LEGAL NOTES VOL 5/2022

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SA LAW REPORTS MAY 2022

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Section 194 of Constitution provides for the removal from office of heads and commissioners of Chapter 9 institutions. For the removal procedure, the Constitution mandates that such a process can only take place once the National Assembly has adopted a resolution calling for the removal of that person from office, followed by a vote in the National Assembly. The Constitution does not prescribe the process the National Assembly must follow for the removal, other than the need for a resolution and a vote. Section 57(1) of the Constitution however provides that the National Assembly may adopt rules to govern its removal process. (See [6] – [7].)
On 3 December 2019 the National Assembly (the NA) adopted rules to govern the removal process of Chapter 9 institution office-bearers (the Rules). Under the Rules, if a motion for impeachment is found to be compliant, the Speaker must immediately refer the motion to an *independent panel* appointed by her to consider whether there is prima facie evidence for the removal of a Chapter 9 institution office-bearer. Rule 129V provides that the independent panel must consist of three fit and proper South

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2022 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

African citizens, '*which may include a judge*'; and rule 129AD(3) that the 'committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, *provided that the legal practitioner or other expert may not participate in the committee*' (see [26]).

On 24 January 2020 the Speaker announced in National Assembly her acceptance of a Democratic Alliance (DA) motion for the Public Protector's removal, and invited political parties to nominate candidates to serve on the independent panel. On 28 January 2020 the Public Protector wrote to the Speaker alleging that the Speaker had acted unlawfully when announcing the commencement of the process for the Public Protector's removal, without first informing the Public Protector that the motion was compliant with the Rules. The Public Protector further alleged that the Rules were unconstitutional, and that the Speaker should refrain from taking any further steps until the issues raised in her letter had been resolved. When the Speaker refused to suspend the implementation of the Rules, the Public Protector approached the High Court on an urgent basis. Part A of her notice of motion was an application for urgent interdictory relief suspending the National Assembly proceedings; in part B she challenged the constitutionality of the Rules on 12 grounds (see [24])). Part A was dismissed by a full court of the High Court on 9 October 2020.

The subject-matter of the present case was two applications for urgent direct access to the Constitutional Court to appeal and cross-appeal the High Court's later order in respect of part B of the Public Protector's notice of motion: that rule 129V was unconstitutional for offending separation of powers doctrine insofar as the independent panel 'may include a judge'; as was rule 129AD(3) for infringing the right to legal representation (see [26]). The High Court also ordered that the offending phrases be severed from the Rules.

The applications were brought by the Speaker and the DA, respectively. The Speaker appealed against the High Court's findings on legal representation, and on the inclusion of judges to the independent panel, the DA against the latter aspect. The Public Protector was the first respondent in both applications, and also applied for leave to cross-appeal against the High Court's dismissal of eight of the grounds she advanced as to the Rules' unconstitutionality (without bringing a formal application in terms of rule19(5)*(a)* of the Constitutional Court Rules).

Before the Constitutional Court, the issues were as follows:

• Whether the court's jurisdiction was engaged:

Held, that constitutional issues were raised in this application which implicated the separation of powers doctrine, constitutional values of accountability and rationality as well as the extent of the power of the National Assembly to regulate its own processes. Accordingly the court's jurisdiction was engaged. (See [30].)

• Whether leave to appeal directly to this court on an urgent basis should be granted:

Held, that impeachment processes were the means through which accountability and fidelity to the rule of law could be attained. To leave such processes suspended, for as long as it would take for the matter to be heard in the ordinary course, did not accord with the public interest in the finalisation of the important issues raised. It was manifestly clear that there would be a saving in time and costs if leave to appeal directly to this court were granted. The matter was therefore urgent, and it was in the interest of justice to grant leave to appeal directly to the Constitutional Court. (See [37] and [39].)

• Whether rule 129AD(3) of the Rules limiting a Chapter 9 institution office-bearer's right to legal representation was rational:

Held, that the limitation was not rationally connected to its objective, ie personal accountability of the office-bearer. Rather than ensuring personal accountability, by placing a limit on legal representation the National Assembly risked that the Chapter 9 institution office-bearer may be removed because they did not do a sufficiently good job in cross-examining witnesses or advancing oral submissions. This could not be; full legal representation must be included in this process. Section 194 enquiries could be grounded on factual disputes and complex legal issues; fairness would demand that the office-bearer be fully assisted by a legal practitioner in such instances. It followed that the appeal against the order of the High Court on this aspect must fail. The proviso to rule 129AD(3) was unconstitutional and invalid, and would be severed from the rule with retrospective effect. (See [42], [47] – [49] and [110].)

• Whether a judge may be appointed to the independent panel established in terms of rule 129V in light of the separation of powers doctrine:

Held, that the High Court erroneously asked the question whether it was *desirable* to appoint a judge to an independent panel as contemplated in rule 129V, instead of whether it was *permissible* to do so. The result of this fallacious point of departure was that it may very well never be appropriate to appoint a judge to such panels, under any circumstances. To the extent that the conclusion of the High Court was based on this case only and on any heightened political controversy that may be associated with the case, it was decided subjectively. Therefore, the High Court had misdirected itself. A court should ask, objectively, whether it was permissible for a judge to play a role on the independent panel involved in the removal of any Chapter 9 institution office-bearer. The appointment of judges to perform non-judicial functions compatible with their judicial office was permissible, and even desirable. It was their impartiality, independence and lack of bias that placed judges in the perfect position to perform this function. The role, of being appointed to the independent panel and providing advice or recommendations in the case of the removal of Chapter 9 institution office-bearers, was not only compatible with their judicial office, but an appropriate precondition for ensuring the fairness of the process. The High Court accordingly erred when it severed the part of rule 129V which related to the appointment of a judge to the independent panel. The appeal on this ground would be upheld and the order set aside. (See [56] – [60] and [69].)

• Whether the Public Protector's conditional application for leave to cross-appeal was properly before court and, if so, whether leave to cross-appeal should be granted directly to the Constitutional Court:

Held, that, despite procedural non-compliance, the cross-appeal would be entertained. The applicants were not prejudiced by her non-complaince, and granting leave would, inter alia, provide certainty as to the Rules without which the Speaker would be unable to perform part of her constitutional duties, which was to ensure the transparency and accountability of office-bearers of Chapter 9 institutions. (See [73].)

• The merits of the cross-appeal:

Held, the allocation of a judge to a panel was not equivalent to the appointment of a person as a judge — the Rules made provision for a person already designated as a judge to be appointed to serve on the independent panel (see [78]). The Public Protector's argument that the appointment of an independent panel 'offends the principle of legality' was without merit and would be rejected (see [85]). The Speaker's decision involved a prima facie finding that the motion was compliant, made before commencement of the s 194 enquiry, and although 'a hearing before a hearing' was not a prerequisite for legality, the Rules gave the office-bearer two such opportunities. The process was therefore rational (see [91]). Any presumption against retrospectvity

was rebutted — it was the clear intention of the Rules to hold Chapter 9 institution office bearers accountable (see [94]). The Rules were unable to amend the constitutional definitions because the Constitution contained no definitions (see [98]). The functions of the National Assembly and the Speaker in respect of the adoption and implementation of the Rules were fulfilled in terms of s 57(1) of the Constitution, and they were expressly excluded from the definition of administrative action in the Promotion of Administrative Justice Act 3 of 2002, and were therefore not reviewable (see [105]). It followed that the cross-appeal would fail (see [109]).

Cases cited

VAN ZYL NO v ROAD ACCIDENT FUND 2022 (3) SA 45 (CC)

Constitutional law — Principles of natural justice — *Lex non cogit ad impossibilia* — Reiterated that law does not require impossibilities — Principle forming part of Constitution — Application where mentally incapacitated claimant not protected against statutory prescription of claim against Road Accident Fund.

Maxims — *Contra non valentem agere non currit praescriptio* — Ambit — Application where mentally incapacitated claimant not protected against statutory prescription of claim against Road Accident Fund.

Maxims — *Lex non cogit ad impossibilia* — Ambit — Application where mentally incapacitated claimant not protected against statutory prescription of claim against Road Accident Fund.

Maxims — *Lex non cogit ad impossibilia* — Incorporated into Constitution.

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Prescription — Mentally incapacitated claimant not in detention or under curatorship — Lex non cogit ad impossibilia (impossibility principle) applied — Prescription beginning to run only from date of appointment of *curator ad litem* — Road Accident Fund Act 56 of 1996, s 23.

On 1 May 2010 one KJ sustained serious brain injuries in a motor vehicle accident. The injuries reduced his mental capacity to the extent that he was unable to manage his own affairs. A compensation claim against the RAF, lodged on his behalf more than seven years later, was repudiated on the ground it had prescribed under s 23 of the Road Accident Fund Act 56 of 1996.

Despite the debilitating effects of his injuries, KJ did not fall into the classes of persons expressly protected against prescription under s 23(2) of the RAF Act, namely minors, persons detained under mental-health legislation and persons under curatorship. Also militating against the survival of the claim was that the preamble to s 23(1) explicitly excluded the operation of 'any law' that would allow for a prescription period different to that specified in s 23. The applicant, KJ's *curatrix ad litem*, argued in the Grahamstown High Court that KJ's claim had not prescribed because the Prescription Act 68 of 1969 was applicable, so that the running of prescription was delayed, under s 13 of that Act, due to KJ's mental incapacity. The High Court nonetheless upheld the RAF's special plea of prescription, ruling that s 23 applied to the claim, to the exclusion of the Prescription Act.

In an appeal to the Supreme Court of Appeal the applicant argued that the High Court judgment unjustly excluded mentally incapacitated persons *not* detained under mental-health legislation or under curatorship — 'affected persons' in this judgment — from the Prescription Act's protection. Apart from arguing that s 23 had to be read as incorporating s 13 of the Prescription Act, the applicant raised the point that the special

plea should have been dismissed on the basis of impossibility (*lex non cogit ad impossibilia*: the law does not require impossibilities). She submitted that because KJ was mentally incapacitated by his injuries, it had been impossible for him to institute action for damages before the expiry of the three-year period prescribed by s 23, and Parliament could not have intended for him to do the impossible. The applicant also invoked the common-law incapacity principle, which states that prescription does not run against those who lacked capacity to institute action (*contra non valentem agere non currit praescriptio*).

The SCA dismissed the appeal, ruling that prescription in RAF claims was regulated exclusively by s 23. The SCA declared itself bound by the Constitutional Court's judgment in *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) (2011 (1) BCLR 1; [2010] ZACC 18), which held in similar but not identical circumstances that s 12(3) of the Prescription Act did not apply to RAF claims. The SCA never addressed the applicant's impossibility argument.

The applicant turned to the Constitutional Court, which upheld the appeal. It delivered three judgments: one by Pillay AJ, one by Jafta J, and a dissenting one by Theron .Theron J would have dismissed the appeal, while Jafta J agreed with Pillay AJ that the appeal should succeed, but for different reasons.

Held per Pillay AJ (Mogoeng CJ and Khampepe J concurring):

The common law could be used to protect affected persons from prescription. (See [3], [38].) Section 39(2) of the Constitution enjoined the courts to prefer statutory interpretations that promoted the Bill of Rights over those that did not, so that if an interpretation denied the right of access to courts while another had the opposite effect, the court was obliged to adopt the latter. The Supreme Court of Appeal's refusal to take the route of s 39(2) unravelled its decision to dismiss the appeal. (See [40] – [41], [72].)

To exclude the impossibility principle, which was grounded in science and logic, from the concept of 'any law' as intended in s 23(1) would amount to a perversion of justice. The 'any law' prelude to s 23(1) did not occlude the impossibility principle because for any law — including the RAF Act — to be just, it had to be underpinned by justice, equity and reasonableness. Such an interpretation would spare the court from enquiring into the validity of s 23(1) and (2) and would be in line with the international Convention on the Rights of Persons with Disabilities (CRPD), to which South Africa was a signatory. (See [46] – [49], [53] – [58], [75], [77] – [86].)

The application of the impossibility principle would, together with the incapacity principle, rescue KJ's claim from prescription. This approach simultaneously recognised the validity of the RAF Act and the rights of the affected persons to human dignity and to access courts, without overburdening the RAF. (See [87] – [89].)

Therefore, the decision of the SCA would be reversed on appeal and the special plea of prescription dismissed. (See [90].)

Held per Jafta J (Madlanga J, Majiedt J, Mhlantla J, Tlaletsi AJ and Tshiqi J concurring):

While the order proposed by Pillay AJ was correct, it was difficult to appreciate what role the CRPD played in the interpretation of s 23, or the nature of the link between that interpretation and the impossibility principle. Pillay AJ was correct in stating that a statutory provision which affected rights protected by the Bill of Rights had to be construed in accordance with the international-law injunction in s 39(2) of the Constitution. This was, however, subject to the requirement that the language of the provision had to be reasonably capable of such a meaning. (See [92] – [93], [106].)

While KJ's claim had, on a literal interpretation of s 23, prescribed, the section was under-inclusive of those who truly needed its protection. Parliament could not have intended people like KJ to do the impossible. The exclusion amounted to an absurdity that could not have been contemplated by Parliament and that would, contrary to s 9(1) of the Constitution, deny equal protection and benefit of the law. It also served no legitimate government purpose to require individuals to do the impossible. While it was true that s 23 superseded other laws on prescription, it did not exclude *lex non cogit ad impossibilia* because the maxim did not regulate prescription but relieved a person from complying with the requirements of a law in circumstances where it was impossible to comply. Therefore s 23(1) did not exclude the operation of the impossibility principle. (See [102], [108], [111] – [117].)
Since the maxim was part of the rule of law, one of the foundational values of the Constitution, it formed part of the Constitution. By parity of reasoning the maxim equally applied to the present matter, and for as long as the disability arising from KJ's mental condition persisted, prescription would not begin to run. (See [125] – [126].)
Held per Theron J:
Pillay AJ's judgment failed to explain why the impossibility principle was not expressly excluded by the 'any law' exclusion. Any reliance on natural law was alien to our legal system and fell to be rejected. (See [144].)
Section 23 was not merely under-inclusive. Instead, it unequivocally excluded the operation of any law allowing for a prescription period different to that which it specified. There was no authority for the proposition that Parliament could not exclude the impossibility principle — in fact, it had to enjoy such power. (See [146].) In a statutory setting, it could do so by express provision (see [147]). Here, the applicability of the impossibility principle was excluded by the proviso to s 23(1) (see [148]).
Jafta J's invocation of absurdity, the intention of Parliament and inconsistency with s 9(1) of the Constitution all amounted to the same thing, namely that s 23(1) was unconstitutional. This was the stuff of a frontal attack, not interpretation under s 39(2) of the Constitution. In any event, Jafta J's judgment ignored the manifest purpose of s 23(1) and (2): to provide for the suspension of prescription *only* in the result of events capable of easy proof. (See [155].)
While the Constitution might require that the relevant common-law principles should be applicable in a situation such as the present, the proper place for such an argument was a frontal challenge to the constitutional validity of s 23(1), not through the back door of s 39(2) of the Constitution. In the absence of a frontal challenge, Parliament was deprived of the opportunity of justifying what appeared to be a rights limitation occasioned by s 23(1). For these reasons, the appeal should be dismissed. (See [156] – [159].)

LD v CENTRAL AUTHORITY (SOUTH AFRICA) AND ANOTHER 2022 (3) SA 96 (SCA) 2022 (3) SA

Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Grave risk return would expose child to physical or psychological harm or otherwise place child in intolerable situation — Requirements for successful reliance on defence — Summary of position — Hague Convention on the Civil Aspects of International Child Abduction, 1980, art 13*(b)*.
Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Grave risk return would expose child to physical or psychological harm or otherwise place child in intolerable situation —

Requirements for successful reliance on defence — Focus was on best interests of child — Hague Convention on the Civil Aspects of International Child Abduction, 1980, art 13*(b)*.
Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Grave risk return would expose child to physical or psychological harm or otherwise place child in intolerable situation — Application by father for return of child unlawfully abducted from Luxembourg to South Africa by mother to live with new husband and half-brother — Removal of child back to Luxembourg would mean severing strong bonds child had developed with mother, as well as half-brother and mother's husband — Disruption of family unit — Article 13*(b)* defence established — Hague Convention on the Civil Aspects of International Child Abduction, 1980, art 13*(b)*.

This matter concerned an application in terms of art 12 of the Hague Convention, * originally instituted in the Pretoria High Court, by the appellant (LD), supported by the first respondent, the Central Authority (South Africa), for the return (from South Africa) of his daughter, E, to Luxembourg, where the child had been habitually resident before being removed by the mother — the second respondent, PH — without his consent. The mother had taken E, along with her son S from a previous marriage, to live in South Africa with her new South African husband, and they have lived here as a family for three years at this point. The removal of the child constituted an unlawful abduction in terms of the Hague Convention: at such time, while primary residence of E was with the mother, in terms of orders of the Juvenile and Guardianship Court of Luxembourg (the Juvenile Court), both parents had parental authority of E, which included rights of custody, and the father had visitation and accommodation rights; further, the Juvenile Court had refused the mother's application for leave to relocate E to South Africa, which ruling was confirmed in subsequent appeals to the Juvenile Court and higher authorities. The Juvenile Court had also, subsequent to E's removal, ordered that E's habitual residence vest with the father, and fined the mother an amount of €100 per day until she returned E to the father's care, subject to a maximum of €5000; this order the mother ignored. The High Court, per Collis J, granted LD's application and ordered the return of E to Luxembourg, subject to various conditions. However, the mother successfully appealed to the full court. Tuchten J, with the concurrence of Davis J and Mokose J, set aside Collis J's order and replaced it with one dismissing the application. Leave to appeal was then granted to the father by the Supreme Court of Appeal.
The only issue for determination before the SCA was whether the mother had, as she had sought to do, successfully raised a defence in terms of art 13*(b)* of the Hague Convention to the unlawful abduction by her of her daughter E from Luxembourg to South Africa. That provision provided that 'the judicial or administrative authority of the requesting State is not bound to order the return of the child if the person . . . [who] opposes its return establishes that . . . *there is a grave risk that his or her return would expose the child to physical or psychological hardship or otherwise place the child in an intolerable situation*'.
Held, that the position, when an art 13*(b)* defence was raised to an application for the return of a child to their habitual residence, may be summarised thus: *(a)* the party who raised the defence bore the onus to prove it because the Hague Convention's default position was the return of abducted children to their habitual residences; *(b)* a certain degree of harm was inherent in the court-ordered return of a child to their habitual residence, but that was not harm or intolerability envisaged by art

13*(b)*; *(c)* that harm or intolerability extended beyond the inherent harm referred to above and was required to be both substantial and severe. (See [29].)
Held, while acknowledging that the behaviour of the mother had been deplorable, that, in considering the facts relevant to the art 13*(b)* defence, the focus was on the best interests of E. If giving effect to the paramountcy of her best interests had the effect of 'rewarding' the mother for her bad behaviour, that was an unfortunate but unavoidable result. (See [30].)
Held, that the removal of E to Luxembourg would have a profound adverse affect on her, in a manner going far beyond the normal hardship and dislocation associated with cases of this sort (see [39]): it would mean severing (or at least placing under severe strain) the strong bonds that E had developed with her mother as well as half-brother S, and disrupting the family unit which E regarded her mother and S as forming, along with the husband; this would be in conflict with E's right under s 28(1)*(b)* of the Constitution, which included the nurturing and support a child received from its immediate family group. (See [31] – [38].) Accordingly, the mother had established that there was a grave risk that E's return would expose her to psychological harm or otherwise place her in an intolerable situation (see [39]). Appeal dismissed.
Mocumie JA dissented from the rest of the court, holding that she would have upheld the appeal and granted an order for the return of E to Luxembourg, subject to certain conditions (see [65] – [67]). She stressed that, what a parent seeking to rely on a defence in terms of art 13*(b)*had to establish, was that there was a grave risk that the return would expose the *child* to physical or psychological harm or otherwise place the *child* in an intolerable situation (see [56]). This, Mocumie JA held, the mother had failed to do (see [55] and [56]). (Mocumie JA rejected the notion that returning E to her habitual residence with her parents could equate with 'grave risk of harm' (see [61]).) The mother's assertions, Mocumie JA held, related to her own risk and not that of her minor child (see [53]); her case boiled down to the fact that returning to Luxembourg would expose *her* to the risk of arrest and detention by the authorities of that country (see [56]). Mocumie JA acknowledged that the removal of a parent might translate to grave risk to the child (see [56]). But this was not established here. There was little risk of criminal investigations leading to the mother's arrest in Luxembourg: The Central Authority, Luxembourg, had confirmed that there was not a warrant out for the mother's arrest and had committed its office to ensure that the prosecuting authority would not pursue the mother upon her return; and the father had undertaken 'not to press charges' (see [56] and [58]). Furthermore, protective measures could be incorporated into any order granted to ameliorate any risk in this regard (see [65]).

PREMIER, WESTERN CAPE v PUBLIC PROTECTOR AND ANOTHER 2022 (3) SA 121 (SCA)

Constitutional law — Human rights — Right to freedom of expression — Tweets concerning impact of colonialism — Review of findings and remedial actions in report by Public Protector on tweets made by Premier of Western Cape — Approach to interpretation of s 16—Constitution, s 16.

Appellant, Ms Zille, while she was Premier of the Western Cape Government, had posted statements on Twitter about the impact of colonialism, and these in turn had caused a member of the provincial legislature to lodge a complaint with the Public Protector that they violated the Executive Ethics Code (see [1], [3] – [4] and [7]). Acting thereon, the Public Protector then investigated and made findings that the statements

violated ss 10, 16, 16(2)*(b)* and the preamble to the Constitution, as well as ss 2(1)*(d)* and 2(3)*(c)* of the Ethics Code, and recommended remedial action (see [10] – [12]). These findings and remedy Ms Zille sought to review in the High Court, whence, on not succeeding, she appealed to the Supreme Court of Appeal (see [12]). It held as follows:

- The Public Protector's finding that the tweets contravened the preamble and s 10 of the Constitution was based, irrationally, on Ms Zille's apology for her statements rather than the tweets themselves (see [25]).
- In coming to the conclusion that ss 16(1) and 16(2)*(b)* had been violated, the Public Protector had failed to adopt the requisite objective approach to the interpretation of the tweets and had not considered their context or provided bases for concluding they were likely to incite violence (see [29] – [31]). She had, moreover, failed to understand that s 16(2) was a definitional provision, and had neglected to consider all s 16(2)*(b)*'s requisites (see [32] – [33]).
- The further finding that the tweets, because 'insensitive', violated s 16(1), ran against authority and constituted an unjustifiable limitation of free expression (see [36] and [38]).
- As to the findings that the Code and s 136 of the Constitution had been infringed, they rested on the erroneous conclusions in respect of s 16(1) and s 16(2)*(b)* and were unsupported by any facts (see [40]).

The order of the High Court was accordingly set aside and substituted with an order reviewing and setting aside the findings and remedial action in the Public Protector's report (see [43]).

PURVEYORS SOUTH AFRICA MINE SERVICES (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2022 (3) SA 139 (SCA)

Revenue — Tax administration — Voluntary disclosure — Application for voluntary disclosure relief — Requirement that disclosure be voluntary — Taxpayer informing Commissioner of default and Commissioner confirming tax liability — Whether information voluntarily disclosed for purposes of application for voluntary disclosure relief — Whether voluntary disclosure prompted by compliance action question of fact, determined by examining circumstances in which made — In casu disclosure not voluntary, instead Commissioner's confirmation of liability prompting taxpayer to comply — Taxpayer electing to inform Commissioner of its default, risking that subsequent disclosure might not be treated as voluntary — Tax Administration Act 28 of 2011, s 227*(a)*.

The taxpayer, on 30 January 2017 and by email, requested a meeting with Sars to regularise its value-added tax (VAT) liability. This after its auditors advised it that it was supposed to have paid over VAT on the import of an aircraft. Sars confirmed liability, also for penalties, and requested to see documentation in terms of s 101 of the Customs and Excise Act 91 of 1964. Customs officials also gained knowledge of the default and advised the taxpayer (on 1 February 2017) that the aircraft should be declared in South Africa and VAT paid thereon. Further correspondence between the taxpayer and Sars followed but the taxpayer took no further steps to regularise its liability for VAT and penalties — until 4 April 2018, when it applied for voluntary disclosure relief in terms of s 226 of the Tax Administration Act 28 of 2011 (the TAA). (See [8] – [12].)

Section 227*(a)* provides that one of the requirements for valid voluntary diclosure is that it must be 'voluntary'. Sars, relying on s 227*(a)*, rejected the taxpayer's application for voluntary disclosure on the grounds that the disclosures were not voluntary; and did not contain facts of which Sars was unaware, as those facts had already been disclosed to it prior to the voluntary disclosure application. The High Court, dismissing the taxpayer's application for declaratory and other relief, agreed with Sars. The present case concerned the taxpayer's appeal, with the leave of the High Court, to the Supreme Court of Appeal.

At issue was whether the exchange or discussions between the representatives of Sars and the taxpayer had any material bearing on compliance with s 227*(a)*, properly interpreted. The taxpayer contended that the prior information disclosed to Sars, in the process of ascertaining its tax liability, was irrelevant and not a bar to making a valid voluntary disclosure application; and that there was no requirement that 'disclosure' ought to be new or something of which Sars had not been previously aware. (See [14] – [15].) Sars contended that s 227 envisaged disclosure of information that Sars was unaware of, and that the taxpayer did not disclose such information or facts; and further that the application was not voluntary, as the taxpayer was prompted by Sars and the customs official's advice that it would be liable. (See [16] – [17].)

Held

The language used in the section clearly indicated the legislature's intention to arm the Commissioner with extensive powers to prevent taxpayers from disclosures which were neither voluntary nor complete in all material respects. The fact that the section provided that the disclosure application must be made in the prescribed form or manner, rather than obtaining ad hoc advice from Sars, was a clear indication that the section was designed to prevent the mischief of a taxpayer disclosing information to Sars and later making a voluntary disclosure application. Errant taxpayers must come clean of their own volition, without any prompting, to make amends in respect of their default by informing Sars. No purpose would be served if the TAA enabled errant taxpayers to obtain informal advice, and, when it did not suit them, to then apply for voluntary disclosure relief. A sensible interpretation of the voluntary disclosure provisions, and their context and purpose show that the drafters of the provisions clearly had in mind that a taxpayer who elected to inform Sars of its default ran the risk that any subsequent disclosure might not be treated as being voluntary. The purpose of the application was to incentivise taxpayers to make a clean break so that Sars can give them immunity. This could only happen if there was full and proper disclosure, of which Sars was unaware and which disclosure was not prompted by Sars. This conclusion arose by necessary implication from the terms of the provisions as a whole. Clearly it was not the intention of the legislature to reward involuntary conduct with exemptions conferred by the section. (See [20] and [27] – [28].)

Whether a voluntary disclosure was prompted by a compliance action was question of fact, to be determined by examining the circumstances in which it was made. The facts showed that from the outset — and well before the submission of its voluntary disclosure application — the taxpayer knew that it was liable for the import value-added tax on the aircraft, and penalties, which were not going to be waived. It was prompted by Sars' compliance action, not motivated by any desire to come clean, but rather to avoid the payment of fines and penalties. The taxpayer's disclosure to Sars was not made in the context of a voluntary disclosure relief application, and it would therefore be unconscionable to treat it any differently. Granting the relief sought in these circumstances would be at odds with the purposes of the voluntary disclosure programme — to enhance voluntary compliance with the tax system by enabling errant

taxpayers to disclose defaults of which Sars was unaware, and to ensure the best use of Sars' resources. The taxpayer's application did not pass the test — it was not voluntarily made and did not disclose information of which the Commissioner was unaware. In the result, the appeal would be dismissed. (See [20] – [21], [24] – [25], [29] and [31].)

SA v JHA 2022 (3) SA 149 (SCA) 2022

Marriage — Divorce — Maintenance — Arrear maintenance — Maintenance obligations in consent paper incorporated in divorce order — Prescription — Amounting to 'judgment debt' prescribing after 30 years — Prescription Act 68 of 1969, s 11*(a)*.
Prescription — Extinctive prescription — Judgment debt — What constitutes — Maintenance obligations in consent paper incorporated in divorce order — Amounting to 'judgment debt' prescribing after 30 years — Prescription Act 68 of 1969, s 11*(a)*(ii).

Sections 11*(a)*(ii) and *(d) of* the Prescription Act 68 of 1969 provide that the periods of prescription of debts shall respectively be 'thirty years in respect of . . . any judgment debt'; and 'save where an Act of Parliament provides otherwise, three years in respect of any other debt'. (Quoted in full at [38].)
Ms JHA had caused a writ of execution to be issued against Mr SA in respect of arrear maintenance dating back to July 1993, the date of their divorce order, which incorporated a consent paper setting out his cash maintenance obligations. Despite the fact that Mr SA had failed to pay the maintenance stipulated in the consent paper, Ms JHA did not take any steps to recover the arrear maintenance until December 2018.
Mr SA approached the High Court for an order, inter alia, staying execution of the writ pending the outcome of an application he had brought in the maintenance court for the retrospective discharge of his maintenance obligations under the consent paper. He sought also a declaratory order that maintenance obligations under the consent paper which accrued before 1 March 2017 — the due date for payment of maintenance three years prior to the date of service of the writ — had been extinguished by prescription. The High Court rejected the application, holding that s 11*(a)*(ii) applied.
As it was in the High Court, the dipositive issue in this case, Mr SA's appeal to the Supreme Court of Appeal, was whether maintenance obligations in a consent paper, incorporated in a divorce order, was a 'judgment debt' subject to 30 years' prescription period as contemplated in s 11*(a)* (ii), or was 'any other debt', subject to three years' prescription period as contemplated in s 11*(d)*.
Resolution of this issue in turn depended on the determination of the question whether a maintenance order possessed the essential nature and characteristics of a civil judgment. Mr SA contended that it did not constitute a final judgment for the purposes of the Prescription Act because it could be varied by the court which granted it for sufficient reason or good cause (see [18]). He also relied on the fact that ss 24(1) and (2) of the Maintenance Act drew a distinction between maintenance orders and orders for a one-off payment of a specified sum of money, with only the latter being described as a civil judgment (see [21]).
Held
From a survey of authoritative case law on the nature of a 'judgment debt' and settlement agreements made orders of court, it was manifest that maintenance orders possessed the essential nature and characteristics of civil judgments, ie they

were *(a)* dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decide a just amount of maintenance payable based on the facts in existence at that time; *(b)* final and enforceable until varied or cancelled; *(c)* capable of execution without any further proof; and *(d)* appealable. (See [15] – [17].)
That a maintenance order was subject to variation did not detract from the fact that the court granting the maintenance order did so on a consideration of the facts placed before it at the time. Its decision, either by way of a reasoned judgment or by agreement between the parties, disposed of the lis which was in existence between the parties at that time. An application for variation of that order thus introduced a new lis, the party applying for such an order having to show changed circumstances justifying a reconsideration of the original decision. Thus, the matter was res judicata on the facts which were before the court that made the original maintenance order. An aggrieved party who wished to challenge the soundness of the original decision, without establishing changed circumstances, could only do so by way of an appeal. (See [19] and [20].)
The attempt to draw a distinction between an 'order' and a 'judgment' was contrived and did not find support in decided cases. Section 24(1) of the Maintenance Act provided that a maintenance order had the effect of an order or direction of the court made in a civil action. This meant that a maintenance order had the same legal consequences which flowed from an order made in a civil action. There could be no clearer declaration of the legislature's intention to visit upon a maintenance order the legal characteristics of a civil judgment. The court a quo made the correct order, and the appeal would fail. (See [23], [24] and [28].)

SOMALI ASSOCIATION OF SOUTH AFRICA AND OTHERS v REFUGEE APPEAL BOARD AND OTHERS 2022 (3) SA 166 (SCA)

Immigration — Refugee — Asylum application — Proper application of ss 3*(a)* and *(b)* of Refugees Act — Ambit of 'persecution' and 'fear' thereof — Standard of proof — Assessment of credibility — Decisionmaker's duty to assist in establishing facts — Duty to disclose adverse information — Interpreters — Refugees Act 130 of 1998, ss 3*(a)* and *(b)*.

Second to ninth appellants were Somalis who had fled violence in that country and who had made their way to South Africa (see [10]). Once here, they applied for asylum at a Refugee Reception Office, completing the requisite form, as required by the office, in English, with the assistance of translators, allegedly of poor quality (see [24]).
The application forms were then considered by Refugee Status Determination Officers, with some of the asylum seekers being afforded interviews, allegedly of a cursory form, and characterised by ineffective communication (see [25]). All of the applications were subsequently refused (see [25]). Thereafter, the appellants had lodged appeals with the Refugee Appeal Board, and were granted hearings of 20 to 30 minutes, to which they were required to bring their own interpreters. Communication was once again poor and questioning limited. The Board later dismissed all the appeals (see [26]).
Appellants then brought a review of the decision in the High Court, asserting that the Board had erred in construing s 3*(a)* of the Refugees Act 130 of 1998 to be the sole criterion for the grant of asylum, and overlooking that s 3*(b)* was an independent ground, which the facts of each application implicated (see [29] and [31]). (Section 3*(a)* requires, inter alia, proof of 'a . . . fear of being persecuted by reason of . . . race,

tribe, religion, nationality, political opinion or membership of a particular social group . . .'; and s 3*(b)* of 'events seriously disturbing or disrupting public order . . .' (see [28]).)
Appellants further contended that the Board had overly narrowly interpreted 'persecution' (see [32]); had applied the wrong onus (placing it entirely on the asylum seeker where it was properly shared with the Board) (see [33]); had stumbled in assessing credibility (setting too high a bar for a positive finding thereof) (see [38]); erred on the standard of proof (certainty) (see [37]); and denied audi by failing to disclose prejudicial information and allow its challenge (see [39]).
The respondents' counter was that in substance the review was an appeal on the merits, and that in deciding it the court would usurp the Board's powers (see [54] – [55]).
The High Court proceeded on the matter against a background of the facts before the Board, rather than on those facts supplemented by material in appellants' affidavits (see [60]). It disagreed that persecution was too narrowly viewed (appellants had simply failed to establish such) (see [64]); found s 3*(b)* had been applied (see [65]); and ruled there was no support for a shared onus (see [67]).

It found further that it ill-behoved it to dictate as to assessment of credibility (see [68]); that disclosure of adverse information was unnecessary (the cases were 'hopelessly inadequate' to begin with) (see [69]); and that non-provision of interpreters had caused no harm: appellants had brought their own (see [70]).
Here, with the Supreme Court of Appeal's leave, appellants made appeal (see [2]). It considered the following:

- The refugee status determination process was an inquisitorial and facilitative one, and to this end Refugee Status Determination Officers and the Refugee Appeal Board were under a duty to assist in the obtaining of the facts of a particular case, both in their questioning of the applicant — this including a duty to clarify inconsistencies — and through their own research (see [72], [74] – [76] and [82]). This where the Board was invested with a wide appellate jurisdiction and was not bound to the Refugee Status Determination Officer's record (see [81]).
- The High Court's holding that the information supplied by the appellants was of such poor quality as not to trigger the duty of assistance was belied by the High Court's own summation of the evidence before the Refugee Status Determination Officer and the Board (see [82]).
- The information supplied by the appellants had been sufficient to require consideration of whether s 3*(b)* was implicated (see [83]).
- The High Court ought to have recognised that the Board's confinement of s 3*(a)* to fear of political persecution was overly narrow, as likewise, its treatment of qualifying fear: specifically exclusion of fear based on threats to family and friends that the applicant would be the next to be targeted (see [84] – [85]).
- The High Court's view that there had been no need to confront the appellants with information adverse to their cases was erroneous. It came against a background of the Board's failure to assist with gathering information and was controverted by case law obligating such disclosure and recognising a right of response (see [86]).
- Insofar as provision of translators was concerned, there was indeed a qualified right thereto (where practicable), but nonetheless the decisionmaker was under a duty to ensure effective communication (see [87]).
- As regards onus, this the appellants bore, but the standard of proof was a qualified balance of probabilities, qualified in that the case made had to be considered in light of a refugee's circumstances: possible difficulties in obtaining corroborative evidence,

a possible reluctance to speak freely, and so on. Accordingly, the assessment was 'more flexible than would otherwise be the case', and the same went for assessment of credibility (see [92]).

- Then the substitution request: appellants' invitation to the appeal court to itself decide whether refugee status was warranted. This invitation the court refused: it was not in as good a position to decide the matter as the specialist appellate tribunal, and nor was the decision foregone (see [93]).
- The same went for the structural interdict sought, which prescribed investigation of the Board's repeated errors: it had been rendered redundant by a recent statutory overhaul that, among other things, replaced the Board with a new structure (the Refugee Appeals Authority) that notionally would be better able to effect the statute's scheme (see [94] – [95]).

Ordered, that the appeal be upheld and the High Court's order set aside and substituted with an order setting aside the Board's dismissals of the appellants' appeals, and remitting them for hearing before its successor tribunal, the Refugee Appeals Authority (see [99]).

DR MAUREEN ALLEM INC v BAARD 2022 (3) SA 207 (GJ)

Appeal — From High Court — Security for costs — Rule 49(13) of Uniform Rules of Court — Appellant obliged to provide security for respondent's costs on appeal — Semble: Rule unconstitutional — Ultra vires Rules Board for Courts of Law Act 107 of 1985, s 6(1)*(m)*, and contrary to Superior Courts Act 10 of 2013, s 17(5) — Should be reconsidered by Rules Board and responsible minister.

Rule 49(13)*(a)* of the Uniform Rules of Court obliges an appellant in an appeal from the High Court to provide security for the respondent's costs on appeal unless (i) the respondent waives its right to security or (ii) the court granting leave to appeal releases the appellant from said obligation.

The applicant, DMA, the respondent in an appeal to a full bench of the High Court by the respondent, Baard, applied to the present court under rule 30A (which regulated procedure in the event of non-compliance with the rules) for an interlocutory order to compel Baard to furnish, within three days, security for its costs on appeal under rule 49(13).

Leave to appeal to the full bench was granted by the Supreme Court of Appeal and the matter was set down for hearing by the full bench on 18 August 2021, only a few days after the hearing of the present application.

Baard denied an obligation to furnish security, directly challenging the constitutionality of rule 49(13) on the grounds that it (i) infringed the right of access to the courts in s 34 of the Constitution; (ii) was inconsistent with s 17(5) of the Superior Courts Act 10 of 2013 (which envisaged that the court considering leave to appeal would set the conditions for the appeal); and (iii) was ultra vires s 6(1)*(m)* of the Rules Board for Courts of Law Act 107 of 1985 (which limited the powers of the Rules Board to make rules regarding the provision of security).

Held

Ripeness: While the doctrine of ripeness required the court to first attempt to resolve the dispute without recourse to constitutional issues, it was appropriate here for the court to deal with the constitutional issues before it made a determination under rule 30A(2). The rule gave the court a discretion to make an appropriate order, having

regard to circumstances like (i) the defaulting party's reasons for non-compliance; (ii) whether the defaulting party's case appeared to be hopeless; (iii) whether the defaulting party seriously intended to proceed; and (iv) prejudice to either party. (See [4], [41].

Infringement of s 34 of the Constitution: The bar to access to the court imposed by rule 49(13) was justifiable: the appellant could escape the requirement of providing security by agreement with the respondent or by making an approach to court. The rule therefore did not infringe s 34 of the Constitution. (See [12], [46] – [48].)

Inconsistency with rule of law (doctrine of legality): Insofar as rule 49(13) purported to impose a requirement that security be furnished in cases where the SCA had granted leave to appeal, it was inconsistent with s 17(5) of the Superior Courts Act. Such inconsistency would render the rule unenforceable under s 51 of the Superior Courts Act. And even if rule 49(13) were consistent with s 17(5), the imposition of a duty on an appellant to furnish security would be ultra vires the powers of the Rules Board under s 6(1)(m) of the Rules Board Act. (See [57] – [58].) In these circumstances, rule 49(13) had to be restrictively read as operating only where the respondent was able to assert a right to security derived from another source, such as a court order. If it were not so read, it was not capable of being upheld as a law of general application that legitimately limited the access to justice right and would have to be set aside for want of compliance with the doctrine of legality. (See [59], [83].)

Determination under rule 30A(2): The court would refuse to entertain the rule 30A(2) application, (i) because it lacked jurisdiction to release Baard from the obligation to furnish security where the SCA had set no requirement in this regard; and (ii) because the circumstances of the case — Baard's meritorious attack on rule 49(13) and the prejudice she would suffer if an order to compel was granted so close to the hearing of the appeal — did not warrant the furnishing of security. (See [67] – [68], [70] – [71], [80] – [81], [84].)

Conclusion: While the court was therefore able to resolve the dispute without entering upon the constitutional issue, the concerns about the legality of rule 49(13) required consideration by the Rules Board and the Minister of Justice and Constitutional Development. (See [83].)

GREENHILL v DISCOVERY PRESERVATION PENSION FUND AND ANOTHER 2022 (3) SA 236 (GJ)

Marriage — Divorce — Proprietary rights — Pension interest — Attachment — High Court order under rule 43 may be executed against pension fund assets by way of warrant of execution issued by High Court — Maintenance Act 99 of 1998, s 26(4); Pension Funds Act 24 of 1956, s 37A(1).

Pension — Benefits — Divorce — Pension interest — Attachment — High Court order under rule 43 may be executed against pension fund assets by way of warrant of execution issued by High Court — Maintenance Act 99 of 1998, s 26(4); Pension Funds Act 24 of 1956, s 37A(1).

This case concerned the executability of a spouse's pension benefits by High Court warrant after his failure to comply with a rule 43 order. The court had to assess the effect of two statutory provisions: s 38A(1) of the Pension Fund Act 24 of 1956 (the PFA), which provides that 'save as permitted by this Act . . . and the Maintenance Act

[99 of 1998] . . . no [pension] benefit . . . shall . . . be liable to be attached or subjected to any form of execution under a judgment or order of a court'; and s 24(6) of the Maintenance Act (the MA), which provides that '(n)otwithstanding anything to the contrary contained in any law, any pension . . . or similar benefit shall be liable to be attached or subjected to execution under *any* warrant of execution or *any* order issued or made under [ch 5 of the MA] in order to satisfy a maintenance order' [emphasis added]. Chapter 5 of the MA — headed 'civil execution' — provides for the enforcement of maintenance orders by means of warrants of execution issued by a 'maintenance court', ie a magistrates' court.

The facts were that the applicant, who was in the process of getting divorced from her husband, the second respondent, had in the High Court obtained a rule 43 order against the second respondent that obliged him, inter alia, to pay maintenance. When he failed to comply, the High Court issued a warrant of execution to attach his pension benefits held by the first respondent (Discovery). Discovery refused to pay, arguing that the warrant was invalid because it was issued out of the High Court, contrary to ch 5 of the MA. The applicant argued in response that the High Courts had to be taken to have inherent jurisdiction to enforce their own maintenance orders.

Held

A textual analysis of s 26(4) of the MA suggested two possible meanings (see [41], [65]). On the approach favoured by Discovery, s 26(4) limited execution under the PFA to warrants issued by maintenance courts (see [29] – [35]). But s 26(4) — which made no reference to a 'maintenance court', only 'a maintenance order' — could equally be read to contemplate High Court warrants (see [36] – [40]). Given the ambiguity, the court could resort to external factors to decide which interpretation to adopt (see [41]). Recent case law favoured treating High Court processes in maintenance matters as being capable of execution by that court, locating its competence in the Constitution and the Superior Courts Act 10 of 2013 (see [41], [44]). The Constitution in s 173 empowered the superior courts to protect and regulate their own processes, and hence the process of execution of their orders. And the Superior Courts Act did not, in its provisions dealing with execution, * place any limit on the execution of superior court processes. (See [52] – [56].) Logic also dictated that if a High Court could issue a maintenance order, it could also execute it (see [57]). Moreover, the requirements of efficiency and fairness to the creditor spouse, which underpinned the rule 43 process, provided a convincing purposive argument for this interpretation. And the argument that pensions required special protection was unpersuasive: the MA itself did not protect them from attachment and the PFA allowed their liquidation as part of an order under s 7 of the Divorce Act 70 of 1979. This did not mean, however, that spouses who wished to protect their pension benefits from execution would not be heard: they could make their argument during the rule 43 application. (See [62] – [64].)

In summary: High Court orders in terms of rule 43 could be executed against pension assets by way of a warrant of execution issued by the High Court, and s 26(4) of the Maintenance Act must be given this interpretation (see [66]). Application granted.

BWANYA v THE MASTER OF THE HIGH COURT AND OTHERS 2022 (3) SA 250 (CC)

Partnership — Life partnership — Opposite-sex life partners — Death of one partner — Constitutionality of omission of surviving partners from categories of 'spouse' and 'survivor' — Intestate Succession Act 81 of 1987, s 1(1); Maintenance of Surviving Spouses Act 27 of 1990, s 2(1).

Applicant, Ms Bwanya, and one Mr Ruch had formed a permanent life partnership with reciprocal duties of support. (For the details of their relationship, and the indicia of such a life partnership, see [3] – [7] and [76], respectively.)

When Mr Ruch died, Ms Bwanya lodged a claim for maintenance under the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance Act), and one for inheritance under the Intestate Succession Act 81 of 1987, against Ruch's intestate estate (a will left by Ruch had failed). (See [7] – [8].)

Ms Bwanya's claims were, however, rejected by the estate's executor on the ground that neither Act made provision for a claimant of this sort — the surviving partner of the kind of relationship described above. This prompted Ms Bwanya to institute High Court proceedings. Her claim was that the Acts' omission of a partner such as herself was a violation of her constitutional rights to equality and dignity (see [9]).

Before the matter was heard, the parties settled. But Ms Bwanya insisted on declarators that the omissions were indeed unconstitutional and invalid (see [10]). She met with mixed success, the High Court finding that while it was precluded from any invalidation of s 2(1) of the Maintenance Act by established precedent, she was entitled to an order declaring the Intestate Succession Act's omission in its s 1(1) invalid (see [11]).

Ms Bwanya applied for leave to appeal the finding in respect of the Maintenance Act and for confirmation of that in respect of the Intestate Succession Act (see [2]).

The Constitutional Court granted leave and upheld the appeal, and also confirmed the invalidity declaration (see [18] and [95]).

It held as follows:

- The confirmation proceedings, being a component of the invalidation process, were properly before the court (see [13]).
- Though hearing the maintenance matter would, as between the parties, be of no practical effect and thus moot, it nonetheless was in the interests of justice to hear it on account of the importance of the point implicated — it affected substantial numbers of South Africans — and on the further ground that comprehensive arguments had been advanced (see [14] – [16]).
- The maintenance challenge raised constitutional questions and fell within the jurisdiction of the court (see [17]).
- Leave to directly appeal the Maintenance Act finding was justified in the circumstances: the maintenance challenge and the confirmation proceedings were intimately linked and convenient to hear together, and the maintenance challenge, in addition to its importance, enjoyed reasonable prospects of success (see [18]).
- Standing in the way of any inclusion of heterosexual life partnerships in s 2(1) of the Maintenance Act was the prior case of *Volks v Robinson*, * which had concluded that the section's omission of such partnerships was discriminatory, but not unfairly so — a finding that the court considered wrong, but not clearly so (see [37], [39], [46] – [47] and [73]).
- However, the no-unfairness finding could be bypassed and a finding of unfairness made (see [47] and [73]). Firstly, it rested on the factual assumption that couples who had not married had refrained from doing so out of a mutual choice to that end (see [61]). However, seen in the light of the evidence presented, the female partner had often had no choice in this regard even where she was desirous of marriage (see [63]). The second ground for bypass stemmed from *Volks*' consideration of how the estate's maintenance obligation could be justified: *Volks* had reasoned it inappropriate to burden a partner's estate with a maintenance duty where none had existed during the

lifetime of the partners, while, in marriage, in contradistinction, the maintenance obligation was a natural extension of the obligation which had existed by operation of law during the marriage (see [43]). This justification had, however, been eroded by the later development of the common law, which had come in the context of delict to recognise a claim for loss of a partner's support, where action ability of the claim was premised not on its flowing from a contractual support obligation, but from the support obligation's origin in a familial relationship (see [71]).

- As to justification for excluding surviving partners from s 2(1)'s benefit, that none that was convincing had been presented: the section's purpose would not be thwarted by the survivor's inclusion and perceived difficulties in proving a partnership were not insurmountable, and it was unclear how such inclusion could undermine the institution of marriage (see [74] – [75] and [78] – [80]).
- When it came to the Intestate Succession Act, its exclusion of opposite sex life partnerships, grounded as it was in marital status, was also presumptively unfair discrimination, and this presumption could indeed be confirmed (see [92]). Pertinent in this regard was that same sex life partners already enjoyed the benefits of the section (this where the basis for their preference had fallen away) and the vulnerability, typically of the female partner, in an opposite sex life partnership (see [84] – [85] and [88] – [89]). There was moreover no justification for the discrimination concerned (see [93]).

Declared, inter alia (the full order is at [95]), that the omission from 'survivor' in s 1 of the Maintenance Act of the words 'includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate', was unconstitutional and invalid; and the omission from s 1(1) of the Intestate Succession Act after 'spouse' of the words 'or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support', was unconstitutional and invalid (see [95]).

Mogoeng CJ would have set aside the declaration of invalidity (see [151]).

He highlighted the following:

- It was a misframing to cast the case as one about a life partnership, Bwanya and Ruch having chosen to be married and not life partners (see [100]).
- No compelling basis was provided for why *Volks v Robinson*, which stood in the way of the majority's finding, was clearly wrong, and so legitimately bypassed (see [110] and [134]).
- It was unclear what factors should be resorted to to determine the subsistence of a life partnership (see [113] – [114] and [147]).
- The fundamental differences between marriages and life partnerships militated against the application of the same legal regime to them (see [118], [135] and [137]).
- It was doubtful that the option of leaving a life partnership was, as suggested by the majority, an illusory one for many women, and the law should not incentivise remaining in such a relationship where it was unsatisfactory (see [126] and [130]).
- The common law provided remedies for unmarried couples and it could be extended to further protect their interests (see [140] and [148]).
- It was best left to Parliament to determine what provision should be made for life partners (see [149]).

Jafta J (Mhlantla J and Tshiqi J concurring) would confirm the declaration of invalidity in respect of the Intestate Succession Act but decline to declare s 2(1) of the Maintenance Act invalid (see [152]).

In Jafta J's view *Volks*, which declined to invalidate the section, was not clearly wrong, and accordingly bound the court to that position (see [197]). It was not clearly wrong in the sense that it had correctly applied the law, and salient elements of its reasoning were defensible (see [170]). These concerned choice to marry and the difficulty of extending s 2(1) to protect surviving partners (see [183] – [184]).
Jafta J also flagged the fact that had Bwanya taken that approach, a common law remedy would have been available to her, and that the true difficulty lay not in the section, but in Parliament's failure to regulate the position (see [185] and [195]). To this end it would have been appropriate to recommend that Parliament legislate on the issue rather than put it on terms to do so (see [195] – [196]).

SA CRIMINAL LAW REPORTS MAY 2022

S v MANYAKA 2022 (1) SACR 447 (SCA)

Sentence — Serving of — Applicant turned away by correctional authorities when reporting to serve sentence — Authorities informing him
that not in possession of his papers and would arrange later for his incarceration — Authorities only enforcing warrant of committal six and
a half years later — Period of 15 years between commission of offence and commencement of imprisonment — Accused now 35 years of
age with three children — Change of circumstances after imposition of sentence justifying interference with original sentence — Matter
remitted to trial court for obtaining of probation officer's report for possible imposition of correctional supervision.
Appeal — Against sentence — Facts and circumstances occurring after imposition of sentence — Changed circumstances several years
after imposition of sentence justifying interference with original sentence.
Sentence — Imprisonment — Correctional Services failing for many years to revert to accused who had reported to serve sentence but for
whom they had no papers — Changed circumstances of offender over period of 15 years entitling court on appeal to interfere with original
sentence.

The applicant, who was 20 years of age at the time of the commission of the offences, was convicted in a magistrates' court of two counts of culpable homicide arising out of a motor vehicle collision. He was sentenced on the first count to three years' imprisonment in terms of s 276(1)

(i) of the Criminal Procedure Act 51 of 1977 (the CPA). This meant that he had to serve a minimum of onesixth of the sentence imposed before he could be considered for correctional supervision. On the second count, he was sentenced to three years' imprisonment, wholly suspended for five years on condition that he was not convicted of culpable homicide involving the driving of a motor vehicle.

He appealed to the High Court where the full bench, in exercising its powers of review, set aside a further conviction on the ground that there
was no evidence of reckless or negligent driving. In respect of the sentence imposed for the offences of culpable homicide, the court found that
the magistrate had committed a misdirection, and that the two counts should have been taken as one for the purpose of sentence, and that there was only one incident

that resulted in two deaths. It set aside those sentences and replaced them with a sentence of four years 'imprisonment in terms of s 276(1)*(b)* of the CPA, of which one year was suspended for five years. The result of the appeal was that, instead of the applicant serving a possible one sixth of his sentence of imprisonment, he would have to serve a three-year period of imprisonment. The imposition of a heavier sentence was done without notice to the applicant, which was erroneous. The applicant duly handed himself over to the correctional services centre to serve his sentence, but was told that they were not in possession of his court records and could therefore not detain him. He was told to go home, and they would arrange to take him to the correctional centre once they had the necessary records.
The applicant stayed for six and a half years in the same house without any attempt by the authorities to enforce his sentence. In the meantime he married and, at the time when a warrant of arrest was issued for his arrest, his wife was expecting their third child. He brought an urgent application in the High Court to stay the warrant pending an application for reconsideration of the appeal within 15 days. The court granted the application and he accordingly applied further to the Supreme Court of Appeal for special leave to appeal the judgment and order of the full bench and to lead further evidence, but did not bring this application within the stated period of 15 days. The state conceded that he had good prospects of success because of the irregularity committed by the full bench in increasing the sentence, and did not oppose an application for condonation.

Held, per Carelse JA (Mocumie JA and MbandlaBoqwana JA concurring), that in such exceptional circumstances, the condonation application and the application to lead further evidence had to be granted, and that the sentence imposed by the full bench could not stand. (See [10]– [12].)

Held, further, that the applicant was not the cause of the inordinate delay that had occurred before his being required to serve his sentence:

the changed circumstances between the imposition of sentence and the putting into effect of the sentence, namely the applicant's age; his marriage and having become a father; and that over the 15 years he had led a socially responsible and crimefree

life, meant that a sentence of correctional supervision would be the most appropriate sentence. (See [15].)

Held, further, that the court could not itself substitute the sentence, as the epartment of Correctional Services had not filed a report as required under s 276(1)(h) of the CPA, and without a report from a probation officer or correctional official the court would not be in a position to impose such sentence. Therefore, it would be appropriate to remit the matter to the magistrate to obtain such a report and consider

imposing sentence afresh. (See [22].)

Held, per Schippers JA and Phatshoane AJA, dissenting, that the applicant and his attorneys were solely responsible for the delay after the granting of the stay of execution of the sentence, and condonation for the late filing of the application for leave to appeal was inappropriate.

Held, further, that there was nothing extraordinary or markedly unusual about the applicant's personal circumstances: the changed personal circumstances that had come into existence after he was sentenced, were irrelevant and could not become

relevant by effluxion of time. The applicant had not made out a case of exceptional circumstances for the admission of the further evidence and it was not in the interests of justice that it be admitted. The sentence originally imposed by the magistrate could not be faulted.

S v KHUBONI 2022 (1) SACR 470 (KZP)

Trial — Record — Judgment — Reasons for — Not sufficient for court to merely come to decision, reasons for decisions to be articulated as well.

The appellant was convicted in a regional magistrates' court of murder, attempted murder, and kidnapping. The counts of murder and kidnapping were taken as one and he was sentenced to 15 years' imprisonment, and on the count of attempted murder he was sentenced to 10 years' imprisonment. The sentences were not ordered to run concurrently. In convicting the appellant, the magistrate summarised the evidence that he had heard from the state witnesses in approximately one page and dealt with all the evidence of the four accused and their witnesses in one sentence, namely that they admitted that they were on the scene, but each denied assaulting the deceased or complainant. No attempt was made to consider the appellant's version or the version of his witness or to provide the reasons behind the conclusion reached regarding the trustworthiness of the state witnesses' evidence. There were contradictions in the state case that needed to be explained and dealt with in the judgment of the court, but this had not happened. Besides the external contradictions there was also a significant internal contradiction in the evidence of the first state witness, whose evidence was accepted by the magistrate. There was furthermore no evidence that indicated that the appellant was ever present at or involved in the kidnapping of the deceased.

The court noted that the appellant was hardly crossexamined by the prosecutor, such crossexamination representing just under two and a half pages of the transcript of evidence. The witness who testified on behalf of the appellant was also barely crossexamined by the prosecutor, the crossexamination representing less than one and a half pages of the transcript.

Held, that it was trite that a conviction could only follow upon a proper evaluation of the evidence before the court. Only then could it be concluded that there was a prima facie case for an accused to answer. The failure by the magistrate to properly evaluate the evidence adduced in the state case, but to accept it all, including the contradictions, and his failure to consider the appellant's evidence at all, but to nevertheless reject it, placed the court in an invidious position. No specific credibility findings had been made by the magistrate. It was not sufficient that a court came to a decision, the reasons for the decision had to be articulated as well. The trial court's failure to substantiate the judgment and engage in a proper evaluation of the evidence infringed the appellant's right to a fair trial, which included the right to have his appeal properly adjudicated by a higher court. (See [17] – [18] and [20].)

Held, further, that, after considering all the evidence placed before the court, it seemed that the appellant's evidence and that of his witness could reasonably possibly have been true, and the appeal accordingly had to be upheld. (See [24].)

S v MGUMBI 2022 (1) SACR 478 (WCC)

Bail — Application for — Renewed application after earlier refusal of bail — Application on new facts — Court obliged to hear evidence and not sufficient for legal representative to make submissions from bar — Criminal Procedure Act 51 of 1977, s 60(11)*(a)*, sch 6.

The appellant appealed against the decision of the magistrate to refuse to grant him bail after a second application for bail under sch 6 and in terms of s 60(11)*(a)* of the Criminal Procedure Act 51 of 1977. The appellant's legal representative informed the court at the second application that he intended to bring such application on new facts. The magistrate enquired from him what those facts were, and the legal representative placed the alleged new facts on record. The magistrate then postponed the matter for the investigating officer to confirm the submissions. The investigating officer never did appear to confirm the submissions and the magistrate proceeded to find that the appellant had failed to prove that exceptional circumstances existed, and that it would be in the interests of justice to release him on bail. No evidence was led before this finding.

Held, that the oversight by the court a quo to hear evidence was concerning. It was required of presiding officers to be vigilant at all times, especially in dealing with the liberty of accused persons on a daily basis. In an application for bail on new facts the court had to afford the accused person an opportunity to bring facts that did not exist at the time the initial bail application was heard, and the court had to give the accused an opportunity to present evidence in support of the application. In the present case the court had decided the matter on the submissions made by the legal representative from the bar and, in doing so, the court had erred. The matter had to be remitted to the court a quo to urgently hear the bail application on new facts. (See [23] and [27].)

S v MAKHALA AND ANOTHER 2022 (1) SACR 485 (SCA)

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 (Hearsay Act) — Statements made in terms of s 204 of Criminal Procedure Act 51 of 1977 — Recantation of at trial — Section 3(1)*(c)* of Hearsay Act applicable to such statements.

The two appellants were convicted in the High Court of murder, the possession of an unlicensed firearm, and the unlawful possession of ammunition. Their conviction was based upon two statements made by a witness, that he had procured the services of a third accused to shoot and kill the deceased. The first statement was made to a colonel in the police, who was investigating the murder and who informed him before making the statement that he would be treated as a witness under s 204 of the Criminal Procedure Act 51 of 1977. The colonel informed the witness of his constitutional rights, namely his right to legal representation, his right to remain silent, and the right not to incriminate himself. The services of the witness were obtained at the instance of the second appellant, an independent councillor of the local authority, who wanted to eliminate the deceased who was also a councillor, but a member of a political party. The first appellant approached the witness,

his brother, to acquire the services of the third accused.
The witness collected the third accused in Cape Town and, after the first appellant pointed out the home of the deceased to the third accused prior to the shooting, returned the third accused to Cape Town after the shooting.
When the witness was called to give evidence at the trial, without forewarning to the prosecution he recanted the contents of his two statements that incriminated himself and the other accused in the murder, and the prosecution sought to have him declared a hostile witness, which the trial court proceeded to do. The witness testified that the incriminating portions of the statements were fabrications which the police had forced him to record in his statements, and that he was intimidated by the police and threatened with assault. The trial court considered whether the witness had been coerced to make the statements, but found that the evidence of the colonel and a sergeant, who took down the statements, was overwhelmingly convincing and corroborated by a further sergeant. The court then considered whether the two statements should be admitted as evidence in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) and did so on a consideration of the factors listed in s 3(1)*(c)* of the Act. It considered the risk of falsity to be minimal and that the content of the statements included information that would otherwise be unknown to the police. Aspects of the statements were also confirmed by independent and objective evidence.
The conviction of the accused was based largely on the admission of the two statements of the witness. On appeal the appellants challenged the admissibility of and the use of the two statements.

Held, per Meyer AJA (Mocumie JA, Makgoka JA and Mothle JA concurring), that the statements in question had not been obtained in violation of the witness's rights; that the trial was not rendered unfair by the admission of the statements; nor was there anything done in securing the statements that constituted any material detriment to the administration of justice; that the trial court correctly declared the witness to be a hostile witness; that he had not been denied a right to choose to be represented by an attorney and had suffered no substantial injustice by not being provided an attorney at state expense before being declared a hostile witness; that the trial court had properly applied the cautionary rule applicable to the evidence of an accomplice; and that there was sufficient corroborative evidence to convict the appellants.

Held, further, that s 3(1)*(c)* of the Hearsay Act applied to the admission into evidence of extracurial statements made by s 204 state witnesses who recanted statements that incriminated themselves and the accused in the commission of the offences in question.
Held, per Unterhalter AJA, dissenting only in respect of the applicability of s 3(1)*(c)* of the Hearsay Act to the extracurial statement made by a witness. (See [64].)
The appeal was dismissed.

HUME v DIRECTORATE FOR PRIORITY CRIME INVESTIGATION AND ANOTHER 2022 (1) SACR 518 (GP)

Search and seizure — Seizure by police in terms of s 20 of Criminal Procedure Act 51 of 1977 — Application for return of goods seized —Rhinoceros horns, belonging to applicant, seized whilst being transported by two persons convicted of unlawful possession and transportation of seized horns — Court not making order for return

of goods — Discretion to hear matter — Court obliged to consider application for return and not compel applicant to pursue matter before court which convicted accused.

Search and seizure — Seizure by police in terms of s 20 of Criminal Procedure Act 51 of 1977 — Application for return of goods seized —Rhinoceros horns, belonging to applicant, seized whilst being transported by two persons convicted of unlawful possession and transportation of said horns — Court not making order for return of goods — Right to possession of items — Once criminal proceedings concluded, state's right to possess seized horns not necessarily terminating — Such depending on circumstances and provision in Act which provided for return of seized goods.
Search and seizure — Seizure by police in terms of s 20 of Criminal Procedure Act 51 of 1977 — Application for return of goods seized —Rhinoceros horns, belonging to applicant, seized whilst being transported by two persons convicted of unlawful possession and transportation of horns — Seized goods not transferred by police to court for purposes of trial — Section 33 of Act not implying that seized articles had to be physically present at court — Reference in s 34 to s 33 merely aimed at identifying seized article in respect of which judicial officer had to make order.

The applicant applied for the return of 181 rhinoceros horns. He claimed that he lawfully possessed the horns and had intended to sell them to a purchaser whom he had never met. To this end he allowed two individuals to transport the horns without a permit from a safe third-party vault.
The accused were sent by the purchaser to collect the horns from the vault in Gauteng and to take them to a place in North West Province.
The second respondent, the investigating officer attached to the first respondent, had been investigating the illegal exportation of rhino horns and the applicant's involvement in that business. He had investigated the transaction between the purchaser and the applicant, and stated that the purchaser had no intention of buying the horns or receiving them into his possession; he and others had agreed to permit applications being submitted in their names in exchange for money. The applicant claimed to have no knowledge of these facts.
The accused were subsequently charged with the unlawful possession and transportation of the horns in contravention of s 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004. They entered into a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the CPA), but at the conclusion of the proceedings, the magistrate presiding failed to make an order as to the return of the horns that had been seized under s 20 of the CPA.

The court remarked that the applicant's version of events was most bizarre. It was astounding that a selfprofessed businessman would voluntarily release valuable assets from his control and custody and entrust them to a potential buyer he had never personally met for inspection, in the hope that the potential buyer became a buyer of the horns at a reasonable price to be agreed. It defied logic why the potential buyer could not inspect the horns at the vault. It was also implausible that any person would release, not a few, but all the horns, each valued at approximately R60 000, making a total value of approximately R10 million, without any assurance that the buyer intended buying one, let alone 181. (See [24.)

The respondents contended that the court had a discretion whether to hear the matter or order the applicant to pursue the statutory remedy in the criminal court in terms of s 34(3) of the CPA.
Held, that, while the court before which the criminal proceedings were concluded was in a better position to interrogate whether the seized goods should be returned, the present court could not agree that a court had a discretion to refuse to decide an application properly before it and demand that a litigant pursue his claim in another court. (See [26].)
Held, further, that the result of the coexistence of a statutory remedy and a common-law remedy in the present case was that, in terms of the common-law remedy, the goods seized under s 20 had to be returned to the owner. However, in the same circumstances, a statute not only withheld from the owner the right to possess property owned, but deprived him of ownership. In view of the conclusion to which the court came, it was not necessary to consider the aspect further. (See [33].)

Held, further, that the applicant's argument, that once the criminal proceedings were concluded, the state's right to possess the seized goods ceased, was attractive, but the answer was not that simple. An examination and analysis of the provisions of the CPA showed that this depended on the circumstances and the provision in that Act which provided for the return of the seized goods. (See [37].)

Held, further, in respect of the applicant's argument that s 34(1) of the CPA, by virtue of its reference to 'any article referred to in section 33', would not apply if the seized article was not transferred by the police to court for the purposes of trial, that the provision did not apply only in instances where the seized article had been transferred to the clerk of the court in terms of s 33. Section 33 did not mean that the seized article had to be physically present inside the court. The delivery to the clerk of the court was an obligation imposed on a police official to release the seized article into the custody of the clerk of the court to ensure that it was safeguarded. The reference in s 34 was aimed at identifying the seized article in respect of which the judicial officer had to make the order contemplated in s 34(1). (See [51] – [52].)

Held, furthermore, that the legislature could never have intended that seized articles had to be transferred to court, even though an agreement in terms of s 105A had been entered into. Nor could the legislature have intended that in such cases the provisions of s 34 would not apply. If this had been its intention, it would have been expressly provided. Consequently, until the criminal court made an order for the release of the 181 horns, the respondents were not only entitled, but were obliged, to retain the horns.

The application is dismissed with costs, including the costs of two counsel, one of whom is a senior counsel.

S v TM 2022 (1) SACR 536 (FB)
Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — No reference to application of s 51(1) of Act in chargesheet, and appellant not warned by legal representative or court of consequences in event of no substantial and compelling circumstances being found to exist — Sentences of life imprisonment had to be set aside — Appellant having

raped 15 year-old daughter 19 times — Appellant expressing no remorse — Court substituting sentence on each count with sentence of 25 years' imprisonment.

The appellant was convicted in a regional magistrates' court of 21 counts of rape read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act); assault with intent to cause grievous bodily harm; and attempted rape. He was sentenced to life imprisonment in respect of 19 of the counts of rape; 10 years' imprisonment in respect of the other two counts; and to one year imprisonment in respect of each of the counts of assault with intent to cause grievous bodily harm and attempted rape. He appealed against his convictions and sentences.

The complainant was the appellant's daughter, and her parents were divorced. After her mother remarried, the complainant made contact with the appellant and in March 2004 moved into his place of residence. A few days later the appellant informed her that, since she was his eldest daughter, a certain cultural practice or custom had to be complied with which required that he have sexual intercourse with her. He then assaulted her and raped her. This was the first of many similar incidents that occurred which the complainant was able to recall during her testimony, with rapes occurring approximately every second day during the initial period. After the appellant was held in custody for a period of approximately a year, he returned and continued with the same modus operandi.

On appeal, the court dismissed the appeal against the convictions and, in respect of the sentences, noted that the appellant had not been informed of the applicability of the provisions of ss 51(1) and 51(2) of the Act. The fact that the complainant was 15 years old at the time when the first 19 rapes occurred was stated in the chargesheets, but there was no reference to the application of s 51(1) or any indication that the appellant was apprised of the consequences in the event that substantial and compelling circumstances did not exist. Neither the appellant's legal representatives nor the presiding magistrate alerted him to the provisions of the section.

Held, that, due to the omission to alert the appellant to the consequences of the charge, the sentences in respect of the 19 counts had to be set aside and replaced with appropriate sentences. (See [27].)

Held, that the offences committed by the appellant were extremely serious, involving the rape by a father of his teenage daughter. The rapes had taken place repeatedly over a period of approximately five months and, after the appellant was released from incarceration, he again searched for her and raped her. A victim impact report was not made available during the hearing of the matter, but it was palpable from the testimony presented by the complainant that she undoubtedly suffered tremendous hardship, pain and suffering due to the sexual abuse and concomitant violence perpetrated against her by her father, who appeared to show no expression of remorse. In the circumstances, a sentence of 25 years' imprisonment on each of the 19 counts would be appropriate. The effective sentence imposed on the appellant was therefore one of 35 years' imprisonment.

S v NDLANGAMANDLA 2022 (1) SACR 546 (MM)

Trial — Record — Language — Duties of magistrate in transmitting record to High Court — Although trial could be conducted in any of official languages, where language used other than English, presiding officer has duty to see that record submitted to High Court is translated into English.

The appellant was convicted in a magistrates' court of a contravention of s 31 of the Maintenance Act 99 of 1998 for having failed to pay maintenance, and was sentenced to one year imprisonment, suspended for five years.
Unfortunately, the interpreter failed to interpret parts of the trial which were in isiZulu, and the missing parts of the record could not be retrieved from the recording system. On review, the judge noted that it was his impression that the trial was fully conducted in one or two of the official languages, except that sometimes the magistrate would communicate with either the witnesses and/or the accused in isiZulu, and that part of the trial was not interpreted into English. The judge noted further that there was nothing wrong in having a trial conducted in any of the official languages, as all of them were equal and needed to be given equal treatment, but where the trial was conducted in any language other than the court language of record, being English, the presiding officer had a duty to see to it that the record that was submitted to the High Court was translated into English. It was further incumbent upon every judicial officer, before embarking on a trial in any other language, to make sure that there were resources to take care of the translation, without causing the wheels of justice to grind to a halt, and thereby prejudicing any of the parties involved. In the circumstances, where the missing parts had not been recorded at all and could not be retrieved from the system, the conviction and sentence had to be set aside.

S v NEMUKULA 2022 (1) SACR 549 (FB)
Sentence — Imposition of — Formulation of — Formulation of sentence for road traffic offence vague and ambiguous, and worded in unprofessional manner — Sentence reformulated on review.

The matter was referred to the High Court on special review because of a potentially incompetent sentence imposed on the accused who had been convicted of a contravention of s 59(4)*(a)* of the National Road Traffic Act 93 of 1996 (the Act). The sentence imposed was as follows:
'R3000 fine or six months imprisonment which is half suspended for a period of 3 years, on condition that accused does not contravene NRTA 93 of 1996 or part thereof during period of suspension. The driver's licences of the accused's suspension, shall not take effect.'

Held, that the reading of the sentence as a whole made no sense in law and was vague and ambiguous. The words 'half suspended' were not clear and precise and did not clearly refer to the amount fined, and the period of imprisonment imposed. The abbreviation of the Act was unprofessional and unclear: a sentence should refer to the Act as it was promulgated, to render it competent. The condition imposed was further excessively wide and grossly irregular. The sentence was set aside and replaced with a sentence reading: 'R3000 or six months' imprisonment of which R1500 or three months' imprisonment was suspended for a period of three years on

condition that the accused is not again convicted of the contravention of s 59(4)*(a)* of the National Road Traffic Act 93 of 1996 and which was committed within the period of suspension.' The order in terms of s 35(3) of the National Road Traffic Act 93 of 1996, that the suspension and disqualification of the accused's driver's licence shall not take effect, was confirmed. The sentence was antedated to 24 June 2021.

S v NZINDE 2022 (1) SACR 552 (GP)
Culpable homicide — Sentence — Accused having caused death of deceased by throwing brick at him — Accused 19yearold first offender — Sentence of 10 years' imprisonment, of which four years suspended, replaced with sentence of six years' imprisonment of which three years suspended.

The appellant was convicted in a regional court on a count of culpable homicide and was sentenced to 10 years' imprisonment of which four years were suspended. He appealed against the sentence imposed on him. It appeared that a quarrel had broken out between the appellant and the deceased who was pushing a trolley containing a variety of vegetables. In the course of said quarrel the appellant threw a brick at the deceased, which hit him on the head. The deceased collapsed and was taken to hospital, but was pronounced dead on arrival. The appellant was a 19 yearold first offender with four minor children. It was accepted that he had sought help for the deceased after the assault, confessed to the police and expressed remorse. On appeal,
Held, that, although the appellant did not foresee that death would ensue, a brick was a hard object, and assaulting another person with such an object was serious. The sentence was, however, not proportionate to the offence which he was convicted of. The presentencing report did not investigate the possibility or give recommendations for correctional supervision in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977. Correctional supervision was not in the present instance a sentencing option, but the sentence had to be reduced. The court accordingly imposed a sentence of six years' imprisonment of which three years were suspended.

ALL SA LAW REPORTS MAY 2022

Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited [2022] 2 All SA 299 (SCA)

Civil Procedure – Production of documents – Rule 35(12) deals with service of a notice to produce documents referred to in an opposing party’s pleadings or affidavits, and is designed to cater for the production of documents or tape recordings before the close of pleadings or the filing of affidavits – Court exercises discretion and will refuse to order production of a document that is not in the possession or under the control of the other party or which is privileged or irrelevant – Where documents sought were found to be relevant, they were required to be produced subject to measures aimed at the protection of confidentiality.

The appellant (“Caxton”) fell within the class of persons contemplated in section 165(2) of the Companies Act 71 of 2008, who may serve a demand upon a company requiring the company to commence or continue legal proceedings, or take related steps, to protect the interests of the company. It served such demand on the respondent (“Novus”), who refused to initiate or continue legal proceedings. After

receiving a report from an independent person it had appointed to investigate Caxton's demand, Novus advised Caxton that the latter's demand to institute legal proceedings was declined. Caxton consequently, in terms of section 165(2), applied to court for leave to bring or continue legal proceedings in the name and on behalf of Novus.

Novus resisted the relief sought by Caxton in the main application. In its answering affidavit in the main application, Novus made reference to several documents, one of which was the section 165(4) report, in terms of which it sought to demonstrate that the proposed action lacked any prospect of success or was simply devoid of merit. That prompted Caxton to bring an interlocutory application to compel the production of the documents concerned. The High Court dismissed the application but granted leave to appeal.

Held – The central issue on appeal was whether the documents sought by Caxton in terms of its rule 35(12) notice were relevant and therefore ought to be produced for inspection and copying. A further question was whether the report of the independent and impartial person was privileged and thus protected against disclosure. If the report was found to be privileged, it had to be decided whether in quoting virtually the entire conclusion of the report in its answering affidavit Novus had, as a result, waived the privilege attaching to the report.

Rule 35(12) deals with service of a notice to produce documents referred to in an opposing party's pleadings or affidavits, and is designed to cater for the production of documents or tape recordings before the close of pleadings or the filing of affidavits. As a general rule, a document to which reference has been made in a pleading or affidavit is susceptible to production. However, a court will refuse to order production of a document that is not in the possession or under the control of the other party or which is privileged or irrelevant. Relevance refers to the document or tape recording having potential evidentiary value or assisting the party seeking production in relation to any issues that might arise in light of the facts stated in the pleadings or affidavits. The court has a narrowly circumscribed discretion in rule 35(12) applications. Once the applicant has established the requisite elements, the scope to refuse relief to the applicant is limited.

Considering the individual categories of documents whose production Caxton sought to compel, the Court found the report of the independent person appointed by Novus in terms of section 165(4) not to attract legal privilege. The remaining documents sought were found to be relevant and were required to be produced subject to measures aimed at the protection of confidentiality.

City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and another [2022] 2 All SA 334 (SCA)

Property – Sale agreement – Appeal against order of specific performance – Enforceability of agreement of sale of property – Court finding no merit in challenges to validity of sale agreement, finding agreement not to be subject to conditions, or impugnable on any other grounds raised.

In terms of a sale agreement between the City of Tshwane and first respondent ("Brooklyn Edge"), the properties sold by the City to Brooklyn Edge could be transferred into the name of a nominee of Brooklyn Edge. The second respondent ("Pivot") alleged that it was that nominee, and claimed enforcement of the deed of sale. As co-plaintiff, Brooklyn Edge claimed the same relief in the alternative. The

Court held that Pivot had not accepted the purported nomination, but gave judgment in favour of Brooklyn Edge. The properties included a public open space which the City had decided to close, rezone, and sell to Brooklyn Edge.

On appeal, the issue was whether the court *a quo* correctly ordered specific performance of the deed of sale.

In challenging the order, the City argued that it was a tacit suspensive or resolutive condition of the deed of sale that the closure and rezoning of a public open space had to be successfully finalised within a reasonable time. As that had not happened, it was contended that the deed of sale was unenforceable.

Held – The deed of sale did not in any way provide that the finalisation of the closure and the rezoning were conditions precedent to the operation of any obligations thereunder. None of the clauses on the deed of sale, relied on by the City, could be construed as provisos or conditions.

Pending the fulfilment of a resolutive condition, the contract is fully operative and the parties must perform their obligations in terms thereof. A resolutive condition generally terminates the obligations flowing from the contract upon the occurrence of a future uncertain event. However, the true question raised by the City's argument was whether the deemed cancellation clause was tacitly subject to the closure and the rezoning taking place within a reasonable period of time. A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The Court held that the proposed tacit term was not by necessary implication required to give business efficacy to the deed of sale.

The Court also rejected the City's contentions that the agreement was void for vagueness or due to non-compliance with its own obligations. An attempt to rely on section 14 of the Local Government: Municipal Finance Management Act 56 of 2003 was equally unsuccessful. The Act has no retrospective effect and was not applicable.

Only the City's contentions regarding the common law *in duplum* rule was upheld, with the court agreeing that the rule applies only to arrear interest and that in terms of the deed of sale, there was no arrear interest. The High Court's order was amended on the issue of interest payable.

Eskom Holdings Soc Limited v Letsemeng Local Municipality and others [2022] 2 All SA 347 (SCA)

Local Government – Provision of electricity – Failure by municipality to pay for bulk electricity supply – Application by electricity supplier to compel municipality to comply with its contractual and statutory obligations – Where municipality raised no sustainable defence to claim, payment ordered.

The Letsemeng Local Municipality ("Letsemeng") was indebted to the appellant ("Eskom") in the amount of over R41 million. Its ongoing failure to comply with its

obligations led to Eskom issuing a final notice to interrupt electricity supply with effect from 18 February 2020. That led to Letsemeng bringing an urgent application to interdict Eskom from implementing the interruption pending an application for review of its decision, and the determination of a dispute between the parties to be referred to the National Energy Regulator of South Africa ("Nersa") in accordance with the provisions of the Electricity Regulation Act 4 of 2006.

Eskom filed a counter-application to compel Letsemeng to comply with its obligations.

The High Court's dismissal of the counter-application was the subject of Eskom's appeal.

Held – the primary issue on appeal was whether Eskom was entitled to the relief sought in its counter-application. The Court first outlined the relief claimed in the counter-application, and set out the prayers to which Eskom had not established an entitlement. The remaining prayers sought by Eskom in its counter-application were aimed at securing payment from Letsemeng on the basis of its contractual and statutory obligations.

A local government is required to strive, within its financial and administrative capacity, to ensure the provision of services to its community in a sustainable manner. Electricity is an important basic municipal service. Eskom and Letsemeng assumed reciprocal obligations in terms of an electricity supply agreement entered into between them. Eskom was obliged to supply bulk electricity to Letsemeng, and Letsemeng was obliged to pay for that service. In terms of section 51(1)(b)(i) of the Public Finance Management Act 1 of 1999, Eskom must take effective and appropriate steps to collect all revenue due to it, and section 65(2) places an obligation on Letsemeng to take all reasonable steps to ensure that money that it owes is paid within 30 days of receiving an invoice or statement. It was clearly in breach of that obligation. Its attempt to avoid having to pay what it had agreed to on the ground that it was unable to pay did not find favour with the court. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party. In this case, Eskom had granted Letsemeng ample opportunity to make arrangements for the payment of its debt and to keep its current account up to date. Letsemeng, on the other hand, displayed bad faith throughout, and repeatedly reneged on its payment arrangements.

The appeal was accordingly upheld in the majority judgment.

A dissenting opinion was based on the application of the Intergovernmental Relations Framework Act 13 of 2005, the view being that the parties should be directed to resolve their dispute in terms of section 40(1) of that Act.

Makhala and another v S [2022] 2 All SA 367 (SCA)

Criminal Law and Procedure – Evidence – Admission into evidence of recanted prior inconsistent statements by witness – Challenge to admissibility of statements based on lawfulness and hearsay found to be without merit – For prior inconsistent statements to be admissible, it suffices that the witness who made the statement is available for cross-examination by the accused.

Convicted of murder, possession of an unlicensed firearm and unlawful possession of ammunition, the appellants each received an effective sentence of life imprisonment. The convictions were based largely on two statements made by the first appellant's brother, incriminating the appellants in the murder. During the trial, the witness recanted the statements. However, the trial court declared him a hostile witness. The Court considered whether he was forced to make the statements and did not do so freely and voluntarily, and whether the statements should be admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988. The statements were admitted into evidence and the court convicted the appellants on the basis of the statements.

On appeal, appellants challenged the trial court's admission and use of the statements.

Held – The appellant challenged the statements on the ground that they had not been lawfully obtained. In terms of section 35(5) of the Constitution, evidence obtained in a manner that violates any constitutional right must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. A preliminary hurdle for the appellants was that the witness in this case did not fall into any of the category of persons to which section 35 applied. Section 35 is concerned with the rights of arrested, detained and accused persons. The witness therefore had no rights under section 35 which could have been violated. If he were to be considered as a suspect, there was still no basis for finding that he had his rights as a suspect infringed.

The appellants' next contention was that the extra-curial statements made by a witness who is an accomplice should not be admitted into evidence as against the accused, or should not be admitted without careful consideration of the dangers of doing so, in order to preserve the fairness of the trial. In order to determine whether the statements constituted hearsay evidence, the court began with the definition of hearsay evidence. The Law of Evidence Amendment Act defines hearsay evidence to mean evidence, "the probative value of which depends upon the credibility of any person other than the person giving such evidence". In the main judgment, it was held that once a court has determined that an extra-curial statement was made by a witness called to testify, the extra-curial statement is not hearsay, and it may be admitted without determining whether it is in the interests of justice to do so by recourse to section 3(1)(c).

Turning to consider the treatment of a prior inconsistent statement made by a witness, the court set out the requirements to be met to render prior statements admissible. It suffices that the witness who made the statement is available for cross-examination by the accused. The prior statement must otherwise be admissible by asking whether it would have been admissible if it had formed part of the testimony given by the witness at trial.

Each of the remaining challenges brought by the appellants also failed, and the appeal was dismissed.

Although agreeing with all the findings in the main judgment, a separate concurring judgment did not agree with the conclusion that section 3(1)(c) finds no application to the admission into evidence of extra-curial statements made by a section 204 State witness who, when testifying, recants statements that incriminate himself and the accused in the commission of the offence. It was held that the application of section

3(1)(c) to such inconsistent extra-curial statements of a section 204 State witness is sound.

Masinga and others v Chief of the South African National Defence Force and others [2022] 2 All SA 399 (SCA)

Constitutional and Administrative law – Defence force – Officers of South African National Defence Force – Termination of service – Operation of law – Section 59(3) of the Defence Act 42 of 2002 providing that members of the SANDF who absent themselves from official duty for more than 30 days without the permission of their commanding officer, must be regarded as having been dismissed – Where all jurisdictional requirements of section 59(3) were established on the facts, dismissal in terms of section 59(3) confirmed.

After defying an order by their commanding officer, the appellants, who were officers in the medical branch of the South African National Defence Force ("SANDF"), were informed that they had been dismissed. The appellants were receiving training as doctors in Cuba, and after their complaints about their training were not addressed, they refused to attend classes.

Although the High Court declared the decision to terminate their service unlawful, the Full Court held that the dismissal under section 59(3) of the Defence Act 42 of 2002 arose by the operation of law, and there was no decision susceptible to review.

Held – Section 59(3) of the Act provides that members of the SANDF who absent themselves from official duty for more than 30 days without the permission of their commanding officer, must be regarded as having been dismissed.

Two principal issues arose on appeal. The first was whether the Chief of the SANDF had taken a decision to dismiss the appellants prior to, and regardless of, any submissions they might make, and the second concerned the proper construction of section 59(3) of the Act, more specifically whether its jurisdictional requirements were satisfied.

The jurisdictional requirements of section 59(3) were that members must have absented themselves from official duty; without permission of their commanding officer; and for a period of not less than 30 days. Once those requirements were met, the members, if they were officers (as in this case), would be regarded as having been dismissed on account of misconduct with effect from the day immediately following their last day of attendance at their place of duty. On their own version, the appellants refused to go to their appointed place of duty, without the permission of their commanding officer, until their demands were met. In so doing, they absented themselves from official duty, and thus the first jurisdictional requirement had been satisfied. Their conduct was found to satisfy all the remaining jurisdictional requirements listed above. Their flagrant breach of duty was held to be precisely the reason that section 59(3) was enacted.

The decision of the Full Court that the appellants' dismissal in terms of section 59(3) of the Act occurred by the operation of law was confirmed.

Trustees for the Time Being of the Burmilla Trust and another v President of the Republic of South Africa and another [2022] 2 All SA 412 (SCA)

Civil Procedure – Common law delictual claim and claim for constitutional damages – Exceptions to particulars of claim – In deciding an exception, a court has to accept the facts alleged in the relevant pleading unless clearly untenable – Excipient must satisfy the court that upon every reasonable interpretation of those facts, the pleading is excipiable.

In 1988, the Government of the Kingdom of Lesotho ("Lesotho") granted five mining leases to a company "(Swissborough)" incorporated in Lesotho and controlled by the second appellant (Mr van Zyl). Swissborough later ceded and transferred all its rights, title and interest in and to any claim that it might have against Lesotho, to the Burmilla Trust. The trust claimed compensation from Lesotho consisting of the value of the mining leases at the time. It claimed the amount of R641 109 723, as well as interest and costs in respect of the lease. Mr van Zyl claimed the amount of R80 million in respect of "moral damages".

The appellants claimed damages of approximately R800 million from the President of South Africa and the South African government, alleging that the then President and the government had violated their constitutional rights by participating in the prevention of the prosecution of claims brought by the appellants before the Southern African Development Community ("SADC") Tribunal. Appellants had claimed that Lesotho had violated the SADC treaty by expropriation of a valid mining lease without compensation and moral damages were payable.

An appeal was brought against the upholding of respondents' exceptions to the particulars of claim, alleging on 14 grounds that they did not disclose a cause of action in respect of any of the claims. The issue on appeal was whether the amended particulars of claim disclosed a cause of action in respect of all or any of the claims.

Held – In deciding an exception, a court has to accept the facts alleged in the relevant pleading (except those that are palpably untenable). The excipient has to satisfy the court that upon every reasonable interpretation of those facts, the pleading is excipiable. An interpretation that disregards the context in which the factual allegations are made would generally not qualify as a reasonable one.

The appellants' pleaded case that the SADC tribunal would probably have upheld the SADC claim against Lesotho brought principles of international law into play.

The Court identified the appellants' cause of action as a common law delictual claim on the basis that the respondents were liable as joint wrongdoers with Lesotho for dispossessing the mining lease without compensation; and an alleged cause of action for constitutional damages. The Court was unable to detect a common law delictual claim in the particulars of claim, as no reasonable reading of the allegations in the particulars of claim supported a delictual cause of action.

One of the questions which arose was whether the SADC tribunal could in law have held that the mining lease was valid despite Lesotho court decisions to contrary. Under international law, the SADC tribunal was not bound by the Lesotho court decisions, and could reach a different conclusion on proper grounds. Proper grounds were in fact alleged.

A further question was whether the case of *Van Zyl v Government of Republic of South Africa* [2008] 1 All SA 102 (2008 (3) SA 294) (SCA) precluded the trust's claim in respect of the value of the mining lease. The Court found the decision not *res iudicata* in respect of any issue in the present action.

The majority judgment therefore held that the exception should have been dismissed in respect of the claim for the value of the mining lease and costs of prosecution of that claim before the SADC tribunal.

In the dissenting judgment, the view was that the exceptions had been correctly upheld by the court *a quo*.

Knoetze v Rand Mutual Assurance [2022] 2 All SA 458 (GJ)

Labour and Employment – Occupational injury – Claim for compensation – Interpretation of sections 65 and 66 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 – Section 65(1)(a) providing that an employee will be entitled to compensation if he proves to the satisfaction of the Director General that he contracted a disease mentioned in Schedule 3 of the Act and section 66 creating presumption in favour of employee for purposes of proving that the contracted disease arose out of and in the course of the employment.

The claim of the appellant ("Mr Knoetze") for compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the "Act") for hearing loss sustained by him whilst working in a mine, was repudiated by the respondent on the ground that the a rapid (as opposed to gradual) deterioration was not indicative of noise induced hearing loss. The dismissal of his appeal led to the present appeal in court.

The respondent was the entity licensed in terms of section 30 of the Act for purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment in the mining sector.

Held – The central issue was whether the appeal tribunal correctly interpreted section 65 read with section 66 of the Act. Statutory provisions must be interpreted in light of their context and purpose and in a manner that gives effect to the spirit, purport and object of the Bill of Rights. The Act in this case was essentially concerned with providing appropriate social security to employees who have suffered disablement as a result of an occupational disease.

Section 65(1)(a) makes it clear that an employee will be entitled to compensation if he proves to the satisfaction of the Director General that he contracted a disease mentioned in the first column of Schedule 3; and such disease arose out of and in the course and scope of his or her employment. Section 66 of the Act creates a presumption in favour of the employee for purposes of proving that the contracted disease arose out of and in the course of the employment.

It was common cause between the parties that the appellant sustained a hearing impairment during his long working career on the mines. The factual evidence presented by the appellant was that he performed work listed in Schedule 3 and that his work ordinarily involved his exposure to very loud, even excessive noise. The factual evidence presented was supported by medical opinion that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with noise-induced hearing loss. That was sufficient to trigger the presumption in section 66 with the consequence that the respondent attracted the burden to prove that the appellant's hearing loss did not arise out of and in the course of his employment.

There was nothing to counter the evidence which established that the appellant's occupational disease, namely, hearing impairment caused by noise, arose as a result of and in the course and scope of his employment. The appeal was thus upheld.

Mzansi Fire and Security (Pty) Ltd v Durban University of Technology and others [2022] 2 All SA 475 (KZD)

Constitutional and Administrative Law – Judicial review – Procurement decision of university – Whether procurement of security services constituted "administrative action" as contemplated in the Promotion of Administrative Justice Act 3 of 2000 – A university is an Organ of State, exercising a public power when contracting for the provision of security services – Where award of contract is not in compliance with section 217 of the Constitution, it falls to be declared invalid in terms of section 6(2)(b) of the Promotion of Administrative Justice Act.

In response to an invitation for tenders by the first respondent ("DUT"), the applicant ("Mzansi") submitted a bid to provide guarding services at DUT's campuses. The contract was however awarded to the third respondent, leading to Mzansi applying for the setting aside of the award on the ground that the tender process was irregular and tainted with fraud. It also challenged the correctness of the scoring attributed to it in the evaluation of its bid. Apart from the setting aside of the award of the contact, Mzansi sought an order that DUT refund to it the tender appeal deposit of R200 000 together with interest.

DUT countered with the submission that the decision being challenged was of a domestic nature rather than it constituting administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000.

Held – The starting point in determining the application was whether the procurement of security services constituted "administrative action" as contemplated in the Promotion of Administrative Justice Act 3 of 2000. DUT's contention that the awarding of a security tender to a private security company is not reviewable in terms of the Act as it does not constitute administrative action was based on the case of *Eden Security Services CC and others v Cape Peninsula University of Technology and others* (17703/2013). The court in that case concluded that a university did not fall within the ambit of section 217 of the Constitution, and as a result, could not be considered to be an organ of State for the purposes of the definition of administrative action. The basis of that court's conclusion was questioned by the present court, which stated that *Eden* cannot be held out as authority for the proposition that a university is not an organ of State, particularly in light of the Constitutional Court having decided to the contrary in *Harrielall v University of KwaZulu-Natal*. The fact that the university is funded by the State is an important consideration for the question of whether a public power is being exercised when those funds are disbursed. The court applied the test set out in the case of *Minister of Defence and Military Veterans v Motau and others* 2014 (8) BCLR 930 (2014 (5) SA 69) (CC) regarding whether particular conduct would entail the exercise of public power, and found the procuring of guarding services to meet the test. The court was satisfied that DUT was an organ of State which would have been exercising a public power when contracting for the provision of security services.

As, in awarding the tender, DUT did not act in accordance with the provisions of section 217 of the Constitution, the award was declared invalid in terms of section

6(2)(b) of the Promotion of Administrative Justice Act. The court refused to make an order of substitution as it was not just and equitable. It stayed the declaration of invalidity for 6 months to allow DUT to conduct the required procurement process.

S v Zuma and another [2022] 2 All SA 499 (KZP)

Criminal Law and Procedure – Special plea in terms of section 106(1)(h) read with section 106(4) of the Criminal Procedure Act 51 of 1977 – Appeal against dismissal of special plea – Appealability – Where applicant not advancing any recognisable basis for allowing an appeal prior to conviction, leave to appeal is refused.

The first accused ("Mr Zuma") brought an application for leave to appeal against the court's judgment dismissing his special plea in terms of section 106(1)(h) read with section 106(4) of the Criminal Procedure Act 51 of 1977. As Mr Zuma's application for leave to appeal was sought to be broadened in scope, the court in the present judgment clarified what it was called upon to decide.

Held – that the primary issue before the court was not whether Mr Zuma's complaints might possibly require the removal of the prosecutor (Mr Downer), but whether the complaints, assuming that they were established, would result in Mr Downer lacking the "title to prosecute" as contemplated in section 106(1)(h) of the Act. That enquiry depended on the meaning to be assigned to the words, "that the prosecutor has no title to prosecute" in section 106(1)(h). The court confirmed that "prosecutor" refers to the person prosecuting, and not the State. Referring to binding case authority, the Court explained that complaints of an alleged lack of impartiality, or of bias on the part of a prosecutor might in exceptional instances possibly impair the fair trial rights of an accused, but they do not affect the prosecutor's title to prosecute. That was dispositive of Mr Zuma's special plea.

In seeking leave to appeal, one of the allegations made by Mr Zuma was that the Court had adopted a potentially irregular procedure in fixing dates for the exchange of affidavits. The Court explained why that allegation was factually incorrect, and held further that the allegation was legally irrelevant as the fixing of dates for the exchange of affidavits had no impact on the correctness of the main judgment.

Alleging a conflict of interest on the part of Mr Downer, Mr Zuma argued that Mr Downer should not have deposed to the State's answering affidavit in the proceedings, because the special plea concerned him. The Court dismissed the objection, finding no conflict of interest and pointing out that Mr Downer was the person best equipped to answer the allegations against him in the special plea.

On the contentious question of the appealability of the order dismissing the special plea, the court pointed out that generally with regard to appeals, section 316 of the Criminal Procedure Act provides for appeals only after conviction. In the alternative, Mr Zuma invoked the fair trial provisions of section 35(3)(o) of the Constitution. However, section 35(3)(o) also does not provide a right to appeal by an accused person at a stage prior to conviction. The Court concluded that the determination of the special plea would not have the effect of disposing of at least a substantial portion of the relief claimed in the criminal trial. The alleged infringement of Mr Zuma's fair trial rights was the true basis of Mr Zuma's complaints, but was not properly raised and should in any event be determined at the end of the trial. Allowing

an appeal at the present stage would be contrary to the court's duty to actively discourage preliminary and piecemeal litigation. An appeal and an application for leave to appeal in respect thereof should not be entertained at this stage of the criminal trial. The application for leave to appeal also was dismissed on the merits.

The application for leave to appeal and all related applications were dismissed.

Solidarity and another v Black First Land First and others [2022] 2 All SA 549 (GJ)

Constitutional and Administrative Law – Freedom of expression – While the Constitution guarantees freedom of expression in section 16(1), section 16(2) excludes certain categories of speech, including hate speech, from that protection – Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits hate speech and posits an objective test which considers what meaning the reasonable person would extract from comments alleged to constitute hate speech – Comments demonstrating a clear intention to be harmful or to incite harm and to promote or propagate hatred clearly falling within prohibited speech.

In February 2019, the collapse of a walkway bridge at a school led to the death of four learners. Commenting on the incident, a Facebook user expressed an inability to feel sympathy as the victims were white. The second and third respondents, who were office bearers of the first respondent, endorsed that sentiment, and made further comments in the same vein. In consequence, the applicants sought to have the comments declared to be hate speech.

Defending their actions, the respondents denied that the comments amounted to incitement to cause harm to white people, or that they promoted hatred based on race.

Held – The Constitutional Court, in the case of *Qwelane v South African Human Rights Commission and another* 2022 (2) BCLR 129 (CC), has provided clarity on section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, positing an objective test which considers what meaning the reasonable person would extract from the impugned comments. It has also been confirmed that the elements of section 10 should be read conjunctively. The Constitutional Court confirmed that it is not a requirement to establish a causal link between the expression and actual harm committed.

Following the lead of the Constitutional Court, the Court in the present case began by determining whether the impugned statements could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred. It was found to be clear that the statements of the second and third respondent demonstrated an intention to be harmful or to incite harm and to promote or propagate hatred, and to undermine the dignity and humanity of the children who had died and were injured, their parents and whites in general. The Court noted the public platform occupied by the respondents and rejected the argument that there could be a valid context justifying the comments.

While the Constitution guarantees freedom of expression in section 16(1), section 16(2) excludes certain categories of speech from that protection. Excluded is the advocacy of hatred based on race. The Court was left with no doubt that the respondents' comments fell squarely within the ambit of hate speech and the

prohibition in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act. The respondents were ordered to refrain from repeating such comments, to delete their relevant comments from any public platforms, to publish an apology, and to pay R50 000 to each of the families of the four children.

ST v BN and another (Centre for Child Law as *amicus curiae*) [2022] 2 All SA 580 (GJ)

Family Law and Persons – Unmarried parents – Right to approach Family Advocate – – Mediation in Certain Divorce Matters Act 24 of 1987, section 4 – Constitutionality of unmarried parents not being entitled to rely on the provisions of the Act to simply enlist the services of the Family Advocate after the institution of legal process without applying to court to avail themselves of that option – Where no legitimate government purpose existed for differentiation based on marital status in the context of the treatment of children, discrimination was unjustified and unconstitutional.

The applicant and first respondent were the unmarried parents of two children. The applicant wished to relocate to Australia with the children, while the respondent refused to consent and brought a claim for the primary care of the children to lie with him. Part A of the applicant's application was for referral to the Family Advocate. The court *mero motu* raised a constitutional challenge to section 4 of the Mediation in Certain Divorce Matters Act as without a court order, the Family Advocate will not become involved where the parties were never married.

Held – It was common cause between the parties that the provisions of the Act only applied to divorcing or divorced parents. Unmarried parents were not entitled to rely on the provisions of the Act to simply enlist the services of the Family Advocate after the institution of legal process by completing a standard form, and had to apply to court to avail themselves of that option. The question was whether the differentiation between married and unmarried parents and their children bore a rational connection to a legitimate government purpose. Although the Act was justified at the time of its promulgation, its purpose had been overtaken by changing societal norms. Formal marriage was no longer the only recognised family relationship. There was thus no legitimate government purpose for differentiation based on marital status in the context of the treatment of children. Such discrimination was unjustified, cannot be in the best interests of children and was therefore inconsistent with the Constitution.

The Court emphasised purpose of and role performed by the office of the Family Advocate in disputes involving minor children. An objective investigation and recommendation was considered imperative in order to assist the court ultimately in arriving at a decision which would be in the best interests of the children.

The first respondent took issue with the point of constitutionality raised by the court *mero motu*, contending that a court may not raise a constitutional issue *mero motu*. However, the Court rejected that submission. As upper guardian, it has a duty to protect and uphold the best interests of minor children. The point was therefore properly raised and considered.

Section 4 of the Mediation in Certain Divorce Matters Act was declared unconstitutional, and the Family Advocate was directed to investigate whether relocation would be in the children's best interests.

END-FOR NOW