CIVL LAW UPDATES JUNE 2022[1]

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A Penglides (Pty) Ltd and another v Minister of Agriculture, Forestry and Fisheries and another [2022] JOL 53519 (SCA)

Appeal-calculation of time for lodging appeal where last day falls on public holiday

Having been allocated fishing rights in the large pelagic longline sector, the first appellant was required to confirm two vessels which it would be using. Some three months after the allocation of the long-term rights, the first appellant applied to substitute one of those vessels with another. Its application was rejected on 17 May 2017, and it lodged an appeal with the Minister on 19 June 2017. The dismissal of the appeal was taken on review before the High Court. That court decided that the appeal to the Minister was lodged out of time, and dismissed the appeal, declining to enter into the substantive merits of the application. The appellants appealed to the Supreme Court of Appeal

Ponnan JA explains the effect of the High Court's declining to consider the merits [para 18] and considers whether the High Court was correct in concluding that appellant's appeal to the Minister was lodged out of time. The 30-day period within which the appeal had to be lodged ended on a public holiday. Court holds that "when the Department's offices are closed on the last day of the 30-day period for the serving of an appeal, the appeal will be served within the designated period if served on the next day on which the offices are open" [para 33].

Appeal upheld with costs.

Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and another [2022] JOL 53514 (SCA)

Interdict-entitlement to interdict preventing honouring of demand guarantee

Exxaro Coal Mpumalanga sought leave to appeal against the High Court's granting an order declaring Exxaro's demand for payment under a performance guarantee to be invalid and of no force or effect. The first respondent (TDS) had applied to the High Court for an interim order interdicting Exxaro from demanding, and the second respondent (ABSA) from making payment of any amount under the guarantee to Exxaro.

Mabindla-Boqwana JA confirms that the performance guarantee was a demand guarantee and explains the nature of such guarantee [para 10].

Stating the requisites for the grant of a final interdict [para 12], the court found that TDS could not show that it would sustain any injury if ABSA honoured the guarantee when not obliged to do so. Moreover, any contractor that has given a performance guarantee and which was in the same position as TDS, would have its ordinary contractual remedy against the guarantor. That remedy was a complete defence to any claim founded on the honouring of the guarantee when ABSA was not obliged to do so [para 16].

Leave to appeal is granted and the appeal upheld.

TM obo MM v Member of the Executive Council for Health and Social Development, Gauteng [2022] JOL 53608 (CC)

Jurisdiction-Constitutional court-engagement of constitutional court's jurisdiction

The Supreme Court of Appeal set aside the decision of the High Court which found the respondent, the Member of the Executive Council for Health and Social Development, Gauteng, liable for applicant's damages arising from injuries sustained from the alleged negligent conduct of the medical staff at Charlotte Maxeke Academic Hospital. The applicant applied to the Constitutional Court for leave to appeal.

Mathopo J considers whether a constitutional issue is raised and, if so, whether it is in the interests of justice for the court to grant leave to appeal. Approach to determining whether matter engages the jurisdiction of the Constitutional Court set out [para 43].

The character of the appeal turned on the divergent factual findings of the Supreme Court of Appeal. Such factual evaluation is not a precursor to reaching and deciding a constitutional issue. The court must refuse to entertain an appeal that seeks to challenge only factual findings. Leave to appeal is refused.

Mhlongo and others v Mokoena NO and others [2022] JOL 53609 (SCA)

Jurisdiction- Precedent of statutes over practice directives in determining jurisdiction

In the present dispute, a point in limine was raised, that the Gauteng Division did not have jurisdiction to adjudicate the application because the leased property involved was situated in Mpumalanga. Relying on the provisions of Gauteng Division Practice Directive No 1 of 2015, the eighth respondent contended that the appellants' application ought to have been launched in the Mbombela or Middelburg circuit courts, as the high court had ceased to have jurisdiction in any matters emanating and arising from magisterial districts in the Mpumalanga province. The High Court's upholding of the point led to an appeal. The appellants relied on the provisions of section 21(1) and 21(2) of the Superior Courts Act as a basis for their contention that the High Court had the necessary jurisdiction to adjudicate their application.

Molemela JA identifies the issue as whether it is competent for a Judge President of a high court to remove certain areas of the court's jurisdiction through a practice directive.

Court discusses principles applicable to the interpretation of statutes [para 10]; and finds that the Judge President, in purporting to oust the jurisdiction of the Gauteng Divisions by dint of clause 1.5 of the Practice Directive, acted beyond his powers, which conduct was invalid [para 14]. Appeal is upheld.

Ellis v Eden [2022] JOL 53820 (WCC)

Rescission grounds for rescission under rule 31(2)(b), common law and rule 42(1)(A)

In the first of two applications before the court, Mr Ellis sought judgment against Mr Eden for the amount reflected as owing by Mr Eden to Mr Ellis in a liquidation and distribution account prepared by a receiver pursuant to an order dissolving an alleged partnership between the parties. In the second application, Mr Eden sought rescission of the order dissolving the alleged partnership.

Rogers J identifies the rescission application as decisive of both applications.

Court decides matter in terms of rule 31(2)(b) [paras 25-27]; finds rescission application to have been brought way out of time [para 30]; and discusses double burden placed on Mr Eden by rule 31(2)(b) [para 31]. Court not satisfied that there was good cause, in terms of rule 31(2)(b), to rescind the dissolution order, or good cause, in terms of rule 27, to condone failure to comply with the 20-day limit in rule 31(2)(b) [para 52]. Rescission application failing under rule 31(2)(b) and common law.

Rule 42(1)(a) considered [para 56] and found to also not assist Mr Eden.

Rescission application is dismissed and Mr Ellis' enforcement application succeeding.

Mokoteli and another v Body Corporate of Viking Villas Sectional Title Scheme and others [2022] JOL 53975 (WCC)

Rescission of default sequestration order obtained by body corporate of sectional title scheme against unit owner

A dispute arose between Mr Mokoteli and the body corporate of the sectional title scheme into which he bought. The body corporate objected to a security gate he had installed in his unit and when he refused to remove it began fining him each month. In protest he eventually stopped paying levies and did not pay fines and interest.

In terms of section 149(2) of the Insolvency Act 24 of 1936 and the common law, Mr and Mrs Mokoteli sought an order rescinding a default order of sequestration subsequently obtained by the body corporate. An application for condonation was also brought in respect of the late filing of the replying affidavit.

Mantame J confirms the approach to condonation applications [para 6], and is satisfied that the applicant made out a case for condonation.

Requirements for rescission of default judgment at common law explained [para 25]. Court questions whether it was competent for a sequestration order to have been granted, even though the available facts from the body corporate supported the fact that Mr Mokoteli's estate was in fact solvent.

Mr Mokoteli is found to have shown good cause for the order to be rescinded.

Commissioner for the South African Revenue Service and others v Dragon Freight (Pty) Ltd and others [2022] JOL 54094 (SCA)

State-Notices to state -requirement of notice of legal proceedings in terms of section 96(1) of the Customs and Excise act 91 of 1964

The first appellant (SARS) seized 19 containers of clothing on the basis that the respondents had under-declared their transaction value so as to pay less customs duty than they were lawfully required to pay. The respondents succeeded in a review application, leading to an appeal.

The court had to decide on the lawfulness of SARS' action; and whether the respondents had complied with section 96(1) of the Customs and Excise Act 91 of 1964 which proscribes the institution of legal proceedings against SARS, unless the litigant delivers a written notice setting out its cause of action at least one month before instituting those proceedings.

Schippers JA refers to section 96(1) [para 27]; undertakes a proper interpretation of the section [paras 30-33]; and discusses the purpose of the section. High Court found to have erred in its interpretation and application of section 96(1) and on that basis alone, the appeal had to be upheld.

Having regard to the purpose of section 88(1)*(c)* of the Act, the information before the Commissioner and the reasons given, the impugned decision could not be said to be unjustified. The appeal is upheld.

Bestbier and others v Nedbank Limited [2022] JOL 54037 (SCA)

Rule 46A and judicial oversight when creditor seeks to execute against residential immovable property

A trust in which the appellants were trustees obtained a loan from the respondent ("Nedbank"), with the first appellant also standing as surety. The trust defaulted on its obligations and Nedbank sued for repayment of the debt and an order declaring the trust's mortgaged property executable. A settlement agreement was entered into but the trust reneged and Nedbank successfully applied for judgment by consent. On appeal, the appellants relied on rule 46A of the Uniform Rules of Court and Practice Directive 33A of the High Court as the property sought to be declared executable was owned by a trust and was a primary residence of the trust beneficiaries, as well as the trust employees and their families

Molefe AJA discusses the legislative and historical context of rule 46A; and considers whether the execution of the immovable property could impair the appellants' existing and potential access to adequate accommodation [para 18].

Rule 46A requires judicial oversight and consideration by a court of various factors when a creditor seeks to execute against the residential immovable property of a judgment debtor. The High Court correctly found that the appellants' rights to adequate housing were not engaged or compromised.

Appeal is dismissed.

McGroarty v Hutchinson [2022] JOL 54206 (KZP)

Appeal-protection order - setting aside of protection order granted against neighbour
The parties in this matter were residents in a residential estate. The appellant appealed against an interim protection order handed down against him in terms of the Protection from Harassment Act 17 of 2011. The respondent had obtained the order, alleging that appellant was threatening and aggressive in his interactions with her, and that he appeared to be watching her on his surveillance cameras.

Masipa J deals with the appellant's failure to timeously prosecute the appeal [para 37]; and the requirements for condonation [paras 72-76]. To decide on the prospects of success, the merits had to be considered.

Court discusses relevant provisions of Protection from Harassment Act [paras 85-88]; onus of proof [para 102]; and concludes that court a quo erred in granting protection order.

Condonation is granted and appeal upheld.

MEC for Health, for the Kwazulu-Natal Province and others v Medical Information Technology SA (Pty) Ltd [2022] JOL 54205 (KZP)

Exceptions and amendment to pleadings-rule 28
The question raised was whether an excipient would be entitled to demand that an exception be determined by a court without considering subsequent amendments effected to the pleadings excepted to.

Koen J refers to Rule 28 in connection with the amendment of the plaintiff's particulars of claim and replication [para 14]; Rule 30 [para 16]; the defendants' non-compliance with the provisions of rule 30; and the issue of condonation.

Court also explains rules regulating amendment to pleadings and rejects defendant's suggestion that if allowed to argue the exception successfully, that could bring an end to the litigation on those pleadings [para 35].

"The issue must always be whether the particulars of claim and replication as amended, raise legally triable issues. If, after the amendments were effected, the pleadings still did not raise triable issues, then the defendants' remedy was to have objected to the proposed amendments, or having failed to do so, to persist with the exception and to enrol it for hearing, or to raise whatever other remedy would be open to it." [para 36]

Application dismissed.

Road Accident Fund v McDonnell [2022] JOL 54038 (WCC)

Rescission application-doctrine of peremption applied to rescission application

The Road Accident Fund (RAF) sought the rescission of an order, contending that the inherent power of the court as envisaged in section 173 of the Constitution extended to rescission proceedings in appropriate circumstances, where serious injustice would otherwise result, and that this was such a case.

The application was opposed on the ground that the real purpose of the application was an attempt to revisit the merits of the respondent's claims.

Thulare J identifies the issue as whether a judgment granted on 7 December 2020 where the RAF elected not to participate in judicial proceedings, stood to be rescinded.

The court referred to the doctrine of peremption [para 14], described in case law as expressly prohibiting litigants from acquiescing in a court's decision and then later challenging that same decision. The RAF had deliberately not attended court when the order was taken, and in the circumstances, was not entitled to seek rescission.

Transnet SOC Limited v Total South Africa (Pty) Limited and Another (CCT 114/21) [2022] ZACC 21 (21 June 2022):

Jurisdiction-Constitutional Court- and leave to appeal

On Tuesday 21 June 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). In that Court, Total South Africa (Pty) Limited and Sasol (Pty) Limited (the respondents) sought damages from Transnet SOC Limited (the applicant) for an alleged breach of its obligations in terms of a variation agreement to set tariffs for conveyance of crude oil from Durban to Sasolburg.

In 1967 the apartheid government concluded an agreement with Total to establish an inland oil refinery, subject to the condition that costs of transporting crude oil from the coast to the inland refinery would not place Total at a disadvantage compared to coastal refineries. This was referred to as the neutrality principle. Natref, an inland refinery sited in Sasolburg, was then established, its shareholders being Total and Sasol, which was then a wholly owned government entity. In terms of the agreement, tariffs for the conveyance of crude oil from the coast to Natref were structured such that the principle of neutrality was maintained.

Over the years Transnet became the successor in title to the government and, therefore, a party to the agreement. A variation agreement concluded in 1991 by Transnet, on the one hand, and Total and Sasol, on the other, altered the terms of the original agreement, but also embodied the neutrality principle, albeit on the basis of a different formula. It provided that Transnet would increase the tariffs for conveyance of crude oil by no more than a weighted average cost for the conveyance of refined petroleum products from the coast to inland markets.

In 2008 and 2011 Transnet set tariffs that were above this weighted average cost. Total and Sasol instituted proceedings in the High Court alleging that this constituted a breach of the variation agreement. They claimed contractual damages in the form of a refund of amounts paid as a result of the overcharge. Transnet gave three years' notice to terminate the variation agreement. Total and Sasol then added to the relief sought an order declaring that the variation agreement remained binding on Transnet.

Transnet raised a defence that in law Total and Sasol cannot claim a refund for monies allegedly overcharged by it unless the variation agreement is first cancelled. It also contended that it had validly terminated the variation agreement in accordance with

clause 5 by giving the three-years notice. In terms of clause 5 of the variation agreement each party must give at least a three-year notice of its intention to "disregard the contents of [the variation agreement] subject to the arrangement that a full agreement of conveyance for crude oil is being prepared and that such agreement will embody the contents of this [agreement] and supersede this [agreement]".

The High Court held that Total and Sasol did not have to cancel the variation agreement before claiming payment for monies overcharged as a result of Transnet's breach. The High Court also found that the variation agreement remained binding on Transnet as, properly interpreted, the agreement makes cancellation contingent on the conclusion of a new agreement embodying the neutrality principle. Both the High Court and Supreme Court of Appeal dismissed Transnet's applications for leave to appeal.

Transnet then approached the Constitutional Court to appeal the judgment of the High Court. It argued that Total and Sasol's claim for damages is bad in law and should have been brought as a claim for unjustified enrichment rather than damages for breach of contract. Transnet also asked the Constitutional Court to reject the High Court's interpretation of the cancellation clause (clause 5), as it would be contrary to public policy to lock Transnet into a prejudicial agreement in perpetuity. Total and Sasol argued that they were correct to claim contractual damages from Transnet since their claim arises from Transnet's breach of its tariff-setting obligations. Further, a proper interpretation of the variation agreement, considering the text, context and purpose, should lead the Court to the conclusion that Transnet repudiated rather than validly terminated the variation agreement. Total and Sasol disputed Transnet's assertion that the variation agreement is contrary to public policy.

In a unanimous judgment penned by Madlanga J, the Constitutional Court held that there was no substance in Transnet's contention that Total and Sasol could not claim contractual damages without first having cancelled the variation agreement. On termination of the variation agreement, the Court held that a viable interpretation of clause 5 is one that factors into the contextual setting the history of the neutrality principle. It held that on a contextual reading of clause 5, the contracting parties

were not adding a suspensive condition to the cancellation clause. They were merely *recording* that at the time of concluding the variation agreement a full agreement was being prepared and that – upon conclusion – it would automatically replace the variation agreement. There was no reason to assume that the words "subject to" were used in a technical legal sense that introduced a suspensive condition. The upshot of this was that the variation agreement was terminable on three years' notice.

As a result, the Court held that Transnet's notice of termination was issued validly and the variation agreement had, therefore, been terminated validly. However, that did not in itself mean that Transnet no longer had an obligation to convey crude oil to Natref. All that the judgment meant was that conveyance was no longer to be regulated by the variation agreement. This was because there was nothing in the papers to suggest that Transnet wished to terminate the use of the pipeline by Total and Sasol. The main point of contention between the parties had been whether the tariff for use of the pipeline should continue to be based on the neutrality principle. In this regard, the Court reasoned that while Transnet's licence to operate the pipeline was not before it, section 20(1)(f) of the Petroleum Pipelines Act 60 of 2003 provides that a petroleum pipeline may be licensed for either crude oil or petroleum products, or both, "as long as sufficient pipeline capacity is available for crude oil to enable the uninterrupted operation of the crude oil refinery located at [Sasolburg], to operate at its normal operating capacity at the commencement of this Act and for so long as that refinery continues as a going concern". The Court went further and held that public law remedies may well be available to Total and Sasol if Transnet, when making decisions regarding access to, and the terms for use of, the pipeline, failed to observe the legal constraints on the exercise of its powers.

Finally, the appeal succeeded only to the extent of the questions whether the variation agreement was terminable and, if it was, whether it was terminated validly.

[36] Does this Court have jurisdiction? That question must be answered in relation to each of the two issues before us. I start with the cause of action defence. As stated a few times before, Transnet pleaded that a contract must be cancelled in order for a party to claim a refund for a breach of that contract. It persists in that argument. Transnet did not suggest that this issue engages our constitutional

jurisdiction. I need say no more about that. Transnet invoked our general jurisdiction. In terms of section 167(3)(b)(ii) of the Constitution the general jurisdiction of the Constitutional Court is engaged if a "matter raises an arguable point of law of general public importance which ought to be considered by that Court". In *Paulsen* this Court held that "[t]he notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility."[17]

Firstrand Bank Limited v Wright and Another (A1/2020) [2022] ZAGPPHC 394 (2 June 2022)

Execution-foreclosure-yet respondent has a buyer-appeal-upheld. Full bench appeal.

Hatfield Man Truck and Bus v Zitholama Cleaning Hygiene Chemicals CC In re: Zitholama Cleaning Hygiene Chemicals CC v Hatfield Man Truck and Bus (20732/2020) [2022] ZAGPPHC 412 (14 June 2022)

[1] The applicant prays, in terms of the provisions of rule 24(1) of the Uniform Rules of court, for leave to file a counterclaim. The applicant's plea was filed on 5 June 2020 and its counterclaim, contrary to the provisions of rule 24(1), only on 26 August 2020.

[2] This prompted the respondent to deliver a rule 30 notice alleging that the filing of the applicant's counterclaim is an irregular step and affording the applicant a period of 10 days or withdraw the counterclaim. Faced with the aforesaid difficulty, the applicant's attorney requested consent from the respondent on 14 September 2020 to introduce the counterclaim.

[3] The respondent refused to grant consent and on 17 September 2020 the applicant duly filed a notice of withdrawal of its counterclaim.

[4] The present application to seek leave from the court to file the counterclaim was served on or about 22 September 2020.

LEGAL FRAMEWORK

[5] In order to succeed with the relief claimed the applicant must:

5.1 give a reasonable and acceptable explanation for the lateness; and

5.2 show an entitlement to institute the counterclaim.

[See: *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* **2012 (3) SA 143** (GSJ)]

[6] The respondent did not seriously contend that the applicant has not shown an entitlement to institute the counterclaim, but strenuously opposed the application on the basis that the applicant has not given a reasonable and acceptable explanation for its delay.

Reasonable explanation

[see the case! The attorney had a reasonable explanation but due to the opponent not giving in, condonation was graned with costs]

Rademeyer v Ferreira (343/2021) [2022] ZASCA 92 (17 June 2022)

Prescription-fresh summons-new case number .

[1] This is an appeal against the judgment of the Eastern Cape Division of the High Court, Port Elizabeth (the high court), in which the appellant's special plea of prescription was dismissed with costs. The appeal is before us with the leave of the high court.

[2] On 27 August 2008, the parties concluded a written agreement of sale. The appellant, Mr Rademeyer, purchased an immovable property from the respondent, Mr Ferreira, for R950 000. The appellant paid R190 000 as a deposit. However, he refused to sign the required documents to effect the transfer registration into his name and furnish guarantees for payment of the purchase price balance.

[3] As the applicant in the high court, the respondent brought an application for rectification of the deed of sale and an order compelling the appellant to sign the necessary transfer documents to effect registration of transfer of the property into his name. Furthermore, the respondent sought an order that, in the event of the appellant failing to comply with his obligations within five days of the service of the order upon him, the agreement would be cancelled, and the respondents would be entitled to claim damages.

[4] On 7 August 2012, Pickering J granted the relief sought by the respondent as per the notice of motion. This part of the relief sought read as follows:

'4. That in the event of the Respondent failing to comply with his obligations within five (5) days of service of this order upon the Respondent, cancellation of the said agreement of sale and damages.'

[5] The appellant failed to comply with the above order. In 2016, and under the same case number and in the same application, the respondent applied for amended relief for payment of damages as a result of the appellant's failure to comply with the order of Pickering J. Thereafter, the appellant filed a rule 30(1) notice contending that the order of Pickering J was a final order, as it disposed of all the relief set out in the first application.

[6] As a result of the objection, and in March 2016, the respondent withdrew the interlocutory application and issued fresh summons under a new case number, in which the respondent sought payment of the sum of R854 182.20 as damages arising from the appellant's failure to comply with the original order of Pickering J and cancellation of the agreement.

[7] The appellant filed a special plea to this claim contending that the claim had become prescribed, as the respondent failed to institute the action by 23 August 2015, which was three years from the date on which the order of Pickering J was granted plus five days.

[Note: there was an application in 2012, then in April 2016 summons, special plea was dismissed as the first motion application interrupted prescription]

National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services - Pinetown and Another (382/2021) [2022] ZASCA 104 (24 June 2022):

[1] The central question in this appeal is what constitutes a sufficient trigger for the appellant, the National Credit Regulator (the NCR) to initiate a complaint into

alleged contraventions of the National Credit Act 34 of 2005 (the NCA). The NCR has a statutory responsibility to ensure compliance with the NCA. It initiated a complaint against the first respondent, Dacqup Finances CC trading as ABC Financial Services – Pinetown (Dacqup), which is a registered credit provider. It advances micro-loans of up to R8000.

[2] The complaint was considered by the second respondent, the National Consumer Tribunal (the Tribunal), an independent adjudicative body. The Tribunal found that Dacqup had contravened various sections of the NCA and had engaged in repeated prohibited conduct. It ordered Dacqup to pay a fine and that all Dacqup's credit agreements for a certain period be assessed by an independent auditor. Dacqup successfully appealed against those orders in the Gauteng Division of the High Court, Pretoria (the high court). The high court did not consider the merits of the appeal, as it found in favour of Dacqup on a point *in limine*. The appeal is with the leave of the high court.**[1]**

[3] It is necessary to place the regulatory environment in context. The NCA came into operation on 1 June 2006, replacing the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. At that time, the credit market was characterised by discrimination, lack of transparency, high costs of credit and limited consumer protection. This was particularly prevalent in the micro-financing industry, which capitalised on vulnerable markets characterised by overpriced debt repayments. The major reason for the NCA's enactment was to protect consumers from unscrupulous lenders and to create an accessible and affordable credit market with mechanisms to protect the consumers from reckless credit and over-indebtedness.**[2]**

[4] It is against this backdrop that the relevant sections of the NCA should be considered. Section 136 provides that any person may submit a complaint of reckless credit, alternatively the NCR may submit a complaint in its own name. Reckless credit is dealt with in ss 80 and 81 of the NCA. Section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective customer. In terms of s 81(2)*(a)*(i), a credit provider cannot enter into a credit agreement without first taking reasonable steps to assess the consumer's general understanding and appreciation

of the risks and costs of the proposed credit. In terms of s 81(2)*(a)*(ii), the credit provider is obliged to take into account the debt repayment history of the consumer, and in terms of s 81(2)*(a)*(iii), the consumer's existing financial means, prospects and obligations. In terms of s 80(1)*(a)*, a credit agreement is reckless if the credit provider failed to conduct an assessment as required by s 81(2), irrespective of the outcome had the proper assessment been made at the time. In terms of s 80(1)*(b)*, a credit agreement is reckless if, having conducted the assessment, the information points to the probability that the consumer did not fully understand and appreciate the risks, or that she would be over-indebted if she entered into the credit agreement.

[5] Importantly, the NCA affords the NCR certain investigative and referral powers. Once a complaint has been initiated by either the NCR or any other person in terms of s 136, the NCR may direct an inspector to investigate the complaint, and appoint others to assist. At any time during the investigation, the NCR may summons a person to appear under oath before the NCR, or subpoena any document, provided that no self-incriminating evidence will be admissible in a criminal trial.**[3]** As part of its mandatory oversight and enforcement functions, the NCA mandates the NCR to attend to 'monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted'.[4] Pursuant thereto and as part of its monitoring functions, the NCR sends personnel to different parts of the country on so-called 'scouting exercises'.

[6] It was on one such 'scouting exercise' during 2018, that an NCR inspector, Ms Muhanganei Mbedzi, noticed a signboard outside Dacqup's premises advertising 'instant loans'. This aroused her suspicion for a variety of reasons. If the loans were 'instant', it would be difficult to comply with the onerous affordability assessments required by the NCA. Conversely, if they were not 'instant', the advertisement breached the NCA's prohibition on misleading and deceptive advertising of credit. Posing as a potential customer, the inspector entered the premises to inquire about a prospective loan. Upon enquiry about the interest rate, she was informed that an interest rate of 30% per month was levied on short-term loans, which amount far exceeded the statutory maximum permissible.

[7] The scouting exercise led to the NCR initiating an investigation in its own name into possible contraventions of the NCA by Dacqup. It conducted an on-site investigation, during which ten credit agreements were assessed, where loans of between R510 and R3000 were granted. Following the assessment, a report was compiled, in which it was found that Dacqup had failed to properly assess the financial means of the respective consumers and their debt repayment history. The NCR concluded that the granting of credit had been reckless as defined in s 80 of the NCA. In addition, the NCR found that Dacqup had overcharged on interest and on initiation fees in some instances, and had not provided customers with pre-agreement statements.

BALOYI v PUBLIC PROTECTOR AND OTHERS 2022 (3) SA 321 (CC)

Labour law — Courts — Jurisdiction — High Court and Labour Court — Concurrent jurisdiction — Unlawful termination of fixed-term contract — Fact that dispute located in realm of labour and employment not excluding High Court's jurisdiction — Whether High Court having jurisdiction dependent on nature of claim and whether it was required under LRA or BCEA to be determined exclusively by Labour Court — Labour Relations Act 66 of 1995, ss 157(1) and (2); Basic Conditions of Employment Act 75 of 1997, s 77(3).

Ms Baloyi was employed by the office of the Public Protector on a five-year contract, with a six-month probation period which could be extended. The contract provided that, at the end of the probationary period, the Public Protector would be entitled to either terminate or confirm her employment. After the expiry of the probationary period (on 31 July 2019), she was invited (by letter received by her on 8 October 2019) to make representations as to the confirmation of her employment contract. She did so (in writing on 15 October 2019) but subsequently received a further letter (on 21 October 2019) from the Public Protector terminating her contract.
Ms Baloyi then launched an urgent High Court application for the following relief: first, a declaratory order that the decision to terminate her employment contract was unconstitutional, unlawful, invalid and of no force and effect; secondly, an order setting aside the termination decision; and thirdly, a declaratory order to the effect that the Public Protector, in her official capacity, had failed to fulfil her obligations under s 181(2) of the Constitution in that the decision was taken for an ulterior purpose.
The alleged unlawfulness of the termination had two aspects: first, that the termination amounted to a breach of contract in that it was terminated out of time after her probation period had ended and was in conflict with its terms relating to termination; secondly, that it amounted to an exercise of public power that breached the principle of legality in that the decision was, inter alia, taken by an official without the necessary authority. The High Court concluded (on the first aspect of the alleged unlawfulness) that Ms Baloyi's allegations raised a labour dispute as envisaged by

the Labour Relations Act 66 of 1995 (the LRA) and dismissed Ms Baloyi's application on the ground that it did not have jurisdiction over the dispute. It did not consider the legality aspect and made no ruling regarding the declaratory relief.
In the present case, her application for leave to appeal directly to the Constitutional Court, Ms Baloyi sought to review the decision to terminate her employment and an order for reinstatement (the review relief); a declaratory order that the Public Protector, in her official capacity, violated her constitutional obligations under s 181(2) of the Constitution (the declaratory relief); and she challenged the High Court's finding that it did not have jurisdiction in relation to both the declaratory relief and the review relief (the jurisdictional challenge).

Held

As to the Constitutional Court's jurisdiction

The jurisdictional challenge raised a constitutional issue because it turned on the interpretation of s 157(1) and (2) of the LRA (quoted at [23] and [27], respectively); * and so did the declaratory relief on whether Ms Mkhwebane, in her capacity as the Public Protector, had complied with her constitutional obligations; as did the review relief on whether the Public Protector had abused her power and, in doing so, breached the Constitution and the principle of legality. The court's jurisdiction was therefore engaged in relation to her jurisdictional challenge, as well as the substantive relief comprising the review and declaratory relief. (See [10] – [12].)

As to whether leave for a direct appeal should be granted

This depended on a number of factors, including the interests of justice. It would be in the interests of justice to allow a direct appeal iro the jurisdictional challenge; it raised an important constitutional issue which had not been expressly addressed by the Constitutional Court. The merits were, however, not fully ventilated in the High Court, and it would therefore not be in the interests of justice to grant leave directly iro of the merits and to adjudicate upon it as a court of first and last instance. (See [13], [15] – [17] and [20].)

Whether the High Court had jurisdiction to hear Ms Baloyi's claim

Both the LRA and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) expressly recognised that there were certain matters in respect of which the Labour Court and the High Court enjoyed concurrent jurisdiction: s 157(2) of the LRA iro any alleged or threatened violation of any fundamental constitutional right 'arising from employment and from labour relations'; and s 77(3) of the BCEA iro 'any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'. It was plain from these sections that the scope of the Labour Court's exclusive jurisdiction in s 157(1) was not cast in Manichean terms. Section 157(1) did not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction but provided that they were to be found elsewhere in the Act. In some instances their location was clear; in others it was left to the courts to determine whether a matter was one arising in terms of the LRA and was, in terms of that Act, or another law, to be determined solely by the Labour Court. The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of s 157(2) of the LRA and s 77(3) of the BCEA afforded litigants an additional right to approach either court where a dispute fell within the ambit of those sections. (See [27], [29] and [31].)
The termination of a contract of employment may potentially found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that did not emanate from the LRA, ie a contractual right. The mere fact that a dispute was

located in the realm of labour and employment did not exclude the jurisdiction of the High Court; and the mere potential for an unfair- dismissal claim did not obligate a litigant to frame their claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action existed. The exclusive jurisdiction of the Labour Court was engaged where legislation mandated it, or where a litigant asserted a right under the LRA or relied on a cause of action based on a breach of an obligation contained in that Act. (See [40], [43] – [44] and [45].)
Whether the High Court lacked jurisdiction to adjudicate Ms Baloyi's claim, depended on whether her claim was of such a nature that the LRA or the BCEA required it to be determined exclusively by the Labour Court. On analysis of her pleaded case, a claim for contractual breach absent reliance on any provision of the LRA could be identified. While she may also have a claim for unfair dismissal in terms of the LRA, she had elected not to pursue this claim, and nothing in the LRA or the BCEA required her to advance that claim in the Labour Court. And while the High Court did not consider either the public-law basis for the review relief or the declaratory relief, neither claim as pleaded fell within the exclusive jurisdiction of the Labour Court in terms of s 157(1) of the LRA. The High Court had erred in dismissing her application on the basis that it was 'essentially a labour dispute' and that its jurisdiction was not engaged. Accordingly her appeal against the High Court's finding on jurisdiction would be upheld and the matter be remitted to the High Court for a hearing de novo. (See [32] and [48] – [50].)

DELTAMUNE (PTY) LTD AND OTHERS v TIGER BRANDS LTD AND OTHERS 2022 (3) SA 339 (SCA)

Evidence — Subpoena duces tecum — Ambit — Only documents which may be sought are those which 'would' be relevant — Relevance determined with reference to pleadings — High threshold for production compared to discovery process, in terms of which discovery is in respect of documents which 'may' be relevant — Uniform Rules of Court, rule 38; Superior Courts Act 10 of 2013, ss 35(1) and 36(5).

The present matter concerned the validity and enforceability of subpoenas to produce documents issued by the first to third respondents, respectively Tiger Brands Ltd, Enterprise Foods (Pty) Ltd and Tiger Consumer Brands Ltd: collectively Tiger Brands. It had its genesis in the discovery, by the National Institute for Communicable Diseases (the NICD), that an outbreak of listeriosis in South Africa between January 2016 and 3 September 2018 could be traced to *Listeria monocytogenes* [*L Mono*]-contaminated ready-to-eat processed meat products produced and packaged by Tiger Foods at its meat-processing facility in Polokwane. The High Court authorised a class action by 18 individuals against Tiger Brands for damages sustained consequent to the consumption of foods prepared or having passed through the Polokwane facility.
Subsequent to the certification of the action, Tiger Foods, acting under s 35(1) of the Superior Court Act 10 of 2013, read with Uniform Rule 38, issued various *subpoenas duces tecum* to a number of third parties: the commercial pathology laboratories, Deltamune and Aspirata (the first and fourteenth appellants, respectively), which performed testing for the presence of, inter alia, *L Mono*; the raw-meat suppliers Federated Meats (Pty) Ltd (the fourth appellant) and related entities (the fifth to tenth appellants); and the statutory body tasked with promoting the epidemiological

surveillance and management of diseases through the monitoring of laboratory results, the National Health Laboratory Services (the NHLS) (the twelfth appellant). The subpoenas were very broad in their scope in seeking, for example: from the laboratories, *all test results*, and related documents and correspondence, in respect of *any request from any person or entity* for testing for *L Mono* (for the period 1 July 2017 to date of subpoena); from the Federated Meats appellants, *all test results* for the presence of *L Mono* in respect of material collected at their facilities for the period 1 January 2016 to 3 September 2018, as well as all communications concerning listeriosis made during the period 1 January 2016 to 3 September 2018; and from the NHLS, all data and test results for the period 1 July 2016 to the present for detection testing of *L Mono* in samples taken from any of Tiger Brands' manufacturing plants, as well as all related documents and correspondence for the same period, and all records relating to any person who had suffered from listeriosis during the period 1 September 2015 to present.

The service of the subpoenas triggered the launching of four applications in the High Court, all of which were consolidated for the purposes of hearing. Tiger Brands sought an order against the laboratories compelling them to comply with the subpoenas it had issued against them (the compel application). Deltamune, the Federated Meats appellants and the NHLS respectively sought orders aimed at setting aside the subpoenas, on the grounds, inter alia, that the documents sought were not relevant to the issues arising in the class action. The High Court granted an order compelling compliance with a somewhat amended version of the subpoenas. The High Court held that, given the 'wide-ranging sets of facts and allegations' in the particulars of claim of the class action, the wide-ranging set of information sought in the subpoenas was on the face of it relevant to the class action. The High Court, however, stressed that s 35 of the Superior Courts Act dealt only with the right to obtain production of the document as opposed to the right to view the contents of the documents. The approach of the High Court was to order the relevant defendants to deliver to the Registrar of the High Court the documents sought, which would remain inaccessible to Tiger Brands until such time as the Registrar, or the High Court on referral by the Registrar, had ruled on any objections raised to the disclosure of the documents (whether on questions of privilege, privacy or terms). The High Court dismissed the applications to set aside. The High Court granted the defendants leave to appeal to the Supreme Court of Appeal, where they argued that, despite their amended form, the subpoenas were not relevant to the class action, remained too wide in their ambit, and lacked specificity.

Re High Court's approach

The SCA was critical of the approach adopted by the High Court in entrusting and deferring determination of whether there should be disclosure to the Registrar or another court. This, it held, would lead to piecemeal litigation, against which courts had repeatedly cautioned. The result would be additional costs and possible delays in the finalisation of the disputes concerning the subpoenas. Inevitably, this would have a delaying effect on the finalisation of the class action. This certainly would not be in the interests of justice. The SCA asserted that the High Court should have considered the merits of the various applications and determined what could or should not be disclosed, and the terms, if any, upon which that disclosure had to take place. (See [18].)

Whether subpoenas should be set aside

The SCA addressed the question of relevance. It referred to the principle applicable to the process for *the discovery of documents* under rule 35. That held that rule 35 documents were discoverable if relevant, and relevance *was determined with reference to the pleadings*, and that asking for information not relevant to the pleaded case would be a fishing expedition. This, the SCA said, should apply too in the context of a *subpoena duces tecum*. A higher threshold for relevance was, however, applicable: in terms of rule 35(3) of the Uniform Rules, discovery may be requested in respect of documents 'which *may* be relevant', whereas in terms of s 36(5)*(a)* of the Superior Courts Act, documents may be subpoenaed which '*would* be relevant'. Aside from the wording of the rule, other factors pointed to such stricter threshold, namely the fact that, while the discovery process was applicable only between the parties to the litigation, in terms of the process of subpoena under s 36(5) of the Superior Courts Act read with rule 38, third parties may be subpoenaed to attend court and produce documents. Third parties ought not to be required to do so unless it was absolutely necessary and there was some certainty that such documents were relevant to the issues in the underlying action. (See [20] – [22].)
The SCA held that, when regard was had to the present pleadings of the class-action plaintiffs — leaving aside the unnecessarily pleaded pieces of evidence and focusing only on the facta probanda (to which pleadings were meant to be confined), and read with the terms of the certification order which set the parameters within which the pleadings should be considered (see [25] – [27]) — the real issue between the parties was the following: Could *Tiger Brands* be held liable for damages *in respect of injuries sustained by members of any of the four classes* identified * as a result of the consumption of products that had been produced in, or had passed through, Tiger Brands' Polokwane facility? (See [35] – [39].) Tiger Brands, however, the SCA noted, had sought the documents it did with a view to obtaining evidence to establish whether there were alternative sources of contamination, ie to refute the allegation that it was the sole source of the contamination (see [33], [34]). But that issue was irrelevant to the issues requiring determination in the class action. The demands for production of documents in this regard were entirely speculative. (See [40] – [43], [61].) The SCA characterised the High Court's analysis of the pleadings as flawed, in its failure, in determining relevance, to confine its attention to the facta probanda, and ignoring the rest. (See [43].)
The SCA concluded that the third parties against whom subpoenas were sought would be unable to be of any assistance to the court in the determination of the issues raised in the class action. It held that the appeals should succeed, and the subpoenas in all the circumstances ought to be set aside.

NAIDOO AND ANOTHER v DUBE TRADEPORT CORP AND OTHERS 2022 (3) SA 390 (SCA)

Close corporation — Members — Derivative action — Common-law derivative action still available, including to unregistered member — Beneficial owner of member's interest in close corporation can invoke derivative action on behalf of close corporation.

Close corporation — Members — Power to bind corporation — Third party seeking to rely on s 54 of CC Act must be bona fide and innocent — Close Corporations Act 69 of 1984, s 54.

Close corporation — Proceedings by and against — Common-law derivative action by member — Still available, including to actual, unregistered member — Beneficial owner of member's interest in close corporation can invoke derivative action on behalf of close corporation.

Practice — Pleadings — Exception — Approach of court — Must accept factual averments in particulars as truthful unless manifestly false — Cannot go beyond pleadings at exception stage.

A and B were brothers locked in an acrimonious dispute over control of a close corporation, X, and the sale of its only asset to another concern, Y.
A claimed he was the beneficial owner of the member's interest in X and that B, X's sole registered member, held his member's interest on A's behalf as his nominee, and hence had no right to cause X to sell the property without first obtaining A's consent. When A and X later sued B and Y out of the Durban High Court to set aside the sale, the court upheld Y's exception to the effect that the claim was a doomed attempt by A, a non-member, to institute a derivative action on X's behalf. In the exception Y also claimed it was protected by s 54 of the Close Corporations Act 69 of 1984 (the CC Act), which provided that 'any member of a corporation shall in relation to a person who is not a member and in dealing with the corporation, be an agent of the corporation', because it had transacted with A on the basis that he was an agent of X who had the authority to bind it.
In its judgment the High Court held that, while a common-law derivative action was available to close corporations, A could not sue on X's behalf or in its name because he was not a registered member of X. The High Court also held that s 54 precluded the action by A and X against Y since Y had transacted with B, who, as X's sole member, had the power to bind it. Thus, the High Court reasoned, Y was protected against the negative effects of both the ultra vires and constructive notice doctrines. The High Court, having found that A and X's pleaded case did not set out a cause of action against Y, upheld the exception. In coming to its decision, the High Court seemingly doubted A's claims to membership of X, characterising him as 'a legal stranger to' X who was 'not capable of passing a resolution . . . authorising the institution . . . of proceedings in [its] name'.
In an appeal to the Supreme Court of Appeal Y argued that the abolition of the common-law derivative by s 165 of the Companies At 71 of 2008 meant that there was no derivative action applicable to close corporations either. Y further argued that s 49 and s 50 of the CC Act, respectively, barred A and X from bringing the action.

Held
There were three issues for determination: (i) the locus standi of A and X, which was dependent on A's claim that he was a 'beneficial owner' of the member's interest in X; (ii) whether the common-law derivative action on which A relied was available in respect of close corporations; if so, (iii) whether A was entitled to bring such an action on behalf of X; and (iv) whether s 54 of the CC Act protected Y.
Ad (i): it was clear, on a simple and sensible reading of the allegations in the particulars, that A was suing on X's behalf and in his own name. While X was not, on the established principles of derivative action, supposed to be cited as plaintiff, this

did not detract from the fact that A purported to sue on behalf of X. On the pleadings, A's locus standi to bring a derivative action on behalf of X was clear and should have been accepted by the High Court. (See [16] – [18].)
Ad (ii): The abolition of the common-law right of derivative action in s 165 did not affect the common-law rights in respect of close corporations incorporated prior to the commencement of the Companies Act that were not converted to companies. The common-law right of a member of a close corporation — including an actual, unregistered owner of a member's interest — to a derivative action was still available and not affected by s 49 and s 50 of the CC Act. A did not rely on s 49 or s 50 but was pursuing his common-law right as X's actual, albeit unregistered, member (See [21] – [22].)
Ad (iii): The purpose of s 54 of the CC Act was to protect third parties who had bona fide transacted with a member of a close corporation against the negative effects of the ultra vires doctrine and the doctrine of constructive notice. While the submission that s 54 protected Y was attractive at face value, the caveat in s 54(2), that where the third party knew, or ought reasonably to have known, that the member it was dealing with had no power to act for the close corporation, it did not enjoy the protection afforded by s 54. Here, Y was not a bona fide, innocent purchaser since it could not have believed, given the acrimony of the dispute between A and B, that A would have consented to the sale of X's property. Since Y had the imputed knowledge envisaged in s 54(2), it was removed from the protection of s 54(1), and it followed that the s 54 issue should also have been decided against Y. (See [29] – [34].)
Concluding remarks: The main flaw in the High Court's judgment was the failure to apply the established approach in respect of exceptions, namely to accept as correct the factual averments in the particulars of claim unless clearly false and untenable, which led to the wrong conclusion that A was not a member of X. Had it adopted the proper approach, it would have accepted that A was the beneficial owner of the member's interest in X and that B was his nominee and, on that basis, found that B had no authority to sell the property to Y. (See [35].)

PM v MM AND ANOTHER 2022 (3) SA 403 (SCA)

Practice — Applications and motions — Affidavits — Locus standi — Whether attorney or advocate requiring authority from client to depose to affidavit in support of latter's application for rescission — Distinction between right to institute proceedings, authority to act on behalf of client and basis for deposing to affidavit, discussed.

Magistrates' court — Civil proceedings — Practice — Judgments and orders — Default judgment — Rescission — Locus standi — 'Party' and 'person affected' — Whether attorney or advocate requiring authority from client to depose to affidavit in support of latter's application for rescission — Distinction between right to institute proceedings, authority to act on behalf of client and basis for deposing to affidavit, discussed — Magistrates' Courts Act 32 of 1944, s 36(1); Magistrates' Courts Rules, rule 49.

This appeal concerned the question whether an attorney who deposed to an affidavit in support of a rescission application was required to obtain authorisation from her client to do so. The appellant and the first respondent were previously married to

each other. Subsequent to their divorce, the first respondent launched an application in the Garankuwa Regional Court seeking an order for the appointment of a liquidator of the assets of the joint estate subsisting between the parties. This the appellant opposed, being of the view that it granted powers to the liquidator to deal with the assets of the parties in a manner contrary to what was agreed by them in terms of the settlement agreement incorporated into their decree of divorce. The appellant appointed the attorney Ms Moduka to act on her behalf in opposing the application, and an answering affidavit was filed. On the date for set-down, however, an order was granted in favour of the first respondent in the absence of the appellant. The latter consequently sought an order before the same court for the rescission of the judgment. The appellant's attorney deposed to the founding affidavit in support of the application, in which she alleged that an administrative error in her office had led to the rescission application being incorrectly diarised.

In refusing rescission, the regional court upheld a point in limine raised by the first respondent to the effect that Ms Moduka lacked 'locus standi' on the basis that, as the attorney for the appellant, she was not the person affected by the judgment sought to be rescinded, and she accordingly did not have a 'direct and substantial interest in the main application' which would entitle her to bring the rescission application. It found that Ms Moduka had not been authorised by the appellant to bring the application. The Mahikeng High Court dismissed the appellant's appeal, finding that Ms Moduka 'lacked locus standi to bring the application for rescission in the absence of authorisation by the appellant'. It based its conclusion on a reading of the provisions of Uniform Rule 49(1), and s 36(1) of the Magistrates' Courts Act 32 of 1944, which reserved the right to seek rescission to 'a party to proceedings in which default judgment was given', or 'any person affected by such judgment'. An attorney or advocate, the High Court held, did not fall into such categories.

The Supreme Court of Appeal granted the appellant leave to appeal.

Held, that both the regional court and the High Court had conflated *(a)* the legal standing of the party seeking rescission of judgment; *(b)* the basis for deposing to an affidavit; and *(c)* the authority to represent a party.
Held, as to *(a)*, that the appellant had the necessary standing, as she was the party affected by the judgment sought to be rescinded: she, as respondent in the main application, had opposed the main application, and, upon learning of the default judgment granted against her, had sought rescission of the default judgment. The enquiry into Ms Moduku's legal standing was irrelevant to the matter. (See [9].)

Held, as to *(b)*, that Ms Moduka alleged that her reason for deposing to the founding affidavit was that the facts that gave rise to the need for a rescission application lay squarely within her knowledge as the attorney who was dealing with the matter. It stood to reason that a deponent to an affidavit was a witness who stated under oath facts that lay within her personal knowledge. She swore to or affirmed the truthfulness of such statements. She was no different from a witness who testified orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client. (See [11].)

Held, as to *(c)*, that at all relevant times Ms Moduka had the necessary authorisation to act on the appellant's behalf (see [12]). Accordingly, appeal upheld (see [14]).

ABSA BANK LTD v MEIRING 2022 (3) SA 449 (WCC)

Practice — Pleadings — Plea — Special plea — Special plea and plea on merits — Defendant obliged to plead over when delivering special plea — No scope for continuation of practice in Cape ('Cape Practice') whereby defendant not obliged to do so — Uniform Rules of Court, rule 22.

Practice — Judgments and orders — Summary judgment — Application — Amended rule 32 — Plea and special plea — Not appropriate for defendant to plead only those defences that could be specially pleaded and to withhold, until later stage, general plea — Defendant which had failed to plead all its defences required to apply to amend its plea if seeking to add any for purposes of opposing summary judgment — Defendant's failure to have pleaded such defences initially would be material and require convincing explanation if it was to exclude possibility that court might infer delaying tactics and lack of bona fides — Defendant ordinarily having to bear wasted costs of application for leave to amend and those occasioned by any attendant postponement of summary judgment application — Uniform Rules of Court, rules 22 and 32(2)*(b)*.

When confronted with a request to make an order by agreement refusing summary judgment and directing the matter in question to proceed to trial, which it accepted, the Cape Town High Court saw it fit to address the following question: Should it be permissible for a defendant, at least in matters that could be affected by an application for summary judgment, to plead only those of its defences that *could be specially pleaded* and to withhold until a later stage its plea on those defences that fell to be generally pleaded (see [8])? In this regard a general practice had in fact developed in the Cape (the so-called 'Cape practice') to the effect that it was unnecessary for a defendant to 'plead over' when filing a special plea. The court saw it necessary to ask the question, given, in the light of the conduct of the defendant, the implication of the amended Uniform Rule 32(2)*(b)* dealing with summary judgments, which read that the plaintiff in its affidavit accompanying its application for summary judgment had to, inter alia, explain briefly why the defence *as pleaded* did not raise any issue for trial. In this matter the defendant, in answer to the plaintiff's action, had raised a special plea, without more. Application for summary judgment followed. The defendant then filed an opposing affidavit in which he now set out a defence on the merits of the case. This prompted the parties to seek postponement, to allow the defendant to deliver a general plea that incorporated such defence — the parties were seemingly in agreement that the defendant was entitled to deliver a general plea at this stage, without the need to seek leave to amend its plea — and for the parties to subsequently exchange supplementary supporting and opposing affidavits on the issue of summary judgment. The postponement was necessary because the plaintiff was not called upon to deal in a supporting affidavit in terms of rule 32(2)*(b)* with any defences that had not been pleaded (see [5]). On the resumption date the request for refusal of summary judgment was made. The court noted that the plaintiff would probably not have applied for summary judgment had it been apprised of all the defendant's grounds for defending the action at the stage when the defendant, purporting to comply with rule 22, delivered his special plea (see [7]). It followed that the defendant's conduct in failing to plead over materially delayed the finalisation of the litigation and contributed

to an unnecessary incurrence by the parties of additional costs, not to mention an unwarranted demand on judicial time and court resources (see [7]).
Held, that the delay, unnecessarily increased costs and inconvenience occasioned in the current matter by the defendant's failure to plead over served to demonstrate that the administration of justice would be better served by interpreting rule 22 to require a defendant to plead over [when delivering a special plea], and by recognising that it did not leave scope for the continuation of 'the Cape Practice'. (See [19].)
Held, accordingly, that a defendant in a summary judgment application which had failed to plead all its defences would be required to apply to amend its plea if it sought to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially would be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, would require convincing explanation if it was to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect would be that such a defendant would ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application. (See [20].)
Held, however, that the orders agreed to by the parties should be made, this in light of the prevailing uncertainty about the continuing acceptability of 'the Cape practice'. The object of the present judgment was to signal that this would not be the case in the future (see [21]).

CITY SQUARE TRADING 522 (PTY) LTD v GUNZENHAUSER ATTORNEYS (PTY) LTD AND ANOTHER 2022 (3) SA 458 (GJ)

Practice — Judgments and orders — Summary judgment — Application — Amended rule 32 — Defendant filing amended plea after filing of application for summary judgment — Whether plaintiff, pursuant thereto, precluded by rule 32(4) from making adjustments to its affidavit which it had filed in terms of rule 32(2) — Plaintiff not deprived of rights under rule 28(8) to make consequential adjustments to its affidavit — Plaintiff, however, prohibited from introducing factual matter which was in nature of reply or rejoinder to defendant's case — Uniform Rules of Court, rules 28(8) and 32(2) and (4).

The plaintiff had applied for summary judgment in the High Court subsequent to the defendants filing their plea to its summons. In their affidavit resisting summary judgment, the defendants raised defences which they had not originally pleaded. The defendants then amended their plea to bring it in line with their affidavit. The question in the present matter was whether the plaintiff was entitled to file in response — as it sought to do — a further affidavit for the purpose of supplementing the founding affidavit it had filed in terms of Uniform Rule of Court 32(2)*(a)*. The defendants' position was that the provisions of rule 32 (which regulated summary judgment proceedings) precluded the plaintiff from doing so. So, in the present interlocutory application, relying on rule 30, they sought to set aside the affidavit. The defendants placed reliance on rule 32(4), which provided that '*(n)o evidence* may be adduced by the plaintiff *otherwise than by the affidavit referred to in subrule* (2) . . .'. * The defendants, acknowledging that the application for summary judgment could not be proceeded with in the circumstances of the amendment of the plea, with the founding affidavit as it was, submitted that a fresh application for summary judgment had to be brought. In support of their views, the defendants relied on the case

of *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC). The plaintiff for its part argued that, in light of the fact that the plea was now different, a further engagement with the plea was indicated and was not precluded by subrule (4).
The court noted that, while rule 32 itself did not deal with what was to happen if there were an amendment to the plea, rule 28(8), which was of general application, took account of the consequences of the amendment of pleadings generally. Rule 28(8) provided that '(a)ny party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make consequential adjustment to the documents filed by him'. The provision was, the court held, deliberately inclusive, the only constraint here that the adjustment should be *consequential* on the amendment, failing which formal leave had to be sought in terms of subrule (1). (See [17].) In the case of the amendment of the plea after the filing of a summary judgment application, the court continued, the plaintiff was decidedly 'a party affected' by the amendment. Thus, the provisions of rule 28(8) applied to it and so afforded it the right to adjust the founding affidavit without leave, provided the adjustment was consequential. The consequential adjustment in this instance would be the amendment of the affidavit filed in terms of rule 32(2)*(a)* to take account of the amendment. Rule 32(4) did not preclude such adjustment. (See [18].) The court added that, as long as the adjustment was strictly consequential on the amendment, there was no reason why the affidavit, although supplemented, should not be read to conform to the description of the subrule (2)*(a)* affidavit. (See [19].) In this regard the court added that the fact that a further affidavit was necessary for the purpose of this adjustment did not change the nature and characterisation of the founding application. (See [20].)
The court concluded that rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which was of the nature of a reply or rejoinder to the defendants' case and which was not consequential on the amendment of the plea. (See [29].) Finding that the matter sought to be introduced by the supplementary affidavit was indeed consequential, the court dismissed the rule 30 application, and found the plaintiff's supplementary affidavit to have been properly filed. (See [30] and [31].)

GEFEN AND ANOTHER v DE WET NO AND ANOTHER 2022 (3) SA 465 (GJ)

Land — Unlawful occupation — Eviction — Application — Discretion of court to strike out defence in eviction application — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

Practice — Pleadings — Striking out — Eviction application — Discretion of court to strike out defence in eviction applications — Appeal against striking out defence in eviction application without considering PIE and whether just and equitable — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

In an interlocutory application in eviction proceedings — brought by the joint liquidators of the company owning the immovable property that the appellants were in occupation of — the appellants' defence was struck out and their eviction ordered. This based on the appellants' failure to comply with an order in an earlier interlocutory application, compelling them to serve their heads of argument and a practice note as required by the division's practice directives.

At issue in the present case, their appeal to a full bench of the division, was the nature and extent of the court's discretion to strike out a defence in eviction applications, more particularly since the court a quo had done so without considering the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and whether it was just and equitable.

Held
A court striking out a defence in an eviction application must exercise a judicial discretion going beyond an enquiry to establish whether good cause had been shown for the non-compliance with the compelling order. The additional discretion derived from PIE, more specifically s 4(7) and (8). (See [14] and [29] – [30].)
A judicial discretion could only be exercised if it was a properly informed decision; it would not be helpful to strike a defence and the facts supporting the defence which, in this instance, were contained in an answering affidavit. A court should broadly consider the veracity of all possible defences which could inform a court about a possibly successful defence against an eviction and whether such defences were raised in a bona fide manner. (See [26] and [27].)
By striking a defence the facts upon which a court should exercise its discretion could not be relied upon; it deprived a court of considering allegations in an answering affidavit pertaining to issues stipulated in s 4(7) of PIE (quoted at [15]). These included the rights and needs of the elderly, children, disabled persons and households headed by women. (See [25].)
The court a quo did not consider the veracity of the appellants' defence, which should have included an enquiry whether it would have been just and equitable to evict the appellants, and the impact of s 4(7) of PIE on the order to strike the defence and to evict the appellants. Consequently, the court a quo did not exercise its discretion judicially in granting the application. The appeal would be upheld on this ground alone. (See [32].)

JA OBO DA v MEC FOR HEALTH, EASTERN CAPE 2022 (3) SA 475 (ECB)

Evidence — Expert evidence — Evaluation — Conflicting expert opinions — Restatement of applicable legal principles.

The present matter concerned a claim for delictual damages by the appellant on behalf of her minor child, DMA, in respect of a brain injury he had sustained. The appellant claimed that DMA's injury was caused by the negligence of the employees of the MEC in treating her when she gave birth to DMA at the Andries Vosloo Hospital in Somerset East in the Eastern Cape. The appellant had launched her action for damages in the Bhisho High Court. Before the trial court, it was common cause that DMA had a brain impairment/injury, ie that of a left-sided spastic hemiplegic-type of cerebral palsy with microcephaly. It was also admitted that the nursing staff treating the appellant had been negligent in unduly prolonging her labour, which was obstructed, and which had led to the foetus being deprived of oxygen. What was in dispute was the question of causation, whether it was such oxygen deprivation that had led to DMA's injury. The appellant's expert witness, the paediatric neurologist Van Toorn, expressed the opinion that it was. Van Toorn held the view that DMA's condition was the result of a brain injury known as hypoxic-ischemic encephalopathy, which *he had sustained during labour*, and was caused by prolonged partial hypoxic ischemia. The respondent's expert, the paediatric

neurologist Keshave, contended otherwise, and expressed the view that, on the clinical evidence, DMA had an *underlying* neurometabolic disorder in keeping with Nonketotic Hyperglycinemia (NKH), which might account for his clinical condition. Based on its assessment of the evidence, the trial court found that both expert opinions were capable of logical support. Unwilling to choose one version over the other based on mere preference, the court refused to find for the appellant, and it granted absolution from the instance. The appellant successfully appealed to the full court of the Bhisho High Court.

That full court identified the key issue to be determined as whether the trial court was correct in concluding that the two opinions were equally placed, on the evidence before it, and that the appellant as a consequence had to 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 DMA (see [9]). Before determining this issue, the court provided a thorough overview of the law dealing with how expert opinion evidence must be approached and evaluated where there was conflicting or inconsistent evidence from two or more expert witnesses (see [10] – [17]), with regard to *(a)* the assumed facts (see [11]); *(b)* the analysis of the established facts and inferences to be drawn therefrom by opposing witnesses ([12] – [14]); *(c)* competing theories of a purely scientific nature (see [15]); and *(d)* the accepted standard of a medical professional (see [16]).

Moving on to the issue in dispute, the court found that Van Toorn's opinion evidence with regard to the cause of the injury, when measured against that of Keshave, proved to be more reliable, with there being nothing, at least not of a material nature, that may detract from the probative value thereof. His evidence, the full court held, not only had a logical basis, but the conclusions reached by him were well reasoned, and consistent with the clinical evidence, the joint reports of the expert witnesses engaged by the respective parties, the oral evidence of the other expert witnesses, and the probabilities as the they arose therefrom. (See [19] and [51].)

By contrast, the full court held, Keshave's opinion on what was the cause of DMA's injury and clinical condition showed that it did not support a defensible conclusion when measured against the facts and other largely uncontested evidence (see [38]): Keshave wavered between different opinions (see [38] and [39]); he sought to draw inferences that were tenuous, and gave evidence that was largely of a speculative nature (see [38], [39] and [46]); he expressed views on aspects he was not qualified to do (see [38] and [42]); and he relied on incorrect facts, and reached conclusions not supported by the evidence (see [38], [40], [44], [46] and [51]).

The court concluded that, on the whole, the clinical evidence supported the appellant's expert opinion that it was more likely than not that the brain injury sustained by DMA, and the disabilities that later followed, was the result of prolonged partial hypoxic ischemia during labour, as opposed to NKH. The injury, it held, was consistent with the conduct of the respondent in allowing a severely prolonged obstructed labour of the appellant to continue, which exposed the foetus to a real risk of sustaining a hypoxic-type of brain injury, and it further accorded with the clinical condition of DMA immediately following his birth. The conduct of the respondent's employees created a risk of harm, and the more plausible explanation was that the

injury occurred within that area of risk. (See [52].) Accordingly, appeal upheld (see [53]).

JOHANNESBURG CITY v K2016498847 (PTY) LTD 2022 (3) SA 497 (GJ)

Interdict — Interdict by local authority restraining use of property in contravention of Land Use Scheme — Where effect to evict occupiers — Local authority obliged to comply with s 26(3) of Constitution — Obliged to meaningfully engage with occupiers of property in question and offer to provide alternative accommodation where it was reasonably needed — Constitution, s 26(3).

Land — Unlawful occupation — Eviction — Interdict by local authority restraining use of property in contravention of Land Use Scheme whose effect to evict occupiers — Local authority obliged to comply with s 26(3) of Constitution — Obliged to meaningfully engage with occupiers of property in question and offer to provide alternative accommodation where it was reasonably needed — Constitution, s 26(3).

Local authority — Powers and duties — When seeking interdict restraining use of property in contravention of Land Use Scheme — Where effect to evict occupiers — Local authority obliged to comply with s 26(3) of Constitution — Obliged to meaningfully engage with occupiers of property in question and offer to provide alternative accommodation where it was reasonably needed — Constitution, s 26(3).

In the present application before the High Court, the Johannesburg Metropolitan Municipality (the City) sought an order for an interdict restraining the respondent company from using a certain property as an 'accommodation establishment', such use being contrary to the way the property was zoned under the applicable Land Use Scheme (the Scheme), ie 'Residential 1', and to forthwith use the property in a zone-compliant manner. The City sought further relief: that, should the respondent not comply, the sheriff be authorised to take all necessary steps to give effect to the interdict, including taking into possession 'all that [was] found at the property' and to keep such items that the company was using to conduct an accommodation establishment, pending payment of the City's 'reasonable fees and disbursements' incurred in the execution of the order.
Held, that the effect of the order whereby the City sought to enforce the Scheme *was the eviction of the occupiers of the property* (see [10], [14] and [16]). Where the enforcement of the Scheme affected the rights of people living on property to which the Scheme applied, they were obviously necessary parties to any enforcement application, and had to be joined (see [20]). The City had failed to meet this requirement, and on such ground alone the application could not succeed (see [18]).
Held, that, where the City meant to enforce the Scheme through the eviction of people living on the relevant property, further requirements were triggered (see [20]). The principal requirement was compliance with s 26(3) of the Constitution, which provided that '(n)o one may be evicted from their home . . . without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' (See [21].) In seeking relief to give effect to its Land Use Scheme by removing people who resided on property in breach of that Scheme from their homes, the City was required to demonstrate that it had engaged meaningfully with each of the affected individuals, and that it would provide alternative accommodation to those individuals where it was reasonable to do so. It would be reasonable to

provide alternative accommodation where an occupier would be left homeless without it. (See [24].)
Held, accordingly, that the City could not demonstrate a clear right to an interdict which enforced its Land Use Scheme through an eviction unless it had shown that it had meaningfully engaged the occupiers of the property in question, and offered to provide alternative accommodation where it was reasonably needed (see [25]). The City had not made out such a case in this application. The application accordingly had to be dismissed (see [26]).

JUMA v MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD 2022 (3) SA 506 (WCC)

Practice — Judgments and orders — Default judgment — Application for by credit provider — Judicial oversight — Credit providers seeking default judgment to indicate in application what response, if any, s 129 notice or summons elicited and what payments, if any, were made between issuance of s 129 notice and date of application for default judgment — Court to guard against bad practices by credit providers — National Credit Act 34 of 2005, s 129.

Courts should, in order to offset credit-provider domination over consumers, exercise judicial oversight of the period between the issuance of a notice under s 129 of the National Credit Act 34 of 2005 and a subsequent securing of a court order by the credit provider, in particular where default judgment is sought. Credit providers seeking default judgment should disclose to the court hearing the application what response, if any, the s 129 notice or summons elicited and what payments, if any, were made from the date of issuance of the s 129 notice to the date of application for default judgment. (See [18] – [19].)

A credit provider who continues receiving payments after cancelling a credit agreement in the s 129 notice, where the consumer was unaware of the cancellation, receives them under false pretences. Mitigation of damages and transparency, especially a frank disclosure to a court called upon to determine a request for default judgment, are not mutually exclusive. Courts, especially when considering default judgment, should guard against bad practices in debt recovery such as the hasty and unnecessary dispossession of property subject to credit agreements. (See [20].)

SOLOMON AND ANOTHER v JUNKEEPARSAD 2022 (3) SA 526 (GJ)

Legal practitioner — Advocate — Fees — Liability for — Attorney's liability for fees charged by advocate instructed by him or her — Such liability having evolved into hard rule of law to be implied in contract between attorney and advocate if not expressly agreed — Legal Practice Act 28 of 2014, s 36; Code of Conduct for Legal Practitioners under GN 168 in GG 42337 of 29 March 2019.

The advocates' profession is no longer self-regulatory but regulated by the Legal Practice Act 28 of 2014 (date of commencement 1 November 2018), the Legal Practice Council and its Code of Conduct. The former 'professional practice or trade

usage' under which an attorney was liable for the fees charged by an advocate briefed by him or her has hardened into a rule of law that, if not expressly agreed, is implied in the contract between the attorney and advocate as a matter of law. How much counsel may charge is agreed between counsel and attorney, not counsel and client. It is the attorney who offers the brief to counsel, and counsel who accepts or declines the brief. Attorneys are liable for the fees of counsel instructed by them, and this liability extends to every partner of a firm of attorneys or member of an incorporated firm. If the firm is dissolved or the incorporated firm is wound up, such liability remains with each partner or member. Where the attorney for reasons of insolvency or any other reason is unable to pay, counsel may, with leave from the Provincial Council, receive the fees due to him or her from another source in discharge of the indebtedness of the attorney. (See paras 18, 26, 27, 34 and 35 of the Code of Conduct and [11] – [19] of this judgment.)

Meyer J:

[1] The hearing of two applications, which have been instituted under case Nos 37003/19 (the *Marimuthu* application) and 37456/19 (the *Isseri* application), has been consolidated. The applications have been instituted by two members of the Johannesburg Bar, Adv Richard Alan Solomon SC and Adv Arlette Mary MacManus (who are cited as the first and second applicants, respectively, in each application) against Mr Vishal Suresh Junkeeparsad (who is cited as the respondent in each application). He is a practising attorney and the sole director of Vishal Junkeeparsad & Co Inc, Umhlanga, Durban.

[23] In the result the following orders are made:

(a) In case No 37003/2019:

(i) The respondent is to pay to the first applicant the amount of R1 653 880 plus interest thereon at the rate of 10,25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R829 399,50 plus interest thereon at the rate of 10,25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(iii) The respondent is to pay the costs of this application, including those of senior counsel.

(b) In case No 37456/2019:

(i) The respondent is to pay to the first applicant the amount of R1 016 640,85 plus interest thereon at the rate of 10,25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R657 642 plus interest thereon at the rate of 10,25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(iii) The respondent is to pay the costs of this application, including those of senior counsel.

Applicants' Attorneys: *Ian Levitt & Associates*, Sandton.
Respondent's Attorneys: *Mohamed Hassim Attorneys*, Durban.

STANDARD BANK OF SOUTH AFRICA LTD v LAMONT 2022 (3) SA 537 (GJ)

Execution — Immovable property — Residential immovable property — Order declaring residential immovable property executable — When sought in summary judgment proceedings — Need for practitioners in drafting application to ensure compliance with rule 46A — Uniform Rules of Court, rule 46A.

Practice — Judgments and orders — Summary judgment — Order declaring residential immovable property executable — Need for practitioners in drafting application to ensure compliance with rule 46A — Uniform Rules of Court, rule 46A.

This was an application for summary judgment by the applicant bank against the respondent for the payment by the latter of the amount he owed to the bank in terms of a home loan agreement he had entered with it. Importantly for present purposes, the applicant had also sought in its application an order declaring to be specially executable certain immovable property belonging to the respondent which happened to be the latter's primary residence. Uniform Rule 46A was accordingly applicable. The court that heard the matter — the Johannesburg High Court — in its judgment noted this and the fact that the applicant had failed to meet the procedural requirements imposed upon it by the rule, more particularly those of 46A(4)*(a)*(ii), which obliged a party applying for an order declaring residential immovable property executable to give notice of such application to the respondent, informing it 'that if the respondent intend[ed] to oppose the application or make submissions to the court, the respondent [had to] do so on affidavit within 10 days of service of the application and appear in court on the date on which the application [was] to be heard'. (See [4], [7] and [9].) The court highlighted that compliance with the rule was important because a respondent, in terms of rule 46A(6)*(a)*, was entitled to oppose the application and/or 'make submissions which are relevant to the making of an appropriate order by the court' (see [5]). And only if a respondent had been given the opportunity to make such submissions could a court properly exercise the discretion it was required to under subrule 46A(2). (See [6].) The applicant fell short of the requirements of the rule in its application for summary judgment by failing to inform the respondent that, quite apart from setting out a defence to the summary judgment application, he was also entitled to draw the court's attention to any information regarding his personal circumstances and how an order of executability might impact him (see [7]). The court suggested that this was not a deliberate ploy on the part of the applicant; it was simply a result of a failure by its lawyers drafting the pleadings to effectively marry the summary judgment procedure with that of rule 46A, which required that this separate notice be given to the respondent. (See [8].)
The court felt that, given that the respondent had not been given a proper opportunity to make the specific representations identified in rule 46A, it could not meet its obligations in terms of subrule 46A(2) to ensure that the order it made was appropriate. The solution it arrived at was to grant the respondent an opportunity to file an affidavit setting out the information he was entitled to provide the court under subrule 46A(6)*(a)*. (See [9].) The court ultimately granted the relief sought by the applicant, subject to the condition that the respondent be given an opportunity to sell the property privately (see [38] and [42]).

The court, however, saw it fit to caution practitioners when drafting papers in similar matters to ensure that the requirements of rule 46A did not fall by the wayside when seeking orders of executability by way of summary judgment against home-loan debtors. This, it noted, may require a hybrid application in which notice was given to the respondent both of his rights under rule 32, and his rights under rule 46A. The

most important objective, the court stressed, was to ensure that the respondent was notified that, in addition to opposing the summary judgment application, or even in the event that he elected not to do so, he was nonetheless entitled under rule 46A(6) to make representations to the court regarding what effect an order of executability may have on him and his family's right to housing under s 26 of the Constitution.

HAL OBO MML v MEC FOR HEALTH, FREE STATE 2022 (3) SA 571 (SCA)

Evidence — Expert evidence — Joint minutes — Fact versus opinion — Admissibility — Evidence qualifying — Verification.

In 2005 M was born to H and at the time appeared to be healthy. Later, however, M showed symptoms of neurologic abnormality and was eventually diagnosed with cerebral palsy (see [1]). Later still, in 2014, an MRI scan revealed a brain injury rooted in partial asphyxia, and this finding presaged a claim H came to make against respondent MEC, that the asphyxia stemmed from negligent omissions of hospital staff attending during the late stages of the birthing process. The action was however unsuccessful, with the High Court finding H to be an unreliable witness whose evidence, which largely founded her experts' opinions, discrediting same (see [2], [18] and [71]). (The evidence went to placing the occurrence of the injury in the late intrapartum period (see [84]).)
Here, in an appeal to the Supreme Court of Appeal, H challenged these findings. The majority (per Makgoka JA) confirmed them and dismissed the appeal (see [84] – [85]). (See [26] – [27], [29] and [60] – [65] for observations on H's reliability; [42], [44], [53] and [67] for considerations of her experts' opinions; and [73] for the majority's conclusions. See also [66] for the distinction between credibility and reliability.)
The minority, per Molemela JA, would have upheld the appeal and found the MEC liable (see [178]). In his view the High Court had, in assessing H's credibility, underweighted evidence corroborating her story and overweighted the fact that she was the sole witness of the events concerned (see [94] – [95]). It had also failed to recognise that the respondent's version was not put to H in her cross-examination, and that she was not informed that the questions went to demonstrating she was untruthful in her testimony (see [93]).

So too, assessment of H's testimony had been insufficiently charitable against the backdrop of the hospital's failure — to H's prejudice — to safeguard certain of her records (see [126] but also [77] – [80]). (Indeed, in such an instance it might be appropriate for a healthcare provider to bear an evidential burden of showing that care provided was in line with good medical practice (see [123]).) Conversely, respondent's failure to call staff to explain entries in the limited records ought to have attracted a negative inference (see [126]). As for the joint minutes, the court — despite being bound to — had failed to accept agreed points (see [133] – [134]). Lastly, the evidence disclosed negligence and causation — there being no requirement, as suggested by the High Court, to pinpoint the precise timing of the injury in order to satisfy the latter test (see [149] and [178]).
In his concurrence Wallis JA expressed his disquiet at apparent touting and at the inexactitude of H's pleadings which failed to delineate the issues (see [179], [191],

[198] – [199] and [233]). Wallis JA further observed that experts had testified prior to the establishment of the facts on which their opinions were based, when the appropriate sequence was indeed the reverse (see [208], [211] and [215]).

As to the agreed minute, and agreed minutes generally, Wallis JA noted that agreements on facts bound a court but agreements of opinion did not — a court had further to verify that the opinions were based on established facts and sound reasoning (see [220] and [229]); agreements of opinion did not preclude the experts or other witnesses giving evidence which qualified or contradicted the opinion concerned (see [229] – [230]); and a joint minute remained inadmissible unless its authors testified or it was agreed that it should be admissible (see [231]).

Advertising Regulatory Board NPC and others v Bliss Brands (Pty) Ltd [2022] 2 All SA 607 (SCA)

Civil Procedure – Private regulatory body – Jurisdiction – Submission to jurisdiction – A failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate submission to jurisdiction.

As an independent, self-regulatory body in the advertising industry, the Advertising Regulatory Board NPC ("ARB") required its members to adhere to the Code of Advertising Practice. The second and third appellants ("Colgate") and the respondent ("Bliss Brands") were competitors in the toiletries business.

The ARB decided a complaint lodged by Colgate in which Bliss Brands was accused of exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. Bliss Brands, while not a member of the ARB, fully participated in the hearing. The ARB found against Bliss Brands which then applied for review in the High Court. That court found the ARB's Memorandum of Incorporation ("MOI") unconstitutional and invalid because it permitted the ARB to decide complaints concerning advertisements of non-members. It held that the ARB had no jurisdiction over non-members in any circumstances and could not issue any rulings in relation to non-members or their advertising. That led to the ARB appealing to the Supreme Court of Appeal.

Held – The High Court disregarded the fact that a court should decide only the issues before it, as pleaded by the parties. Bliss Brands' submission to the jurisdiction of the ARB should have put paid to any challenge to jurisdiction, or to the constitutionality of the Code or MOI. Moreover, constitutional issues should only be raised by courts *mero motu* in exceptional circumstances – which this was not. Bliss Brands, when notified of Colgate's complaint, was requested to inform the ARB if it did not consider itself to be bound by the board. However, it raised no objection to the ARB's jurisdiction, legitimacy or procedures. It participated fully in the hearing of the complaint with no protest. As a failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate submission to jurisdiction, Bliss Brands was found to have submitted to the jurisdiction of the ARB.

Despite that finding be dispositive of the appeal, the Court addressed each of the High Court's findings to alleviate legal uncertainty regarding the powers of the ARB.

Private bodies are capable of exercising public powers in the absence of statutory authorisation, if sourced in an instrument or agreement such as the MOI. The effect of the High Court's orders was to prevent the ARB from exercising its legitimate powers.

The Court held further that the right of association includes the right to dissociate. The ARB may only make rulings on the advertisements of non-members for the benefit of its own members, which are not binding or legally enforceable against non-members. The impact of ARB rulings on non-members is therefore indirect, in cases where they engage the services of an ARB member to approve, create or publish their advertising. Members of the ARB are bound to comply with the Code and ARB decisions, and are obliged to decline to approve, create or carry advertisements that breach the Code. Non-members who do not wish to meet the ethical standards contained in the Code are free to approve, create and publish their advertising using the services of non-members of the ARB.

Bliss Brands' contention that the ARB's processes infringed the right of non-members of access to court under section 34 of the Constitution and usurped judicial functions was found to be without merit.

The appeal was upheld.

Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others [2022] 2 All SA 626 (SCA)

Constitutional and Administrative Law – Review proceedings – Remedy – A court in review proceedings, whether under the principle of legality or the provisions of the Promotion of Administrative Justice Act 3 of 2000, has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the case – Remedy must be fair to all those affected by it, and yet effectively vindicate the rights violated – Court's remedial discretion may only be interfered with on appeal if at odds with the law.

The Strategic Fuel Fund Association NPC ("SFF") is a wholly owned subsidiary of the Central Energy Fund SOC Limited ("CEF"). Its facilitation of the rotation of South Africa's strategic stock of some 10 million barrels of crude oil, and transactions that followed led to an application for review. The impugned transactions involved the sale by the SFF, acting through its then Chief Executive Officer ("CEO"), Mr Gamede, of the strategic stock to various of the first to eighth respondents. The SFF brought the review application essentially as a self-review under the doctrine of legality, and the CEF applied for review in terms of the Promotion of Administrative Justice Act 3 of 2000.

Despite finding that the appellants had delayed unreasonably in bringing the review application, the High Court condoned the delay and declared the impugned decisions invalid based on their clear and indisputable illegality. It held the SFF itself to be culpable, rejecting the submission that Mr Gamede was solely to blame. As the fourth, sixth and seventh respondents were innocent parties, the High Court set aside their contracts subject to payment of compensation for out-of-pocket expenses.

The question on appeal related to whether the relief granted by the High Court was just and equitable in the circumstances.

Held – A court in review proceedings, whether under the principle of legality or the provisions of the Promotion of Administrative Justice Act, has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the case. The remedy must be fair to all those affected by it, and yet effectively vindicate the rights violated.

In crafting an appropriate remedy in cases that entail setting aside a contract, courts must be guided firstly by the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists. The second guiding principle is the "no-profit-no-loss" principle. While innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract. The court's remedial discretion may only be interfered with on appeal if at odds with the law.

Requiring the SFF to repay the out-of-pocket expenses of the innocent parties was a consequence of restitution. The Court rejected the appellants' contention that a claimant for compensation must initiate its own proceedings, confirming that application proceedings were appropriate in this case.

The appellants' attempt to challenge the cost order against them was also unsuccessful. It was emphasised that courts exercise a true discretion in relation to costs orders, and an appellate court will not lightly interfere with the exercise of a true discretion, which involves a choice between the number of equally permissible options.

WK Construction (Pty) Ltd v Moores Rowland and others [2022] 2 All SA 751 (SCA)

Civil Procedure – Extinctive prescription – Question of when the appellant had the relevant knowledge of debt or could have acquired the relevant knowledge by exercising reasonable care – Plaintiff not requiring knowledge of specific duties of auditors where it had knowledge of facts leading to reasonable suspicion of possible negligence – Special plea of prescription correctly upheld in circumstances.

Between 2006 and 2013, the appellant was defrauded by its financial director. From 2007, the appellant's auditor was a partnership known during various periods by the names of the three respondents. The partnership was later replaced by an incorporated entity ("Mazars").

Mazars' failure to report on the fraudulent transactions during its term as auditor led to the appellant suing based on alleged breach of the auditing contract. Mazars entered a special plea that the claim of WK Construction had been extinguished by prescription. The upholding of the special plea led to the present appeal.

Held – In terms of sections 10(1) and 11(d) of the Prescription Act 68 of 1969, a debt such as that in this case is extinguished after the lapse of three years, with prescription commencing to run as soon as the debt is due. Section 12(3) provides that, "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

In casu, the issue on prescription related to when the alleged debt was deemed to have become due. That required a finding on when the appellant had the relevant knowledge or could have acquired the relevant knowledge by exercising reasonable care. An assessment of what comprised the relevant knowledge was required.

Based on the evidence, the court was satisfied that by 22 August 2013, the appellant had concluded that its financial director had defrauded it over a number of years of many millions of rands. However, the appellant contended that it did not, by 22 August 2013, have knowledge of the requisite facts giving rise to liability on the part of Mazars.

The present matter concerned the facts required for prescription to begin running in a claim based on professional negligence. That was different to the facts which must be proved at a trial. The appellant maintained that evidence was required as to the applicable accounting standards and that Mazars had breached those. The question was whether the evidence contended for by the appellant was necessary in the circumstances The Court confirmed that, in order for prescription to run, the creditor need not be in a position to prove its case. The facts led the court to conclude that the appellant, by 22 August 2013, must have had a reasonable suspicion of possible negligence on the part of Mazars. The High Court thus correctly upheld the special plea of prescription, and the appeal fell to be dismissed.

ABSA Bank Limited v Sable Hills Waterfront Estates CC and others and a related matter [2022] 2 All SA 767 (GJ)

Civil Procedure – Summary judgment – Provisions of Uniform Rule 32 – Requirement that plaintiff engage closely with contents of plea, and to explain briefly why defences pleaded do not raise any issue for trial – Summary judgment will only be granted where bona fide defence has not been established.

As plaintiff in two separate matters, Absa Bank applied for summary judgment against the respective defendants.

Held – Before addressing the merits of the summary judgment applications, the changes introduced to the summary judgment procedure in Uniform Rule 32 by GN R842 of 31 May 2019. The first significant change was the recommendation that the defendant should deliver its plea before summary judgment could be applied for. It was also recommended that the plaintiff should deliver an affidavit that went beyond the mere formalism which was required under the previous rule. The previous sub-rule required the plaintiff's affidavit to be by a person who could swear positively to the facts and verify the cause of action and the amount, if any, claimed. The amended rule now requires a plaintiff to consider very carefully whether it is justified in applying for summary judgment, because it is now required to engage more closely with the contents of the plea. The plaintiff has to explain briefly why the defences pleaded do not raise any issue for trial.

In the first case considered by the court, Absa claimed payment in respect of loan agreements and an overdraft facility extended to the principal debtor. The defendants raised *in limine* defences that the summary judgment application was jurisdictionally defective, and that the plaintiff already had sufficient security as contemplated in Uniform Rule 32(3)(a), which warranted the defendants being afforded the opportunity to enter into the merits of the matter at trial. The court found on the first point that the plaintiff's affidavit did not exceed the permissible bounds contemplated in

rule 32(2)(b). On the second point, the court found that the security already in place did not satisfy the requirements of rule 32(3)(a). Both preliminary points were dismissed. Regarding the merits, the court was not satisfied that the plaintiff's case was unimpeachable and that the defendants' defence was bogus or bad in law. The defendants were found to have disclosed a *bona fide* defence to the action and the plaintiff was thus not entitled to summary judgment.

In the second matter, Absa claimed payment from the defendants arising from various debt and security instruments concluded and a mortgage bond. The defendants pleaded that the parties had settled the balance outstanding through a compromise by which Absa agreed to write off the outstanding balance. Explaining the nature of a compromise, the court held that the party alleging a compromise bears the onus of proving it. In determining whether or not a compromise has been effected, the court will have regard to the substance rather than the form in which it is couched or the description given to it by the parties. The defendants were found not to have established the compromise on a sufficient basis to avoid summary judgment. In the absence of a *bona fide* defence being raised, Absa was entitled to summary judgment.

Hospital Association of SA v Head of Department, KZN Department of Health and others [2022] 2 All SA 831 (KZP)

Constitutional and Administrative Law – Judicial review – Delay – Proceedings for judicial review under section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 must be instituted without delay and before the expiry of 180 days from the date of the administrative action sought to be reviewed – Section 9 empowers a court to extend the prescribed period where the interests of justice so require.

Constitutional and Administrative Law – Judicial review – Substitution – Power of a court on review to substitute administrative action, depends upon a determination that a case is exceptional in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000.

Constitutional and Administrative Law – Refusal by head of provincial health department to issue Letters of Support required for accreditation of nurses – Where decision was not rationally connected to the evidence before decision-maker, it was subject to review and setting aside.

As head of the KwaZulu-Natal Department of Health, the first respondent (the "HOD") was mandated to issue public and private Nursing and Education Institutions ("NEIs") with Letters of Support in terms of the National Department of Health Circular 1 of 2018 (the "Circular") issued on 23 November 2018. The Hospital Association of South Africa ("HASA") sought to review and set aside the alleged failure or refusal of the HOD to issue public and private nursing and education institutions who were HASA members, with the required Letters of Support. The HOD had informed HASA in 2019, that no Letters of Support would be issued to any private nursing education institution for a period of three years as there was a surfeit of existing qualified nurses available.

Held – The two issues requiring determination were whether the applicant should be granted condonation in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000, and whether the applicant was entitled to the review of the HOD's failure and substitution of his decision.

The Court referred to the relevant regulations which governed the process of accreditation of nursing education institutions and nursing education programmes by the third respondent (the "Nursing Council"). Regulation 2 of the Regulations Relating to the Accreditation of Institutions as Nursing Education Institutions governs conditions and requirements for the accreditation of an institution as a nursing education institution, while regulation 3 deals with accreditation process.

There was a substantial delay on the part of HASA in instituting review proceedings after the communication of the decision to it on 16 May 2019. Proceedings for judicial review under section 7(1) of the Promotion of Administrative Justice Act must be instituted without delay and before the expiry of 180 days from the date of the administrative action sought to be reviewed. Section 9, however, empowers a court to extend the prescribed period where the interests of justice so require. An assessment of what the interests of justice require is case-specific and a wide range of considerations are relevant to the enquiry.

The application of the delay rule involves a two-stage enquiry, namely whether there was an unreasonable delay, and if so, whether the delay should be condoned. The first stage is a factual enquiry upon which a value judgment is made in light of all the relevant circumstances. The Court noted the extensive attempt made by HASA to engage with the Department, and found that it had fully accounted for the delay. The matter was also one of significant public importance, requiring that condonation be granted.

The Department's decision was found not to be rationally connected to the evidence before it.

The power of a court on review to substitute administrative action, depends upon a determination that a case is exceptional in terms of section 8(1)(c)(ii)(aa) of the Act. The unduly long delay on the part of the HOD to make the necessary allocation, persuaded the court that a substitution was required. The impugned decision was reviewed and set aside and was substituted with an order directing the HOD to issue Letters of Support to the applicant's members.

Stemmet and another v Mokhethi and another [2022] 2 All SA 896 (FB)

Civil Procedure – Claim for damages – Plea of prescription – Section 12(3) of the Prescription Act 68 of 1969, which states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises – Defendant bears onus of proving prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt.

The appellants sold their immovable property to the respondents in 2013. A year after the respondents moved into the house, cracks started developing in the structure. A claim lodged with the property insurer was rejected on the ground that the problem was an old and gradual one relating to active clay. The first respondent then employed the services of civil engineers who reported that the cause was clay in the soil under the foundation, and that the cracks had previously been patched up, but would recur as the underlying cause remained. The respondents sued the appellants for damages in the Magistrate's Court, which held the appellants held liable for fraudulent misrepresentation pertaining to latent defects in the property. The Court was satisfied

that the respondents had proved on a balance of probabilities that the appellants were aware of the latent defects on the property and that they deliberately concealed the cracks by filling them with plaster and painting over them. That led to an appeal against those findings.

Held – When an appeal is lodged against a trial court's findings of fact, the appeal court takes into account that the trial court was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial. However, the court cautioned against an over-emphasis of the trial court's advantages.

One of the grounds of appeal related to the appellants' submission that the respondents' claim had prescribed. The court set out the provisions of section 12(3) of the Prescription Act 68 of 1969, which states that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. A defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case.

The Court found on the evidence that the first plaintiff had only acquired the minimum facts required for him to institute action by September 2014, with the result that the prescription plea could not succeed.

On the merits, the court agreed that the appellants had deliberately omitted to inform the respondents about the existence of the latent defects, so as to induce them to purchase the property.

The appeal was dismissed by the majority of the court.

In a dissenting judgment, it was held that the respondents' claim had prescribed as prescription had started running earlier than accepted in the majority judgment.

END-FOR NOW