence was put into operation, R97 000 was still outstanding, and that an amount of R40 000 was available to be paid on that day, leaving a balance of R57 000 which the applicant, with the assistance of his family, would repay in instalments of R3500 a month. The applicant's attorney requested a postponement for one day so that proof of payment of the R40 000 could be obtained, but the magistrate refused the postponement and put the sentence into operation. On review,
Held, that the magistrate had not followed a proper process before putting the sentence into operation and the correct process would have been for him to apply his discretion judicially in accordance with the law, considering the following factors: the first aim of the condition of suspension was to keep the convicted person out of prison; an application for putting into operation a suspended sentence was not a mere formality, but entailed a fully fledged exercise of judicial discretion, requiring as much consideration and judicial discretion as the imposition of sentence; in some respects the consideration of implementation required even more careful consideration; the circumstances of the precipitating non-compliance had to be considered; the condition had to be assessed in the light of events since its imposition; and the putting into operation of a suspended sentence did not follow automatically and remained a matter for careful judicial consideration. (See [16].)
Held, further, that the magistrate had not recorded the factors he considered before putting the suspended sentence into operation, and had not enquired what exactly the changed circumstances were. It was clear that the magistrate was irritated and impatient and his frustration could be understood due to the non-compliance with the court order, but that was no reason to act capriciously. The order had to be set aside and replaced with an order suspending the sentence for a further two years on condition that the outstanding balance be repaid in the suggested manner. (See [17].)

S v ALEHI 2022 (1) SACR 271 (GP)

Bail — Pending trial — Factors to be taken into account — Appellant's illegal status in country — Not sole determinant of whether in interests of justice for suspect to remain in custody.

Bail — Pending trial — Factors to be taken into account — Appellant having supplied false information on arrest — Indicative of likelihood, if released on bail, that would undermine objectives of proper functioning of criminal-justice system.

The appellant, a Nigerian foreign national without a valid permit or passport, appealed against the refusal by the magistrate to admit him to bail following his arrest on a charge of dealing in drugs in contravention of s 5 of the Drugs and Drug Trafficking Act 140 of 1992 (it being an offence falling under sch 1 to the Criminal Procedure Act 51 of 1977, the state bore the onus of proving that it was in the interests of justice for the accused to remain in custody). It was contended for the appellant that the statement by the court that 'the Appellant was illegal[ly] in the country and therefore it can never be in the interests of justice to release anybody who is illegal in the country', meant that the court had seemed to suggest that the rights under s 35 of the Constitution were not available to him. When the appellant was arrested, he gave information to the police that he was not married and had no dependants, but in his bail application the appellant led the evidence of a woman who said that she was his life partner and that they had an 11-month-old daughter.
Held, that the magistrate's statement concerning the appellant's status in the country had to be read together with the reasoning of the court as a whole and in consideration of all the other evidence that was led to determine the soundness of the court's conclusion and decision. The facts that pertained to a person's legal status would be a factor to be considered, but would not be singled out as the sole determinant of whether or not it was in the interests of justice for a suspect to remain in custody. (See [16].)
Held, further, the fact that the appellant had supplied false information at the time of his arrest or during the bail proceedings indicated that there was a likelihood that, if he was released on bail, he would undermine or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system. The appellant had furthermore failed to prove that the decision of the court, to refuse him bail on the reasons given, was wrong, and the state had proved that it would be in the interests of justice for him to remain in custody. (See [23] – [24].) The appeal was accordingly dismissed.

S v ALI AND ANOTHER 2022 (1) SACR 281 (WCC)

Bail — Pending trial — When to be granted — Undocumented foreign nationals — Magistrate not having information necessary to determine whether refugees — Appeal from refusal of bail upheld, but no order made, and state ordered to assist appellants to present themselves before refugee reception officer.

The two appellants, undocumented foreign nationals, were charged with the unlawful possession of a firearm and ammunition. When they came before the magistrates' court for a bail application, it was alleged on their behalf that they had made several attempts to apply for refugee status, but the queues were always too long, and they never succeeded. The magistrate refused them bail, chiefly on the ground that they were undocumented foreign nationals.
Held, that it would have been advisable if the magistrate had stood the matter down to allow the defence to adequately address the status of the appellants. It remained unknown what the address of the prosecutor would have been, as the magistrate simply denied the prosecutor an opportunity of addressing the court. (See [13].)

Held, further, that, on a proper consideration of the case, the magistrate did not have reliable and important information necessary to reach a decision on the question whether the appellants were refugees in terms of the laws of South Africa. Furthermore, against the background of the Covid-19 pandemic and the resultant regulations issued by the government to limit movements and access to government buildings, including the Department of Home Affairs which administered the Refugees Act 130 of 1998, it was incumbent upon the magistrate to ensure that the appellants had access to the services of a refugee reception officer designated by the Director-General in the Department of Home Affairs (as well as related services in terms of the Act) for a proper determination. The magistrate was wrong to refuse bail, without more. (See [14].) The appeal was accordingly upheld. No order was made on the bail application, but the state was ordered to assist the appellants to present themselves before a refugee reception officer within five working days.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v SHARMA AND OTHERS 2022 (1) SACR 289 (FB)

Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Company in business rescue — Locus standi of directors of company in business rescue — Such directors have no locus standi to oppose restraint order without authorisation of business rescue practitioners.

The applicant raised a point in limine in proceedings in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 in respect of a restraint order over the property of the third defendant, Islandsite Investments 180 (Pty) Ltd (Islandsite), which was in business rescue. The applicant contended that the directors of Islandsite did not have locus standi to oppose the provisional order made in terms of the provision. The appointment of the business rescue practitioners was set aside by the Gauteng High Court, but that decision was overturned on appeal by the Supreme Court of Appeal. An application for leave to appeal to the Constitutional Court, as well as an application for condonation for the late filing of that application was pending at the time of the present hearing. It was contended for Islandsite that, under business rescue, the company's directors remained directors and operated under the authority of the business rescue practitioners, but only insofar as the business rescue practitioners had authority to represent the company. They did not have the authority to represent the company when the company needed to be represented outside of the running of the business of the company or of the rescue in terms of a business rescue plan.
Held, that the application for leave to appeal against the order of the Supreme Court of Appeal, filed with an application for condonation, did not suspend the order of the Supreme Court of Appeal, which meant that the business rescue practitioners were still in charge of the company's affairs, business and property, pending the outcome of the application for condonation. (See [25].)
Held, further, it was correct that the directors remained directors, but, importantly, they operated under the authority of the business rescue practitioners. If Islandsite's proposition was correct it would mean that the directors could perform certain governance functions without the authorisation or consent of the business rescue practitioners, which would undermine the whole business-rescue scheme and give rise to an undesirable parallel management of the company. This could not be correct. (See [29].)

Held, further, that s 133(1)*(d)* made it plain that criminal proceedings against a company or its officers could be commenced or proceeded with during business rescue proceedings, but that no such proceedings could take place, except with the written consent of the business rescue practitioner. There was no reason in law or logic why the converse should also not hold true: the company could not commence, defend or proceed with legal proceedings without the consent of the business rescue practitioner. Therefore, Islandsite had no right to authorise its attorneys to oppose proceedings on its behalf without the authority of the business rescue practitioners, and such decision was void for lack of approval by the business rescue practitioners. (See [31] – [32].)

S v KORVER 2022 (1) SACR 298 (WCC)

Bail — Conditions — Amendment of — Application for amendment to allow appellant to travel to Netherlands to see daughter and aged parents recovering from medical procedures — Parents' increasing age identifiable factor when bail conditions originally set — Appellant remaining flight risk — No altered circumstances justifying reconsideration of conditions.

In an appeal against the refusal by a magistrate, in a specialised commercial crimes court, of an application to amend his conditions of bail to allow him to travel to the Netherlands to visit his elderly parents and one of his daughters who was celebrating her coming of age, the court noted that appellant was regarded as a flight risk and, in addition to having handed in his passport, was prohibited from entering any port of entry in the country. The appellant's counsel sought to identify aspects that he contended evidenced altered circumstances, such as the time the matter had taken to come to trial and the increasing age of the appellant's parents, and that his father had undergone cardiac surgery and that his mother had had a mastectomy.
Held, that the matter had indeed been much delayed, but most of the delays had been attributable to the appellant, and he could not lay much stock by the delay: if it were not for his own actions, his trial would already have been under way. (See [23].)
Held, that the increasing age of his parents was an identifiable factor when the bail conditions were originally set, and the appellant had given no detail as to when the medical procedures had been carried out or as to how, once his parents had recovered from surgery, their condition prevented them from travelling to visit him. The magistrate's approach to this aspect of the matter could not be faulted. (See [24].)
Held, further, that the Covid-19 pandemic did not bear on the central issue, which was whether circumstances had changed such as to indicate that the appellant should no longer reasonably be considered to be a flight risk. If anything, the Covid-19-related travel restrictions, summarily imposed and lifted by governments around the world during the ever changing course of the pandemic, showed that, if the appellant left the country, his ability to return, on the date he was required for the purposes of court appearance, could easily be compromised, even if he wished to come back. (See [25].)

S v VAN DER BANK 2022 (1) SACR 307 (WCC)

Traffic offences — Driving with excessive concentration of alcohol in blood — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Proof of — Two-hour period — Calculation of.

In an appeal against a conviction for contravening s 65(2)*(a)* of the National Road Traffic Act 93 of 1996 (the Act), the court noted that the section and s 65(3) had to be interpreted purposively to promote the spirit, purport and objects of the Bill of Rights. (See [12].) The Act did not specify as to when the two hours contemplated in s 65(2) started running. The main punishable offence in s 65(2)*(a)* was the driving of a vehicle while the alcohol content in one's blood, that was drawn within two hours of driving, exceeded 0,05 grams per 100 millilitres. The facts of the appeal clearly indicated that there was a general misconception or misunderstanding that the two-hour period was calculated from the time of arrest. However, the two-hour period commenced immediately when the engine of the vehicle stopped running. The time of arrest could be delayed by various aspects and, if the prescribed two-hour period were to be calculated from the time of arrest, the test results would be compromised due to the process not meeting the prescript of 'within two hours' after the alleged contravention. (See [12] – [14].) In the circumstances of the present case, where the appellant's blood sample was drawn long after the two-hour period envisaged in the Act had expired, the conviction and sentence had to be set aside. (See [24].)

S v SM 2022 (1) SACR 313 (WCC)

Mental health — Assisted-care, treatment and rehabilitation services — Application for — Naval officer involved in criminal case resorting to filing numerous vexatious applications against persons in authority — Conduct giving rise to suspicions of mental illness — Court ordering Minister of Defence to trace relatives to provide them with opportunity to consider filing application as envisaged in s 27(1)*(a)* of Mental Health Care Act 17 of 2002.

As a result of a flurry of papers filed at court by the plaintiff, in which he sought orders against a multitude of people, apparently arising out of five offences allegedly committed by the plaintiff, and his ignoring of orders against him that interdicted him from instituting legal proceedings against any person in any court without leave of that court, the court noted that the rate at which he was filing documents at court, almost every day, was causing a great inconvenience to the administration of justice, and that he became so agitated that the intervention of the security personnel either to calm him down or to remove him from an office was often required.
In the view of the court there was a need to ascertain whether the plaintiff could appreciate the nature of the orders granted against him, and, consequently, the nature of the proceedings before the court, and what he in law could competently place before the court at the present point of his intended litigation. His general conduct both inside the courtroom, and within the courthouse and outside, warranted some observation and investigation of his psychological, if not psychiatric, position. The court had doubts about the state of his intellectual functions and the integrity of his memory, and this might explain his warped papers. As the plaintiff was an officer in the Defence Force, the Minister of Defence would be in a better position to help

trace his relatives so as to provide them with an opportunity to consider filing an application as envisaged in s 27(1)*(a)* of the Mental Health Care Act 17 of 2002. The court accordingly ordered the Minister of Defence to file a report in this regard. If no relative was willing, capable or available to make an application, the plaintiff was required to present himself before the district surgeon on or before 9 March 2022 for consideration of s 27(1)*(a)*(ii) of the Mental Health Care Act. (See [12] – [13].)

Legislation cited

The Mental Health Care Act 17 of 2002, s 27(1)*(a)*: see *Juta's Statutes of South Africa 2020/21* vol 5 at 2-233.

An application under s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956 for leave to institute proceedings against the defendants.

Order

1. The Minister of Defence is to trace the relatives of the plaintiff and provide all the necessary assistance for them, if they so elect, to file an application as envisaged in s 27(1)*(a)*(i) of the Mental Health Care Act 17 of 2002 before the end of the month of February 2022.
2. The Minister of Defence is to file a report in respect of para 1 to be tabled at the date to which this matter is postponed.
3. Should the spouse, next of kin, partner, associate, parent or guardian of the plaintiff all be unwilling, incapable or not available to make such an application, the plaintiff shall present himself before the District Surgeon, Cape Town, on or before 9 March 2022 for consideration of s 27(1)*(a)*(ii) of the Mental Health Care Act 17 of 2002.
4. The matter is postponed to 15 March 2022.

VAN DER WALT AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER 2022 (1) SACR 320 (ECG)

Prosecution — Permanent stay of prosecution — Application for — Jurisdiction — Regional magistrates' court — Magistrates' courts not having jurisdiction to hear such application.

The applicants applied for the review and setting-aside of the decision of a regional commercial crimes court which had dismissed their application for a permanent stay of the prosecution against them. The court first examined the question of the jurisdiction of the regional magistrates' court to hear an application for such, and held that, if it were accepted that the whole purpose of an enquiry in terms of s 342A of the Criminal Procedure Act 51 of 1977 (the CPA) was to 'eliminate' a delay in criminal proceedings before a court (see s 342A(3) in [6]), it could not be correct that a permanent stay of prosecution eliminated a delay on any possible interpretation of the word 'eliminate'. Such an order was in effect a prohibitory interdict which, if granted, meant that the National Director of Public Prosecutions could never prosecute that person in any court. Such a relief was so far-reaching in its width that it could not be incidental to any other power which a lower court might exercise. If it had been the intention of the legislature that the power to grant an order for a permanent stay of prosecution be exercised by any court before which criminal proceedings are pending, including a lower court, the legislature would have made such a provision in s 342A of the CPA. Therefore, in the absence of a specific provision in s 342A or any other provision of the CPA, the magistrates' courts lacked jurisdiction to entertain an application for a permanent stay of prosecution. The

proceedings in the commercial crimes court accordingly had to be set aside. (See [9] – [10].)

S v ELGIN 2022 (1) SACR 325 (WCC)

Admission of guilt — Setting aside — Accused arrested and detained for minor offence and told would be released if paid fine — Magistrate not apprised of all relevant facts when certifying that admission of guilt in accordance with justice — Conviction and sentence set aside — Criminal Procedure Act 51 of 1977, s 57.

The accused was arrested on a charge of shoplifting and was taken to the police station where she was told that she would be released if she paid an admission-of-guilt fine of R300. She paid the fine and was duly released. In a subsequent affidavit, the accused alleged that she believed that the South African Police Service had not followed the correct procedure and that the proceedings were not in accordance with justice, in that she had entered the store 'in a daze' whilst she was emotionally fragile, and had not understood the steps in the process before she paid the fine. The option the police gave her was to pay a fine or remain in custody for up to 48 hours. The admission of guilt had been confirmed by a magistrate, but in the light of the new affidavit the magistrate sent the matter on review in terms of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977.
Held, that the import of the consequences of the accused paying the admission-of-guilt fine had not been explained to her, and this deficiency resulted in a failure of justice. The magistrate was not apprised of the facts set out in the accused's affidavit at the time that the conviction and sentence were certified to be in accordance with justice. An alleged erroneous admission of guilt and/or a probable or an arguable defence, had been sufficiently demonstrated in the affidavit. The accused had not been issued with a summons or written notice, but had been arrested and detained, contrary to the provisions of s 57 of the Act, for a minor offence. Justice ought not be buried in the cemetery of statistics on convictions, for the state to look good on paper, in the battle against crime. (See [20] – [22].) The conviction and sentence were set aside, and the amount paid refunded to the accused who could be prosecuted in the ordinary course.

PETERSEN v MINISTER OF POLICE AND ANOTHER 2022 (1) SACR 333 (WCC)

Search and seizure — Seizure — Seizure in terms of s 31 of Criminal Procedure Act 51 of 1977 — Money held for long period by police — Asset Forfeiture Unit ought to have applied ex parte for preservation order expeditiously.

The applicant applied for the release of an amount of R480 000 that had been seized by the Metro Police in 2019 at the home of a friend of his. The home had been the target of a raid by the police in search of firearms and drugs. Instead, they had found the cash. The owner informed the police that the applicant had asked her to keep it there as he intended to use it to buy a surprise birthday present for his wife. The money was kept in a small box in a safe and some of it was in a shoebox. The police subsequently searched the applicant's home, some 13 kilometres away, and found traces of drugs, plastic bags and a machine for sealing small packets. The money was seized in terms of s 31 of the Criminal Procedure Act 51 of 1977, but no

prosecution was ever instituted. The National Director of Public Prosecutions (the NDPP) sought to intervene in the present proceedings to apply for a preservation-of-property order under s 38 of the Prevention of Organised Crime Act 121 of 1998, contending that the Asset Forfeiture Unit was investigating the case on the basis that the money was the proceeds of drug- dealing and money-laundering.
Held, the applicant's explanation for the money, namely that it arose from buying and selling motor vehicles, did not add up, as he had only sold two vehicles over a long period, and it was suspicious that he kept his money at another
person's house, rather than banking it. The court was satisfied that a preservation order should be granted, and the accused's application had to fail. (See [14] – [15] and [17].)
The court remarked that, in truth, what had happened was that the police had held the money almost as an agent for the NDPP, awaiting the preservation application. That may well be lawful if that action continued for a short while, but the police did not have the authority to hold someone's property indefinitely, knowing that there would be no criminal proceedings, whilst they waited for the Asset Forfeiture Unit to gear itself up to bring a forfeiture application. These matters had to be done much more expeditiously. There were redeeming features in the present matter, in that the preservation application was launched three months after the raid, but had taken so long to reach the court because it had not been done on an ex parte basis. The Asset Forfeiture Unit should have been before the court within months of the raid, asking for a preservation order, on an ex parte basis if need be. (See [17] – [18].)

ALL SA LAW REPORTS MARCH 2022

African Transformation Movement v Speaker of the National Assembly and others [2022] 1 All SA 615 (SCA)

Constitutional and Administrative law – Motion of no confidence in President – Request for vote by secret ballot – Refusal of request by Speaker of the National Assembly – Imposition of an onus on a party requesting that a vote of no confidence be held by secret ballot constituting a fundamentally flawed approach to the exercise of the discretion of the Speaker – Speaker's decision vitiated by irrationality.

The African Transformation Movement ("ATM") approached the High Court to set aside the refusal by the Speaker of the National Assembly to decide a motion of no confidence in the President of the country by secret ballot. The dismissal of the application led to ATM appealing.

It was common cause between the parties that this was a rationality review. It was also common ground that the Speaker has the power to direct that a vote in the National Assembly be held by secret ballot.

Held – The Speaker correctly accepted the finding of the High Court that there is no onus on a requesting party such as the ATM to make out a case for a vote by secret ballot.

ATM contended that where the procedure or approach decided on to determine the facts on which a decision is to be based is incorrect, that gives rise to irrationality. The Court confirmed the correctness of that contention. The rational connection must be that the chosen procedure will provide the correct facts and circumstances on which to found the decision in question. To found a rationality review, the incorrect procedure used must be material to the decision arrived at. If the correct legal basis on which to

arrive at a decision is misconstrued, the decision cannot be rationally connected to the purpose for which the power to decide is granted. Such a decision is vitiated by irrationality.

Applying the basic principles governing a rationality review involving procedure to the decision of the Speaker in the present matter, the Court held that when a motion of no confidence in the President is to be decided, the Speaker must decide how it is to be conducted.

In evaluating the approach taken by the Speaker in exercising her discretion, the court examined the reasons given by the Speaker for her decision. It was evident that the Speaker held the view that the ATM bore an onus to show the need for a secret ballot by producing evidence or reasons for that procedure to be adopted. The imposition of an onus on a party requesting that a vote of no confidence be held by secret ballot was a fundamentally flawed approach to the exercise of the discretion of the Speaker. What the Speaker should have asked was what the best procedure would be to ensure that Members of the National Assembly exercise their oversight powers most effectively as regards the particular vote of no confidence, given a conspectus of the reasonable and legitimate circumstances obtaining at that time which could assist in arriving at that decision.

Finding that the decision of Speaker was vitiated by irrationality, the Court upheld the appeal.

Arcus v Arcus [2022] 1 All SA 626 (SCA)

Civil Procedure – Prescription period applicable to maintenance orders – Whether an undertaking to pay maintenance in a consent paper, made an order of court, gave rise to a judgment debt as contemplated in section 11(a)(ii) of the Prescription Act 68 of 1969, with a prescriptive period of 30 years, or any other debt, as contemplated in section 11(d), with a prescriptive period of three years – Court confirming that maintenance orders possess the essential nature and characteristics of civil judgments, and are final judgments for the purposes of the Prescription Act, with a 30-year prescription period.

Upon their divorce in 1993, the appellant and respondent entered into a consent paper which provided that the appellant would pay maintenance for the respondent until her death or remarriage, and for their minor daughters until they became self-supporting. The consent paper was made an order of court. The appellant did not comply with his obligations, but the respondent did not take any steps to recover the arrear maintenance until December 2018, when she instructed her attorneys to send a letter of demand to the appellant. The appellant then commenced paying the monthly maintenance due to the respondent from January 2019, but failed to pay the arrear maintenance. The respondent instituted action to recover the arrear amounts due to her.

In the High Court, the appellant sought a declaration that all maintenance obligations under the consent paper which accrued before 1 March 2017 (being the due date for payment of maintenance three years prior to the date of service of the writ obtained by the respondent) had been extinguished by prescription. The Court held that the maintenance obligations in the consent paper arose from a "judgment debt" as

contemplated in section 11(a)(ii) of the Prescription Act 68 of 1969 and were consequently subject to a 30-year prescription period.

The question raised on appeal was whether the undertaking to pay maintenance in the consent paper, made an order of court, gave rise to a judgment debt as contemplated in section 11(a)(ii), with a prescriptive period of 30 years, or any other debt, as contemplated in section 11(d), with a prescriptive period of three years.

While accepting that a maintenance order has characteristics of a civil judgment, in that it is executable without further proof and appealable, the appellant contended that a judgment debt for purposes of section 11(a)(ii), is one which is final in the sense of it being appealable, capable of execution and unalterable by the court which granted it.

Held – That resolution of the appeal involved determination of whether maintenance orders possess the essential nature and characteristics of civil judgments. The court examined the attributes of a judgment or order of court, and of maintenance orders in particular. Maintenance orders are final judgments in that they are dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decide a just amount of maintenance payable based on the facts in existence at that time; final and enforceable until varied or cancelled; capable of execution without any further proof; and (d) appealable. The Court rejected the appellant's contention that a maintenance order cannot constitute a final judgment for the purposes of the Prescription Act, since it can be varied by the court which granted it, for sufficient reason or good cause. A maintenance order fixes the parties' obligations, and variation can only occur if new circumstances arise.

The appellant's contention that various policy considerations militated against a finding that maintenance orders are subject to a 30-year prescription period also failed to sway the court, which found no room for interpretation of section 11(a)(ii) to give effect to such considerations.

The appeal was dismissed in the majority judgment.

A seperate judgment agreed that the appeal should be dismissed, but adopted a different approach – focusing on the hardships on women and children which would be perpetuated should the appellant's interpretation be accepted.

Eskom Holdings Soc Limited v Lekwa Ratepayers Association NPC and others and a related matter [2022] 1 All SA 642 (SCA)

Civil Procedure – Interim interdict – Appealability – Although an appeal against an interim interdict is generally not permissible, in exceptional circumstances the interests of justice dictate that an interim interdict be appealable.

Constitutional and Administrative Law – Disputes between Organs of State – Intergovernmental Relations Framework Act 31 of 2005 requires Organs of State to make reasonable efforts in good faith to settle intergovernmental disputes – Failure to exhaust all efforts to resolve disputes before taking action constituting non-compliance with Intergovernmental Relations Framework Act.

Eskom's reduction of its bulk electricity supply to several towns due to non-payment by the relevant municipalities, led to residents, through their associations, seeking interim interdicts against Eskom to restore electricity supply. The High Court granted the interim interdicts pending finalisation of review applications, and Eskom appealed.

Held – The present matter was one of the exceptional cases where the interests of justice demanded that the interim interdicts granted by the High Court should be appealable. Electricity being one of the most common and important basic municipal services and the right of citizens to receive basic services such as electricity was an issue of special public importance.

Eskom, an Organ of State, is the only entity licensed to supply electricity to municipalities in the country. Municipalities, for their part, are licensed by the third respondent ("NERSA") to reticulate electricity supplied to them in bulk by Eskom. They, in turn, supply and on-sell the electricity to the end-users within their areas of jurisdiction.

After explaining the contractual relationship between Eskom and the municipalities, the Court clarified that the residents involved in this litigation were all paying consumers for pre-paid electricity. However, the two municipalities had failed to honour their payment obligations towards Eskom for years. The reduction of the bulk electricity supply by Eskom had serious socio-economic and humanitarian consequences that adversely impacted the health and well-being of individuals within the municipalities' jurisdictions, which led to the High Court finding that the residents had established a *prima facie* right to the interim interdictory relief sought. Thus, the essential question for determination on appeal was whether the High Court was correct in its finding regarding a *prima facie* right having been established. The other requirements for an interim interdict had been met. For the granting of an interim interdict, an applicant must establish a prima facie right, even if open to some doubt.

The court referred to the case of *Eskom Holdings Soc Limited v Resilient Properties* (*Pty*) *Ltd and others* [2021] 1 All SA 668 (SCA) in which it had held that before Eskom decides to invoke its powers under section 21(5) of the Electricity Regulation Act 4 of 2006 to interrupt the supply of electricity to a municipality, it must be mindful of its constitutional obligations as an Organ of State. Its status brought it within the purview of the Intergovernmental Relations Framework Act 31 of 2005 which requires Organs of State to make reasonable efforts in good faith to settle intergovernmental disputes. Eskom, as an Organ of State, could not act in a manner that rendered another organ of State unable to discharge its constitutional and statutory obligations, and its impugned decisions were held in the *Resilience* case to be irrational. The court in this case held those principles to be of equal application in this matter. Eskom's failure to exhaust all efforts to resolve the disputes with the municipalities fell foul of the Intergovernmental Relations Framework Act. The residents, therefore, established a *prima facie* right for interim relief. All the requirements for granting interim interdictory relief having been established, the High Court's granting the interim interdicts was unassailable and the appeal was dismissed.

LD v Central Authority (Republic of South Africa) and another [2022] 1 All SA 658 (SCA)

Family Law and Persons – International child abduction – Unlawful removal child by mother – Order for return of child – Defence in terms of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 – Article 13(b) providing for refusal of return of child if there is a grave risk that such return would expose child to physical or psychological hardship or otherwise place child in an intolerable situation.

The appellant and second respondent were unmarried parents of a young child, and had been granted joint parental authority of the child by the Juvenile and Guardianship Court of Luxembourg. At all relevant times, the child's primary residence was with the second respondent (the "mother") while the appellant (the "father") had rights of visitation and accommodation. In 2018, the mother married a South African and applied for leave to relocate the child to South Africa with her, as she had been offered employment there. The father filed a conditional counter-application for the child's habitual residence to vest with him if the mother wished to relocate without the child. The mother's application was unsuccessful, but in October 2018, she removed the child from Luxembourg and moved to South Africa.

With the assistance of the Central Authority (Republic of South Africa), the appellant brought an application in the High Court to have his child returned to Luxembourg. That court ordered the return of the child to Luxembourg subject to various conditions. The mother successfully appealed to the Full Court and the father obtained leave to appeal to the present Court.

Held – It was not disputed that the removal of the child from Luxembourg was unlawful and triggered the operation of article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, which empowers the judicial or administrative authority of the contracting state to which a child has been unlawfully moved, to order the return of the child if a period of less than one year has elapsed from the date of the wrongful removal or retention. In the absence of a valid defence under the Hague Convention, the High Court was obliged to order the return of the child. The only substantive issue raised by the mother was under article 13(b) of the Convention, which provides for refusal of the return of the child if there is a grave risk that such return would expose the child to physical or psychological hardship or otherwise place the child in an intolerable situation.

A full onus rests on the person resisting return to establish the defence relied upon, as the Hague Convention's default position is the return of abducted children to their habitual residences. A certain degree of harm is inherent in the court ordered return of a child to their habitual residence, but that is not harm or intolerability envisaged by article 13(b), and instead extends beyond the inherent harm referred to above and is required to be both substantial and severe.

Applying the above principles to the facts in this case, the court concluded that the return of the child would break up her family in South Africa, leading to severe adverse effects on her. The appeal was therefore dismissed by the majority of the court.

In a dissenting judgment, the child's return to Luxembourg was endorsed. It was held that all that the Full Court should have done, was to correct the protective measures

which the court of first instance did not put in place to ameliorate any harm or grave risk to the child.

Allem Incorporated v Baard; *In re*: Baard v Allem Incorporated [2022] 1 All SA 680 (GJ)

Civil Procedure – Security of costs – Uniform Rules of Court, rule 49(13) envisaging that security for costs must be given by an appellant unless the counterparty has waived the right to security; or the court granting leave to appeal has released the appellant from the obligation – Application for security to be furnished refused where court lacked jurisdiction and case for security not established.

The applicant sought an order to compel the respondent to furnish security for costs as contemplated in Uniform Rule 49(13) within 5 days, failing which the applicant be authorised to apply for the respondent's appeal to be struck or dismissed with costs. The applicant relied on the purported obligation expressed in rule 49(13) that an appellant furnish security for costs, and elected to give effect to its asserted right by invoking the procedure in rule 30A to compel compliance with rule 49(13).

Held – Rule 30A(2) confers a discretion on the court, which discretion must be exercised judicially and upon a proper consideration of all the relevant circumstances, which may include the reasons for non-compliance; whether the defaulting party's case appears to be hopeless; that the defaulting party does not seriously intend to proceed; and prejudice to either party. The list is not exhaustive, but it is indicative of the matters properly to be taken into account in the judicial exercise of discretion.

Rule 49(13)(a) appears to be peremptory in its terms, envisaging that security for costs must be given by an appellant unless one of two circumstances prevails, namely, either that the counterparty has waived his or her right to security; or the court granting leave to appeal has released the appellant from the obligation.

The Court considered the respondent's contention that rule 49(13) was constitutionally invalid for infringing upon the right of access to court in a manner that is not justifiable in an open and democratic society, and for want of compliance with the doctrine of legality. It could not be found that rule 49(13) infringed upon the right to access to court. However, the Rule did fall short of the doctrine of legality in that it was inconsistent with section 17(5) of the Superior Courts Act 10 of 2013 and *ultra vires* the powers of the Rules Board under section 6(1) of the Rules Board for Courts of Law Act 107 of 1985. Nevertheless, the court pointed out that conclusion of constitutional non-compliance ought not to be resorted to if the determination in the case could be made without recourse to the constitutional question.

It was held that the application for security fell to be dismissed as the court did not enjoy the jurisdiction to entertain a rule 30A(2) application to compel security where the Supreme Court of Appeal had granted leave to appeal without making provision for security, because in such an application this court would have to engage upon the question of whether an appellant ought to be released from an obligation to furnish security – in respect of which it lacked jurisdiction. Even if the court did enjoy jurisdiction, a judicial consideration of the relevant factors did not lead to the conclusion that security ought to be compelled in the circumstances of the case.

Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa [2022] 1 All SA 706 (GP)

Constitutional and Administrative Law – Constitutional validity of Executives Ethics Code – Whether, on a proper interpretation of the Code, any Member of the Executive is required to make disclosure of funding received in support of any campaign to hold office within the political party of which a member – Loopholes in Code, which could enable Members of the Executive to avoid disclosing information about donations received rendering it unconstitutional, unlawful and invalid.

The applicant ("amaBhungane") was granted leave to intervene in a review application by the President of the Republic of South Africa and to institute a conditional counter-application concerning the constitutional validity of the Executives Ethics Code. The President's review application was directed at a report by the Public Protector in which she found that the President had breached his duties under the Code by failing to disclose donations that had been made to an internal party-political campaign that had supported his election as President of the African National Congress.

AmaBhungane's case was that the disclosure requirements of the Code breached the constitutional principles of accountability, openness and transparency and that, in doing so, the Code breached the identified fundamental rights guaranteed by the Constitution.

Held – The question raised was whether, on a proper interpretation of the Code, any Member of the Executive is required to make disclosure of funding received in support of any campaign to hold office within the political party of which she or he is a member.

The Executive Members' Ethics Act 82 of 1998 is aimed at providing for a code of ethics to govern the conduct of members of Cabinet, Deputy Ministers and Members of Executive Councils.

Financial donations to a campaign in support of a Member's election to a position in his or her own party are not *per se* disclosable under the Code. However, they are not *per se* exempt from disclosure. If, on a consideration of relevant factors, the donations can be categorised as a personal benefit, there is a duty on a Member to make disclosure of them under the Code.

The Court turned to consider whether the Code passed constitutional muster. It was accepted that disclosure by government office bearers, including Members of the Executive, of funding in support of their private (ie intra-party) political campaigns is constitutionally required to protect fundamental rights. The State is bound to adopt measures to respect, protect, promote and fulfil those rights. The question was whether the disclosure requirements in the Code were a reasonable and effective means of ensuring the protection of the constitutional rights implicated. The Court identified loopholes in the Code, which could enable Members of the Executive to avoid disclosing information about donations received in support of their internal party-political election campaigns. The Code was therefore declared unconstitutional, unlawful and invalid insofar as it did not require the disclosure by Members who were subject to the Code, of donations made to campaigns for their election to positions within political parties.

Hlophe v Freedom Under Law and related matters [2022] 1 All SA 721 (GJ)

Civil Procedure – Joinder – Test – Requirement that a direct and substantial interest in the subject matter of the case be established.

Civil Procedure – Pleadings – Uniform Rules of Court, Rule 18(5) – Rule 18(5) regulates information that must be contained in a pleading and format of the pleading, and makes the responsibility that of the pleader rather than a deponent to an affidavit – The word "pleading" in rule 18 does not include an affidavit.

A finding of the Judicial Service Commission ("JSC") of gross misconduct by Hlophe J was the subject of a review application. The allegation leading to the Commission's finding was that Hlophe JP had tried to suborn two Justices of the Constitutional Court to pervert their judgment to favour former president, Jacob Zuma.

In the first of two interlocutory applications in that matter, Freedom Under Law ("FUL") sought to be joined as a party, and in the second Hlophe JP, in terms of rule 30, sought an order setting aside FUL's replying affidavit due to alleged non-compliance with rule 18(5).

Held – Uniform Rules of Court prescribe the manner of presentation of documents in court proceedings. Non-compliance with the prescripts are the subject matter of rule 30 which deals with irregular proceedings and what an aggrieved party may do about the irregularities allegedly perpetuated by an adversary. The rule 30 application in this case was based solely on the failure of the replying affidavit to comply with the prescripts of rule 18(5) ie, the injunction that there shall be a "clear and concise statement of the material facts relied on" for a claim, answer or defence and that this be made with "sufficient particularity to enable the opposite party to reply". The rule regulates the information that must be contained in a pleading and the format of the pleading, and makes the responsibility that of the *pleader*, ie Counsel or attorney rather than a deponent to an affidavit.

The rule 30 application in this case hinged on whether rule 18 applies to affidavits. The Court found no authority for the proposition that an affidavit equates to a pleading. The conclusion that the word "pleading" in rule 18 does not include an affidavit led to the application to set aside the replying affidavit being dismissed.

The test for joinder involves establishing a direct and substantial interest in the subject matter of the case. As a public interest organisation whose objectives included upholding of constitutional norms through participation in litigation of constitutional significance, FUL established proper grounds to be joined.

LM v RK [2022] 1 All SA 738 (WCC)

Family Law and Persons – Unmarried cohabiting partners – Division of assets on termination of relationship – Claim for half of assets and nett profits based on existence of universal partnership – Implied universal partnership requires party relying thereon to prove through evidence that mutual agreement can be inferred from parties' conduct or circumstances.

The parties in this matter were in a long-term, cohabiting relationship but never married. Upon termination of the relationship, the plaintiff sought to prove the existence of a universal partnership to claim entitlement to an equal share in the division of assets as at the date of the dissolution of the relationship.

Held – Formal marriage leads to certain legalities such as financial advantages, protection and entitlements. There is currently no statute in South Africa that regulates the relationships between cohabitees. However, South African jurisprudence, through court decisions, has moved towards recognising, and treating universal partnerships the same manner as traditional marriages. Consequently, a universal partnership may confer the same legal rights and responsibilities conferred in a traditional marriage. A universal partnership thus exists and runs in parallel to the institution of formal marriage, affording some form of legal protection to partners who would otherwise be left vulnerable.

In the case of implied universal partnership, the party that relies on it should prove through evidence that mutual agreement can be inferred from the parties' conduct or circumstances.

Having regard to the evidence adduced, the Court found ample evidence demonstrating that the parties handled their finances in many ways as a partnership for their joint benefit. Even on the defendant's version, they ran a joint household. Finances were not kept separate but were merged into a single pool. The Court was satisfied that it was the parties' mutual understanding that they were in a partnership agreement and that their finances and financial responsibilities were intrinsically and intimately interconnected for purposes of their own household financial security. The defendant was in control of the combined income and plaintiff thus became financially dependent on him. The court rejected the defendant's attempts to minimise the plaintiff's contribution in the relationship. It was found that the plaintiff spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home, raising their children and running a swimming school. The plaintiff was found to have presented more than conclusive proof that a tacit universal partnership existed between herself and the defendant from 1996 to September 2013 and that she was entitled to the 50% share of assets.

A declaratory order to the above effect was issued and a liquidator was to be appointed with authority to realise the whole of the partnership assets; to liquidate the assets of the partnership; to prepare a final account and to pay the parties each a half of the nett profits made by the partnership.

Organisation Undoing Tax Abuse v Minister of Transport and others
[2022] 1 All SA 756 (GP)

Constitutional and Administrative Law – Legislative authority of national, provincial and local spheres of government – Challenge to legislative competence of national government to enact Administrative Adjudication of Road Traffic Offences Act 46 of 1998 and Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 – Whether Parliament may legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level, and whether Acts violated exclusive provincial legislative competence conferred upon provincial and local government in terms of section 44(1)(a)(ii) of the Constitution – Acts found to

unlawfully intrude upon exclusive executive and legislative competence of local and provincial governments, and as such declared unconstitutional.

In a constitutional challenge, the applicant ("OUTA") questioned the legislative competence of national government to enact the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019. The court had to decide whether Parliament may legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level, and whether the Acts were in violation of the exclusive provincial legislative competence conferred upon provincial and local government in terms of section 44(1)(a)(ii) of the Constitution.

Held – In essence OUTA submitted that the two Acts were unconstitutional in that they trespassed on the narrow constitutional areas over which the national government has no legislative or executive power.

The two Acts create a system whereby traffic laws are, by default, enforced through a national system of administrative tribunals, administrative fines and demerit points. All road traffic infringements are handled by the Road Traffic Infringement Authority and the Appeals Tribunal. The proposed new dispensation moved the enforcement of all road and traffic laws to national level. Governmental power is distributed between national, provincial and local spheres of government. The various legislative and executive competencies of each of the three spheres of government are identified and listed in Schedule 4 and Schedule 5, Parts A and B of the Constitution. Section 41(1)(g) of the Constitution stipulates that each sphere of government must exercise its powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

Section 104(1)(b)(ii) of the Constitution (which provides for the legislative authority of provinces) confirms that the provincial sphere of government has exclusive legislative competence in respect of those functional areas listed in Part A of Schedule 5 of the Constitution. The national government has no legislative power in respect of these areas, save that national government may in respect of the exclusive legislative competencies provided for in Schedule 5, in exceptional circumstances of compelling national interest as provided for in section 44(2) of the Constitution, encroach upon the exclusive competencies listed in Schedule 5. Thus, executive power conferred exclusively on municipalities and provincial government may not be encroached upon by national legislation.

Where the Constitution confers functional areas regarding the same issue to different spheres of government, the functional areas should be interpreted based on what is appropriate in the different spheres. In determining the allocation of power to the different spheres, regard should also be had to the historical allocation of power. The power to enforce traffic laws on municipal roads has historically been conferred on municipalities. The court agreed that what is given to local government, cannot be taken away by the higher levels in the hierarchy, namely provincial and national government.

Rejecting the respondents' submissions to the contrary, the court concluded that the impugned Acts unlawfully intruded upon the exclusive executive and legislative competence of the local and provincial governments, respectively and as such were

unconstitutional. Not persuaded that the offending provisions of the Acts could be severed, the court declared the Acts unconstitutional in their entirety.

Recycling and Economic Development Initiative of South Africa NPC v Tubestone (Pty) Ltd [2022] 1 All SA 774 (WCC)

Constitutional and Administrative Law – Claim by Organ of State for payment – Collateral challenge raised against decision to demand payment – Relevance of delay in raising collateral challenge – Where impugned decision was known and was directed at the citizen, then the question of delay in raising the collateral challenge is relevant – There must be a basis for the court, where there is a delay in raising the collateral challenge or review, to exercise its discretion to overlook the delay – Unreasonable delay not capable of being overlooked in present case.

The applicant ("REDISA") was tasked with implementation of a plan for the disposal and recycling of waste tyres. As a producer of tyres, the respondent ("Tubestone") was a compulsory subscriber to the plan, and was required to acknowledge compliance, provide monthly subscriber returns and comply with administrative requirements. Subscribers' monthly returns, indicating the mass of disposed tyres for a specific period, were followed by REDISA issuing invoices and collecting payment of fees.

In terms of the plan, a waste tyre management fee was levied on all subscribers. The primary issue in the present application related to Tubestone's non-payment of waste tyre management fees and its collateral challenge.

While Tubestone admitted the existence of the plan, that it was a subscriber thereto, and its undertaking to adhere to the plan, it contended that REDISA was not entitled to compel compliance with the plan and demand payment of the fee as it had acted *ultra vires* in failing to review and update cost estimates in light of operational experience; failed to attempt to minimise the fee; and failed to determine the fee on a costs recovery basis. It was further submitted that to the extent that REDISA did review the fee annually, such determination was procedurally unfair due to lack of notification and engagement with subscribers.

Held – Tubestone was not seeking review of an administrative decision taken by REDISA. Instead it was raising a collateral or reactive challenge to the validity of REDISA's administrative act. The Court confirmed that a challenge to an administrative act may be either by review or collaterally. Legally, there is no bar to raising a collateral challenge.

The most important issue in this matter related to the question of delay in raising the collateral challenge. While Tubestone contended that the issue of delay in raising the collateral challenge was irrelevant, REDISA contended that the question of delay was pertinent to determination of the challenge and due to Tubestone's lack of explanation for the delay in raising its defence, the collateral challenge had to fail. Case law referred to by the court showed that delay plays no role and the subject is entitled to challenge the lawfulness of the coercive action, but where the particular action or decision was known and was directed at the citizen, then the question of delay in raising the collateral challenge plays a part.

There must be a basis for the court, where there is a delay in raising the collateral challenge or review, to exercise its discretion to overlook the delay. In terms of applicable precedent, even where no explanation is provided for delay and the delay

is unreasonable, the court must nonetheless decide whether it may overlook the unreasonableness of the delay but it cannot do so in a vacuum. In a legality review, courts have the power to refuse an application where there is an undue delay in initiating proceedings or a discretion to overlook the delay. In overlooking a delay, the court should adopt a flexible approach. In this case, the delay was unreasonable and could not be overlooked. The collateral challenge was thus dismissed and REDISA's application for payment granted.

Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy [2022] 1 All SA 796 (ECG)

Environment – Seismic survey operations by oil company – Interim interdict – Applicants satisfying court that they had established a prima facie right; a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict was not granted; that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

The applicants sought to prevent the third respondent ("Shell") and the fourth and fifth respondents from proceeding with a seismic survey off the eastern coast of South Africa, pending an application for a final interdict prohibiting the respondents from proceeding with the seismic survey unless and until an environmental authorisation had been granted under the National Environmental Management Act 107 of 1998. Shell was currently conducting the said seismic survey in an area covering almost the entire Eastern Cape coastline. According to Shell, the survey would take between 110 and 140 days, from December 2021 until April 2022.

Held – To secure the interdict sought, the applicants were required to satisfy the court that they had established at least a *prima facie* right even if it was open to some doubt; a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict was not granted; that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

According to the applicants, they had a *prima facie* right to be meaningfully consulted about the seismic survey, because it impacted upon their customary rights, including customary fishing rights; and a statutory right under the National Environmental Management Act, which requires that prospectors must obtain an environmental authorisation for exploration for oil and gas. Reliance was also placed on constitutional rights contained in sections 24, 30 and 31 of the Constitution. The consultation process was set out in the environmental management programme, which was the basis upon which the exploration right was granted to Shell. Shell relied on the fact that the advertisements were placed in four newspapers to notify the public about the proposed project and providing details of the consultation process. However, such notifications were not published in the languages spoken in the affected communities, who were thus excluded from the consultation process. Emphasising that meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations, the Court found the process embarked on by Shell to fall short of allowing for meaningful consultation. The exploration right which was awarded on the basis of that substantially flawed consultation process, was thus unlawful and invalid. The applicants having established a *prima facie right*, they were entitled to have that right protected against such unlawfulness, provided that the other requirements of an interim interdict have been met.

Based on evidence of a series of expert witnesses, the Court was satisfied that the applicants had established a reasonable apprehension of irreparable to marine life. The seismic survey would also negatively impact on the livelihood of the fishers and cause cultural and spiritual harm. Finally, the applicants established that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

An interdict was granted preventing the conducting of seismic survey operations pending finalisation of the relief sought under Part B of the notice of motion.

Systems Applications Consultants (Pty) Ltd v Systems Applications Products [2022] 1 All SA 824 (GJ)

Corporate and Commercial – Claim for delictual damages for unlawful interference with contractual relationship – Breach of agreement by contracting party as a result of inducement by another party to no longer honour the contract but to support another product, amounting to a delict in German Law, which applied to dispute – Contravention of sections 826 and 823 of the German Civil Code leading to third party which interfered with contract to be held liable for damages.

The plaintiff ("SAC") sued the defendant ("SAP") as parent company of SAP SI, a company appointed by SAC to promote SAC's software product. According to SAC, SAP induced SAP SI to breach its contractual obligations with SAC. Alleging that such interference in the contractual relationship between it and SAP SI resulted in the destruction of its business, SAC sought damages suffered as a result of SAP's unlawful conduct.

Held – SAP was an *incola* of Germany and the cause of action of SAC arose wholly in Germany. It was on that basis that German law was applicable while all the procedural issues relating to the matter were to be determined under South African law.

Four issues were identified for determination by the court. They were whether SAC was a party to the contract concluded between it and SAP SI and whether the parties who acted on behalf of SAP SI had the necessary authority to bind it; whether the contract between SAC and SAP SI was in fact ever concluded; and whether in German law of delictual liability, SAC made a case in terms of section 826, alternatively in terms of section 823(1), of the German Civil Code.

The issue regarding the identity of the contracting party to the software distribution agreement was raised as a special defence by SAP which alleged that SAC was not a party to the agreement, but an Irish company was the party with whom SAP had contracted. The evidence overwhelmingly established that both SAP SI and SAP knew that the company that was to partner with SAP was SAC. SAP's submission to the contrary was regarded by the court as a red herring and was rejected. The special plea on that point was dismissed.

Next, the court turned to consider whether the agreement was ever concluded and whether the parties who acted on behalf of SAP SI had the necessary authority to bind it. Having regard to a number of emails between the parties, the court was satisfied that there was a valid software distribution agreement entered into between the parties, and the persons who acted on behalf of SAP SI had the necessary authority and permission to act on its behalf. The fact that SAP SI did not sign the contract was

held to be irrelevant. The intent to be bound was implicitly assumed by the mutual agreement accompanied by the implementation of the terms of the agreement.

SAC contended that the breach of the agreement by SAP SI as a result of the inducement by SAP to no longer honour the contract but to support another product, amounted to a delict in German Law. SAC relied in that regard on section 826 alternatively section 823 of the German Civil Code. The Court found that there was inducement of SAP SI to breach the agreement to the prejudice of SAC, in contravention of section 826 of the German Civil Code. The conduct of SAP was *contra bonos mores*. SAP's conduct was also unlawful in terms of section 832(1). The breach resulted in the damages that SAC might suffer and prove in due course, for which SAP was liable.

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Tread Research CC v Bridoon Trade and Invest 197 (Pty) Ltd t/a Nashua Cape Town [2022] 1 All SA 865 (WCC)

Corporate and Commercial – Agreement for supply of telephonic services – Validity of agreement – Where agreement was not validity concluded due to lack of authority, withdrawal of services based on reliance on invalid agreement held to be wrongful, entitling plaintiff to delictual damages.

As telephonic services were critical to plaintiff's business model and thus to its income, it entered into a subscriber agreement with a company ("ECN") for such services to be provided. The defendant had concluded a dealer agreement with ECN in 2011 in terms of which it provided certain support services to ECN. At some point both ECN and the defendant operated under the "Nashua" banner. Plaintiff's subscriber agreement with ECN and its rental agreements with defendant were distinct agreements.

In May 2016, a subscriber agreement was entered into on behalf of plaintiff by its financial administrator (Ms Flandorp) and defendant, which was represented by a Mr Titus. In terms thereof, defendant would replace ECN as the service provider in respect of plaintiff's telephonic services. In June 2016, Titus forwarded a resolution and a suretyship document to Flandorp which he requested should be signed by plaintiff. Neither of those documents was ever signed by plaintiff's members. Plaintiff alleged that prior to the sending of the resolution and suretyship agreements, defendant unlawfully interfered with the existing ECN agreement without plaintiff's consent by causing it to be terminated. It followed that ECN ceased providing telephonic services to plaintiff and the debit order in terms of which plaintiff paid ECN was cancelled. According to the plaintiff, ECN's services and hardware were replaced by defendant without plaintiff's consent. After plaintiff declined to sign the resolution and the suretyship documents, the defendant terminated its telephonic services on 15 September 2016, only restoring them on 1 December 2016.

Plaintiff's case in the present action was based on its claim that its telephonic services were unlawfully disrupted by defendant from 15 September 2016 to 1 December 2016, pursuant to which it suffered damages in the form of loss of income. It sought to hold defendant liable therefor.

Held – The validity of the 2016 agreement was critical to the disposal of the case.

Faced with diametrically different accounts regarding what took place when the 2016 agreement was signed, the court pointed to the improbability in Titus' allegation that Flandorp was authorised to enter into the 2016 agreement on plaintiff's behalf. Titus' demeanour played a significant albeit supplementary role in the court's assessment of the two witnesses. The Court could not find that Flandorp had actual authority to sign the agreement on plaintiff's behalf.

Significantly, no member of plaintiff was ever provided with the 2016 agreement which was however signed by defendant's representatives. It having been established that the 2016 agreement was not validly concluded, the interference with the ECN agreement and further conduct which resulted in the plaintiff not having access to telephonic lines was wrongful. Harm was caused to plaintiff as a result of defendant relying on a contract which was not legally concluded.

Finally, the Court rejected defendant's submission that a contractual relationship existed between ECN and plaintiff and that therefore, legal policy did not favour an extension of the delictual claim to plaintiff.

Defendant was ordered to pay plaintiff's proven damages and to repay the amount paid by plaintiff under duress to secure restoration of its telephonic service.

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Defendant was ordered to pay plaintiff's proven damages and to repay the amount paid by plaintiff under duress to secure restoration of its telephonic service.

Wattpower Solutions CC v Transnet SOC Limited [2022] 1 All SA 892 (KZD)

Constitutional and Administrative Law – Procurement by Organ of State – Whether an Organ of State can be penalised, before the final awarding of the contract, for wanting to conduct a more thorough investigation to satisfy itself of the competence of the bidder to carry out the works – Due diligence investigation carried out by Organ of State not tainted by any unfairness to bidders, nor irregular in the context of the procurement process.

The applicants submitted a bid for a tender for the upgrading of Transnet's fire protection system at one of its fuel storage depots. The applicants and the second respondent ("M&D") were the only bidders who successfully passed the functional evaluation stage. Despite the applicants securing the highest points at the fourth stage of the five-stage procurement process, they were not awarded the contract. Instead, Transnet, relying on, *inter alia*, the provisions of the Preferential Procurement Policy Framework Act 5 of 2000, sought to subject both bidders to a due diligence investigation, supposedly in terms of section 2(1)(f) of the Act, which provides that "the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer". Transnet further relied on regulation 25(9) of the Construction Industry Development Board Regulations GN 692, *GG* 26427 (9 June 2004), in terms of which it had to be satisfied that the successful tenderer has demonstrated that it has the resource capacity and capability to perform in terms of the contract. The contract was ultimately awarded to M&D on the basis that the applicants did not demonstrate their capacity to execute the tender.

According to the applicants, the invitation to tender constituted a binding contract between Transnet and bidders, and made no provision for a second opportunity to verify a bidder's ability to meet the requirements of the bid. It was contended that once the applicants were found to have out-scored the remaining competitive bidders, the contract had to be awarded to them.

Held – The applicants' arguments raised the question of whether an organ of State can be penalised, before the final awarding of the contract, for wanting to conduct a more thorough investigation to satisfy itself of the competence of the bidder to carry out the works. In the present case there was no suggestion that the applicants were taken by surprise or that there was any unfairness in the manner in which the due diligence exercise was carried out.

The use of functionality as an assessment tool in the adjudication of a tender has generated controversy that has not yet been resolved by the courts. Section 2(1) of the Preferential Procurement Policy Framework Act must be read together with regulation 11 of the Preferential Procurement Regulations 2017, which provides that where a contract is to be awarded to an entity other than that which scored the highest points in terms of section 2(1)(f), not only must that decision be based on objective criteria, but the objective criteria must also be fleshed out in the tender documents or in the invitation to tender.

The Court was satisfied, having regard to the invitation to tender, that the due diligence investigation carried out by Transnet was not tainted by any unfairness to the applicant, nor irregular in the context of the application of the procurement process, that it did not constitute a repeat of the functionality assessment, and accordingly that ground of the applicants' challenge failed.

Other criticisms of Transnet's actions in the tender process were found not to vitiate the process.

The application was dismissed with costs.

END-FOR-NOW