LEGAL NOTES VOL 4/2022

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SA LAW REPORTS APRIL 2022

ABORE v MINISTER OF HOME AFFAIRS AND ANOTHER 2022 (2) SA 321 (CC)

Immigration — Refugee — Asylum seeker — Delay in applying for asylum — Effect — Impact of legislative changes — Refugees Act 130 of 1998.
Mr Abore, an Ethiopian, had entered South Africa illegally on an unknown date, had not sought to initiate the asylum-seeker process and had later been arrested, convicted and sentenced to a period of imprisonment (see [2] – [3]). Thereafter and while Mr Abore was still detained, the respondents obtained a warrant of detention to facilitate his deportation (see [4]). Mr Abore had met this event with an application for an order barring his deportation until he had made an asylum application, and for his release from detention. The High Court dismissed this application and Abore applied then to the Constitutional Court for leave to directly appeal to it (see [1] and [5]). It granted this leave: Abore's s 12 right was implicated and this established jurisdiction, while the matter's urgency and the need for legal clarity after amendments to the Refugees Act 130 of 1998 justified a direct approach (see [9] and [12] – [13]).
The court concluded as follows:
1. It was often impossible to determine the date on which an asylum seeker had entered the country, but where it was known on which date an intention to apply for asylum had been expressed, this date ought to be used to determine the legislative regime applicable (see [31] and [33]). Here this date was the one on which Abore had been arrested (see [34]).
2. Section 2 of the Act, which contained the principle of non-refoulement, had not been amended, and accordingly its protection continued to apply to any illegal foreigner evincing an intention to apply for asylum. This protection endured until final determination of the asylum claim (see [42] and [45]).

[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!**

3. While a delay in evincing the requisite intention might impact in an assessment of credibility, it did not — as understood by the High Court — debar an individual from making an asylum claim (see [45] – [47]).
Ordered, accordingly, that leave to direct appeal would be granted; that the High Court's order would be set aside; and that the latter order would be substituted with an order that Abore was entitled to remain in the country until his asylum status was finally determined. Ordered, further, that respondents must take all reasonable steps to effect Abore's intention to apply for asylum. In addition, certain periods of his detention declared to have been unlawful. (See [53].)

BAYPORT SECURITISATION LTD AND ANOTHER v UNIVERSITY OF STELLENBOSCH LAW CLINIC AND OTHERS 2022 (2) SA 343 (SCA)

Credit agreement — Consumer credit agreement — Cost of credit — 'Collection costs' — Whether collection costs as defined including all legal costs incurred in enforcing credit agreement — National Credit Act 34 of 2005, s 1 sv 'collection costs' and ss 101(1)(*g*) and 103(5).
Credit agreement — Consumer credit agreement — Cost of credit — Limit — Whether s 103(5) of NCA applying for as long as consumer remaining in default of credit obligations, from date of default to date of collection of final payment owing in order to purge default, irrespective of whether judgment in respect of default been granted or not during this period — National Credit Act 34 of 2005, s 103(5).

In terms of s 101(1) of the National Credit Act 34 of 2005 (NCA), a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt and the costs of credit set out in paras *(b)* – *(g)*. One such cost of credit (para *(g)*) is 'collection costs', which is defined in s 1 as 'an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement but does not include a default administration charge'. Section 103(5) of the NCA provides that the amounts contemplated in s 101(1)*(b)* – *(g)* that 'accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs'. In an application brought before the Western Cape High Court, the respondents (as cited in the present appeal) — which included the University of Stellenbosch Law Clinic (the Law Clinic) and Summit Financial Partners (Pty) Ltd (Summit) (first and second respondents, respectively) — obtained an order to, inter alia, the following effect:
(a) That the collection costs referred to in s 101(1)*(g)*, as defined in s 1 and contemplated in s 103(5) of the National Credit Act 34 of 2005, *included all legal fees* incurred by the credit provider in order to enforce the monetary obligation of the consumer under a credit agreement charged before, during and after litigation.
(b) That s 103(5) of the National Credit Act 34 of 2005 applied *for as long as the consumer remained in default of his/her credit obligations*, from the date of default to the date of collection of the final payment owing, in order to purge his/her default, irrespective of whether judgment in respect of the default had been granted or not during this period.
In the present appeal before the Supreme Court of Appeal, the first and second appellants, Bayport Securitisation Ltd and the Law Society of South Africa,

respectively, contested the interpretation as reflected in the above declaratory orders, and in particular that 'collection costs' properly defined included legal fees.

Held, as to *(a)*, that South African courts had over many years drawn a distinction between collection costs and litigation costs. It was trite that a statutory provision should not be interpreted so as to alter the common law more than was necessary, unless the intention to do so was clearly reflected in the enactment, whether expressly or by necessary implication. (See [15].) Nothing in the NCA suggested an intention on the part of the legislature to depart from that construction (see [16]). It followed that collection costs, as defined and referred to in s 101(1)*(g)*, should be given the same meaning as it was in the common law. (The SCA referred with approval to the case of *D & DH Fraser Ltd v Waller* 1916 AD 494, which stressed that costs of collection referred to those costs incurred in collecting a debt by means other than legal processes (see [15]). Further, the respondents' submission that the NCA put a maximum limit on the amount of legal costs that could be recovered from a consumer would lead to some glaring absurdities. What militated against such a construction was that the award of costs generally involved the exercise of a judicial discretion. To hold that collection costs included legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. (See [18].) Finally, had the legislature intended collection costs to include legal costs, it could easily have said as much. The language used by the legislature demonstrated that collection costs were not intended to include litigation costs. (See [19].)
Held, as to *(b)*, that the charges contemplated in s 101(1)*(b)* – *(g)* were not post-judgment charges. The judgment entered was thus for the capital sum fixed at a particular date together with interest. It followed that, even had it been correctly found that s 103(5) found application, it did not apply post-judgment. (See [26].)
Held, in conclusion, that the High Court's interpretation of collection costs in s 1, and its application to ss 101(1)*(g)* and 103(5) of the NCA, which culminated in the declaratory orders granted, could not be supported. Accordingly, the appeal had to be upheld.

ESORFRANKI (PTY) LTD v MOPANI DISTRICT MUNICIPALITY 2022 (2) SA 355 (SCA)

Delict — Liability — Fraud in government procurement — Award vitiated by fraud — Municipality awarding tender to third party — Unsuccessful bidder alleging fraud integral to award and absent such it would have received tender — Claiming its lost profits.
Government procurement — Fraud — Award vitiated by fraud — Delictual action for damages for loss of profits by unsuccessful tenderer — Claim based on state organ's breach of constitutional duty to implement fair tender process — Wrongfulness, public policy and causality where tender set aside and aggrieved tenderer would not have won, even absent fraud.

The Mopani District Municipality had awarded a tender to a third party but Esorfranki (Pty) Ltd, an unsuccessful tenderer, obtained rescission on the ground of illegality (see [2] and [11]). Esorfranki thereafter appealed certain other aspects of the

Pretoria High Court's rescission order and obtained their substitution in the Supreme Court of Appeal (SCA) (see [11] and [13]).
Esorfranki instituted an action for damages in the High Court (see [16]). Its claim was that fraudulent conduct was integral to the award and that, absent it, it would have won the tender and reaped the associated awards. Esorfranki claimed its lost profits as damages. (See [3].)
The action was dismissed by the High Court on two grounds (see [4]). Firstly, because Mopani's liability was contingent on a finding that Esorfranki would have been the successful bidder, in circumstances in which the review court and the SCA had already ruled that it would not have been (see [19]); and, secondly, because legal causation was not established: neither the review court nor SCA had found the municipality's conduct to be fraudulent (see [20]). Moreover, Esorfranki's unsuccessful second bid, submitted after the tender was readvertised pursuant to the SCA's order, was a *novus actus interveniens* (see [21]).
Esorfranki approached the SCA on appeal. The court returned a split judgment. The minority — per Goosen AJA, Petse AP concurring — would have upheld the appeal (see [86]). Goosen AJA reached the following conclusions:

- The evidence that had served before the trial court had been properly before it. The question as to whether it was properly before the court arose because Esorfranki had presented its affidavits from the review proceedings as its evidence at the trial without objection or countervailing evidence from Mopani. This had the effect that the only (and hence uncontested) evidence at the trial was Esorfranki's (see [23] and [28]). In this regard Goosen AJA, in response to reservations from the majority, noted that it was of no significance that evidence from one proceeding could serve at another (the same facts could support different causes of action), and that it was unobjectionable for evidence to be presented at a trial on affidavit (see [26] and [27]).

- Neither the review court nor the SCA had decided that there was no fraud involved in the grant of the tender to the third party; nor had those courts decided that Esorfranki would in any event (in a lawful contract process) have failed in its tender bid (see [40]).
- Esorfranki's failure to win the readvertised tender did not constitute a *novus actus interveniens* (see [52]). This because the readvertised tender was an entirely different one to the first and so could not appropriately be a factor in any assessment of causation (see [50]).
- The evidence before the trial court established fraud on Mopani's part in its award of the tender to the third party (see [66]).
- Considerations of policy militated for finding that the conduct was wrongful (see [67] and [74]). These included Mopani's attempts to avoid an order restraining implementation of the tender pending its review, the deliberateness of its conduct, and its derogation from the standard of behaviour expected of an organ of state (see [70] – [72]).
- But for Mopani's conduct, Esorfranki would have been awarded the tender (see [78]); and Esorfranki's loss was closely enough linked to the fraud to establish legal causation (see [79]): it was reasonably foreseeable that Esorfranki would have profited from the tender (see [83]). Conversely, readvertisement of the tender lacked the requisites to constitute a *novus actus interveniens*: it was neither unforeseeable nor unexpected or unusual (see [84] – [85]).

Given all of the above, had Goosen AJA commanded the majority, he would have upheld the appeal, set aside the High Court's order, and have declared Mopani liable to Esorfranki for Esorfranki's loss of profits (see [86]).
The majority (per Nicholls JA, Poyo-Dlwati AJA concurring) in dismissing the appeal took account of the following (see [121]):

- Militating against wrongfulness were that breach of the constitutional guarantee of a fair tender process had been held to not ground a delictual claim (see [95]); that the setting-aside of the tender expunged any delictual duties attaching to it (see [98]); and that public policy did not permit a claim in circumstances in which an aggrieved bidder on a voided tender subsequently failed in a bid for a lawful-successor tender (see [99]).
- The evidence failed to establish that, but for the fraudulent conduct, Esorfranki would have won the tender (see [110]).
- Seen in the light of the renewed opportunity to bid, it would be, insofar as legal causation was concerned, unfair to find the municipality liable for Esorfranki's loss (see [119]).

Mbatha JA, writing separately, would have dismissed the appeal (see [142]). In his view the matter was res judicata, with fraud grounding both the review and delictual proceedings, and the same relief — monetary compensation — availing, albeit not being pursued in both (see [126] – [128]). Moreover, legal causation was excluded both by the *novus actus interveniens* (Esorfranki's failure to win the readvertised tender) and on policy grounds (Esorfranki had received an administrative law remedy, and allowing a claim in such circumstances would unjustifiably burden the public purse) (see [131] and [141] – [142]).

FRAMATOME v ESKOM HOLDINGS SOC LTD 2022 (2) SA 395 (SCA)

Engineering and construction law — Engineering and construction contract — Dispute resolution — Contractual adjudication — Adjudicator's decision — Enforceability — Principles applicable.

The appellant, Framatome, and the respondent, Eskom, were parties to an engineering and construction contract (the contract). Under the contract, Framatome was the contractor, tasked with securing the replacement of steam generators at Koeberg Power Station; Eskom was the employer, represented by a project manager. The contract provided for the appointment of an adjudicator, whose decisions would be binding on the parties unless revised by a tribunal, and enforced as a matter of contractual obligation between the parties.
Two related decisions by the adjudicator gave rise to the present matter: In resolution of a dispute referred by Framatome, the adjudicator found, in decision No 7, that the change by Eskom's project manager of the definition of key dates in the contract amounted to a 'compensation event' entitling Framatome to additional payment and time, and that the project manager was to complete the assessment of such event in accordance with the contract. Later, in answer to a further dispute referred by Framatome, the adjudicator found, in decision No 11, that since the project manager had failed to timeously make a full assessment of the compensation event as required by decision No 7, the quotation in the applicant's earlier referral would, by operation of the contract, be deemed accepted by the respondent.
As a result of Eskom's failure to pay the compensation owing to Framatome as per its quotation, Framatome brought an application against Eskom to the Johannesburg

High Court, to enforce the adjudicator's decision No 11. The High Court, in declining the enforcement order, upheld Eskom's argument that the adjudicator had, in making decision No 11, exceeded his jurisdiction as he had not decided the dispute that was actually referred to him: he had framed the question to be asked as whether the assessment, as directed by decision No 7, had been made timeously, when in fact, as was apparent from the notice of adjudication, the issue to be decided was whether the assessment made was correct or not, and if so whether it could be construed as a disregard for the adjudicator's decision No 7. In other words, the adjudicator had answered the 'wrong question'. The Supreme Court of Appeal granted Framatome leave to appeal to it.

The SCA held that the question to be asked was whether the adjudicator's determination was binding on the parties, and the answer to that question turned on whether the adjudicator had confined himself to a determination of the issues that were put before him by the parties. If he had done so, then the parties were bound by his determination, notwithstanding that he may have fallen into error. The SCA held that the finding of the High Court that the adjudicator had answered the wrong question was not borne out by the facts. The adjudicator formulated the dispute as it was referred to him. At no stage did he depart from the real dispute between the parties. He decided the dispute in accordance with what the parties had contemplated and appreciated. (See [29].) The SCA further expressed the view that the High Court had unduly focused its attention on the words 'timeously or in due course' in the adjudicator's award. But it was necessary that the dispute be looked at holistically, taking into account how the parties conducted themselves. During adjudication proceedings, the SCA stressed, Eskom did not contend that the notified dispute had been varied, it being obvious to all the parties that the dispute remained the same, and the adjudicator consequently rendered a sound decision based on the facts. (See [30].)

The SCA characterised the various arguments raised by Eskom in resisting the enforcement order as relating to the merits of the adjudicator's decision (see [22]). These, the SCA asserted, it could not interrogate (see [23]). In this regard, the SCA held that only a tribunal may revise an adjudicator's decision. The SCA reiterated that adjudication was merely an intervening, provisional stage in the dispute resolution process, and that parties still had a right of recourse to litigation and arbitration. As the adjudicator's decision had not been revised, it remained binding and enforceable (see [23]).

The SCA accordingly upheld the appeal, and granted an award enforcing the adjudicator's decision (see [31]).

PRIDE MILLING CO (PTY) LTD v BEKKER NO AND ANOTHER 2022 (2) SA 410 (SCA)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company being wound up and unable to pay its debts made after commencement of winding-up — Discretion of court to validate such disposition — Nature of discretion — Relevant considerations — Companies Act 61 of 1973, s 341(2).

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company being wound up and unable to pay its debts made after commencement of winding-up — Discretion of court to

validate such disposition — Whether court may validate disposition made after granting of provisional winding-up order — Companies Act 61 of 1973, s 341(2).

In terms of s 341(2) of the Companies Act 61 of 1973, '(e)very disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders'. The present matter addressed the question of the circumstances in which it would be appropriate for a court to validate a disposition otherwise void in terms of s 341(2); and, more particularly, whether a court may validate dispositions made after a provisional winding-up order had been granted but prior to the grant of a final order. The background follows. Liquidation proceedings were commenced in the Pretoria High Court, on 5 May 2017, against Irfan Sohail Trading (Pty) Ltd (Irfan) — a private company carrying on business as a general trading store at Ga-Masha Village in Limpopo — at the instance of a creditor, Eendag Meule Bothaville (Pty) Ltd. A provisional winding-up order was granted on 29 June 2017, and a final order on 14 September 2017. The present matter concerned four payments totalling R295 000 Irfan made to Pride Milling Company (Pty) Ltd (Pride Milling), the appellant, in settlement of amounts owing in respect of goods sold and delivered by Pride Milling to Irfan. The first of such payments took place in the time period between the commencement of liquidation proceedings and the granting of provisional liquidation; the other three payments took place in the period between the granting of provisional liquidation and final liquidation. The first and second respondents, the liquidators of Irfan, contended that these four payments constituted void dispositions liable to be set aside under s 341(2) of the Companies Act 61 of 1973, having taken place after the commencement of liquidation proceedings. They accordingly instituted an application, in the Pretoria High Court, against Pride Milling for an order directing it to repay the amount of R295 000, together with interest, and ancillary relief. Pride Milling opposed such relief, and also launched a counter-application seeking an order that the impugned payments be validated in accordance with the rider to s 341(2) of the Companies Act. The High Court granted the liquidators their application, and refused Pride Milling its counter-application. The Supreme Court of Appeal granted Pride Milling leave to appeal to it. Before the SCA, there was no dispute that the payments at issue were made after the commencement of liquidation proceedings and therefore hit by s 341(2). The only question was whether they should be validated in accordance with the rider to s 341(2). (See [10] and [12].) Pride Milling, in support of its case that they should be, alleged that the payments: *(a)* were made in the ordinary course of business and in good faith; *(b)* were not to the 'detriment of the general body of Irfan's creditors'; *(c)* had 'the effect of increasing the asset value of Irfan to the benefit of the body of the creditors'; *(d)* were received at a time when Pride Milling was not aware that Irfan was in financial distress; and *(e)* were made when it had no knowledge of the fact that Irfan was being wound up.
Held, that, in terms of s 341(2) of the Companies Act, every disposition of its property by a company being wound up was void. The default position ordained by this section was that all such dispositions had no force and effect in the eyes of the law, ie the disposition was regarded as if it had never occurred. (See [30 and [31].) Nevertheless, a court may depart from the statutorily ordained position and order otherwise in appropriate circumstances (see [25] and [31]). In determining whether to direct otherwise, a court exercised an unfettered discretion (see [22]), and had to decide what would be just and fair in light of all the relevant circumstances of the

case in question. Factors which a court would have regard to included the underlying purpose of s 341(2) in the context of winding up a company unable to pay its debts, ie to prevent such a company from dissipating its assets and thereby frustrating the claims of its creditors; the interests of creditors and those of the beneficiary of the disposition (see [23], [26], [30] and [31]).
Held, however, that a court's discretion to validate void dispositions under s 341(2) *was only exercisable in relation to payments made between the date of lodging of the application for winding-up and that of granting of a provisional order* (see [24] and [31]), at which point concursus creditorum was reached (see [18] and [19]). Accordingly, a court had no discretion to validate the three dispositions in this case made after 29 June 2017.
Held, as to the single disposition made on 7 June 2017, ie before the provisional order was granted, Pride Milling had failed to discharge the onus which rested on it to persuade the court with clear evidence that it should depart from the statutorily ordained default position and 'otherwise order'. (See [36].) There was accordingly no tenable reason to interfere on appeal with the manner in which the High Court exercised its discretion in relation to this disposition (see [37]). Appeal dismissed (see [41]).

SMUTS AND ANOTHER v BOTHA 2022 (2) SA 425 (SCA)

Constitutional law — Human rights — Right to privacy — Ambit of protection — Personal details of farmer engaging in animal-trapping published on Facebook page of organisation involved in conservation of wildlife — Constitution, s 14.

Mr Botha, a commercial farmer, had permitted a group of cyclists to ride across his land, and in the course of them doing so, one of the group spotted a pair of cages, with each cage comprising a part of an animal trap, and in which, respectively, were a dead baboon and porcupine (see [1]). A cyclist photographed them and sent the photographs to Mr Smuts, a conservationist and founder of second appellant, the Landmark Leopard and Predator Project (see [1]). Mr Smuts in turn posted the photographs on the Project's Facebook page, along with — in an accompanying textual commentary — the name of the farm, its location, Botha's name, a picture of Botha and his daughter, and Google-derived details of Botha's business, home address and telephone numbers (see [2]). The commentary further stated that Botha claimed to have a permit to kill pest animals (a claim made by Botha in a WhatsApp exchange between Smuts and Botha which was also posted), and recorded Smuts' opinion that trapping was, inter alia, 'unethical, barbaric and utterly ruinous to biodiversity' (see [2]). The post attracted textual comment from third parties who had viewed it, much of it critical of the practice of trapping and some of it slanderous and insulting of Botha (see [3]).
In response Botha obtained an interim order that Smuts remove the photographs of Botha, as well as details of his name, business, the farm's name, and the farm's location. Smuts was also prohibited from making further posts referencing these details (see [4]).
The interim order was later confirmed, the High Court recognising a right on Smuts and the Project's part to publish the photos and to comment on them, but declaring that they had no right to publicise that the photos were taken on Botha's farm. This, on the reasoning that the farm's name and Botha's identity as its owner were

personal information protected by his right to privacy, and that any public interest would be in the topic of trapping rather than in Botha's personal information (see [5]). With the High Court's leave, Smuts appealed to the Supreme Court of Appeal (see [5]).
The issue there was whether Botha's expectation that the information concerned was private was an expectation that society would regard as reasonable, where this issue narrowed into the question of whether the information was sufficiently personal for society to consider the expectation reasonable (see [22]).
The court thought not: Botha allowed members of the public to have access to his farm and he trapped in open view of them (see [26]); Botha himself placed details of his occupation and address in the public domain of the Internet (see [31]); and that he was the owner of the farm was readily determinable in the Deeds Registry (see [27]).
The appeal accordingly upheld, the High Court's order set aside, and substituted with an order that the rule nisi be discharged (see [32]).

TAHILRAM v TRUSTEES, LUKAMBER TRUST AND ANOTHER 2022 (2) SA 436 (SCA)

Expert valuer — Determination by — Right of valuer to rectify mistake in — Whether valuer functus officio or permitted to unilaterally withdraw or cancel valuation in order to alter or amend it.
Sale — Price — To be fixed by third party's valuation — Right of valuer to rectify mistake in valuation — Whether valuer functus officio or permitted to unilaterally withdraw or cancel valuation in order to alter or amend it.

Mr Tahilram and the Lukamber Trust were co-shareholders in the second-respondent company, which also employed Mr Tahilram as its sales director. The shareholders agreement required that upon termination of his employment, he offer his shares in the company to the trust at an agreed fair value or, absent agreement, at a fair market value as determined by the company's auditors.
When Mr Tahilram's employment terminated and no agreement on a fair value of his shares could be reached, the company's auditors determined the fair market value as per the shareholders agreement. After initially disagreeing with the auditors' valuation, Mr Tahilram accepted it and offered his shares to the company based on that valuation. The trust, however,did not make payment, maintaining that various amounts which Mr Tahilram allegedly owed to it should be deducted from the purchase price. Mr Tahilram then instituted motion proceedings in the High Court, claiming payment of such amount plus interest and costs. The trust's answering affidavit averred that in preparation thereof further consultations with the auditors resulted in them supplying an updated valuation with a reduced fair market value.
The High Court, dismissing the application, held that the auditors' valuation was not final and binding on the parties, ie that they were not functus officio. In Mr Tahilram's appeal to the Supreme Court of Appeal — granted only in respect of the application of the functus officio principle — the issue was whether, once their valuation had been communicated to the parties concerned, the auditors were functus officio or legally permitted to unilaterally withdraw their valuation to correct or modify it.

Held
Once the valuer's valuation was communicated to the parties (as was the case here) the valuation validly issued could not, in the absence of a contractual provision to the contrary, or agreement or waiver by the parties (neither of which was suggested here), be withdrawn or cancelled by the valuer to correct mistakes of fact or value in it. Once the valuer issued his written valuation report, he was functus officio. That being so, the valuer was not legally entitled unilaterally to withdraw or cancel his valuation report and to issue one that altered and amended his definitive pronouncement of the fair market value. Whenever parties agree to refer a matter to a valuer, then so long as the valuer arrived at his or her decision honestly and in good faith, the valuer was functus officio and his/her decision final and binding on the parties once communicated to them. Only a court had the power to interfere with the valuer's decision in review proceedings. The appeal would accordingly be upheld, (Paragraphs [23] and [27] – [28].)

VUKEYA v NTSHANE AND OTHERS 2022 (2) SA 452 (SCA)

Marriage — Proprietary rights — Community of property — Powers of spouses — Immovables — Sale of home by spouse without consent of other spouse — Whether purchaser did not know and could not reasonably have known that seller was married in community of property and that his spouse had not consented to sale — Seller living alone and verbally expressing to purchaser that he was unmarried — Title deed reflecting seller as sole owner and unmarried — Power of attorney describing seller as unmarried — Matrimonial Property Act 88 of 1984, s 15(9)*(a)*.

In 2009 appellant had purchased a home from Mr Ntshane, who at the time was living alone therein, and who verbally expressed to appellant that he was unmarried (see [4]). Further to this representation, Mr Ntshane had signed the sale agreement; was reflected in the title deed as the sole owner of the property and unmarried; and had been described in the power of attorney he signed for transfer purposes as unmarried (see [4] and [13]).
It was only after Mr Ntshane's death and the appointment of first respondent, Mrs Ntshane, as the executrix of the estate that Mrs Ntshane, who had been married to Mr Ntshane in community of property since 1980, came to learn of the sale (see [3]). She thereupon instituted proceedings for the setting-aside of the transfer of the property on the grounds that the transaction was rendered void by the provisions of s 15(2)*(a)* of the Matrimonial Property Act 88 of 1984, which provides that 'a spouse [married in community of property] shall not without the written consent of the other spouse alienate . . . [a] real right in any immovable property forming part of the joint estate'.
This relief was granted by the High Court on the basis that the absence of Mrs Ntshane's consent eroded Mr Ntshane's capacity to form the intention necessary to conclude the real agreement with appellant (see [6] – [7]).
Appellant then appealed to the Supreme Court of Appeal, which upheld the appeal on the strength of s 15(9)*(a)*'s requirements being met (see [21]). (The section provides that: 'When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) . . . and that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions . . . it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) . . . .') That is, the court was

satisfied that the appellant had not known of the marriage in community of property nor could reasonably have known, and that the High Court had erred in not considering s 15(9) at all (see [7], [13] and [17]).
The order of the High Court set aside and replaced with an order dismissing Mrs Ntshane's application for the setting-aside of the transfer (see [21]).

MOLEFE v ROAD ACCIDENT FUND 2022 (2) SA 461 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Procedure — Gauteng Judge President's Directive 1 of 2021 — Non-compliance by plaintiff — Default judgment refused and plaintiff directed to comply.

The plaintiff sued the defendant (the RAF) for damages arising out of injuries sustained in a motor vehicle accident. The issue of quantum (loss of earnings) was enrolled for trial and certified trial-ready on 20 October 2020. No process was served between the parties from 3 November 2020, when notice of set-down was served on the RAF, to 25 May 2021, the trial date.
On the trial date the plaintiff served two interlocutory applications on the RAF: one for default judgment under rule 31 and one under rule 38 for the admission of her affidavit as evidence without her physical appearance in court. The plaintiff requested the court to hold the RAF liable for loss of income in accordance with the actuarial report filed with the court.
The question for the court was whether to grant an order based on the interlocutory applications or to proceed with the trial as set down. Relevant to this was the Judge President's Practice Directive 1 of 2021. * Under para 18 of ch 6, the Directive required plaintiffs to comply fully with 'the duty of disclosure as would be expected in an ex parte application' and provided that 'any failure shall imperil an order being granted and may also result in punitive costs orders'. Parties aggrieved by opponents' non-compliance with procedural steps or rules were directed to approach the trials interlocutory court for an order to compel. Non-compliance and recalcitrance could also be visited with punitive costs orders.
Held
The plaintiff's lack of effort to enforce compliance with the court rules was of concern in the light of her duty of disclosure under para 18 of the Judge President's Directive. She should have first approached the interlocutory court for an order to compel and asked that the RAF's defence be struck out. (See [11].)
Also of concern was the plaintiff's failure to enforce compliance as soon as was possible. She could have invoked rule 30A ('non-compliance with rules') to place the RAF in mora. It was not justifiable for her to apply for default judgment on the trial date without the reasonable notice required by rule 31(4). (See [18].) And waiting until the trial date to bring the rule 38 application without notice to the RAF was an abuse of process (see [23] – [24]).
The court, in view of the plaintiff's failure to comply with the Judge President's Directive, refused default judgment, ordered the plaintiff to comply with the Directive and disallowed the costs of the two interlocutory orders (see [26], [31] – [32]).

AFRICAN TRANSFORMATION MOVEMENT v SPEAKER, NATIONAL ASSEMBLY AND OTHERS 2022 (2) SA 468 (WCC)

Constitutional law — Parliament — Motion of no confidence in President of Republic — Decision of Speaker not to allow secret ballot — Issue procedural — Not involving constitutional obligation of Parliament — High Court having jurisdiction — Constitution, ss 102(2), 167(4)*(e)* and 172(2).

Under s 102(2) of the Constitution the President must resign if the National Assembly by a majority of members passes a motion of no confidence in him or her. The facts in the present case were that the Speaker of the National Assembly had declined the applicant political party's request that voting in a motion of no confidence in the President, Mr Ramaphosa, be held by secret ballot. The applicant sought to review and set aside the Speaker's decision on the basis that she had failed to bring her mind to bear when she declined its request for a secret ballot. The issue to be determined was, therefore, whether the Speaker had acted lawfully in ordering an open ballot.

The Speaker opposed the application and raised a preliminary point that the High Court lacked jurisdiction because, under s 167(4)*(e)* of the Constitution, disputes about Parliament's constitutional obligations fell within the Constitutional Court's exclusive jurisdiction.

In response, the applicant argued that the Speaker's decision was her own, not that of Parliament, and that s 167(4)*(e)*, which had to be narrowly construed, was not applicable.

Held

The issue of jurisdiction would be determined by interpreting s 102(2) and s 167(4)*(e)* in the light of the facts pleaded by the applicant (see [14]). The applicant's complaint was about acceptable voting procedures in a motion of no confidence in the President, not the failure of the President or Parliament to fulfil a constitutional obligation, as intended in s 167(4). Being procedural in nature, the complaint did not fall within the narrow gamut of circumstances that would trigger the exclusive jurisdiction of the Constitutional Court. The Speaker's decision was, moreover, within her constitutional mandate, so that the argument, that, by attacking the Speaker's decision, the applicant was attacking Parliament for failing to fulfil its constitutional obligation, was misplaced: any irrationality or unreasonableness was the Speaker's, not Parliament's. (See [18] – [22].)

Section 102(2), which governed motions of no confidence, did not impose a duty on Parliament to perform a specific act or function as intended in s 167(4)*(e)*. Instead, it conferred on Parliament the power to pass a motion of no confidence if the majority of its members supported it. (See [24] – [25].)

In summary, the Speaker's refusal to order a secret ballot in a motion of no confidence against the President and the subsequent challenge thereto did not fall within the exclusive jurisdiction of the Constitutional Court, but squarely within the jurisdiction of the High Court, as envisaged in terms of s 172(2) of the Constitution (see [26]).

Although the Speaker could in appropriate circumstances order a secret ballot, her decision in the present case, that the vote should be by open ballot, reflected the default position for motions of no confidence in the President. She applied her mind and gave reasons for her decision, which was both rational and reasonable, and the court would not interfere with it. (See [46] – [51].)

Application dismissed.

ARENA HOLDINGS (PTY) LTD AND OTHERS v SOUTH AFRICAN REVENUE SERVICE AND OTHERS 2022 (2) SA 485 (GP)

Revenue — Tax administration — Confidentiality of taxpayer information — Various provisions of Promotion of Access to Information Act, and Tax Administration Act, providing for blanket prohibition on disclosure by Sars of taxpayer information — Unjustifiable limitation of rights to access to information (s 32 of Constitution), and to freedom of expression (s 16(1) of Constitution) — Less restrictive means existing whereby rights could be limited, namely broadening of 'public interest override' section of PAIA to include within its scope taxpayer information sought from Sars, such that it should be disclosed if such disclosure would reveal evidence of 'substantial contravention of the law' and be in public interest — Tax Administration Act 28 of 2011, ss 67 and 69; Promotion of Access to Information Act 2 of 2000, ss 35 and 46.
Constitutional law — Legislation — Validity — Various provisions of Promotion of Access to Information Act, and Tax Administration Act, providing for blanket prohibition on disclosure by Sars of taxpayer information — Unjustifiable limitation of rights to access to information (s 32 of Constitution), and to freedom of expression (s 16(1) of Constitution) — Less restrictive means existing whereby rights could be limited, namely broadening of 'public interest override' section of PAIA to include within its scope taxpayer information sought from Sars, such that it should be disclosed if such disclosure would reveal evidence of 'substantial contravention of the law' and be in public interest — Tax Administration Act 28 of 2011, ss 67 and 69; Promotion of Access to Information Act 2 of 2000, ss 35 and 46.

The present matter, heard before the Pretoria High Court, concerned the constitutionality of various provisions of the Tax Administration Act 28 of 2011 (TAA) and the Promotion of Access to Information Act 2 of 2000 (PAIA), securing the confidentiality of taxpayer information. Section 69 the TAA prohibits Sars officials from disclosing taxpayer information to persons who are not Sars officials (see ss (1)), except in certain limited cases (as set out in ss (2)). PAIA effectively mirrors TAA with respect to the disclosure of taxpayer information. In ch 4 it provides for the mandatory protection of, amongst others, certain records of Sars, and in this regard in s 35 provides that a request for information obtained or held by Sars for the purpose of enforcing legislation concerning the collection of revenue (such as the TAA) must be refused if that information relates to a person other than the requester. Section 46, the so-called 'public interest override' section, does, however provide for the *mandatory disclosure* of some of the types of records otherwise protected, and referred to in ch 4, namely *where '(a) the disclosure of the record would reveal evidence of (i) a substantial contravention of, or failure to comply with, the law; or (ii) an imminent and serious public safety or environmental risk; and(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question*. Critically, however, s 35 is specifically excluded from the scope of the public interest override section.
The background to the present application were various requests to Sars for access to information it held relating to the tax affairs of ex-President Jacob Zuma, sought to explore the truth of allegations in the public domain suggesting that he had not been tax-compliant during the years he was president. Sars had refused such requests, asserting the confidentiality of such information. The applicants * in the present

application argued, and sought declarators to such effect, that the above-mentioned statutory taxpayer secrecy regime, in prohibiting the disclosure of taxpayer information in such absolute terms — more particularly, in failing to allow for a public interest exception such as that envisioned in s 46 of PAIA — contravened the rights of access to information provided for in s 32 of the Constitution, and/or the right to freedom of expression provided for in s 16(1) of the Constitution, in a manner that was not justifiable in terms of the limitation clause in s 36 of the Constitution. Sars argued that the statutory regime as it stood, which already did provide exceptions to the secrecy principle, struck the necessary balance between the right of a taxpayer to privacy, protected in terms of s 14 of the Constitution, on the one hand, and the rights of access to information and freedom of speech, on the other hand. Sars also referred to the 'compact' between taxpayers and Sars: in return for taxpayers' full and frank disclosure, Sars promised to keep their secrets. Without such compact, Sars argued, the tax system could not properly function.

The court held that the blanket prohibition of disclosure of taxpayer information, as encapsulated in ss 35 and 36 of PAIA and s 69 of the TAA, limited the rights of access to information provided for in s 32 of the Constitution and freedom of speech provided for in s 16 of the Constitution (see [8.14], [10.1] and [11]). And, when having regard to the principle that access to official (state-held) information was a prerequisite for public accountability and an essential feature for participatory democracy, as juxtaposed against the right of taxpayer confidentiality or privacy of those in whose affairs the public had a legitimate interest, the limitation was not justifiable under s 36 of the Constitution (see [8.14], [10.2] and [11]). The court held, however, that the broadening of the public override section in PAIA to include within its scope s 35(1), amounted to a less restrictive limitation that was justifiable under s 36 (see [8.14] and [10.3]).

The court rejected the arguments of Sars: It expressed doubt as to Sars' assertion that voluntary compliance, at least as far as disclosure goes, was dependent on the secrecy 'compact' written into law (see [8.4]); and described Sars' contention that the other limited disclosures of taxpayer information contained in the TAA struck the 'necessary balance' as too limited and incorrect (see [10.4]).

The court went on to declare (in para [11]) ss 35 and 46 of PAIA as unconstitutional and invalid, to the extent that they precluded access to tax records by a person other than the taxpayer (a requester), even in circumstances where the requirements set out in s 46*(a)* and *(b)* of PAIA were met. It also declared ss 67 and 69 of the TAA to be unconstitutional and invalid, to the extent that they precluded access to information being granted to a requester in respect of tax records in circumstances where the requirements set out in s 46*(a)* and *(b)* of PAIA were met; and they precluded a requester from further disseminating information obtained as a result of a PAIA request. Such declaration, the court held, would be suspended for two years, to enable Parliament to correct the relevant defects, and pending such correction, a reading-in of the 'public interest override' provisions would be implemented, such that —

- s 46 of PAIA shall be read as if the phrase 's 35(1)' appeared immediately after the phrase 's 34(1)' contained therein; and
- s 69(2) of the TAA shall be read as if it contained an additional ss (*b*A) after existing ss *(b)*, which provides, '(*b*A) where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act'; and

- s 67(4) of the TAA shall be read as if the phrase, 'unless the information has been received in terms of the Promotion of Access to Information Act', appeared immediately before the full stop.

ARUM TRANSPORT CC v MKHWENKWE CONSTRUCTION CC AND ANOTHER 2022 (2) SA 503 (KZP)

Practice — Judgments and orders — Summary judgment — Time for — Under amended rules of court — Plaintiff filing application for summary judgment within 15 days after defendants entered plea — However, before filing application, and after filing of defendants' plea, plaintiff filing replication — Plaintiff, in taking further procedural step after delivery of plea, waiving right to apply for summary judgment — Uniform Rules of Court, rule 32.

The present matter, heard before the Pietermaritzburg High Court, concerned an application for summary judgment brought by the plaintiff against the defendants. As per the requirements of the amended Uniform Rule 32, the plaintiff filed the application within 15 days after the defendants had entered their plea. However, after the defendants had filed their plea, and before filing its application for summary judgment, the plaintiff had taken 'another procedural step' by filing a replication. Under the previous rules governing summary judgments, if a plaintiff took a further procedural step after the delivery of a plea, they waived their right to apply for summary judgment. Was this still the position under the new rule? The court held that it was. (See [10], [15], [24].) In this regard, the court referred with approval to case authority to the effect that there was little reason for extending the scope of summary judgment by allowing amplification of the cause of action in either form of summons, if one considered that summary judgments had always been viewed as extraordinary and stringent remedies, and based upon a reading of the rules themselves (see [15] and [24]).
The court accordingly found that the plaintiff had waived its right to apply for summary judgment (see [24]). The court found it would in any event have refused the application for summary judgment, as the defendants had shown there were triable issues (see [25]). Application dismissed (see [32]).

DU TOIT AND OTHERS v AZARI WIND (PTY) LTD AND OTHERS 2022 (2) SA 510 (WCC)
Company — Business rescue — Effect on contracts — Suspension of 'any obligation' arising from contracts — Obligation must arise before, and become due during, business rescue proceedings — Obligation not due if not yet determined/quantified — Obligation must be discrete and identified — Companies Act 71 of 2008, s 136(2)*(b)*.
Section 136(2)*(a)* of the Companies Act 71 of 2008 allows business rescue practitioners to *suspend*, during business rescue proceedings, 'any obligation' of the company that 'arises under an agreement to which the company was a party at the commencement of the business rescue proceedings' and 'would otherwise become due during those proceedings'. Under s 136(2)*(b)* business rescue practitioners may 'apply urgently to a court to . . . *cancel*, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph *(a)*'.
The first and second applicants, joint business rescue practitioners charged with the business rescue of the third applicant, Tsoma, approached the court under s

136(2)*(b)* for the cancellation of Tsoma's obligations under two construction subcontracts concluded between it and the first respondent, Azari. While Tsoma had performed the services it was contracted to perform and the contracts had ended, Azari paid only some of the invoices Tsoma issued to it. In addition to immediate payment of the invoices, the practitioners sought the cancellation of Tsoma's contractual obligations relating to stoppages, delay, disruption, indemnification, warranties, performance bonds and insurance. The practitioners submitted that if the requested urgent relief were not granted, the business rescue process would fail.

Held

The purpose of s 136(2)*(b)* was to empower business rescue practitioners, through the court, to extricate the company from contractual obligations that would prevent it from becoming a successful concern. Since cancelled obligations could not be revived if business rescue failed, practitioners had to identify precisely which obligations needed to be cancelled and explain why such a drastic measure was necessary. (See [14], [27].)

Practitioners had to show, in addition, that the obligations sought to be cancelled would otherwise (ie if uncancelled) become due during business rescue. This entailed sifting through the contracts, ascertaining extant obligations, and determining which of them would become due during business rescue. Because business rescue was intended to be a brief process, practitioners had a definite period to use as a frame of reference when deciding which obligations would become due and ought to be cancelled to assist the rescue of the business. (See [29].)

Here, the principal difficulty for the practitioners was that they failed to demonstrate that the obligations sought to be cancelled would have fallen due during business rescue. For example, the stoppages claims would all have arisen during the course of the contract period, ie prior to the business rescue process, even though not all of them had yet been quantified. (See [31].)

The applicants, while contending that the obligations were not due because amounts to be paid in respect of the stoppages claims had not yet been determined, at the same time failed to indicate that they *would become due during business rescue*. The claims were indeed disputed and unresolved, and according to the applicants, 'remain[ed] the subject of . . . construction adjudication processes and [were] incapable of speedy resolution'. The obligations were therefore, on the applicants' own version, not due. If Tsoma was not liable for the stoppages claims, or the stoppages claims were not yet due, or there was no indication that these claims would become due during the business rescue proceedings, then there was no legal basis for the court to cancel them, and this argument applied equally in respect of the other obligations sough to be cancelled. (See [32] – [35].)

Since the applicants failed to discharge the onus of demonstrating that the obligations sought to be cancelled would otherwise become due during the business rescue proceedings, the application would be dismissed (see [36]).

As to the application for an order for payment by Azari of the amounts claimed by them, the court found that, uncoupled from the claims under s 136(2)*(b)*, it was simply a request for a money judgment on an urgent basis in motion proceedings and in circumstances where the respondents contended that they had a contractual defence to the order sought. Azari had put up a robust defence and in the circumstances the applicants had failed to make out a case for the grant of the order sought. (See [44] – [46].)

HLOPHE v FREEDOM UNDER LAW, AND OTHER MATTERS 2022 (2) SA 523 (GJ)

Practice — Pleadings — What are — Affidavit in motion proceedings — Affidavit did not qualify as pleading for purposes of rule 18 — Uniform Rules of Court, rule 18.

Hlophe JP, at the conclusion of disciplinary proceedings that the Judicial Service Commission (the JSC) had undertaken against him on the basis of claims that he had sought to suborn two justices of the Constitutional Court to pervert their judgment to favour ex-President Jacob Zuma, was found guilty of gross misconduct. He brought an application to review and set aside that decision, citing the JSC, the President of the Republic, the Minister of Justice and the Speaker of Parliament, of which only the JSC opposed. The present matter, heard in the Johannesburg High Court, dealt with various interlocutory applications in that main review, inter alia:

- an application brought by Freedom Under Law (FUL) to be joined as a party; and
- an application brought by Hlophe JP, in terms of Uniform Rule 30, to set aside as an irregular step FUL's replying affidavit that had been filed in response to Hlophe JP's answering affidavit [in the joinder application], on the ground it failed to comply with the prescripts of Uniform 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'.

Held

The rule 30 application

Whether the rule 30 application should be granted, or not, depended on whether rule 18, which was headed 'Rules relating to pleading generally', applied to *affidavits* (see [17]). That in turn depended on the question whether 'pleading' in rule 18 included an 'affidavit' (see [17]).

In none of the number of judgments relied upon by Hlophe JP to argue that an affidavit did indeed qualify as a pleading, to which rule 18 applied, was an affidavit in fact equated to a pleading. The common thread throughout the cases was a discussion of the forensic function performed by an affidavit in motion proceedings. The various remarks addressed the dynamics of litigation and, in the course thereof, dealt with the necessity in any legal proceedings to identify the issues for decision. What was said was that in motion proceedings an affidavit served the purpose that a pleading performed; because pleadings by implication were absent, therefore, by force of circumstance, affidavits, in addition to encapsulating the evidence,

functioned to identify the issues too. This was a far cry from suggesting that the word 'pleading' in rule 18 included an affidavit. (See [25].) When reading a reference to a term or a phrase appearing in a judgment in one context, it could not be simply understood to mean the exact same thing in a different context. It was not feasible to airlift the meaning of a word out of one sentence in a given context and then parachute that meaning into a sentence using the same word in another context. (See [25].)

On a reading of the Uniform Rules themselves, it was plain that rule 18 had no application to motion proceedings (see [28]). Rule 6 was the primary rule that regulated applications. After an extensive array of prescripts, it was provided in rule 6(14) that '(t)he provisions of rules 10, 11, 12, 13, and 14 apply to all applications'.

Prominently absent from the list was any reference to rule 18. Were rule 18 to apply to affidavits it could not have been omitted here. Its omission under these circumstances pointed away from the notion that, by implication, the term 'pleading' when used in rule 18 had any application to an affidavit. (See [28].)
Accordingly, considering that the sole rationale upon which the rule 30 application was brought was invalid, the application to set aside the replying affidavit had to be dismissed (see [33]).

The joinder application

FUL had demonstrated its credentials as a bona fide public interest organisation, acknowledged to be so by our courts, whose objectives were the upholding of constitutional norms through participation in litigation of constitutional significance. The issue in the review was of a question of profound constitutional importance. FUL had been engaged in this case at earlier stages of its evolution. (As early as 2009, when the JSC declined to refer allegations of gross misconduct for an enquiry, FUL successfully sought an order overturning the non-referral, and thereupon an order directing the JSC to undertake the disciplinary enquiry (see [9]).) The merits or demerits of its stance on the controversy — Hlophe JP had resisted the application on the basis that, inter alia, FUL had exhibited a hostile stance against him in its various public statements, in a manner that was against the public interest — were irrelevant to the joinder question. On grounds of its own legal interest evidenced by its prior involvement in the series of cases and as an agent of the public interest, FUL had shown proper grounds to be joined. (See [47].)

INTONGO PROPERTY INVESTMENT (PTY) LTD AND ANOTHER v GROENEWALD AND OTHERS 2022 (2) SA 543 (WCC)

Company — Proceedings by and against — Institution of proceedings by company — Director who is member of board may institute proceedings or authorise their institution by agent — Companies Act 71 of 2008, s 66.
Company — Shares and shareholders — Shareholders — Lacking locus standi to sue for loss suffered by company.
Company — Shares and shareholders — Shareholders — Nominee shareholder — Appointment — Only registered shareholder may appoint nominee shareholder or director.
Company — Shares and shareholders — Shareholders — Proceedings by and against — Shareholder lacking locus standi to sue for loss of property suffered by company.
Land — Sale — Validity — Fraud — Only victim having locus standi to set aside sale.
Maxims — Fraud unravels everything — Limitation — Contract — Victim must seek to set contract aside for fraud to unravel it — Fraudster or third party cannot rely on maxim.

The applicants, Intongo and one Svensson, approached the court for the setting-aside of a sale of a property in Llandudno by the first respondent, Groenewald, to the second respondent, UVT, on the basis that the transaction was tainted by fraud. The application was opposed only by Groenewald and UVT. The other respondents (a bank, the registrar of deeds, the CIPC) did not participate.
The background facts were that in 2015 one Moller sold his shares in Intongo, which owned the Llandudno property, to Groenewald, who was then — allegedly

fraudulently — registered as Intongo's sole shareholder and director. In 2017 Groenewald sold the property to UVT and in January 2018 it was transferred in its name. But Groenewald had not yet fully settled the purchase price on the share-sale agreement with Moller, who learned of the sale of the property to UVT late in 2018. Moller did not initially attempt to set aside the property sale; it was only when his attempts to enforce the share-sale agreement with Groenewald had failed that he directed his attention to reclaiming the property in the name of Intongo by appointing Svensson as his nominee to do so.

In the papers Svensson described himself as 'director and nominee shareholder' and 'duly authorised representative' of Intongo. He claimed his authorisation appeared from a resolution of Intongo's alleged sole shareholder, Moller. It was only in his replying affidavit that Svensson raised the contention that Groenewald had fraudulently appointed himself as shareholder and director of Intongo and that therefore his standing to represent Intongo was impugned.

UVT challenged the locus standi of both applicants on the ground that it was clear (i) that Intongo did not authorise the institution of the proceedings, since its sole director, Groenewald, was the only one that could have done so; and (ii) that Svensson, as self-described nominee shareholder, could also not have done it: companies concerned themselves only with registered shareholders, and Moller, who was never a registered shareholder of Intongo, could not have appointed Svensson as nominee shareholder or director.

The following provisions of the Companies Act 71 of 2008 were relevant:

Section 1, which defines 'director' as 'a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated', and 'shareholder' as 'the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be'. And s 66, which provides that 'the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company'.

Held

Central to the issue of the applicants' standing were the questions as to who in law could institute proceedings on behalf of a company and the purview and position of a shareholder in relation to a company and its assets (see [21]).

The definitions of 'director' and 'board', read with s 66 of the Act, showed that a director who was also a member of the board would be responsible for the decision to institute legal proceedings in the name of the company, so that if a company had just one director, it was only that director who could institute proceedings or authorise their institution by an agent (see [23]). Since it was clear from company documentation that Groenewald was the only active director of Intongo, and since he had not authorised the present proceedings or authorised their institution by Svensson or anyone else, Moller's resolution authorising Svensson to institute proceedings did not clothe Intongo with the requisite standing (see [24]).

The (unsubstantiated) allegations of fraud did not assist the applicants in impugning Groenewald's position as director because the alleged fraudulent representation to UVT contained in the property-sale agreement did not cause UVT to act to its detriment, an essential element of fraud. UVT did not, as alleged victim, seek to set aside the property sale, which limited the applicability of the maxim that fraud unravels everything: whether fraud unravelled a contract depended on its victim, not

the fraudster or third parties. In view of the above, Intongo was not entitled to institute the present proceedings and was non-suited. (See [25] – [27].)
Svensson also lacked the requisite locus standi. There was no evidence that Moller was a 'shareholder' as defined, nor any record that he became a registered shareholder. Since he was never a registered shareholder, he could not have appointed Svensson as a nominee shareholder or director of Intongo. And even had they been shareholders as defined, Moller and Svensson would still lack standing because a company's property belonged to the company and not its shareholders, and only the company could sue in respect of loss of property owned by it. As Intongo's shareholders, Moller and Svensson did not own its property. (See [28] – [31].) Application dismissed.

MILLER v NATMED DEFENCE (PTY) LTD AND OTHERS 2022 (2) SA 554 (GJ)

Company — Directors and officers — Directors — Removal — By shareholders — Not obliged to give reasons in advance for removal of directors — Shareholders, in contrast to board, can remove directors at will without giving reasons — Companies Act 71 of 2008, s 71(1).

The requirement that reasons be given for the removal of company directors operates if *the board* intends to remove them, in which case s 71(2) of the Companies Act 71 of 2008 requires that the director be furnished in advance with reasons for the proposed resolution. But where *shareholders* seek the removal of a director, s 71(1) does not require them to be provided with reasons in advance. The shareholders can remove them at will without giving reasons. (See [35] – [36], [39].)

ORGANISATION UNDOING TAX ABUSE v MINISTER OF TRANSPORT AND OTHERS 2022 (2) SA 566 (GP)

Constitutional law — Co-operative government — Autonomy of spheres of government — Overlapping functional areas — Proper approach — Functional areas granted exclusively to provinces and local government could only be given meaningful content if they were carved out first — Only remainder falling within functional area granted concurrently to national government — Constitution, s 44(1)*(a)*(ii), sch 4 and sch 5.
Constitutional law — Legislation — Validity — Administrative Adjudication of Road Traffic Offences Act 46 of 1998 and Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 — Unlawful violation of exclusive legislative competence constitutionally conferred on provincial and local governments to regulate provincial roads and traffic; and municipal roads, traffic and parking, respectively — Constitution, s 44(1)*(a)*(ii), sch 5.

The Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (the AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 (the Amendment Act) create a new dispensation for the enforcement of road and traffic laws — a shift from the default system of judicial enforcement through criminal law to a compulsory system of administrative enforcement through administrative tribunals, administrative fines and a demerit points system — at national level. (See [11] – [12] and [15].)

At issue, in this challenge of AARTO and the Amendment Act's constitutional validity, was whether, by creating a single national system for the enforcement of road and traffic laws, the Acts violated the exclusive legislative competence — conferred by s 44(1)*(a)*(ii) read with sch 5 to the Constitution * — of provincial and local governments to regulate 'road traffic' and 'municipal roads' and 'traffic and parking', respectively. (See [14], [19] and [21].)

Part A of sch 4 lists 'road traffic regulation' as a functional area of *concurrent* national and provincial legislative competence. This, the respondents contended was the source of their legislative competence to have enacted the AARTO Act and the Amendment Act — they did not regulate matters falling under sch 5 but rather those falling under part A of sch 4. The applicant contended functional competences listed in sch 4 should be interpreted as being distinct from and as excluding those listed in sch 5 — a 'bottom-up approach' requiring carving out those listed competencies, starting from the bottom of the hierarchy, namely the municipal sphere, and working up to the provincial sphere and lastly the national sphere of competencies. (See [25] – [26] and [38].)

Held

The power of the national legislative authority must be interpreted in light of the *exclusive* legislative power that was granted to provinces and local authorities in terms of sch 5. The functional areas granted exclusively to provinces and local government could only be given meaningful content if they were carved out first. Only that which remained would fall within the functional area granted concurrently to national government. Those competencies resorting under the exclusive legislative and executive competence of municipalities must first be carved out. Next in this hierarchy would be to carve out those competencies resorting under the exclusive legislative and executive competence of provinces, which by virtue of the carving-out process would exclude those competencies already carved out in respect of municipalities. (See [29], [33] and [39].)

Schedule 5 must therefore be read to afford provinces exclusive legislative competence in respect of 'provincial roads and traffic' and affording municipalities exclusive legislative competence in respect of 'municipal roads' and 'traffic and parking'. It followed that sch 4, part A, granted concurrent legislative competence to national and provincial governments in respect of national roads and traffic regulation *only* to the extent that they did not deal with those competencies — carved out following the bottom-up approach — dealing with provincial roads and traffic; or municipal roads, traffic and parking. (See [36].)

The AARTO Act and the Amendment Act unlawfully intruded upon the exclusive executive and legislative competence of the local and provincial governments, respectively. As such, the two Acts were unconstitutional. Since the offending provisions of Acts could not be severed, they would be declared inconsistent with the Constitution in their entirety. (See [45] and [50].)

SUSTAINING THE WILD COAST NPC AND OTHERS v MINISTER OF MINERAL RESOURCES AND ENERGY AND OTHERS 2022 (2) SA 585 (ECG)

Minerals and petroleum — Mining and prospecting right — Exploration right to explore for offshore oil and gas — Application for urgent interdict prohibiting seismic survey pending final interdict — Applicants' prima facie right of meaningful consultation infringed, and their constitutional environmental, language and cultural rights implicated — Irreparable cultural and spiritual harm, threatened harm to

marine life and negative impact on livelihood of small-scale fishers arising from harm to marine life, established — Balance of convenience favouring applicants — No satisfactory alternative remedy available — Interim interdict granted — Constitution, ss 24, 30 and 31.

This case concerned an urgent application for an interim interdict against Shell Exploration and Production South Africa BV and its subsidiaries Impact Africa Ltd and BG International Ltd (together referred to as Shell), prohibiting them from proceeding with seismic surveying pending determination of an application for a final interdict prohibiting them from proceeding with seismic surveying unless and until an environmental authorisation has been granted under the National Environmental Management Act 107 of 1998 (NEMA).
The applicants were non-profit companies, natural persons and a communal property association (see [3]). They alleged that they became aware of the commencement of the intended seismic survey through the media during the early part of November 2021, and briefed attorneys on 22 November 2021 after protest action and other forms of activism had failed to convince the government to intervene.
At issue was whether the requirements for an interim interdict had been met, ie whether the applicants had established: (i) at least a prima facie right, even if open to some doubt; (ii) a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict were not granted; (iii) that the balance of convenience favoured the granting of the interim interdict; and (iv) that they had no other satisfactory remedy.
The applicants submitted that they had established the following prima facie rights: firstly, the applicant communities had a right to be meaningfully consulted about the seismic survey, because it impacted negatively upon their customary rights, including customary fishing rights; secondly, that their (as well as the public's) statutory right under NEMA, which required that prospectors must obtain an environmental authorisation under NEMA for exploration for oil and gas, had been breached because Shell did not have a NEMA environmental authorisation; and thirdly, that their constitutional environmental rights (s 24), language and cultural rights (ss 30 and 31) were implicated. (See [8] and [9].)
The consultation process followed by Shell was as follows. After their application for an exploration right in terms of s 79 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) to explore for offshore oil and gas in the Transkei and Algoa exploration areas was accepted (on 1 March 2013 by the Petroleum Agency of South Africa), a draft environmental management programme was made available for interested and affected parties to raise issues and concerns that they may have had with the proposed exploration activities. Advertisements were placed in four daily newpapers — in English and in Afrikaans — notifying the public of the proposed project and providing details of the consultation process and information on how members of the public could provide input for the environmental management programme process, and inviting comment. Comments were compiled after receipt and a draft environmental management programme was placed on the project website, and interested and affected persons were given 30 days to comment. Notification was sent directly to all interested and affected persons. Thereafter a series of in-person group meetings and focused group meetings were held as part of the engagement process. All interested and affected persons on the stakeholder database were invited to these meetings. The environmental

management programme identified the potential interested and affected parties 'through analysis of potential stakeholders and based on stakeholders engaged in previous similar studies in the area'. The list of the interested and affected parties consulted was attached to the final environmental management programme. It included government authorities (local and regional), non-governmental organisations, community-based organisations and industry groups (including the fishing industry). The list was further expanded through feedback and suggestions received following 'consultation and disclosure activities'. The applicants' complaint about the consultation process was that members of the villages, communities and traditional communities were not on that list (proof that their communities were not consulted), that 'group meetings' were not held in the communities in question, and that Shell spoke only to the 'Kings' of communities on the incorrect assumption that those 'Kings' spoke for their subjects. (See [5], [21] and [23] – [25].)

The applicants relied on cultural and spiritual harm, the threatened harm to marine life and the negative impact on the livelihood of small-scale fishers arising from the harm to marine life. To prove irreparable harm, the applicants relied on the evidence of 10 experts. In this regard Shell, denying irreparable harm, submitted that it took comprehensive mitigation measures against any of the adverse effects of seismic surveying. (See [43] – [64].)

Shell submitted that balance of convenience did not favour the applicants because the prejudice to it if the interim interdict were granted would be real and devastating, whereas the prejudice that the applicants would suffer was speculative. Shell also submitted that the applicants had an alternative remedy available; they could have approached the Minister in terms of s 90 as read with s 47 of the MPRDA to cancel or suspend its right to explore.

Held

As to a prima facie right

The newspapers in which the advertisements were published were only accessible to literate persons with access to those newspapers. Those who could not read English or Afrikaans were excluded from the consultation process. Given the nature of the communities in question, the notification provided by Shell was inadequate. Shell was under a duty to meaningfully consult with the communities and individuals who would be impacted by the seismic survey. The evidence showed that Shell had failed to do so; the consultation process in question was inadequate and substantially flawed. The exploration right, awarded on the basis of a substantially flawed consultation process, was thus unlawful and invalid. The applicants' right to meaningful consultation constituted a prima facie right which deserved

to be protected by way of an interim interdict. The applicants established constitutional rights worthy of protection by an interim interdict. Had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate the possible infringement thereof. In terms of the Constitution such practices and beliefs must be respected, and where conduct offended and impacted negatively on the environment, the court had a duty to step in and protect those who were offended and the environment. Whether or not Shell required an environmental authorisation obtained under NEMA was a decision for the court considering the final interdict. (See [22], [32] – [34] and [36].)

As to irreparable harm
Shell elected not to deal with the threat of harm to the applicant communities' cultural and spiritual beliefs. The applicants' allegations in this regard were accordingly undisputed, and there was no reason not to accept their evidence of such harm. The applicants adduced a sizable body of expert evidence which established a reasonable apprehension of irreparable harm to marine life, and that the mitigation measures upon which Shell relied were inadequate. In the circumstances, the applicants established a reasonable apprehension of irreparable harm to marine life, and that the seismic survey would negatively impact on the livelihood of the fishers and cause cultural and spiritual harm. (See [39] and [65].)
As to the balance of convenience
Shell should not now be allowed to use the consequences of its own failure to adequately consult with all interested and affected persons as a ground for why an interim interdict should not be granted against it. The financial loss that Shell was likely to suffer cannot be weighed against the infringement of the constitutional rights in question; it cannot justify the infringement of the applicants' constitutional rights. Where constitutional rights were in issue, the balance of convenience favoured the protection of those rights. Accordingly, the applicants established that the balance of convenience favoured them. The expert evidence established that there was a reasonable apprehension of real harm to marine life; the nature of the harm was not speculative. If there were any uncertainties about the harm that may be suffered, this was a case where the application of the precautionary principle was justified. In the circumstances, the balance of convenience favoured the granting of an interim interdict. (See [68] – [69], [71] and [73].)
As to an alternative remedy
Section 90 read with s 47 of the MPRDA envisaged a time-consuming procedure, which, if followed, would allow the continuous threat of infringement of the applicants' rights. Although the above section did provide a remedy, it was in the circumstances of this case not a satisfactory remedy. The applicants accordingly did not have a satisfactory alternative remedy available to them, other than the grant of an interim interdict. (See [75] and [77].)

VAN DEN BOS NO v MOHLOKI AND OTHERS 2022 (2) SA 616 (GJ)

Execution — Special executability — Whether creditor may obtain declaration of special executability on judgment obtained in Magistrates' Court — Uniform Rules of Court, rule 46A.

In each of a pair of matters a creditor (an administrator of a body corporate) obtained judgments for arrear contributions from debtors (owners of sectional title units). The creditors had duly obtained writs of execution but the sheriff's returns indicated that no attachable movables could be found (see [4]).
Theron, on strength of the magistrates' courts' orders, the creditor applied to the High Court for declarations of special executability in respect of the debtors' immovable properties (see [6]). This under Uniform Rule of Court 46A.
The issue this raised was whether a High Court could grant such declarations on the back of judgments given in the magistrates' court where execution had been initiated in that court (see [7]).
The High Court held that there was no basis on which it could do so: not under its inherent jurisdiction in that there was no lacuna to fix (special executability was

available in the magistrates' court) (see [13] and [22] – [23]); and not by way of process in aid, the requirements for which were unfulfilled (see [23]). Moreover, the creditor was bound to the forum he had chosen (see [24]).
The second issue was whether Uniform Rule 46A applied only to a primary residence (see [27]).
The court, on interpretation, held that the rule applied to all residential properties, but with additional requisites where the residence concerned was primary, and that here, even the lesser requirements in respect of a non-primary residence were not satisfied (see [28] – [30]).
Applications accordingly dismissed (see [32]).

WESBANK v RALUSHE 2022 (2) SA 626 (ECG)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Proof — Section 129(7) of NCA creating presumption of delivery where postal service confirms delivery to relevant post office in writing — Track-and-trace report sufficient — Delivery or reception of notification slip legally irrelevant but could be presumed on overall probabilities — National Credit Act 34 of 2005, s 129(7).

Section 129 of the National Credit Act 34 of 2005 requires a credit provider to notify a defaulting consumer of its default in writing before taking further steps. Three new subsections, s 129(5) – (7), were added to s 129 in 2015 to clarify the notification process in the light of the Constitutional Court's judgments in *Sebola* and *Kubyana.* Crucially, s 129(7) stipulates that delivery by registered mail is satisfied by 'written confirmation by the postal service . . . of delivery to the relevant post office or postal agency'.
In the present case the delinquent consumer (the defendant) denied that the credit provider (the plaintiff) had sufficiently proved compliance with s 129. He specifically denied having received the post-office slip informing him of the delivery of the s 129 notice to his local post office. It was common cause that the s 129 notice had arrived at the correct post office and that the defendant did not receive (or collect) the s 129 notice. It was similarly common cause that the same s 129 letter together with proof of posting and a track-and-trace report was attached to the summons served on the defendant a few months later.
The issues before court were (i) whether the plaintiff had sufficiently complied with s 129; (ii) the issue of proof of delivery of the notice; (iii) the consequence of the defendant's evidence of non-receipt of the delivery slip; and (iv) whether the attachment of a s 129 notice constituted sufficient compliance with s 129.
Held
The s 129 notice retained its warning function, affording the consumer an opportunity to rectify default to avoid legal action. Section 129's 'gateway' role meant that non-compliance could not be cured by attaching the notice to a summons. (See [18], [24] – [26].)
While s 129 did not specifically deal with the issue of proof of non-receipt, the presumption in s 129(7) — that proof of delivery was satisfied by 'written confirmation by the postal service . . . of delivery to the relevant post office' — was rebuttable only by facts showing failure of the prior fact, ie 'written confirmation', on a balance of probabilities. In the present case the plaintiff's track-and-trace report of delivery to the relevant post office was sufficient. Whether the defendant received a notification

slip or whether it was delivered to him was legally irrelevant: once delivery to the correct post office was proved and not rebutted, that was the end of the matter (See [40], [54] – [55], [60].) The defendant's statement that he did not receive the postal slip was, if at all relevant, insufficient to dislodge the overwhelming probabilities in the plaintiff' favour that it was indeed delivered to the defendant's address. (See [66] – [67].)
Since the defendant failed to rebut the presumption of delivery, the plaintiff established compliance with s 129 and would prevail (see [67], [69]).

SA CRIMINAL LAW REPORTS APRIL 2022

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v TUCKER 2022 (1) SACR 339 (CC)

Extradition — Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Evidence — Procedural regime put in place by s 9 and s 10(4) of Act pointing towards more expansive right to adduce evidence by sought person, given possible invasion of fundamental human rights.
Extradition — Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Reopening of enquiry permissible to correct failure to receive certain evidence relating to surrender, even though committal aspect of enquiry finalised.
Extradition — Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Evidence — Purpose of extradition enquiry not magistrate's committal decision alone, and magistrate could receive evidence relating to surrender.

The respondent was convicted in his absence at a Crown Court in the United Kingdom of sexual abuse of young boys. He absconded to South Africa before the end of his trial but managed to appeal against the conviction, which was subsequently set aside, and a new trial was ordered. Further investigations indicated that additional counts had emerged against the respondent which amounted to some 42 sexual offences in total. The authorities issued a fresh warrant of arrest and 16 years later, when the respondent was traced to South Africa, the United Kingdom made a request for his provisional arrest by the South African authorities.
On 4 March 2016 a magistrate in Pretoria issued a warrant for the respondent's arrest under s 5(1)*(b)* of the Extradition Act 67 of 1962. The respondent was subsequently arrested in March 2016 and on 19 April 2016 South Africa received a request from the United Kingdom for his extradition, which was followed by the requisite certificate issued in terms of s 10(2) of the Extradition Act on 23 June 2016. According to the extradition request, he was charged with buggery against minor boys and other persons; indecent assault and acts of gross indecency against minor boys and majors; and living on the earnings of prostitution and conspiracy to live on the earnings of prostitution in terms of the United Kingdom's respective Sexual Offences Acts.
At the magistrates'-court enquiry in Cape Town in terms of s 9 of the Extradition Act and for a determination in terms of s 10(1) for his liability to be surrendered to the United Kingdom and his committal to prison awaiting the decision to surrender by the Minister of Justice and Correctional Services, the respondent did not challenge the authenticity of the s 10(2) certificate. He contended, however, that he could not be

charged with the offences in the request, as s 7(2) of the United Kingdom's Criminal Appeal Act prohibited the retrial of offences for which the accused was not convicted at the original trial; that he could not be extradited to face punishment inconsistent with the South African Constitution, in that he would be discriminated against on the basis of his sexual orientation; and that he would not receive a fair trial because of negative media attention in the United Kingdom. The respondent further requested the magistrate to permit him to put forward evidence to be included in the magistrate's s 10(4) report to the Minister, such evidence not relating to the s 10 enquiry, but being relevant to the Minister's considerations in terms of s 11 of the Extradition Act. The magistrate refused the request and found that there was sufficient evidence to confirm that the respondent had committed extraditable offences and that the respondent was a person liable to be surrendered to the United Kingdom, and therefore made an order committing the respondent to prison pending the Minister's decision. The respondent then applied to the High Court to both appeal and review the magistrate's judgment on the basis that the magistrate should have admitted the evidence relating to trial fairness in the United Kingdom, and that the refusal to allow him to adduce expert evidence on British criminal law, and furnish the court with extracts of media reports, infringed his right to a fair trial.
The High Court held that the magistrate was obliged to receive any evidence that could have a bearing on the exercise of the Minister's decision to extradite, and the magistrate's failure to do so constituted an irregularity, in that it breached the respondent's procedural rights and the *audi alteram partem* principle. In respect of the magistrate's refusal to consider evidence pertaining to the alleged potential infringement of the respondent's fair-trial rights, the High Court held that the magistrate was correct to do so. The court then dismissed the appeal, but ordered the reopening of the proceedings of the extradition enquiry to allow the respondent to put before the magistrate an affidavit by an expert on the United Kingdom's laws and any documentary evidence pertaining to unfair media coverage for the purpose of the magistrate including such evidence in his report to the Minister in terms of s 10(4). All attempts by the respondent to appeal against this decision were unsuccessful. The applicant had, however, successfully sought leave to appeal against the court's order relating to the reopening of the extradition proceedings. On appeal,
Held, per Theron J (Khampepe J, Madlanga J, Mhlantla J, Tshiqi J and Victor AJ concurring) for the majority, that the procedural regime put in place by s 9 and s 10(4) pointed toward a more expansive right to adduce evidence in the context of a s 10 enquiry. This interpretation, which did not unduly strain the language of the text, had to be preferred over the restrictive interpretation proposed by the Director of Public Prosecutions. Courts were required to interpret legislation not only so that legislation did not limit rights, but also in a manner that promoted rights. Extraditing an individual constituted an invasion of fundamental human rights and allowing a sought person to lead evidence relating to surrender promoted their right to a fair hearing. It afforded them the liberty to raise pertinent evidence they felt might be relevant to the Minister's decision from the start of their extradition proceedings, and have that evidence recorded in open court. It did so without prejudicing or disadvantaging the prosecuting authorities or the requesting state and ensured that the person's concerns relating to surrender were recorded in the transcript of proceedings and possible report forwarded to the Minister in terms of s 10(4). (See [104] – [105].)

Held, further, that the magistrate's refusal to receive evidence relating to the surrender was valid until set aside and, although the respondent initially indicated that he would appeal against the High Court's dismissal of his review application, he had not done so. Both parties agreed that para 3 of the High Court's order, namely that part relating to the reopening of the extradition proceedings, should be set aside, although for different reasons. The court, however, was not bound by the common approach of the parties if it was based on an incorrect perception of the law. (See [111] – [112].)
Held, further, that the finding that extradition proceedings could be reopened to correct a failure to receive evidence relating to surrender flowed from a proper interpretation of ss 9 and 10, which envisaged a sui generis enquiry that might serve a dual purpose, namely the committal decision and the receiving of evidence that would inform the Minister's surrender decision under s 11. Therefore, the purpose of the extradition enquiry was not the magistrate's committal decision alone, and it followed that it was competent for the High Court to direct that the magistrate receive evidence relating to surrender, even though the committal aspect of the enquiry had been finalised. (See [116].)
Held, further, that the magistrate was obliged to admit evidence that was relevant to the Minister's surrender during committal proceedings, notwithstanding the fact that the enquiry was solely concerned with the committal of the sought person. Having concluded that the magistrate did not fulfil this obligation, it was competent for the High Court to order that the extradition enquiry in terms of ss 9 and 10 of the Act be reopened and direct that the magistrate receive the respondent's evidence relating to surrender. Therefore, the appeal had to be dismissed and para 3 of the High Court's order had to be preserved. (See [117].)
Held, per Mathopo AJ (Mogoeng CJ concurring), that the High Court was incorrect in deciding that a person could adduce evidence in committal proceedings before a magistrate, which pertained solely to the Minister's considerations in terms of s 11 of the Extradition Act, and it followed that the reopening of proceedings before the magistrate on that basis was impermissible. (See [58].)
Held, per Jafta J, disagreeing with the minority judgment on remedy, and supporting for different reasons the order of the majority, which effectively preserved the High Court's order. (See [135].)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MOKHESI AND OTHERS 2022 (1) SACR 383 (FB)

Search and seizure — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — 'Proceeds of unlawful activities' — 'Benefits' — What constitutes — No evidence that accused received money and only 'benefit' shown was that he had retained his public-service position and had not faced disciplinary proceedings — Such not 'benefit' for purposes of Act.

The respondents opposed the confirmation of a provisional restraint order in terms of ss 25 and 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA) against the second defendant, as well as the ninth, tenth and eleventh respondents. The application for the restraint order was brought because of the irregular awarding of a contract by the second defendant, who was the Director: Supply Chain Management in the Free State Department of Human Settlements, to the fourth respondent. It was contended on behalf of the applicant that the fourth respondent never intended to

perform in terms of the contract, and subcontracted the performance of the work to the eighth respondent, who in turn subcontracted it to the tenth respondent, each time at a lower price. The applicant contended that the second defendant colluded with the other respondents to unlawfully award the project and, but for the collusion, R230 million would never have been paid from the Department of Human Settlements. The second respondent and other respondents had since been charged with various offences, including fraud and money-laundering. The second defendant denied that he had benefited for the purposes of POCA, either directly or indirectly from the offences alleged against him. The applicant contended that the benefit to the second defendant consisted in his retaining his employment within government and not facing disciplinary proceedings.
Held, that it was clear that no open and transparent process was undertaken in the appointment of the fourth respondent, which was by way of an unsolicited bid. Neither was it contentious that no deviation from the procurement regulations had been sought by the Department when the fourth respondent was appointed to proceed with the project. (See [22].)
Held, further, that, even accepting the broader definition of 'benefit' adopted in the case of *S v Shaik and Others* 2008 (2) SACR 165 (CC), it could not be said that the second defendant, or any third party on his behalf, received any moneys at all. The evidence adduced by the applicant did not establish that any direct or indirect financial benefit accrued to the second respondent. To say that he received a benefit, as there were no professional consequences against him and that he kept his senior position, was expanding the definition far beyond what had been approved by the Constitutional Court. In the circumstances the provisional restraint order against the second defendant, and the ninth, tenth and eleventh respondents, had to be discharged. (See [29] – [32].)

RALARALA v MINISTER OF POLICE 2022 (1) SACR 393 (WCC)

Police — Liability of — Vicarious liability of Minister for delictual acts of police officer — Shooting by off-duty police constable using pistol issued to him, despite consistent incompetence on his part to use firearm, having failed competency test on six occasions — If police officers had executed legal duties properly, would have concluded that not fit to possess firearm — Minister liable for damages for bodily injuries to plaintiff.

The plaintiff represented her 15-year-old son who had been shot by a constable in the South African Police Service (Mahlanza), who had used a service pistol whilst off duty. The plaintiff's son was left paralysed, and wheelchair- bound for the rest of his life. The firearm had been issued to Mahlanza by a warrant officer at the police station for the period that Mahlanza was going to be on leave, and a form SAPS 543 (temporary permit) was issued to him for this purpose. On the evening of the shooting, Mahlanza was at a tavern and became involved in an altercation with another man. Mahlanza was allegedly drunk at the time. He drew his firearm outside the tavern in the presence of many innocent bystanders and fired six or seven shots in the general direction of the man with whom he was having an altercation. That man was shot in the neck and knee, but only sustained flesh wounds. The plaintiff's son was walking home after he had had his hair cut and stopped to buy meat at a stand opposite the tavern, and saw Mahlanza draw a firearm and shoot in his direction. He was struck in the neck and fell to the ground, after which he lost

consciousness. At the time of the incident Mahlanza was off duty, dressed in civilian clothes and drinking with friends. The firearm that he used was the weapon issued to him. After a disciplinary hearing Mahlanza was dismissed. It emerged that, in the period between 8 May 2015 and 8 May 2017, Mahlanza had failed his maintenance-shooting test no fewer than six times. He had, however, on 27 June 2017 passed a remedial maintenance course. In addition to this, Mahlanza had a poor disciplinary record. After the incident and before his dismissal he had once again failed his maintenance-shooting test. The court held that the provisions of National Instruction 4 of 2016 issued by SAPS had not been complied with and, despite a competency certificate being a prerequisite in terms of para 4 of the Instruction for the issue of a firearm to a member, the defendant was unable to produce any such certificate. The warrant officer who issued the firearm to Mahlanza testified that he was not provided with a competency certificate before issuing the SAPS 543 form.
Held, that the defendant was directly liable for the damages suffered in the present matter, in that Mahlanza had not been issued with a competency declaration and had consistently demonstrated himself to be incompetent in the use of firearms over a number of years prior to the shooting incident, as well as thereafter. The fact that he had passed the remedial training course shortly before the incident did not render him a suitable candidate to be issued with a firearm or justify the issue of a competency declaration. None of the appropriate procedures or protocols had been adhered to in regard to the issue of the firearm to him, and it followed that at the time of the incident he had been placed in possession of a police-issue firearm in

circumstances where he was not lawfully authorised to be in possession thereof. That lack of lawful authority was directly attributable to negligent practices and improper controls on the part of the defendant. A reasonable person in the position of the defendant would have foreseen that issuing Mahlanza with a firearm could cause a danger to the public, and that harm was imminent. The manner in which Mahlanza conducted himself on the evening in question demonstrated without question that he was not a fit and proper person to be placed in possession of a firearm. The plaintiff's claim on the question of liability was upheld. (See [56] and [59] – [60].)

S v PM 2022 (1) SACR 412 (WCC)

Plea — Plea-and-sentence agreement — Magistrate irregularly questioning accused prior to disclosure of entire agreement — Correct procedure set out — Criminal Procedure Act 51 of 1977, ss 105A, 105A(6)*(a)*, 105A(7)*(a)* and 105A(8).

A regional magistrate submitted the present matter on review to the High Court on the ground that she had in error imposed a sentence of seven years' direct imprisonment pursuant to a plea-and-sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the CPA). The court noted that there were procedural irregularities committed during the proceedings involving the agreement, namely that the magistrate's questioning of the accused occurred after the legal representative had read the preamble and guilty plea and admissions into the record, and that the magistrate, after conducting said questioning, had then proceeded to make findings as to the accused's guilt, and convict him as charged.
Held, that the questioning of an accused in terms of ss (6)*(a)* had to occur only after the entire plea-and-sentence agreement had been disclosed in court. The section did

not in any way allow for a piecemeal disclosure of the agreement, as adopted by the parties and the magistrate in the present matter. The premature questioning of the accused was therefore incorrect and irregular. The incorrect procedure adopted by the magistrate then led to a further irregularity in the proceedings, in that she convicted the accused prior to the disclosure of the entire agreement and in disregard of ss 105A(7)*(a)* and (8). Those provisions did not vest the magistrate with any authority to make a finding or pronouncement on the accused's guilt, and to convict him after the plea and admissions had been disclosed. (See [9] and [12] – [14].)
Held, however, that the irregularities were of a procedural nature and were not fatal, as they did not impair the legal validity of the conviction. The accused was legally presented throughout the proceedings and the state advocate was duly authorised to conclude the plea-and-sentence agreement on behalf of the state; the accused confirmed concluding the agreement and signed it, admitting all the allegations in the charge freely and voluntarily and in sound and sober senses, without any undue influence. His conviction was therefore in accordance with justice. (See [20] – [21].)
Held, further, that the sentence of seven years' imprisonment exceeded the punitive jurisdiction allowed by s 276A(2)*(b).* The magistrate had acted correctly by sending the matter on special review, as she was not at liberty to rectify or amend the sentence in terms of s 298 of the CPA, as she was at that stage functus officio. The matter accordingly had to be remitted to the magistrate to reconsider the sentencing proceedings. (See [22] – [25].)

S v MARTIN 2022 (1) SACR 421 (WCC)

Sentence — Imprisonment — Suspension of — Conditions of suspension — Conditions to be fair, reasonable and not wider than offence of which accused convicted — In conviction of theft, not competent for court to include offences of robbery and fraud in conditions of suspension.

The accused was convicted in a magistrates' court of theft and was sentenced to a fine of R4000 or four months' imprisonment which was wholly suspended for a period of four months on condition that he was not found guilty of theft, attempted theft, fraud, robbery and the contravention of s 36 or 37 of the General Law Amendment Act 62 of 1955 committed during the period of suspension. However, in the sentence annexure attached to the charge-sheet, the magistrate noted that the whole sentence was suspended for a period of five years on similar conditions enunciated above.
On review the court held that the reference to a suspension period of four months was merely a clerical error and that it was clear that the period was intended to be five years. (See [4] – [5].)
In respect of the other conditions of suspension, the court held that such conditions had to be fair and reasonable, and not wider than the offence of which the accused had been convicted. A deviation from this well-established principle offended against the accused's right to a fair trial enshrined in s 35(3) of the Constitution. (See [11].) It was not legally competent for the trial court to include the offences of robbery and fraud as additional conditions. Theft was a competent verdict for robbery, but robbery was a more serious offence, although related to theft. It would have been different if the accused were convicted of robbery, in which case it would have been within the magistrate's power to make theft or attempted theft a condition of suspension. (See

[13].) It was impermissible for the trial court to make fraud a condition of suspension because the definitional requirements of fraud and theft were different. (See [14].) The conditions of suspension were amended accordingly.

S v KUNENE 2022 (1) SACR 427 (KZP)

Fundamental rights — Right to be tried within reasonable time — Trial delays occasioned by systemic delays, mainly because of non-availability of presiding magistrate and/or absence of witnesses, and accused convicted seven years after having been charged — Passage of time unreasonable in extreme — Conviction and sentence set aside.

The appellant was granted leave on petition to appeal against his conviction and sentence on two counts of rape of a young girl, aged 11 at the time of the offence. He was sentenced to an effective term of 15 years' imprisonment. The appellant was 17 at the time of the commission of the offence and was 18 when he was charged. His trial was beset by systemic delays, and he was convicted seven years after having been charged and after he had attended court on at least 46 occasions. Although the delay in the prosecution of the case was not raised by counsel for the appellant, both counsel agreed at the hearing of the appeal that this was a matter that could not be ignored.
Held, that the history of the matter showed that the delays were occasioned by what could rightly be termed as systemic delays and that periods of time were lost mainly because of the non-availability of the presiding magistrate and/or the absence of witnesses. On the occasions on which the appellant himself was absent, it was because arrangements had already been made for the trial to be adjourned for certain reasons. On every other occasion the appellant was present, only to be informed each time that the matter could not proceed. The prejudice to the appellant in these circumstances was self-evident. (See [12].)
Held, further, that a most concerning feature of the delays was that a period of two years and eight months had elapsed from the time of the appellant's arrest and first appearance until the trial commenced on 5 May 2015. After commencing the complainant's evidence-in-chief, the matter was adjourned to 8 July 2015 after which a period of two years and a half years passed from the time that the young complainant commenced her evidence until the matter resumed again on 18 July 2017. What was concerning was that the new prosecutor, in the absence of any formal application before the magistrate or any reasons proffered, commenced to lead the evidence of the complainant de novo. The consequence of this was that the complainant's evidence was now at variance with what she had testified to on the first occasion. (See [13] – [14].)
Held, further, that, bearing in mind that the charges in the present matter were of a sexual nature involving both a young girl and a young offender, there was an overall duty, not only on the court but also on the prosecution, to ensure that the trial commenced and ended within the shortest time possible. The failure in this regard had to be placed squarely at the doors of the magistrate and the prosecution. The result was the severe prejudice caused not only to the appellant, but to the complainant as well. No heed had been paid to the appellant's rights to a trial within a reasonable time, and the conduct of the magistrate and prosecutors involved required censure of the strongest kind. The passage of time in the case was

unreasonable in the extreme and, in the circumstances, the convictions and sentences had to be set aside. (See [17] – [19].)

S v NKUTE 2022 (1) SACR 436 (GP)

Appeal — Record — Lost, destroyed or incomplete record — Reconstruction of — Collaborative effort to be undertaken scrupulously and meticulously.

The appellant appealed against convictions in a regional magistrates' court in 2014 for murder and robbery and sentences of life imprisonment and 15 years' imprisonment, respectively. On 11 December 2020 a directive was issued for heads of argument to be filed by 19 February 2021. These were filed on 18 March 2021 without an application for condonation. The appellant contended on appeal that the record of the proceedings was incomplete, that they had not been a proper reconstruction of the record and that the notes of the magistrate could not be referred to as a reconstructed record. The appellant and the other accused had not been involved in the reconstruction of the record. He contended that the state was the custodian of the trial records and had the duty to provide a record to the court of appeal.
Held, that all parties were to participate in the reconstruction process, which was a collaborative effort. Therefore, there was no merit in the appellant's view that the state bore the exclusive responsibility towards reconstruction of the trial record. When reconstruction was necessary, the obligation lay not only on the appellant, but primarily also on the court, to ensure that the process complied with the right to a fair trial. It was an obligation that had to be undertaken scrupulously and meticulously in the interests of the accused, as well as the victims. (See [23] – [26].)
Held, further, that, considering the effect that striking of the matter would have on the administration of justice, and for the matter to reach finality, it was necessary that a directive be issued in terms of which the matter was to be dealt. (See [33].) The court accordingly provided a schedule to be followed by the relevant role players in order to ensure a speedy finalisation of the matter.

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Afriforum NPC v Premier, Gauteng Province and others [2022] 2 All SA 1 (SCA)

Constitutional and Administrative Law – Powers of administrator of dissolved municipal council – Constitutional validity of approval of budget by administrator – Section 139(1)(c) of Constitution provides for appointment of administrator when municipal council is dissolved, with clear purpose of such appointment being to ensure continued functioning of the municipality – Budget approval is not a legislative function, and the executive powers given to administrator includes power to approve budget.

The appellant (“Afriforum”) appealed against the dismissal of its application to set aside approval of the 2020/21 annual budget of the City of Tshwane Metropolitan Municipality by the third respondent (the “administrator”). It was contended that such approval was unconstitutional and therefore, invalid.

Held – The central issue in the appeal was whether an administrator appointed in terms of section 139(1)(c) of the Constitution has the power to approve an annual

budget of a municipality to which he is appointed. The determination of the issue *inter alia* required an interpretation of section 139(1)(c) of the Constitution.

As the budget which had previously been approved by the administrator on 30 June 2020 was ratified by the council upon its reinstatement by the full court, the administrator submitted that that rendered the appeal moot. Section 16(2)(a) of the Superior Court Act provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. The court decided that it should exercise its discretion and determine the appeal despite the fact that the budget was subsequently adopted by the reinstated council, as it concerned the interpretation of section 139(1)(c) of the Constitution and the lawfulness of a decision taken by an administrator to approve an annual budget, which were both discrete questions of law of public importance which were likely to arise in the future.

The administrator in this case was not appointed as a consequence of a failure by the municipality to approve a budget but in terms of section 139(1)(c), which imposes no obligation on the provincial executive to pass an interim budget when it dissolves the council. It refers to the dissolution of the council and the appointment of an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step. The clear purpose of the appointment of an administrator is to ensure the continued functioning of the municipality.

The fundamental flaw in the appellant's case was that it assumed that whenever a municipal council is dissolved, regardless of the basis for the dissolution or the power invoked, it is only the provincial executive that is empowered to adopt the budget. Budget approval is not a legislative function. The executive powers given to the administrator included the power to approve the budget.

The appeal was dismissed.

Cornerstone Logistics (Pty) Ltd and another v Zacpak Cape Town Depot (Pty) Ltd [2022] 2 All SA 13 (SCA)

Trade (Customs and Excise) – Customs duties – Licensee of customs and excise warehouse – Contract for warehousing services – Indemnity clause protecting licensee of customs warehouse against liability for customs duty, VAT, and other charges in terms of the Customs and Excise Act 91 of 1964 – Interpretation of indemnity clause – Licensee indemnified against any loss incurred as a result of its complying with client's express or implied instructions, with result that client and surety were liable to indemnify licensee once proven that licensee acted on client's instructions.

As licensee of a customs and excise warehouse, the respondent ("Zacpak") was liable, in terms of section 19(6) of the Customs and Excise Act, 91 of 1964, for customs duties and VAT on all goods stored in its warehouse. Such liability only ceases when it is proved that the goods in question have been duly entered in terms of section 20(4) of the Act, either for home consumption or export, and have been delivered or exported in terms of such entry.

The appellant ("Cornerstone") had submitted an application to Zacpak for credit facilities in respect of warehousing services, and signed the application form renouncing the benefits of excussion and division. Cornerstone instructed Zacpak to

store goods in its warehouse. Zacpak subsequently released the goods to a road carrier ("Bridge"), who was supposed to export the goods to Mozambique. Although the consignments were entered for export to Mozambique, they were impermissibly diverted, thus entering for home consumption in South Africa. When the South African Revenue Service demanded payment of duties, Zacpak successfully enforced its indemnity clauses against Cornerstone in the court *a quo*. That led to the present appeal.

Held – In interpreting the indemnity and suretyship clauses, they had to be given meaning and business-like efficacy by having regard to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appeared; the apparent purpose to which it is directed; and the material known to those responsible for its production. Properly construed, in terms of the agreement, Cornerstone indemnified Zacpak against any loss incurred by Zacpak as a result of Zacpak complying with Cornerstone's express or implied instructions. For the indemnity to become effective Zacpak merely had to establish, on a balance of probabilities, that it had released the goods to Bridge on Cornerstone's instructions. Based on the evidence, the court *a quo* correctly found that Zacpak released the goods to Bridge on Cornerstone's express instructions. The court also highlighted evidence of Cornerstone's continued involvement with the goods beyond their entry into Zacpak's warehouse. In the absence of any fault on the part of Zacpak in the wrongful release of the goods to Bridge, liability was attributed only to the appellants.

The Court also found against second appellant, who in signing the agreement as surety, assumed liability accessory to that of Cornerstone.

The appeal was dismissed with costs.

Deltamune (Pty) Ltd and others v Tiger Brands Limited and others
[2022] 2 All SA 26 (SCA)

Civil Procedure – Class action – Subpoena duces tecum – Requirements of relevance and specificity – Rule 18(4) of Uniform Rules of Court requires that pleadings contain a clear and concise statement of the material facts upon which the pleader relies – Pleader is only required to set out the material facts, and in context of a class action, an added consideration is that the certification order sets the parameters within which the issues in the pleadings should be considered – Where evidence sought to be obtained through subpoenas is extraneous to certified class action, subpoenas too wide and fell to be set aside.

An outbreak of listeriosis in South Africa between January 2017 and 3 September 2018 saw a number of people across the country contracting an infection of the bacterium *Listeria monocytogenes* ("L. *mono*") as a result of consuming contaminated ready-to-eat meat products produced by the respondents ("Tiger Brands"). A class action was brought against the company. In response, Tiger Brands issued subpoenas which required the recipients thereof to produce an array of documents, items and other things, mainly in respect of test results conducted for the L. *mono*. The appellants in turn brought applications in the High Court, for setting aside of the subpoenas. The grounds for the applications were that the documents were not relevant to the issues arising in the class action; the breadth of the requests constituted an abuse of the court process; the subpoenas amounted to a fishing expedition; and the information in the requested documents was confidential and

private. The court's upholding the validity and enforceability of subpoenas led to the present appeals.

Held – Relevance in respect of a subpoena *duces tecum* is not only necessary, but appropriate. The second pertinent issue was that of specificity.

Rule 18(4) of the Uniform Rules of Court requires that pleadings contain a clear and concise statement of the material facts upon which the pleader relies. The particularity required in that rule relates only to the material facts of the party's case. Thus, the pleader is only required to set out the material facts – with due regard to the distinction that should be maintained between the facts which must be proved in order to disclose the cause of action (*facta probanda*) and the facts or evidence which prove the *facta probanda* (*facta probantia*). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity. In the context of a class action, there is an added consideration: the certification order sets the parameters within which the issues in the pleadings should be considered. What this suggests is that even where *facta probantia* are pleaded, as is the case here, a court is enjoined to distil the real issues between the parties, within the confines of the certification order. This it can only do if it ignores the unnecessarily pleaded pieces of evidence and focuses on the *facta probanda* of the case before it.

Tiger Brands attempt to cast doubt on whether it was the sole source of the outbreak was not the purpose of a subpoena *duces tecum*. The focus of the class action was only on those whose damages resulted from consuming products from Tiger Brands' meat processing facility at Polokwane. It was therefore irrelevant for purposes of the class action, whether other persons might have been harmed by the consumption of products manufactured by anyone other than Tiger Brands through its Polokwane facility. Having regard to the certification order, the reference to possible cross-contamination was extraneous to the certified class action.

The appeals were upheld.

Member of the Executive Council, Department of Education, Eastern Cape v Komani School and Office Suppliers CC t/a Komani Stationers
[2022] 2 All SA 44 (SCA)

Education – Schools – Payment owed to creditor – Liability of State – South African Schools Act 84 of 1996, section 60.

The respondent ("Komani Stationers") had supplied school stationery to a public school. On not receiving payment, it sued the school governing body and principal. Default judgment was obtained, but the District Director institute interpleader summons seeking an order releasing the goods concerned from attachment on the ground that the goods were owned by the Eastern Cape Department of Education (the "Department") who were not cited nor indebted to Komani Stationers. The latter then sued appellant (the "MEC") for payment. As section 58A(4) of the South African Schools Act 84 of 1996 prevents attachment, in satisfaction of a judgment debt, of assets of a public school, the question in the present appeal was whether section 60(1) of the Schools Act encompasses claims for specific performance in respect of payment of money owed to a creditor by a public school because of the prohibition contained in section 58A(4). A subsidiary issue was whether Komani Stationers's claim against the MEC had prescribed.

The High Court found against the MEC who then appealed.

Held – It was common cause between the parties that the claim asserted by Komani Stationers was essentially one for specific performance, and that on its terms section 60(1) does not absolve public schools from liability in respect of their contractual obligations. The court considered what section 60(1) means in providing that "the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which a public school would have been liable but for the provisions of this section". The established tenets of statutory interpretation were applied.

A delict generally entails a breach of a duty imposed by the law independently of the will of the party bound. On the other hand, contractual damage or loss flows from a breach of contract and thus consists of a breach of a duty voluntarily assumed. There may well be an overlap between a claim for delictual and contractual damage where the conduct complained of constitutes both a breach of contract and also satisfies the requirements of a delictual claim. In contrast, specific performance entails the right of a plaintiff to insist, subject only to the court's discretion, that the other party to the contract performs his or her undertaking in terms of the contract whenever he or she is in a position to do so.

To bring a claim within the purview of section 60(1) in order to hold the State liable the claimant would need to establish delictual or contractual damage or loss; caused as a result of any act or omission; in connection with a school activity; conducted by a public school; for which such public school would have been liable but for the provisions of this section. The Court held that section 60 is limited only to delictual or contractual damage or loss arising as a result of an act or omission in the circumstances stipulated in the section itself against a public school and does not avail a creditor who seeks to enforce a contractual claim for specific performance against the MEC concerned when a claim of that kind lies solely against a public school that is privy to the contract.

The appeal was upheld by the majority of court.

In a dissenting judgment, the point of departure was the interpretation of section 60. The minority judgment favoured a less narrow interpretation so as to read the section to include damages or loss flowing from the non-payment of a claim based on specific performance.

Post Office Retirement Fund v South African Post Office SOC Ltd and others [2022] 2 All SA 71 (SCA)

Employee Benefits and Retirement – Pension funds – Failure by employer to comply with duty to pay contributions to pension fund – Defence of supervening impossibility of performance – Requirements for defence – Where circumstances were not the result of vis major or casus fortuitous, and the impossibility relied upon was relative as opposed to absolute, defence of supervening impossibility of performance found not to be established.

The South African Post Office ("SAPO") is required in terms of the rules of the Post Office Retirement Fund, to pay contributions to the fund monthly. SAPO failed to pay any contributions to the fund for the months of May and June 2020. It disputed any obligation to pay contributions in terms of the fund's rules, claimed that it had the

power to decide not to pay in prioritisation of payments to creditors, and claimed that its parlous financial state rendered it impossible to pay the fund with the effect that its obligation was either extinguished or deferred. The High Court's upholding of the defence of supervening impossibility of performance led to an appeal.

Held – The High Court made a number of far-reaching findings as to the meaning of the relevant fund rule without attempting proper engagement with its terms or the most basic of interpretive exercises. The interpretation of written documents, including legislative instruments, involves a consideration of the language used, the context in which it is used and the purpose of the document that is the subject of interpretation. On an examination of the fund's rules, the court was satisfied that SAPO had no choice. It was placed under an obligation by the rules – a statutory obligation – to pay the fund the contributions provided for therein. No provision was made in the rules for an exemption from the obligation to pay contributions on a monthly basis and SAPO was not authorised, in its discretion, to decide to withhold payment and to prioritise other creditors over the fund. SAPO's contention that the rules did not impose an obligation on it to pay contributions to the fund was therefore rejected. The Court also rejected the notion that the obligation to pay pension fund contributions could be avoided due to obligation to pay other creditors.

The final defence raised by SAPO was that its obligation to pay the fund was extinguished by supervening impossibility of performance. The Court set out the requirements which must be met by the party relying on such defence. SAPO chose not to pay the fund when it could have done so; its financial distress pre-dated the Covid-19 pandemic, was foreseeable and avoidable, and so was not the result of *vis major* or *casus fortuitus*; and the impossibility it relied upon was relative as opposed to absolute. Its defence thus failed.

The appeal was upheld with costs.

Premier of the Western Cape Province v Public Protector and others
[2022] 2 All SA 95 (SCA)

Constitutional and Administrative Law – Report of Public Protector – Finding of contravention of section 16(2)(b) of the Constitution and recommended remedial action against premier of province for statements about colonialism – Absence of rational connection between Public Protector's decision and reasons for the decision – Where Public Protector's findings were materially influenced by errors of law report falling to be set aside.

In 2017, then Premier of the Western Cape Provincial Government, Helen Zille, made certain tweets about the impact of colonialism on South Africa. A complaint led to the Public Protector investigating and issuing a report finding that the tweets violated the Executive Ethics Code, and recommending remedial action. Ms Zille approached the High Court seeking to review and set aside the findings in the Public Protector's report, under the principle of legality The refusal of the High Court to review the decision was the subject of the present appeal.

Held – Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected, the question was whether, objectively considered, the tweets were demeaning. Section 16 of the Constitution guarantees freedom of expression, but that is not an absolute right. The

court looked to case law for guidance on the balancing of competing constitutional rights.

In determining whether Ms Zilles' tweets offended section 10 of the Constitution, the High Court and the Public Protector wrongly placed reliance on the fact that Ms Zille had apologised for her statements. Pointing out that the unlawfulness of Ms Zille's tweets could not be established by an after-the-fact assessment of her apology, the court held that the Public Protector's finding on that aspect was irrational as the conclusion reached was not supported by the reasons furnished.

The Public Protector remarked that in principle Ms Zille's tweets were protected by section 16 of the Constitution, but proceeded to, without any basis, to find that they infringed section 16(2)(b) thereof. It was held that the Public Protector's approach did not pass muster as she failed to determine the objective meaning and applied a wholly subjective approach in terms of which she interpreted the tweets based on what she perceived to be the public's reaction. An important consideration was that not every instance of harmful and/or hurtful speech will result in imminent violence. Without any attempt to objectively interpret the impugned tweets, the Public Protector concluded that the reaction of those who responded to Ms Zille's tweets was adequate indication of the likelihood of Ms Zille's tweet stirring up racial violence in South Africa.

There was no basis for that finding. It was also evident that the Public Protector interpreted the provisions of section 16(2) incorrectly. Her failure to apply her mind to any of the threshold requirements of section 16(2)(b) of the Constitution amounted to a material error of law. Had the Public Protector correctly interpreted section 16(2)(b), she would have embarked on a proper investigation of whether, in making the tweets, Ms Zille intended to incite violence and whether the existence of imminent violence was shown. The conclusion that section 16(2)(b) was implicated constituted a material error of law.

The conclusion that Executive Ethics Code was breached was also shown to be incorrect.

There being no rational connection between the Public Protector's decision and the reasons for the decision, the High Court's refusal to review the decision on the grounds of irrationality was erroneous.

The appeal was upheld with costs and the High Court order was replaced with one reviewing and setting aside the Public Protector's report.

Afrikander on behalf of DMA v Member of Executive Council for Health, Eastern Cape [2022] 2 All SA 112 (ECB)

Personal Liability/Delict – Medical negligence – Claim for damages – Determination of factual causation – Expert evidence – Approach to expert evidence – Faced with a conflict in the expert testimony of opposing parties, court is required to justify its preference for one opinion over another by a careful and critical evaluation thereof.

The trial court's granting of absolution from the instance in appellant's action against the MEC, for damages arising from alleged medical negligence, led to the present appeal.

Held – The sole issue in the appeal was that of factual causation, namely, whether or not it could be said that the negligent conduct of the medical staff at the hospital was the cause of the injury suffered by appellant's child. A determination of the primary issue in turn raised two secondary issues. The first issue was how to deal with a conflict in the evidence of opposing expert witnesses, while the second raised the question of when factual causation must be found to have been proved in such a delictual claim.

The trial court correctly approached the issue for determination on the basis of there being two conflicting expert opinions with regard to what the factual cause of the child's injury was. The question on appeal was accordingly whether the court was correct in concluding that the two opinions were equally placed on the evidence before it, and that the appellant should as a consequence be found not to have discharged the burden of proving that it was the respondent's negligence that was the cause of the injury sustained by the child.

The opinion of a witness is generally inadmissible unless relevant. If the opinion can assist the court in determining an issue, it has probative value, otherwise it is superfluous. Expert opinion evidence is received when the issues require special skill and knowledge to draw the right inferences from the facts stated by the witnesses. The Court described the different types of conflicts which may arise in expert evidence. The evaluation of expert opinion in determining its probative value and the considerations relevant thereto, are determined by the nature of the conflict in the opinion, and the context provided by all the evidence and the issues which the Court is asked to determine. Faced with a conflict in the expert testimony of the opposing parties, the court is required to justify its preference for one opinion over another by a careful and critical evaluation thereof. The function of the court is restricted to deciding a matter on the evidence placed before it by the parties, and to choose between conflicting expert evidence, or accepting or rejecting the proffered expert evidence.

Against the backdrop of the test for factual causation and the burden of proof in a civil case, the Court found the evidence of the appellant's expert to be more cogent. The appeal was upheld and the MEC was ordered to pay

Democratic Alliance v National Commissioner of Correctional Services and others [2022] 2 All SA 134 (GP)

Criminal Law and Procedure – Release of prisoner on medical parole – Correctional Services Act 111 of 1998 – Overturning by National Commissioner of Correctional Services of decision by Medical Parole Advisory Board not to recommend medical parole – Commissioner found to have impermissibly usurped statutory functions of the Board, and his conduct was irrational, unlawful and unconstitutional.

Urgent applications were brought by the Democratic Alliance ("DA") and the Helen Suzman Foundation ("HSF") for a declaration of unlawfulness against the decision of the then National Commissioner of Correctional Services, Mr Arthur Fraser, to grant the third respondent ("Mr Zuma") medical parole under section 75(5) of the Correctional Services Act 111 of 1998 (the "Act"). The parole decision followed the Constitutional Court's sentencing Mr Zuma to 15 months' imprisonment for contempt of court after he failed to comply with an order of that court, requiring him to appear before a Commission of Enquiry. Although the Medical Parole Advisory Board

decided not to recommend medical parole, the Commissioner took the decision to place Mr Zuma on medical parole, without considering the grounds listed in sections 79(1)(b) and (c) of the Act.

The DA and HSF sought to have the medical parole decision reviewed and set aside, and replaced with a decision refusing medical parole and requiring Mr Zuma to return to prison to serve out the remainder of his sentence. According to the applicants, Mr Zuma did not satisfy the requirement for medical parole as set out in section 79(1) of the Act.

Held – The alleged abuse of power in the present proceedings, if proven, would impact the rule of law, and the matter was accordingly urgent.

The placement on medical parole extends to physically incapacitated offenders and those suffering from an illness that severely limits their daily activity or self-care. The Medical Parole Advisory Board, an independent expert body, has to impartially and independently make a medical determination whether or not an offender is terminally ill or is suffering from an illness that severely limits his daily activity or self-care. It is the Board, and not the doctors treating the offender, which decides if an offender is terminally ill or severely incapacitated. If its recommendation is positive, the Commissioner must then decide whether section 79(1)(b) and (c) are satisfied. The recommendations of the Board is ordinarily decisive and binding on the Commissioner, who does not have the medical expertise to overrule the recommendation of the Board.

The Commissioner's decision to grant Mr Zuma medical parole was an administrative exercise of public power and therefore had to be lawful, rational,

reasonable and procedurally fair. In its expert assessment, the Board had already considered medical reports which the Commissioner then reconsidered and relied on to overturn the recommendation of the Board. In so doing, the Commisisoner impermissibly usurped the statutory functions of the Board, and his conduct was irrational, unlawful and unconstitutional. The reasons given by the Commissioner to release Mr Zuma on medical parole were not connected with the requirements for medical parole and were not authorised by the empowering provision.

The effect of the Commissioner's decision was to unlawfully mitigate the punishment imposed by the Constitutional Court, thereby rendering the Constitutional order ineffective, which undermined respect for the courts, the rule of law and the Constitution itself.

In the premises, the impugned decision was reviewed, declared unlawful, and set aside and Mr Zuma was required to return to prison to serve out the remainder of his sentence.

Forum de Monitoria do Orçamento v Chang [2022] 2 All SA 157 (GJ)

Criminal Law and Procedure – Extradition – Competing requests for extradition – Minister of Justice's decision to extradite accused to country where he might enjoy immunity from prosecution – Rationality of decision – Minister's decision must be rationally related to the purpose for which the power was conferred, and in exercising power, Minister must take into consideration all relevant facts when weighing up a matter pertaining to extradition – Ignoring of material facts rendering decision irrational and reviewable.

The first respondent, Mr Chang, was a public official of Mozambique who had occupied the position of Minister of Finance for ten years. He was implicated in the "Mozambican secret debt scandal", and was accused of grand corruption involving plundering public resources. After being charged in both the United States of America ("USA") and Mozambique for corruption and fraud, he was arrested in South Africa at the request of American authorities. The Minister of Justice then received competing requests by both Mozambique and the USA to extradite Mr Chang to their respective countries.

The applicant ("FMO"), being committed to fighting corruption, sought review of the Minister's decision to extradite Mr Chang to Mozambique, after having first decided to extradite him to the USA.

Held – The first issue for determination was whether the Minister's decision was rational and in conformity with the doctrine of legality when he changed his mind from extraditing Mr Chang to the USA, to Mozambique. The second was whether the Minister ignored relevant facts, thus resulting in the decision and the procedure adopted in arriving at the decision, being marred by irrationality.

The Minister's decision must be rationally related to the purpose for which the power was conferred. If it is not, then the exercise of the power would be arbitrary and at odds with the Constitution. Thus, in exercising his power, the Minister must take into consideration all the relevant facts when weighing up a matter pertaining to extradition. The process in leading up to that decision must also be rational.

When a court is faced with an executive decision where certain factors were ignored, it must consider whether the factors ignored were relevant; whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and if the answer to the second stage of the enquiry is negative, whether the ignoring of relevant facts tainted the entire process with irrationality, rendering the final decision irrational.

One of the primary considerations which illustrated that the Minister's decision was not rationally related to the purpose was that of immunity. Extradition to a State where the person enjoys immunity from prosecution is contraindicated. The question of Mr Chang's immunity from prosecution was uncertain, and the Minister's ignoring that aspect rendered his decision irrational. Further relevant concerns which the Minister did not take into account or failed to give sufficient weight to were highlighted by the court.

Post hoc reasons for the Minister's decision did not have sufficient probative value to justify a rational decision.

The extradition decision was reviewed and set aside and the court ordered Mr Chang to be extradited to the USA.

Gore NO and another v Ward and another [2022] 2 All SA 178 (WCC)

Corporate and Commercial – Fraudulent acts committed by company director in name of company – Liability for loss – Authority to act on behalf of company – Actual authority arises from legal or consensual relationship in place between principal and agent and exists independently of third party's understanding of the facts – Liability thus accruing to company.

As joint liquidators of a company ("Brandstock"), the applicants sought the setting aside, in terms of section 26 of the Insolvency Act 24 of 1936 read with section 340 of the Companies Act 61 of 1973, of payments of R250 000 made to each of the respondents; alternatively, for a declaration that the payments were made *sine causa*. Orders were also sought directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of section 26, or on the grounds of their alleged unjust enrichment at the company's expense.

Opposing the application, the respondents contended that the payments were made not by Brandstock but rather by its sole shareholder and director ("Philp"), using funds stolen by him from a third party ("Louw"). The payments had been made to the respondents in satisfaction of a long-standing debt owed to them by Philp, and were made immediately after Philp had secured over R2m from Louw as financing for a sale transaction. Louw had paid the money into Brandstock's account at Philp's request.

The respondents contended that the funds used to make the payments had not become the property of Brandstock, and that the company's banking account had been used as a conduit for the purpose of fraudulently receiving and disposing of the money that Philp had stolen. In other words, the respondents denied that Brandstock had made dispositions to them within the meaning of that word in section 26 of the Insolvency Act. They also denied that they were enriched by the payments.

Held – A company has no mind of its own, and is therefore capable of acting only through a human agency. The law treats the company as the principal in relation to the actions undertaken in its name and on its behalf and the persons acting for it as its agents. A company is therefore bound only by the actions of persons who have authority to represent it. The Court acknowledged the possibility of persons acting, or purporting to act, on behalf of a company, to misuse the opportunity for fraudulent purposes, and to do so entirely for their own dishonest ends to the prejudice of those with whom they purported to transact in the name of the company, and often at the same time also to the prejudice of their supposed principal. That leads to the question of where the resultant loss should fall.

The ultimate control of a company's affairs is vested in its board of directors. Philp, as Brandstock's sole director, fell to be regarded as its authorised agent.

His authority was actual, not apparent or ostensible. Actual authority arises from the legal or consensual relationship in place between the principal and the agent and exists quite independently of the third party's understanding of the facts. Brandstock was thus accountable to Louw for the money that was stolen by Philp.

The Court rejected the respondents' seeking to resort to the directing mind doctrine to displace the law of agency where those are applicable and available to determine a company's liability in a contractual context.

In the circumstances of this case, the funds received from Louw became Brandstock's property when it received the payment. By disposing of the funds credited to its account as a consequence of Louw's payments, Brandstock exercised the personal right it had acquired against its banker in consequence of the payments.

There being no suggestion by the respondents that the dispositions were for value, the court set aside the payments as dispositions without value.

Knuttel NO and others v Bhana and others [2022] 2 All SA 201 (GJ)

Civil Procedure – Founding affidavit – Commissioning of affidavit – Regulation 3(1) requires that a deponent sign the declaration in the presence of a commissioner of oaths – Non-compliance with regulations does not per se invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit.

Property – Eviction application – Enrichment lien – Possession required by lienholder is known as possessio naturalis, comprising both a physical and a mental element, the latter being an intention to hold the property as against the owner's claim to preserve as security for a claim against the owner – Enrichment lien exercised by informal occupier of property not in existence at time seller was entitled to vacant possession of property due to absence of intention to hold possession.

In an application for eviction of the first respondent and others from property owned by a trust in which the applicants were trustees, the court had to decide whether there was substantial compliance with the requirements for the commissioning of the founding affidavit, and whether the second respondent had an enrichment lien over the property. Because the deponent to the founding affidavit was infected with Covid-19 at the time, the affidavit was commissioned via a Whatsapp video call.

Based on concessions made by the first respondent after papers were filed, the matter eventually distilled to an application for eviction from the property of the first respondent, and through her the second respondent and his family, which the first and second respondents contest on the basis of a right of retention (*ius retentionis*) in favour of the second respondent arising out of the alleged unjust enrichment of the applicants by the cost occasioned to the second respondent of effecting improvements to the property and of the alleged increase in value of the property as a result of the improvements.

Among the defences raised by the respondents was that the founding affidavit was not signed by the deponent in the presence of the commissioner of oaths, which was in conflict with the Regulations Governing the Administering of an Oath or Affirmation.

Held – Regulation 3(1) of the above Regulations requires that a deponent sign the declaration in the presence of a commissioner of oaths. Non-compliance with the regulations does not *per se* invalidate an affidavit as the regulations are just directory and non-compliance does not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit. In this case, the court was satisfied that there was substantial compliance with regulation 3(1).

The existence of an enrichment lien was the only defence persisted with on the merits. Critically, possession required by a lienholder is known as *possessio naturalis*, which comprises both a physical and a mental element, the latter being an intention to hold the property as against the owner's claim to preserve as security for a claim against the owner. At the time the enrichment lien was set up by the respondents, the applicants had already been entitled to vacant occupation of the

property as against both the first respondent and the second respondent for over a month. The applicants' right to vacant occupation of the property, which they were entitled to from as far back as 5 November 2020, remained undisturbed by the second respondent's assumption of the role of lienholder for the first time on 8 December 2020 in the answering affidavit. That disposed of the defence based on the lien.

The lease agreement between the trust and the first respondent required the latter to obtain the applicants' consent before effecting any improvements. The second respondent attempted to avoid that requirement by claiming that the relevant contractual term did not extend to him as a non-party to the agreement of sale. He also relied on the oral consent that he alleged the trustees had given him for the improvements. The Court referred to case authority stating that a third party with knowledge of the terms of a contract between two other parties (in this case, the second respondent), may be held bound by those terms. Explaining the nature of and requirements for a right of retention, the court rejected the defence of an enrichment lien.

The eviction order was accordingly granted.

Makate v Joosub NO and another [2022] 2 All SA 226 (GP)

Civil Procedure – Review of determination made by expert valuer – Applicable standard of review – Decision of expert valuer is reviewable only if judgment was exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result – Where determination was based on incorrect information and relevant facts were not considered, decision reviewed and set aside by court.

Whilst employed by the second respondent ("Vodacom"), the applicant came up with an idea involving a telephonic concept. That led to the development of the company's most successful product – the "Please Call Me" ("PCM") product. Prolonged litigation then ensued between Makate and Vodacom culminating in a Constitutional Court order directing Vodacom to negotiate in good faith reasonable compensation to be paid to Makate for PCM. Failing an agreement being concluded, the court further ordered that the matter be submitted to the Chief Executive Officer ("CEO") of Vodacom to determine the amount to be paid. The determination by current CEO, Shameel Joosub, led to a review application by Makate.

Makate also brought an application to strike out a major portion of an explanatory affidavit filed by the CEO, setting out the reasons for his determination. According to Makate, the voluminous explanatory affidavit and the supplementary explanatory affidavit, filed by the CEO, were a facade for the CEO to advance further reasons to bolster his determination.

Held – A court faced with an application to strike out has a discretion whether to strike out or not. The evidence sought to be struck out was not prejudicial to Makate and in fact advanced his allegations. The application to strike out was refused.

As the parties were not *ad idem* concerning the CEO's role, the court examined the facts and found that the parties were in agreement that the CEO had to gather information, and having done so, objectively evaluate same taking into account the issue of fairness. Ultimately, the determination or decision reached had to be just and equitable. While the parties conceded that the decision of the CEO was

reviewable, they differed on the designation to be ascribed to the CEO as deadlock-breaker. Makate saw the role of the CEO as akin to that of an arbitrator, whilst Vodacom submitted that the CEO's role was rather that of an expert valuer. The Court agreed that the CEO was to be considered as an expert valuer. The standard to be applied in reviewing the decision of an expert valuer, is that the decision is only reviewable if the valuer exercised his judgment unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.

Having regard to the information considered by the CEO, and the reasons for his determination, the court found numerous misdirections committed in the course of making the determination. The determination could therefore not stand.

Declining to substitute its own decision for that of Vodacom, the court remitted the matter to the company for fresh consideration of the issue.

Theodosiou and others v Schindlers Attorneys and others [2022] 2 All SA 256 (GJ)

Legal Practice – Contingency fee agreements – Contingency Fees Act 66 of 1997, section 4(1) – Non-compliance – Effect on settlement agreements and court orders flowing from invalid contingency fee agreement – A null contingency fee agreement does not invalidate any related settlement agreement made an order of court without justus error, fraud or public policy considerations – Where particulars of claim failing to disclose a cause of action for relief sought, exception raised by defendants upheld.

The first defendant ("Schindlers") had represented the plaintiffs in several litigious matters, and had agreed to do that on a contingency basis. Settlement agreements in some of the matters were made orders of court. The plaintiffs sought the setting aside of two court orders, one incorporating the two settlement agreements and the other a consent to a money judgment, due to non-compliance with the Contingency Fees Act 66 of 1997 (the "Act").they contended that as the contingency fee agreement was illegal and void due to the said non-compliance, all agreements and orders flowing from that agreement were also void. In the alternative, the plaintiffs pleaded a case for rescission of same.

That led to the second and third defendants raising an exception to the claim on the basis that it lacked the necessary averments to sustain a cause of action; alternatively, that it was vague and embarrassing. The excipients averred that there is no basis in law for a High Court to review an order of the High Court, with the result that it must either be rescinded or appealed. Secondly, it was contended that a void contingency agreement or non-compliance with section 4 of the Act does not, without more, render compromises or orders of the court illegal and void.

Held – Section 4(1) prescribes that any offer of settlement made to any party who has entered into a contingency fees agreement may only be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, and provided that the other provisions of section 4 are complied with.

Referring to the general principles of pleading in the context of exceptions, the Court turned to consider the effect the invalid contingency fee agreement had on the underlying settlement agreements. Non-compliance with the Act rendered the contingency fee agreement invalid and void, and the *condictio ob turpem vel*

iniustam causam was an available cause of action to pursue against Schindlers. The exception concerned whether the relief sought to set aside the two court orders and the settlement agreement was permissible in law.

Public policy requires that parties comply with contractual obligations, even where to one's detriment. The party who seeks to avoid enforcement of the contract bears the onus to prove that a contract is offensive to public policy. Section 4(1) of the Act gives the court a discretion to enquire into the merits of the settlement agreement and make it an order of court. However, its power to enter the merits of the settlement interferes with the parties' right to agree to their bargain freely and is therefore limited to prevent extortion of a plaintiff through an illegal contingency fee agreement or fraud upon a defendant. A null contingency fee agreement does not invalidate any related settlement agreement made an order of court without *justus error*, fraud or public policy considerations.

The plaintiffs claimed repayment of their performance under the settlement agreements and money judgment based on enrichment principles. However, they could not rely upon enrichment without pleading the extent of the defendants' enrichment at their expense.

The validity of the agreements and second court order could be challenged only in terms of rule 42(1)(b) or the common law, and rescission could not be obtained without a *bona fide* defence to the merits of the compromised claims.

Concluding that particulars of claim failed to disclose a cause of action for the relief sought in six of the prayers, the court upheld the exception and struck out the offending paragraphs.

END-FOR NOW