LEGAL NOTES VOL 6/2022

Compiled by: Matthew Klein

INDEX[1]

SA LAW REPORTS MAY 2022

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

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

Ms Baloyi was employed by the office of the Public Protector on a five-year contract, with a six-month probation period which could be extended. The contract provided that, at the end of the probationary period, the Public Protector would be entitled to either terminate or confirm her employment. After the expiry of the probationary period (on 31 July 2019), she was invited (by letter received by her on 8 October 2019) to make representations as to the confirmation of her employment contract. She did so (in writing on 15 October 2019) but subsequently received a further letter (on 21 October 2019) from the Public Protector terminating her contract.
Ms Baloyi then launched an urgent High Court application for the following relief: first, a declaratory order that the decision to terminate her employment contract was unconstitutional, unlawful, invalid and of no force and effect; secondly, an order setting aside the termination decision; and thirdly, a declaratory order to the effect that the Public Protector, in her official capacity, had failed to fulfil her obligations under s 181(2) of the Constitution in that the decision was taken for an ulterior purpose.

[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!**

The alleged unlawfulness of the termination had two aspects: first, that the termination amounted to a breach of contract in that it was terminated out of time after her probation period had ended and was in conflict with its terms relating to termination; secondly, that it amounted to an exercise of public power that breached the principle of legality in that the decision was, inter alia, taken by an official without the necessary authority. The High Court concluded (on the first aspect of the alleged unlawfulness) that Ms Baloyi's allegations raised a labour dispute as envisaged by the Labour Relations Act 66 of 1995 (the LRA) and dismissed Ms Baloyi's application on the ground that it did not have jurisdiction over the dispute. It did not consider the legality aspect and made no ruling regarding the declaratory relief.
In the present case, her application for leave to appeal directly to the Constitutional Court, Ms Baloyi sought to review the decision to terminate her employment and an order for reinstatement (the review relief); a declaratory order that the Public Protector, in her official capacity, violated her constitutional obligations under s 181(2) of the Constitution (the declaratory relief); and she challenged the High Court's finding that it did not have jurisdiction in relation to both the declaratory relief and the review relief (the jurisdictional challenge).

Held

As to the Constitutional Court's jurisdiction

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

As to whether leave for a direct appeal should be granted

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

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

Both the LRA and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) expressly recognised that there were certain matters in respect of which the Labour Court and the High Court enjoyed concurrent jurisdiction: s 157(2) of the LRA iro any alleged or threatened violation of any fundamental constitutional right 'arising from employment and from labour relations'; and s 77(3) of the BCEA iro 'any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'. It was plain from these sections that the scope of the Labour Court's exclusive jurisdiction in s 157(1) was not cast in Manichean terms. Section 157(1) did not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction but provided that they were to be found elsewhere in the Act. In some instances their location was clear; in others it was left to the courts to determine whether a matter was one arising in terms of the LRA and was, in terms of that Act, or another law, to be determined solely by the

Labour Court. The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of s 157(2) of the LRA and s 77(3) of the BCEA afforded litigants an additional right to approach either court where a dispute fell within the ambit of those sections. (See [27], [29] and [31].)
The termination of a contract of employment may potentially found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that did not emanate from the LRA, ie a contractual right. The mere fact that a dispute was located in the realm of labour and employment did not exclude the jurisdiction of the High Court; and the mere potential for an unfair- dismissal claim did not obligate a litigant to frame their claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action existed. The exclusive jurisdiction of the Labour Court was engaged where legislation mandated it, or where a litigant asserted a right under the LRA or relied on a cause of action based on a breach of an obligation contained in that Act. (See [40], [43] – [44] and [45].)
Whether the High Court lacked jurisdiction to adjudicate Ms Baloyi's claim, depended on whether her claim was of such a nature that the LRA or the BCEA required it to be determined exclusively by the Labour Court. On analysis of her pleaded case, a claim for contractual breach absent reliance on any provision of the LRA could be identified. While she may also have a claim for unfair dismissal in terms of the LRA, she had elected not to pursue this claim, and nothing in the LRA or the BCEA required her to advance that claim in the Labour Court. And while the High Court did not consider either the public-law basis for the review relief or the declaratory relief, neither claim as pleaded fell within the exclusive jurisdiction of the Labour Court in terms of s 157(1) of the LRA. The High Court had erred in dismissing her application on the basis that it was 'essentially a labour dispute' and that its jurisdiction was not engaged. Accordingly her appeal against the High Court's finding on jurisdiction would be upheld and the matter be remitted to the High Court for a hearing de novo. (See [32] and [48] – [50].)

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

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

The present matter concerned the validity and enforceability of subpoenas to produce documents issued by the first to third respondents, respectively Tiger Brands Ltd, Enterprise Foods (Pty) Ltd and Tiger Consumer Brands Ltd: collectively Tiger Brands. It had its genesis in the discovery, by the National Institute for Communicable Diseases (the NICD), that an outbreak of listeriosis in South Africa between January 2016 and 3 September 2018 could be traced to *Listeria monocytogenes* [*L Mono*]-contaminated ready-to-eat processed meat products produced and packaged by Tiger Foods at its meat-processing facility in Polokwane. The High Court authorised a class action by 18 individuals against Tiger Brands for damages sustained consequent to the consumption of foods prepared or having passed through the Polokwane facility.

Subsequent to the certification of the action, Tiger Foods, acting under s 35(1) of the Superior Court Act 10 of 2013, read with Uniform Rule 38, issued various *subpoenas duces tecum* to a number of third parties: the commercial pathology laboratories, Deltamune and Aspirata (the first and fourteenth appellants, respectively), which performed testing for the presence of, inter alia, *L Mono*; the raw-meat suppliers Federated Meats (Pty) Ltd (the fourth appellant) and related entities (the fifth to tenth appellants); and the statutory body tasked with promoting the epidemiological surveillance and management of diseases through the monitoring of laboratory results, the National Health Laboratory Services (the NHLS) (the twelfth appellant). The subpoenas were very broad in their scope in seeking, for example: from the laboratories, *all test results*, and related documents and correspondence, in respect of *any request from any person or entity* for testing for *L Mono* (for the period 1 July 2017 to date of subpoena); from the Federated Meats appellants, *all test results* for the presence of *L Mono* in respect of material collected at their facilities for the period 1 January 2016 to 3 September 2018, as well as all communications concerning listeriosis made during the period 1 January 2016 to 3 September 2018; and from the NHLS, all data and test results for the period 1 July 2016 to the present for detection testing of *L Mono* in samples taken from any of Tiger Brands' manufacturing plants, as well as all related documents and correspondence for the same period, and all records relating to any person who had suffered from listeriosis during the period 1 September 2015 to present.

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

Re High Court's approach

The SCA was critical of the approach adopted by the High Court in entrusting and deferring determination of whether there should be disclosure to the Registrar or another court. This, it held, would lead to piecemeal litigation, against which courts had repeatedly cautioned. The result would be additional costs and possible delays

in the finalisation of the disputes concerning the subpoenas. Inevitably, this would have a delaying effect on the finalisation of the class action. This certainly would not be in the interests of justice. The SCA asserted that the High Court should have considered the merits of the various applications and determined what could or should not be disclosed, and the terms, if any, upon which that disclosure had to take place. (See [18].)

Whether subpoenas should be set aside

The SCA addressed the question of relevance. It referred to the principle applicable to the process for *the discovery of documents* under rule 35. That held that rule 35 documents were discoverable if relevant, and relevance *was determined with reference to the pleadings*, and that asking for information not relevant to the pleaded case would be a fishing expedition. This, the SCA said, should apply too in the context of a *subpoena duces tecum*. A higher threshold for relevance was, however, applicable: in terms of rule 35(3) of the Uniform Rules, discovery may be requested in respect of documents 'which *may* be relevant', whereas in terms of s 36(5)*(a)* of the Superior Courts Act, documents may be subpoenaed which '*would* be relevant'. Aside from the wording of the rule, other factors pointed to such stricter threshold, namely the fact that, while the discovery process was applicable only between the parties to the litigation, in terms of the process of subpoena under s 36(5) of the Superior Courts Act read with rule 38, third parties may be subpoenaed to attend court and produce documents. Third parties ought not to be required to do so unless it was absolutely necessary and there was some certainty that such documents were relevant to the issues in the underlying action. (See [20] – [22].)

The SCA held that, when regard was had to the present pleadings of the class-action plaintiffs — leaving aside the unnecessarily pleaded pieces of evidence and focusing only on the facta probanda (to which pleadings were meant to be confined), and read with the terms of the certification order which set the parameters within which the pleadings should be considered (see [25] – [27]) — the real issue between the parties was the following: Could *Tiger Brands* be held liable for damages *in respect of injuries sustained by members of any of the four classes* identified * as a result of the consumption of products that had been produced in, or had passed through, Tiger Brands' Polokwane facility? (See [35] – [39].) Tiger Brands, however, the SCA noted, had sought the documents it did with a view to obtaining evidence to establish whether there were alternative sources of contamination, ie to refute the allegation that it was the sole source of the contamination (see [33], [34]). But that issue was irrelevant to the issues requiring determination in the class action. The demands for production of documents in this regard were entirely speculative. (See [40] – [43], [61].) The SCA characterised the High Court's analysis of the pleadings as flawed, in its failure, in determining relevance, to confine its attention to the facta probanda, and ignoring the rest. (See [43].)

The SCA concluded that the third parties against whom subpoenas were sought would be unable to be of any assistance to the court in the determination of the issues raised in the class action. It held that the appeals should succeed, and the subpoenas in all the circumstances ought to be set aside.

MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE v KOMANI SCHOOL & OFFICE SUPPLIERS CC 2022 (3) SA 361 (SCA)

Education — School — Public school — Liability of state for delictual or contractual damage for which school would have been liable but for Schools Act — Excludes remedy of specific performance — South African Schools Act 84 of 1996, s 60(1).

This case asked whether, under statute, a supplier could sue the state (the responsible MEC) for payment for goods it sold and delivered to a public school which the school failed to pay for. The statute in question was the South African Schools Act 84 of 1996 (the Act), s 60(1) of which made the state liable for any 'delictual or contractual damage or loss' caused by a public school, and s 58A(4) of which precluded the assets of a public school from being attached in any action against it. The words 'delictual or contractual' were inserted into s 60(1) by s 14 of the Basic Education Laws Amendment Act 15 of 2011.
The relevant facts were that a public school in the Eastern Cape failed to pay the respondent, Komani School & Office Supplies CC (Komani), a stationery provider, for goods sold and delivered to it. Komani sued the school and, when this eventually failed, * the appellant (the MEC) as representative of the state, under s 60 of the Act. In a hearing before the Grahamstown High Court, the parties agreed that the suit was one for payment under contract, ie one for specific performance by the MEC in terms of the contract between the school and Komani. The MEC argued that s 60(1) was limited to losses flowing from delict and breach of contract and excluded claims for specific performance. The High Court, however, upheld Komani's claim, finding that its 'loss' arose from (i) the school's failure to perform its obligations under the sale agreement and (ii) its inability, by virtue of s 58A(4), to levy execution against the school's assets.
In an appeal the MEC argued that the legislature's clear intention in s 60(1) was to limit the state liability to delictual or contractual damages or loss. Komani in turn argued that 'loss' had to be given an extended meaning to encompass also loss occasioned by a school's inability to fulfil its contractual obligations, including a claim for specific performance. Komani also argued that if it was not allowed to claim specific performance from the MEC, it had no remedy because it was prevented from executing against the school by s 58A(4).

Held by the majority (per Petse AP, Gorven JA and Weiner AJA concurring)
The amended s 60, while couched in slightly different terms, was functionally equivalent to the pre-amendment version, which the SCA held in *Bastian*† to exclude state liability for specific performance. The unequivocal language, context and purpose of s 60 made it clear that it catered just for claims for delictual or contractual damage or loss instituted from the outset against the MEC (see [39]). Precedent showed that there could be no question that Komani's right of access to courts was breached (see [45] – [46]). Komani had, moreover, become the author of its own misfortune when it misconceived the nature of its remedy under s 60 (see [47]). In summation, since a claim for specific performance such as the one instituted by Komani therefore fell outside the purview of s 60, the appeal would be upheld and the order of the Grahamstown High Court substituted with one dismissing Komani's application (see [41] – [43], [49], [60]).

Held by the minority, dissenting (per Mocumie JA, Mbatha JA concurring)
Section 60 must be interpreted in a purposive, pragmatic manner to protect small-business enterprises like Komani. Curtailing Komani's rights by adopting a narrow interpretation of s 60 would be against public policy and set an unjust precedent. The word 'loss' in s 60(1) therefore had to be read to include damages or loss flowing from the non-payment of a claim based on specific performance. Komani was entitled to constitutional damages for the infringement of its right to equality under s 9 of the Constitution and the MEC should be ordered to settle the debt due to it. The appeal should therefore have been dismissed. (See [73] – [75], [84] – [89].)

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

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

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

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

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

A and B were brothers locked in an acrimonious dispute over control of a close corporation, X, and the sale of its only asset to another concern, Y.
A claimed he was the beneficial owner of the member's interest in X and that B, X's sole registered member, held his member's interest on A's behalf as his nominee, and hence had no right to cause X to sell the property without first obtaining A's consent. When A and X later sued B and Y out of the Durban High Court to set aside the sale, the court upheld Y's exception to the effect that the claim was a doomed attempt by A, a non-member, to institute a derivative action on X's behalf. In the exception Y also claimed it was protected by s 54 of the Close Corporations Act 69 of 1984 (the CC Act), which provided that 'any member of a corporation shall in relation to a person who is not a member and in dealing with the corporation, be an agent of the corporation', because it had transacted with A on the basis that he was an agent of X who had the authority to bind it.
In its judgment the High Court held that, while a common-law derivative action was available to close corporations, A could not sue on X's behalf or in its name because he was not a registered member of X. The High Court also held that s 54 precluded the action by A and X against Y since Y had transacted with B, who, as X's sole member, had the power to bind it. Thus, the High Court reasoned, Y was protected against the negative effects of both the ultra vires and constructive notice doctrines. The High Court, having found that A and X's pleaded case did not set out a cause of action against Y, upheld the exception. In coming to its decision, the High Court

seemingly doubted A's claims to membership of X, characterising him as 'a legal stranger to' X who was 'not capable of passing a resolution . . . authorising the institution . . . of proceedings in [its] name'.
In an appeal to the Supreme Court of Appeal Y argued that the abolition of the common-law derivative by s 165 of the Companies At 71 of 2008 meant that there was no derivative action applicable to close corporations either. Y further argued that s 49 and s 50 of the CC Act, respectively, barred A and X from bringing the action.

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

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

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

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

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

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

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

Held, that both the regional court and the High Court had conflated *(a)* the legal standing of the party seeking rescission of judgment; *(b)* the basis for deposing to an affidavit; and *(c)* the authority to represent a party.

Held, as to *(a)*, that the appellant had the necessary standing, as she was the party affected by the judgment sought to be rescinded: she, as respondent in the main application, had opposed the main application, and, upon learning of the default judgment granted against her, had sought rescission of the default judgment. The enquiry into Ms Moduku's legal standing was irrelevant to the matter. (See [9].)

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

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

NATIONAL PROSECUTING AUTHORITY AND OTHERS v PUBLIC SERVANTS ASSOCIATION AND OTHERS 2022 (3) SA 409 (SCA)

Labour law — Courts — Jurisdiction — High Court and Labour Court — Concurrent jurisdiction — Where specific performance iro implementation of collective bargaining agreements sought in High Court — Proper analysis of applicants' pleadings required to ascertain legal basis of claim — In present case, pleadings not based on contract of employment but on unfair labour practice not justiciable in High Court — Basic Conditions of Employment Act 75 of 1997, s 73(3).

The main issue in this case — two appeals from the High Court to the Supreme Court of Appeal and heard together with its leave on petition — was a dismissed point *in limine*, that the High Court did not have jurisdiction to consider the merits of an application, brought by the Public Servants Association on behalf of a number of Deputy Directors of Public Prosecutions' (DDPPs) and Chief Prosecutors (CPs), for an order of specific performance iro the implementation of certain collective bargaining agreements.
The collective bargaining agreements, inter alia, introduced different career streams and an occupation-specific remuneration structure (OSD) for DDPPs and CPs; and were negotiated by the General Public Service Sector Bargaining Council (GPSSBC) in terms of a Public Service Coordinating Bargaining Council resolution (the PSCBC Resolution), which resolved that translation measures for the movement to the new structure would be dealt with at the relevant sectoral bargaining council. In 2010 the National Director of Public Prosecutions (the NDPP) approved the OSD's implementation.

In the High Court the NDPP, as first respondent, contended that the High Court did not have the jurisdiction to adjudicate the matter because the PSA's application was a labour dispute falling under the mandatory dispute- resolution procedures set out in the Labour Relations Act 66 of 1995 (LRA); and not a dispute 'concerning a contract of employment' as contemplated in s 73(3) of the Basic Conditions of Employment

Act 75 of 1997 (the BCEA) clothing the Labour Court and civil courts with concurrent jurisdiction.

Held

An assessment of jurisdiction must be based on an applicant's pleadings. The High Court could only have been clothed with jurisdiction if the OSD implementation that the PSA sought had been claimed on the ground that the terms of the individual employment contracts between the DDPPs, CPs and the NPA obliged the NPA to act accordingly. (See [58] and [61].)

In context and in terms of their plain language, the PSA's pleadings in no way placed reliance on individual employment contracts; the material relief claimed was all based on documents that were of a collective and/or general nature. Instead, what was relied on was that the failure to implement the OSD in respect of the DDPPs and CPs constituted an unfair labour practice relating to promotion and benefits, as defined in s 186 of the LRA. (See [64] and [69] – [70].)

Therefore, the High Court did not have jurisdiction to hear the matter; it should have struck the matter from its roll. In the result, the appeal would be upheld, the PSA to bear the costs of its High Court application in the High Court and of the appeal, inclusive of the costs of two counsel where so employed. (See [71] – [72].)

SHIVA URANIUM (PTY) LTD (IN BUSINESS RESCUE) AND ANOTHER v TAYOB AND OTHERS 2022 (3) SA 432 (CC)

Company — Business rescue — Business rescue practitioner — Voluntary business rescue — Company appointing practitioner — Affected person obtaining practitioner's removal — Court appointing practitioner's successor — Court-appointed practitioner resigning — Question as to repository of power to appoint new practitioner — Companies Act 71 of 2008, ss 130(6)*(a)* and 139(3).

A company voluntarily entered business rescue and appointed a business rescue practitioner (see [3] and the Companies Act 71 of 2008, ss 129(1) and 129(3)*(b)*), an affected person challenged the appointment and obtained a court order setting it aside (see [4] and [6] and s 130(1)*(b)* read with ss 130(6)*(a)* and 139(2) of the Act), the court appointed a new practitioner (see [6] and s 130(6)*(a)* of the Act) and the new practitioner then resigned (see [11]).

Held, that in this situation the company was the repository of the power to appoint the practitioner's successor (see [37], [39], [40], [59] and s 139(3) of the Act).

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

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

Practice — Judgments and orders — Summary judgment — Application — Amended rule 32 — Plea and special plea — Not appropriate for defendant to plead only those defences that could be specially pleaded and to withhold, until later stage, general plea — Defendant which had failed to plead all its defences required to apply to amend its plea if seeking to add any for purposes of opposing summary judgment — Defendant's failure to have pleaded such defences initially would be material and

require convincing explanation if it was to exclude possibility that court might infer delaying tactics and lack of bona fides — Defendant ordinarily having to bear wasted costs of application for leave to amend and those occasioned by any attendant postponement of summary judgment application — Uniform Rules of Court, rules 22 and 32(2)*(b)*.

When confronted with a request to make an order by agreement refusing summary judgment and directing the matter in question to proceed to trial, which it accepted, the Cape Town High Court saw it fit to address the following question: Should it be permissible for a defendant, at least in matters that could be affected by an application for summary judgment, to plead only those of its defences that *could be specially pleaded* and to withhold until a later stage its plea on those defences that fell to be generally pleaded (see [8])? In this regard a general practice had in fact developed in the Cape (the so-called 'Cape practice') to the effect that it was unnecessary for a defendant to 'plead over' when filing a special plea. The court saw it necessary to ask the question, given, in the light of the conduct of the defendant, the implication of the amended Uniform Rule 32(2)*(b)* dealing with summary judgments, which read that the plaintiff in its affidavit accompanying its application for summary judgment had to, inter alia, explain briefly why the defence *as pleaded* did not raise any issue for trial. In this matter the defendant, in answer to the plaintiff's action, had raised a special plea, without more. Application for summary judgment followed. The defendant then filed an opposing affidavit in which he now set out a defence on the merits of the case. This prompted the parties to seek postponement, to allow the defendant to deliver a general plea that incorporated such defence — the parties were seemingly in agreement that the defendant was entitled to deliver a general plea at this stage, without the need to seek leave to amend its plea — and for the parties to subsequently exchange supplementary supporting and opposing affidavits on the issue of summary judgment. The postponement was necessary because the plaintiff was not called upon to deal in a supporting affidavit in terms of rule 32(2)*(b)* with any defences that had not been pleaded (see [5]). On the resumption date the request for refusal of summary judgment was made. The court noted that the plaintiff would probably not have applied for summary judgment had it been apprised of all the defendant's grounds for defending the action at the stage when the defendant, purporting to comply with rule 22, delivered his special plea (see [7]). It followed that the defendant's conduct in failing to plead over materially delayed the finalisation of the litigation and contributed to an unnecessary incurrence by the parties of additional costs, not to mention an unwarranted demand on judicial time and court resources (see [7]).
Held, that the delay, unnecessarily increased costs and inconvenience occasioned in the current matter by the defendant's failure to plead over served to demonstrate that the administration of justice would be better served by interpreting rule 22 to require a defendant to plead over [when delivering a special plea], and by recognising that it did not leave scope for the continuation of 'the Cape Practice'. (See [19].)
Held, accordingly, that a defendant in a summary judgment application which had failed to plead all its defences would be required to apply to amend its plea if it sought to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially would be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, would require convincing explanation if it was to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect

would be that such a defendant would ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application. (See [20].)
Held, however, that the orders agreed to by the parties should be made, this in light of the prevailing uncertainty about the continuing acceptability of 'the Cape practice'. The object of the present judgment was to signal that this would not be the case in the future (see [21]).

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

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

The plaintiff had applied for summary judgment in the High Court subsequent to the defendants filing their plea to its summons. In their affidavit resisting summary judgment, the defendants raised defences which they had not originally pleaded. The defendants then amended their plea to bring it in line with their affidavit. The question in the present matter was whether the plaintiff was entitled to file in response — as it sought to do — a further affidavit for the purpose of supplementing the founding affidavit it had filed in terms of Uniform Rule of Court 32(2)*(a)*. The defendants' position was that the provisions of rule 32 (which regulated summary judgment proceedings) precluded the plaintiff from doing so. So, in the present interlocutory application, relying on rule 30, they sought to set aside the affidavit. The defendants placed reliance on rule 32(4), which provided that '*(n)o evidence* may be adduced by the plaintiff *otherwise than by the affidavit referred to in subrule* (2) . . .'. * The defendants, acknowledging that the application for summary judgment could not be proceeded with in the circumstances of the amendment of the plea, with the founding affidavit as it was, submitted that a fresh application for summary judgment had to be brought. In support of their views, the defendants relied on the case of *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC). The plaintiff for its part argued that, in light of the fact that the plea was now different, a further engagement with the plea was indicated and was not precluded by subrule (4).
The court noted that, while rule 32 itself did not deal with what was to happen if there were an amendment to the plea, rule 28(8), which was of general application, took account of the consequences of the amendment of pleadings generally. Rule 28(8) provided that '(a)ny party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make consequential adjustment to the documents filed by him'. The provision was, the court held, deliberately inclusive, the only constraint here that the adjustment should be *consequential* on the amendment, failing which formal leave had to be sought in terms of subrule (1). (See [17].) In the case of the amendment of the plea after the filing of a summary judgment application, the court continued, the plaintiff was decidedly 'a party affected' by the amendment. Thus, the provisions of

rule 28(8) applied to it and so afforded it the right to adjust the founding affidavit without leave, provided the adjustment was consequential. The consequential adjustment in this instance would be the amendment of the affidavit filed in terms of rule 32(2)*(a)* to take account of the amendment. Rule 32(4) did not preclude such adjustment. (See [18].) The court added that, as long as the adjustment was strictly consequential on the amendment, there was no reason why the affidavit, although supplemented, should not be read to conform to the description of the subrule (2)*(a)* affidavit. (See [19].) In this regard the court added that the fact that a further affidavit was necessary for the purpose of this adjustment did not change the nature and characterisation of the founding application. (See [20].)
The court concluded that rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which was of the nature of a reply or rejoinder to the defendants' case and which was not consequential on the amendment of the plea. (See [29].) Finding that the matter sought to be introduced by the supplementary affidavit was indeed consequential, the court dismissed the rule 30 application, and found the plaintiff's supplementary affidavit to have been properly filed. (See [30] and [31].)

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

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

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

In an interlocutory application in eviction proceedings — brought by the joint liquidators of the company owning the immovable property that the appellants were in occupation of — the appellants' defence was struck out and their eviction ordered. This based on the appellants' failure to comply with an order in an earlier interlocutory application, compelling them to serve their heads of argument and a practice note as required by the division's practice directives.
At issue in the present case, their appeal to a full bench of the division, was the nature and extent of the court's discretion to strike out a defence in eviction applications, more particularly since the court a quo had done so without considering the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and whether it was just and equitable.

Held
A court striking out a defence in an eviction application must exercise a judicial discretion going beyond an enquiry to establish whether good cause had been shown for the non-compliance with the compelling order. The additional discretion derived from PIE, more specifically s 4(7) and (8). (See [14] and [29] – [30].)
A judicial discretion could only be exercised if it was a properly informed decision; it would not be helpful to strike a defence and the facts supporting the defence which, in this instance, were contained in an answering affidavit. A court should broadly consider the veracity of all possible defences which could inform a court about a

possibly successful defence against an eviction and whether such defences were raised in a bona fide manner. (See [26] and [27].)
By striking a defence the facts upon which a court should exercise its discretion could not be relied upon; it deprived a court of considering allegations in an answering affidavit pertaining to issues stipulated in s 4(7) of PIE (quoted at [15]). These included the rights and needs of the elderly, children, disabled persons and households headed by women. (See [25].)
The court a quo did not consider the veracity of the appellants' defence, which should have included an enquiry whether it would have been just and equitable to evict the appellants, and the impact of s 4(7) of PIE on the order to strike the defence and to evict the appellants. Consequently, the court a quo did not exercise its discretion judicially in granting the application. The appeal would be upheld on this ground alone. (See [32].)

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

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

The present matter concerned a claim for delictual damages by the appellant on behalf of her minor child, DMA, in respect of a brain injury he had sustained. The appellant claimed that DMA's injury was caused by the negligence of the employees of the MEC in treating her when she gave birth to DMA at the Andries Vosloo Hospital in Somerset East in the Eastern Cape. The appellant had launched her action for damages in the Bhisho High Court. Before the trial court, it was common cause that DMA had a brain impairment/injury, ie that of a left-sided spastic hemiplegic-type of cerebral palsy with microcephaly. It was also admitted that the nursing staff treating the appellant had been negligent in unduly prolonging her labour, which was obstructed, and which had led to the foetus being deprived of oxygen. What was in dispute was the question of causation, whether it was such oxygen deprivation that had led to DMA's injury. The appellant's expert witness, the paediatric neurologist Van Toorn, expressed the opinion that it was. Van Toorn held the view that DMA's condition was the result of a brain injury known as hypoxic-ischemic encephalopathy, which *he had sustained during labour*, and was caused by prolonged partial hypoxic ischemia. The respondent's expert, the paediatric neurologist Keshave, contended otherwise, and expressed the view that, on the clinical evidence, DMA had an *underlying* neurometabolic disorder in keeping with Nonketotic Hyperglycinemia (NKH), which might account for his clinical condition. Based on its assessment of the evidence, the trial court found that both expert opinions were capable of logical support. Unwilling to choose one version over the other based on mere preference, the court refused to find for the appellant, and it granted absolution from the instance. The appellant successfully appealed to the full court of the Bhisho High Court.

That full court identified the key issue to be determined as whether the trial court was correct in concluding that the two opinions were equally placed, on the evidence before it, and that the appellant as a consequence had to be found not to have discharged the burden of proving that it was the respondent's negligence that was the cause of the injury sustained by DMA (see [9]). Before determining this issue, the court provided a thorough overview of the law dealing with how expert opinion

evidence must be approached and evaluated where there was conflicting or inconsistent evidence from two or more expert witnesses (see [10] – [17]), with regard to *(a)* the assumed facts (see [11]); *(b)* the analysis of the established facts and inferences to be drawn therefrom by opposing witnesses ([12] – [14]); *(c)* competing theories of a purely scientific nature (see [15]); and *(d)* the accepted standard of a medical professional (see [16]).

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

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

The court concluded that, on the whole, the clinical evidence supported the appellant's expert opinion that it was more likely than not that the brain injury sustained by DMA, and the disabilities that later followed, was the result of prolonged partial hypoxic ischemia during labour, as opposed to NKH. The injury, it held, was consistent with the conduct of the respondent in allowing a severely prolonged obstructed labour of the appellant to continue, which exposed the foetus to a real risk of sustaining a hypoxic-type of brain injury, and it further accorded with the clinical condition of DMA immediately following his birth. The conduct of the respondent's employees created a risk of harm, and the more plausible explanation was that the injury occurred within that area of risk. (See [52].) Accordingly, appeal upheld (see [53]).

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

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

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

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

In the present application before the High Court, the Johannesburg Metropolitan Municipality (the City) sought an order for an interdict restraining the respondent company from using a certain property as an 'accommodation establishment', such use being contrary to the way the property was zoned under the applicable Land Use Scheme (the Scheme), ie 'Residential 1', and to forthwith use the property in a zone-compliant manner. The City sought further relief: that, should the respondent not comply, the sheriff be authorised to take all necessary steps to give effect to the interdict, including taking into possession 'all that [was] found at the property' and to keep such items that the company was using to conduct an accommodation establishment, pending payment of the City's 'reasonable fees and disbursements' incurred in the execution of the order.
Held, that the effect of the order whereby the City sought to enforce the Scheme *was the eviction of the occupiers of the property* (see [10], [14] and [16]). Where the enforcement of the Scheme affected the rights of people living on property to which the Scheme applied, they were obviously necessary parties to any enforcement application, and had to be joined (see [20]). The City had failed to meet this requirement, and on such ground alone the application could not succeed (see [18]).
Held, that, where the City meant to enforce the Scheme through the eviction of people living on the relevant property, further requirements were triggered (see [20]). The principal requirement was compliance with s 26(3) of the Constitution, which provided that '(n)o one may be evicted from their home . . . without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' (See [21].) In seeking relief to give effect to its Land Use Scheme by removing people who resided on property in breach of that Scheme from their homes, the City was required to demonstrate that it had engaged meaningfully with each of the affected individuals, and that it would provide alternative accommodation to those individuals where it was reasonable to do so. It would be reasonable to provide alternative accommodation where an occupier would be left homeless without it. (See [24].)
Held, accordingly, that the City could not demonstrate a clear right to an interdict which enforced its Land Use Scheme through an eviction unless it had shown that it had meaningfully engaged the occupiers of the property in question, and offered to provide alternative accommodation where it was reasonably needed (see [25]). The City had not made out such a case in this application. The application accordingly had to be dismissed (see [26]).

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

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

for default judgment — Court to guard against bad practices by credit providers — National Credit Act 34 of 2005, s 129.

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

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

RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD AND OTHERS 2022 (3) SA 512 (GJ)

Company — Business rescue — Business rescue practitioner — Powers — Ambit of — Right of business practitioner of company A to vote in s 151(1) meeting of another company in business rescue in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1).

Company — Business rescue — Business rescue proceedings — Directors — Powers — Ambit of — Right of director of company A to vote in s 151(1) meeting of another company in business rescue, in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1).

Company — Business rescue — Business rescue proceedings — Difference in powers of, on one hand, directors, and, on other, business rescue practitioners — Significant limitation of powers of directors — Distinction between external and internal functions of company — Companies Act 71 of 2008, ss 137(2), 140(1).

The applicants were directors of the company in business rescue, Tegeta Exploration and Resources (Pty) Ltd (Tegeta). Tegeta was a major creditor of another company, also in business rescue, Optimum Coal Terminal (Pty) Ltd (OCT), in which it held a 100% shareholding. In the present application in the Johannesburg High Court, the applicants sought an order for a declarator to the effect that, inter alia, they, in their capacity as directors of Tegeta, should vote at any meeting of creditors in terms of s 151(1) of the Companies Act 71 of 2008 in respect of OCT, to consider the latter's proposed rescue plan. The respondents, which included amongst their number the business rescue practitioners of both Tegeta (sixth and seventh respondents) and OCT (second and third respondents), opposed the relief sought. They argued that it was rightfully Tegeta's business rescue practitioners who should vote at such meeting. The issue, the High Court held, called for an

interpretation of the relevant sections of ch 6 of the Companies Act to determine the ambit of the powers of directors and those of business rescue practitioners while a company was in business rescue.
In considering the relevant legal framework, the court noted that, generally, the directors of a company had, in terms of s 66 of the Companies Act, the powers to manage the 'business' and 'affairs of a company' and were authorised to exercise all of the powers and perform any of the functions of the company. Importantly, the court stressed, these powers, however, were subject to the proviso, '*except to the extent that this Act . . . provides otherwise*'. (See [22] – [23].) This, the court held, was particularly relevant in considering the ch 6 rights, powers and duties of directors and business rescue practitioners in the context of business rescue (see [23]). In terms of s 140 of the Companies Act, during a company's business rescue proceedings the *business rescue practitioner* had full management control of the company in substitution for its board and pre-existing management. (See [31] – [32].) In terms of s 137(2), during a company's business rescue proceedings, each director of the company had to perform the functions of director, subject to the authority of the practitioner, and had a duty to the company to perform any management function within the company in accordance with the express instructions or direction of the practitioner. (See [35] – [39].)
The court held that, based on a proper construction of ch 6, during business rescue proceedings, the directors' powers were significantly limited (see [30], [40] and [47]). Full management control of the company was transferred to the business rescue practitioners (see [32], [41], [47]). To the extent that directors continued to fulfil certain functions (see [41] and [47]), the court asserted, these were restricted to governance-related tasks, such as the presentation of annual financial statements, issuing of shares, scheduling of shareholders' meetings, proposing resolutions and holding of board meetings; neutral functions, the court described them, far removed from full management control (see [43] and [47]). The task at hand — voting in the s 151(1) meeting of another company in business rescue — the court held, fell within the management powers of the business rescue practitioners (see [41], [43] and [47]). (In reaching this conclusion, the court held that, in order to facilitate the interpretation of the functions of directors and business rescue practitioners during rescue proceedings, a distinction could be drawn between the internal functions of a company — these, the court held, the directors continued to carry out — and the external functions of a company — these fell under the management control of business rescue practitioners. The internal functions of a company would be those related to governance; the external functions would be those calling for interaction with the outside world, and would include debt-collecting and voting at meetings convened in terms of s 151(1). (See [27] – [28], [41], [43] and [47].)
The court accordingly dismissed the application (See [51].)

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

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

The advocates' profession is no longer self-regulatory but regulated by the Legal Practice Act 28 of 2014 (date of commencement 1 November 2018), the Legal Practice Council and its Code of Conduct. The former 'professional practice or trade usage' under which an attorney was liable for the fees charged by an advocate briefed by him or her has hardened into a rule of law that, if not expressly agreed, is implied in the contract between the attorney and advocate as a matter of law. How much counsel may charge is agreed between counsel and attorney, not counsel and client. It is the attorney who offers the brief to counsel, and counsel who accepts or declines the brief. Attorneys are liable for the fees of counsel instructed by them, and this liability extends to every partner of a firm of attorneys or member of an incorporated firm. If the firm is dissolved or the incorporated firm is wound up, such liability remains with each partner or member. Where the attorney for reasons of insolvency or any other reason is unable to pay, counsel may, with leave from the Provincial Council, receive the fees due to him or her from another source in discharge of the indebtedness of the attorney. (See paras 18, 26, 27, 34 and 35 of the Code of Conduct and [11] – [19] of this judgment.)

Meyer J:

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

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

(a) In case No 37003/2019:

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

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

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

(b) In case No 37456/2019:

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

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

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

Applicants' Attorneys: *Ian Levitt & Associates*, Sandton.

Respondent's Attorneys: *Mohamed Hassim Attorneys*, Durban.

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

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

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

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

The court, however, saw it fit to caution practitioners when drafting papers in similar matters to ensure that the requirements of rule 46A did not fall by the wayside when

seeking orders of executability by way of summary judgment against home-loan debtors. This, it noted, may require a hybrid application in which notice was given to the respondent both of his rights under rule 32, and his rights under rule 46A. The most important objective, the court stressed, was to ensure that the respondent was notified that, in addition to opposing the summary judgment application, or even in the event that he elected not to do so, he was nonetheless entitled under rule 46A(6) to make representations to the court regarding what effect an order of executability may have on him and his family's right to housing under s 26 of the Constitution.

VOLTEX (PTY) LTD v FIRST STRUT (RF) LTD (IN LIQUIDATION) AND OTHERS 2022 (3) SA 550 (GP)

Contract — Consensus — Rectification — Rectification of agreement by creditor party after debtor party placed into liquidation and concursus creditorum established — Whether permissible — Principles applicable.

Insolvency- Rectification of agreement by creditor party after debtor party placed into liquidation and concursus creditorum established — Whether permissible — Principles applicable.

The present matter concerned the question whether an agreement between A and B, in which A stood as creditor, and B as debtor, could be still rectified where the application for rectification was sought by A *subsequent t*o B's having been wound up consequent to liquidation proceedings instituted against it, and concursus creditorum accordingly reached.

What was claimed, before the Pretoria High Court, was the rectification of 'an application for credit incorporating a cession of book debts'. The applicant, Voltex (Pty) Ltd, claimed that, on 26 January 1999, an agreement was entered into between itself and the first respondent whereby the latter applied for credit facilities from the former, and ceded to the applicant its book debts and other debts as continuing covering security. The applicant claimed, however, that the written agreement, as a result of an error, did not reflect its company registration number, but that of a pre-existing company associated with the applicant that had previously shared the same name. The applicant now sought to rectify the security cession concluded between itself and the first respondent by deleting the incorrect registration number and replacing it with the correct one. Importantly for present purposes, some time after the abovementioned agreement was entered into the first respondent was placed into liquidation. The applicant was launching this rectification application four years after those proceedings had commenced; it intended to advance a secure claim against the insolvent estate of the first respondent, relying on the cession.

The third respondent, Prevance Bonds (Pty) Ltd, a rival creditor of the insolvent estate of the first respondent, opposed the rectification. It relied on the principle of law that, once a company was liquidated, a concursus creditorum was established, crystallising the insolvent's estate, and after which no transaction could be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor could only be dealt with as it existed at the issue of the order. To grant the rectification sought here would have the effect of allowing a creditor which was only a concurrent creditor at the date of winding-up to alter its position post-liquidation to become a preferent creditor, in disturbance of concursus creditorum. That could not be permitted. (See [6] and [12].)

The court identified the question lying at the heart of the dispute between the parties as whether, in circumstances where one party to an agreement was in liquidation, a written agreement concluded inter se could be rectified after the concursus creditorum was established (see [8]). After a thorough review of case law on the topic (see [8] – [33]), the court, referring with approval to academic authority, held that the legal position was that rectification post-concursus was only precluded where such rectification would result in a creditor acquiring a right or a claim *not already held* at the institution of concursus (see [34]). Thus, rectification was permissible where it was sought merely to reflect the correct position according to the true intention of the parties as at such a date. (See [34] and [35].)
The court went on to hold that, in circumstances where the facts proved that (i) a valid cession agreement was concluded between the parties prior to a liquidation order being granted; but (ii) the agreement did not reflect the parties' common intention in the sense that the creditor was not correctly described, and the evidence indicated that the insolvent and the creditor were in actual fact the parties to the agreement, rectification would neither create nor detract from any rights as they existed when the concursus creditorum came into existence. It was a misconception to view ex post facto rectification of the description of a party to an agreement as an interference with the position obtained at the concursus creditorum. If, in the present case, it was found on the facts that a valid cession of book debts was transacted between the parties, the applicant was a secured creditor and had been such from the moment of liquidation. Where a misdescription of a party was the only issue taken with the contentious agreement, there could be no prejudice to third parties if the document wherein the agreement was captured was rectified to reflect the correct description of the parties. The status quo was not affected by such rectification. (See [36].) The court went on to hold, based on the facts, that the applicant had indeed established that the parties had intended for the credit agreement and security cession to be concluded between the applicant and the first respondent (see [50]), and that it had otherwise met the requirements for rectification (see [51]). The court accordingly granted an order rectifying the agreement in the manner contended for by the applicant (see [51]).

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

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

In 2005 M was born to H and at the time appeared to be healthy. Later, however, M showed symptoms of neurologic abnormality and was eventually diagnosed with cerebral palsy (see [1]). Later still, in 2014, an MRI scan revealed a brain injury rooted in partial asphyxia, and this finding presaged a claim H came to make against respondent MEC, that the asphyxia stemmed from negligent omissions of hospital staff attending during the late stages of the birthing process. The action was however unsuccessful, with the High Court finding H to be an unreliable witness whose evidence, which largely founded her experts' opinions, discrediting same (see [2], [18] and [71]). (The evidence went to placing the occurrence of the injury in the late intrapartum period (see [84]).)
Here, in an appeal to the Supreme Court of Appeal, H challenged these findings. The majority (per Makgoka JA) confirmed them and dismissed the appeal (see [84] –

[85]). (See [26] – [27], [29] and [60] – [65] for observations on H's reliability; [42], [44], [53] and [67] for considerations of her experts' opinions; and [73] for the majority's conclusions. See also [66] for the distinction between credibility and reliability.)
The minority, per Molemela JA, would have upheld the appeal and found the MEC liable (see [178]). In his view the High Court had, in assessing H's credibility, underweighted evidence corroborating her story and overweighted the fact that she was the sole witness of the events concerned (see [94] – [95]). It had also failed to recognise that the respondent's version was not put to H in her cross-examination, and that she was not informed that the questions went to demonstrating she was untruthful in her testimony (see [93]).

So too, assessment of H's testimony had been insufficiently charitable against the backdrop of the hospital's failure — to H's prejudice — to safeguard certain of her records (see [126] but also [77] – [80]). (Indeed, in such an instance it might be appropriate for a healthcare provider to bear an evidential burden of showing that care provided was in line with good medical practice (see [123]).) Conversely, respondent's failure to call staff to explain entries in the limited records ought to have attracted a negative inference (see [126]). As for the joint minutes, the court — despite being bound to — had failed to accept agreed points (see [133] – [134]). Lastly, the evidence disclosed negligence and causation — there being no requirement, as suggested by the High Court, to pinpoint the precise timing of the injury in order to satisfy the latter test (see [149] and [178]).
In his concurrence Wallis JA expressed his disquiet at apparent touting and at the inexactitude of H's pleadings which failed to delineate the issues (see [179], [191], [198] – [199] and [233]). Wallis JA further observed that experts had testified prior to the establishment of the facts on which their opinions were based, when the appropriate sequence was indeed the reverse (see [208], [211] and [215]).

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

SOUTH AFRICAN CRIMINAL LAW REPORTS JUNE 2022

S v BALOYI 2022 (1) SACR 557 (SCA)

Sentence — Prescribed minimum sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Finding of premeditation only made after conviction — Although misdirection occurring, accused warned of applicability of minimum-sentencing legislation on basis of premeditation and proved facts incontrovertibly establishing such — No prejudice suffered and trial not unfair.

The appellant appealed against the dismissal by the full bench of the High Court of his appeal against his conviction of murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997, and sentence of life imprisonment imposed in a regional magistrates' court. Leave to appeal was granted only on the limited basis of the sentence imposed and whether the murder was premeditated. The only question that detained the court was whether the trial court and the full bench had erred in their failure to note that the finding of premeditation was only made after conviction.
Held, that the trial court had misdirected itself in pronouncing that the murder was premeditated only at the sentencing stage, and what remained to be determined was whether the appellant had been prejudiced by such misdirection which resulted in an unfair trial. (See [20].)
Held, further, in the circumstances of the case, where the appellant had been duly warned of the applicability of the minimum-sentencing legislation on the basis of premeditation, and the proved facts incontrovertibly established that the murder was premeditated, there could be no conceivable basis on which he could complain about the fairness of the trial. (See [22].)

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS v PRETORIUS AND OTHERS 2022 (1) SACR 564 (GJ)

Prisoner — Rights — Prohibition by National Commissioner of use of personal laptop computers in communal areas or single cells — Infringing rights to further education and freedom of expression, and constituting unfair discrimination — Constitution, s 16(1)*(d)* and 29(1)*(b)*; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The appellants appealed against a judgment in the High Court which held that the policy procedures on formal-education programmes, as approved by the second appellant (the National Commissioner of the Department of Correctional Services) insofar as it related to the use of personal laptops without a modem in any communal or single cell, constituted unfair discrimination in accordance with the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), and that the three respondents would be entitled to use their personal computers without the use of a modem in their cells for as long as they remained registered students with any recognised tertiary institution in South Africa (subject to them making their computers available for inspection at any given time by any representative of the appellants). The respondents were prisoners serving lengthy sentences for high treason, culpable homicide and conspiracy to commit murder. They were all postgraduate students who were allowed to use their computers only in the computer room, which had limited hours and was not always available, and they were prohibited from taking their laptops into their cells. They stated that for a period of 11 years they had been allowed to use them in their cells and, during two of those years, the first and second respondents ironically even had modems attached to their computers without them in any way putting the security of the Correctional Centre at risk.
They contended that, during their 15-year period of incarceration, their behaviour had been impeccable and at no stage were they ever accused or found guilty of any breach of security.

Held, that, by limiting the time the respondents had access to their computers, the policy of the appellants adversely affected their equal enjoyment of the right to be provided with reading material, which amounted to discrimination in terms of PEPUDA. Moreover, the policy undermined their human dignity which came with being able to better oneself by further education, which, in turn, prepared one for life after prison. For this alone the policy unfairly discriminated against the respondents and the court a quo had been correct in holding thus. The policy also infringed their right to further education, as provided for by s 29(1)*(b)* of the Constitution, and their right to freedom of expression, which included academic freedom and freedom of scientific research, as provided for by s 16(1)*(d)* of the Constitution. (See [18] – [20].)
Held, further, the computers could be screened to ensure that they did not contain modems, and the respondents had indicated their willingness to make them available for inspection at any time for that purpose. Moreover, the evidence suggested that the security risk in the case of the respondents, if regard were had to their track record whilst they were in prison, was slim to non-existent. (See [23] – [24].)
Held, further, that the infringements of their rights did not serve a purpose that was considered legitimate by all reasonable citizens in a constitutional democracy that valued human dignity, equality and freedom above all other considerations. They imposed costs, especially on the respondents, that were disproportionate to the benefits that they obtained, and the court a quo was therefore correct in its finding that the policy had to be set aside. (See [34].) The appeal was dismissed.

S v ZUMA AND ANOTHER 2022 (1) SACR 575 (KZP)

Plea — Prosecutor has no title to prosecute — Determination of such plea — Oral hearing not required.
Plea — Prosecutor has no title to prosecute — Applicability — Plain meaning of s 106(4) of Criminal Procedure Act 51 of 1977 not contemplating range of instances where such plea might succeed.
Plea — Prosecutor has no title to prosecute — Meaning of 'prosecutor' — Reference to 'prosecutor' in s 106(1)*(h)* of Criminal Procedure Act 51 of 1977 not reference to state, but to person acting as prosecutor.
Plea — Prosecutor has no title to prosecute — What constitutes — Lack of independence and impartiality could not amount to lack of title to prosecute — Criminal Procedure Act 51 of 1977, s 106(1)*(h)*.
Plea — Prosecutor has no title to prosecute — Removal of prosecutor — In adversarial criminal proceedings inevitable that prosecutors would be partisan, but method of removing prosecutor is by way of substantive application and not plea in terms of s 106(1)*(h)* of Criminal Procedure Act 51 of 1977.
Plea — Prosecutor has no title to prosecute — Meaning of 'title to prosecute' — No need to adopt strained wider meaning of word 'title' in s 106(1)(h) of Criminal Procedure Act 51 of 1977.
Plea — Prosecutor has no title to prosecute — Reliance by state on principle of issue estoppel — Policy considerations underlying principle clearly conveyed that no reason why issue estoppel, cautiously applied, should not apply across civil and criminal matters.

The two accused faced numerous serious charges in a trial in the High Court, to which they had pleaded not guilty. In addition, the first accused raised a plea in terms of s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA), in which he contended that the lead prosecutor of the prosecuting team, one Mr Downer, had no title to prosecute as contemplated in that section, and had to be removed as prosecutor. He further demanded that, in the event of it being found that Mr Downer lacked title to prosecute, he was entitled to an acquittal of all the charges against him in terms of s 106(4) of the CPA.
The founding affidavit supporting the special plea set out the evidence in respect of the grounds relied upon by the first accused, but did not contain any request for oral evidence to be adduced or that the special plea be dealt with by way of a trial. Nonetheless, his counsel advanced the argument that the special plea had to be determined by trial proceedings, as opposed to on the affidavits. This was sought, both as an extension of the argument that the special plea should be referred to oral evidence, and as part of an argument that the special plea could only, as a matter of law, be determined by way of a trial. It was only from the time when the replying affidavit to the special plea was filed that the first accused requested that oral evidence be received. This contention was pursued by his counsel from the bar at the hearing of the special plea. His counsel submitted, with reference to s 35(3)*(e)* of the Constitution, which provides that an accused was entitled to be present when being 'tried', and that 'tried' in s 108 of the CPA meant a trial with oral evidence, which would then also allow for the first accused's request that Mr Downer be available to be questioned generally on his past involvement in the first accused's prosecution, and other complaints raised by the first accused.

The court held that 'tried' did not denote only a trial with oral evidence, but included a legal adjudication of the special plea by any appropriate process the court might approve, with due cognisance of the accused's constitutional rights. In the present case the interests of justice clearly demanded that the special plea be dealt with as expeditiously as possible, as the charges went back to events which had occurred more than 15 years ago. An oral hearing was not required, not on the wording of s 106(1)*(h)*, s 108 of the CPA or the law generally. If any real disputes of fact on material issues were to arise on the affidavits, then those disputed factual issues, if properly identified, could be dealt with by an appropriate reference of the disputed issues only to oral evidence, or alternatively to trial. The parties were agreed that the adjudication of the special plea should proceed on the affidavits exchanged, and that was undoubtedly a correct position in law, having regard to the wide powers a court had in terms of s 173 of the Constitution to protect and regulate its own process, and to develop the common law, taking into account the interests of justice. (See [52] – [53] and [60].)

Counsel for the first accused submitted that s 106(4) of the CPA envisaged a range or continuum of instances where a plea of lack of title might succeed, and that whether an acquittal of the accused should indeed follow would require that evidence be led to justify such an order. It was submitted that the first accused required such an opportunity, as he believed that he should be entitled to an acquittal. The court held that the plain meaning of s 106(4) did not contemplate such a range of instances, or a court having a discretion, depending on the facts giving rise to the particular lack of title of a prosecutor, to either acquit an accused or not. On the plain wording of the section, if any plea, other than the plea that the court lacked

jurisdiction, succeeded, the accused would be 'entitled to demand that he either be acquitted or convicted'. That an accused, who had successfully established the jurisdictional requirement set by s 106(4), could demand, without any qualification, to be acquitted was a significant legal consequence which not only affected a proper interpretation of the section, but also, in context, affected the meaning to be attributed to the words 'title to prosecute' in s 106(1)*(h)* to prevent such an absurd result. (See [61] – [62].)

Despite the concession by the first accused that our courts had held that the reference to 'prosecutor' in s 106(1)*(h)* was not to the state, but to the person who acted as prosecutor, which was undoubtedly a correct concession of the law, there were numerous allegations in the first accused's affidavits that the state/National Prosecuting Authority (the NPA), as an entity, as opposed to Mr Downer (as natural person and prosecutor), had been disqualified from prosecuting him because of alleged political interference by others, or on the basis of some other complaint. Those complaints against officials of the NPA other than Mr Downer, assuming them to be established, were not grounds to which regard could be had under the rubric of the special plea raised in the matter, whether on a narrow or strict interpretation of 'title to prosecute'. Complaints raised against the state/NPA, which might have affected the first accused's trial rights, could at this stage before the commencement of the trial, at best, have entitled the first accused to a permanent stay of prosecution or some similar relief, but the possible infringement of fair-trial rights did not arise for consideration under the special plea. (See [73] and [77].)

In respect of the complaint by the first accused, that Mr Downer was not an independent and impartial prosecutor, it was incompatible with prosecutions by private and statutory prosecutors, by the very nature of those prosecutions. A lack of independence and impartiality could not amount to a lack of 'title to prosecute', otherwise every private and statutory prosecutor would lack the 'title to prosecute'.

The same principle applied to public prosecutors employed by the state. Section 106(1)*(h)* drew no distinction between public and other prosecutors. Hence, as a matter of consistent statutory interpretation, a lack of independence and impartiality would also not amount to a lack of title. The lack of 'title to prosecute' provided for, unqualified in s 106(1)*(h)*, could not, at the level of interpretation, mean a lack of independence and impartiality in respect of one type of prosecutor, that is, public prosecutors, but not others, that is, private prosecutors. The title to prosecute in the context of public prosecutors, at best, included their authority to prosecute, such as whether they had been properly appointed or were suitably qualified, or possibly whether they had the required authorisation in instances where an additional specific authority might be required to authorise the prosecutor to pursue a specific charge, such as charges of entrapment, which required authorisation in terms of s 252A(4) of the CPA, or prosecutions under the provisions of POCA, where specific authority was required in terms of s 2(4). It could never have been intended that, if one of the many prosecutors employed by the NPA might have some defect attached to their appointment as public prosecutor, but could be replaced by another prosecutor in the employ of the NPA who was properly appointed, or the prosecution continue with the remaining prosecutors only, such a 'defect' in the appointment of one would amount to a lack of title to prosecute on behalf of the other prosecutors, resulting in the

accused being entitled to demand in terms of s 106(4) that he be acquitted, no matter how serious the charges might be.
In adversarial criminal proceedings it was inevitable that prosecutors would be partisan. Their role in criminal prosecutions made it inevitable that they would be perceived to be biased. If an accused believed that the prosecutor assigned to their case would not exercise their powers, duties and functions in good faith, impartially, and without fear, favour or prejudice, or that the prosecutor was an essential witness in the case, then the accused could bring a substantive application to the court for an order that the prosecutor be removed and replaced. What the accused could not achieve, however, was to seek such removal by entering a special plea in terms of s 106(1)*(h)* of the CPA. Lack of title to prosecute was confined to instances of lack of standing, in the sense of a legally recognised interest, or lack of the required authority which a particular prosecutor required to entitle him or her to prosecute an accused. (See [112] and [114].)
In respect of an argument that the court should assign a wider meaning to the term 'title to prosecute', inasmuch as there was no obligation on all courts, in terms of s 39(2) of the Constitution, to 'promote the spirit, purport and objects of the Bill of Rights' when interpreting legislation like the CPA, there was no need to adopt a strained, wider meaning of the word 'title' to provide a remedy where adequate alternative remedies already existed. The argument for an extended meaning of the word 'title', with reference to the first accused's constitutional rights and protections, presupposed that he had no satisfactory alternative remedy in our law. (See [116].)
The court held further that the 'further alternative' basis contended for by the first accused would presumably be a separate substantive application for the recusal or removal of Mr Downer as one of the prosecutors. There was no such application before the court. The special plea in terms of s 106(1)*(h)* of the CPA was the only issue. By acknowledging that the matter had been certified as trial-ready, the parties acknowledged that there were no further applications to be brought before the trial was to commence. Mr Downer had been the lead prosecutor in the trial since 2009, if not before, a fact well known to all. The court would not easily have been disposed, after the matter had been certified as trial-ready, to allow any further adjournment for any further applications, whether for the removal of Mr Downer or otherwise, to be brought. Obviously the first accused's right to enter any particular plea, being part of the trial process, remained available to him when he would be required to plead, but then limited to the scope of the plea so entered. There was accordingly no room for any other form of process as a 'further alternative as an independent basis', as was contended for, being pursued at the present stage. (See [120], [126] and [129].)
Applying the uncontested evidence of the qualifications of Mr Downer and his experience, as well as his appointment and designation, the first accused had not established that he did not have title to prosecute, and the special plea in s 106(1)*(h)* of the CPA accordingly fell to be dismissed. (See [130] – [131].)

In the circumstances of the dismissal of the special plea, it was unnecessary to consider the provisions of s 106(4) and whether the first accused would be entitled to demand an acquittal, but in the event that the court was wrong in so holding, it endeavoured to deal with the arguments advanced by the first accused concerning complaints of alleged bias, lack of independence and objectivity. The court then proceeded to consider those complaints and commenced with the state's reliance on 'issue estoppel'. It held that the principle underlying issue estoppel, namely that it sought to give effect to the finality of judgment, is what was important. Subject to an

accused not being prejudiced, there was no reason why the principle relating to issue estoppel could not be applied to a criminal prosecution where the prior case which determined the issue was a civil case, subject to the application of the principle not resulting in an injustice to an accused.

The policy considerations underlying the principle of issue estoppel, namely to bring an end to litigation and to avoid the same issues being litigated with the potential of different judgments being given in respect of the same issue, clearly conveyed that there was no reason why issue estoppel, cautiously applied, should not apply across civil and criminal matters. The principle of issue estoppel assumed significance in the present matter, viewed against the background of various court judgments which had preceded the current trial.

In 2009 the Supreme Court of Appeal had already referred to the litigation having a 'long and troubled history and the law reports are replete with judgments dealing with the matter', and in 2017 the Supreme Court of Appeal again made similar remarks. The relief claimed in the special plea might be different to that sought previously in the other cases, but in many respects the relief claimed was fundamentally on the same grounds, or at least often on the same facts, which featured as issues in previous judgments. Not only were the issues disposed of, but they were decided in respect of the exact same facts now advanced, by courts whose judgments the court was bound to follow. Therefore, even if not truly instances of issue estoppel, if the reasoning which found application was similar to that previously decided by another court, then that reasoning had in any event to be adopted by the court in the present matter. (See [146], [148] and [156] – [157].)

After examining the evidence proffered by the first accused as regards his complaints against Mr Downer, the court held that the allegations of bias against him had largely been based on the fact that he had allegedly not been independent and objective. On a proper interpretation of s 106(1)*(h)* of the CPA, that did not deprive Mr Downer of the title to prosecute. In the alternative, and adopting a wider interpretation of the words 'title to prosecute', the court was still not persuaded that Mr Downer lacked the title to prosecute or should be removed as prosecutor. It had not been shown that the first accused's rights to a constitutionally fair trial had been impaired, or that there was a real possibility that his rights would be impaired. (See [286].) The special plea was dismissed, and the matter was directed to proceed to trial.

S v LN 2022 (1) SACR 662 (ECB)

Domestic violence — Protection order — Breach of — Arrest in terms of s 8(4) of Domestic Violence Act 116 of 1998 — Requirements — Violation needs to be serious and do damage to objectives of Act — In casu, insult uttered to person other than complainant herself and doubtful whether of such nature that would have constituted violation sufficient to justify arrest under section.

The accused was convicted on his plea of guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, of contravening s 17*(a)* of the Domestic Violence Act 116 of 1998, and was sentenced to 12 months' imprisonment of which six months were suspended for three years. The reviewing judge had doubts about the propriety of

the conviction, given that the record of the plea proceedings, as to what the accused was admitting to, and what conduct on his part he was alleged to have committed were at cross-purposes; and that he had appeared to have admitted to insulting the complainant, but evidently not to her face, and in circumstances where the insult was perhaps not of the kind sought to be prohibited by the relevant protection order. The breach of the protection order was described in the charge-sheet as an insult by the accused in calling his mother 'a witch' and 'by her private parts', yet his admission was confined to having said (evidently of and not to his mother) that she had a 'bad heart, a devil's heart'. According to him, this was said after he had already been arrested.
Held, that a careful perusal of the review record suggested that, although the accused begrudgingly conceded that the complainant would have been insulted by him saying the words which he admitted to having said, or felt hurt by what he said of her, it is not clear that he uttered the insult to the complainant herself, or that it was the kind of insult intended to be covered under the protection order. (See [12].)
Held, further, that it would be far-reaching to suggest that any insult concerning the accused's mother, uttered to someone else about her, would constitute a breach of the terms of the protection order to amount to an act of domestic violence as described in the Act. The terms of the order were very specific to the parties, and the acts sought to be contained by the protection order had to be of the kind that harmed, or might cause imminent harm to, the safety, health or wellbeing of the complainant within the contemplation of the meaning of an act of domestic violence. Section 8(4) of the Act confirmed that, what was required before an arrest for allegedly committing the offence referred to in s 17*(a)* was justified, was that there had to be reasonable grounds to suspect the complainant might suffer imminent harm as a result of the alleged breach by the respondent, and the violation had to be one that was serious and did damage to the object of the Act. (See [15] – [18].)
Held, further, that, whilst the court appreciated that acts of domestic violence were egregious and fell to be sentenced appropriately, the court was not satisfied on the admitted facts that it could be established that the accused committed a breach of clause 3.1 of the protection order, or that he had the necessary criminal intention to violate the terms thereof. The conviction and sentence had to be set aside and the matter referred back to the court a quo for proceedings to commence de novo, should prosecution wish to do so.

ALL SA LAW REPORTS JUNE 2022

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

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

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

The ARB decided a complaint lodged by Colgate in which Bliss Brands was accused of exploiting the advertising goodwill and imitating the packaging architecture of

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

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

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

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

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

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

The appeal was upheld.

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

Constitutional and Administrative Law – Review proceedings – Remedy – A court in review proceedings, whether under the principle of legality or the provisions of the Promotion of Administrative Justice Act 3 of 2000, has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances of the

case – Remedy must be fair to all those affected by it, and yet effectively vindicate the rights violated – Court's remedial discretion may only be interfered with on appeal if at odds with the law.

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

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

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

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

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

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

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

Director of Public Prosecutions, Free State v Mokati [2022] 2 All SA 646 (SCA)

Criminal Law and Procedure – Appeal by State against sentence imposed on count of rape – Court having discretion to impose sentence above the minimum prescribed sentence – Interference warranted on appeal where prescribed minimum sentence was too lenient in circumstances of the case.

Criminal Law and Procedure – Reservation of questions for appeal – State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact – Questions not properly reserved and leave to appeal erroneously granted where questions related to fact rather than law.

The respondent was found to have forcibly had sexual intercourse with a 21 year-old female, and taken her belongings. The victim was prescribed antibiotics and anti-retrovirals after she reported the rape, but died a few weeks later as a result of cerebral venous sinus thrombosis. The respondent was convicted of rape and robbery with aggravating circumstances. The Director of Public Prosecutions appealed against the sentence of 10 years' imprisonment imposed on the rape count. It also reserved certain questions of law in terms of section 319 of the Criminal Procedure Act 51 of 1977, in respect of the acquittal of the respondent on a count of murder and contended that a competent verdict of culpable homicide ought to have been returned. The respondent cross-appealed against his conviction and sentence in respect of the rape and robbery counts.

Held – By the majority in considering the appeal against conviction on the rape and robbery counts, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are taken by the appeal court to be correct and will only be disturbed if they are clearly wrong. The trial court's conviction of the respondent on the two counts was confirmed as correct and the respondent's cross-appeal failed.

The Court then turned to the appeal by the State on the questions of law reserved in terms of section 319 of the Criminal Procedure Act. The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Section 319(1) provides for three jurisdictional requirements to be satisfied. Only a question of law may be reserved; the question of law must arise on the trial in a superior court; and the reservation may be made by the court of its own motion or at the request of the prosecutor or the accused, in which event the court should state the question reserved and direct that it be entered in the record.

The trial court's conclusion that the State had failed to discharge the onus of proof was based upon a finding that the deceased's use of different medication could have independently caused clotting or worked against each other to cause her death. It reasoned that, based on the proven facts, the respondent could not have foreseen the chain of events that ultimately led to the deceased's death. That was not a conclusion of law. The remaining reserved questions relating to the evaluation of expert evidence and to the State's complaint that the trial court failed to consider its concession, and submission, on the proven facts, that the respondent was guilty of culpable homicide, not murder. Those were also not questions of law, and the trial court erroneously granted leave in that regard.

In the appeal against sentence, the State submitted that the 10-year prison sentence for rape was shockingly lenient and thus inappropriate. That was the prescribed minimum sentence in terms of section 51(2)(b) of the Criminal Law Amendment

Act 105 of 1997. The Court declined to increase the sentence based on the possibility of multiple counts of rape as that had not been raised in respect of conviction. However, the Court agreed with the State that the sentence was lenient. Explaining its discretion to impose sentence above the minimum prescribed one, the Court held that such sentence was warranted in this case. The sentence on the rape count was increased to 18 years' imprisonment. A cross-appeal by the respondent was dismissed.

In the minority judgment, the point of departure was the substituted sentence and the reasoning underpinning it.

LA Group (Pty) Ltd v Stable Brands (Pty) Ltd and another [2022] 2 All SA 678 (SCA)

Intellectual Property – Trademarks – Removal from register – In terms of section 10(2)(a) of the Trade Marks Act 194 of 1993, a trademark which is not capable of distinguishing within the meaning of section 9 is liable to be removed from the register – Grounds for removal of trademark from register includes a mark not capable of distinguishing; non-use for five years or longer; likelihood of causing deception or confusion.

The appellant ("LA Group") and first respondent ("Stable") were competitors in retail clothing and accessories The High Court's order for the removal of 46 of the appellant's trade mark registrations from the register of trade marks, in terms of sections 10(2)(a), (b) and (c), 10(13) and 27(1)(a) and (b) of the Trade Marks Act 194 of 1993, led to the present appeal. Stable had challenged LA Group's trade mark registrations on the basis that all the registrations were entries wrongly made in terms of section 24 of the Act. The court cancelled the registrations on various grounds, including that the marks were not capable of distinguishing; were descriptive and non-distinctive and had become customary in the *bona fide* and established practices of the trade; non-use for five years or longer; registration, without a genuine intention to use, coupled with non-use; and, the likelihood of confusion or deception arising from the manner in which the registrations had been used.

The trademarks consisted of the word POLO; pictorial devices of single polo players, each astride a pony engaged in play (the single polo player devices) and pictorial devices of two polo ponies, each with polo players astride them engaged in play (the double polo player devices).

Held – In terms of section 10(2)(a) of the Act, a trademark which is not capable of distinguishing within the meaning of section 9 is liable to be removed from the register. Where a trademark consists of words that are merely descriptive of goods or services in a particular class, that mark is not inherently capable of distinguishing the goods or services of a particular person in that class. Stable submitted that to the public, the word "polo" was incapable of fulfilling the function of a trademark, and in the mind of the consumer, "polo" was not exclusively associated with the appellant. The Court had regard to the prior use of the trademark, and found that the mark had been used continuously for a long time since its registration in 1976. The marks had become firmly established in South Africa and had been operating in the marketplace as indicators of origin for more than 40 years. The general public or a wide segment thereof, would identify goods bearing the POLO trademarks as originating from the appellant. It was thus established that the trademarks had in fact become distinctive

through their use and were not liable to be removed from the register. The High Court therefore also erred in finding that the POLO trademarks were not capable of distinguishing within the meaning of section 9 of the Act on the basis that the fashion industry did not consider the word “polo” as a badge of origin.

The appeal against removal in terms of section 27(1)(a) or (b) of the Act – relating to non-use for five years or longer and registration without a genuine intention to use succeeded in respect of some of the trademarks.

Section 10(13) provides that “a mark which, as a result of the manner in which it has been used, would be likely to cause deception or confusion”, is liable to be removed from the register. That led to Stable’s reference to LA Group’s use of a mark substantially similar to that of the international Ralph Lauren POLO brand. The High Court erred in its construction of section 10(13). It did not consider the appellant’s manner of use of its own trademarks. Instead, it compared the appellant’s trademarks to those of Ralph Lauren.

The majority judgment concluded that Stable had not established that 46 of the appellant’s trademarks were liable to be removed from the register.

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

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

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

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

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

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

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

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

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

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

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

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

In the first case considered by the court, Absa claimed payment in respect of loan agreements and an overdraft facility extended to the principal debtor. The defendants raised *in limine* defences that the summary judgment application was jurisdictionally defective, and that the plaintiff already had sufficient security as contemplated in Uniform Rule 32(3)(a), which warranted the defendants being afforded the opportunity to enter into the merits of the matter at trial. The court found on the first point that the plaintiff's affidavit did not exceed the permissible bounds contemplated in rule 32(2)(b). On the second point, the court found that the security already in place did not satisfy the requirements of rule 32(3)(a). Both preliminary points were dismissed. Regarding the merits, the court was not satisfied that the plaintiff's case was unimpeachable and that the defendants' defence was bogus or bad in law. The

defendants were found to have disclosed a *bona fide* defence to the action and the plaintiff was thus not entitled to summary judgment.

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

Breukel and another v Department of Home Affairs and another [2022] 2 All SA 787 (WCC)

Immigration – Denial of entry of foreigner into country – Existence of legal justification for permitting detained foreigner to enter country while she pursued an application in terms of section 8 of the Immigration Act 13 of 2002 to review the decision denying her entry – Court finding requirements for interim relief to have been met, allowing detained person to enter country until finalisation of review process.

The second applicant ("Ms Serrano") was a citizen of Venezuela who was in a permanent life partnership with a South African citizen ("Ms Breukel").

Ms Serrano travelled to South Africa in December 2021. She was denied entry by immigration officials at Cape Town International Airport because her passport contained an extension document used by the Venezuelan government to extend the validity of the passport. The applicants adduced evidence showing that the Venezuelan government has for several years not issued new passports to replace expired passports. Instead, in order to save costs, it renews passports by inserting an extension document into the expiring passport.

On being denied entry, Ms Serrano was detained in a holding facility pending her removal from the country by the airline (Ethiopian Airlines) on which she had flown in. After consulting with a lawyer, she lodged an application in terms of section 8 of the Immigration Act 13 of 2002 to review the decision denying her entry into the country. The applicants applied to have Ms Serrano released from custody, and for her to be allowed into South Africa pending the Minister's decision on her application. The court granted an interim order allowing Ms Serrano into South Africa to reside with Ms Breukel, while she waited for the decision. That led to the respondents launching a reconsideration application. In that application, they also raised various technical points including that the applicants did not comply with the provisions of section 35 of the General Law Amendment Act 62 of 1955 by not providing the respondents with at least 72 hours' notice of the proceedings to be instituted; and that Ethiopian Airlines was not joined as an interested party.

Held – While section 35 of the General Law Amendment Act is peremptory, a court is given the discretion to allow a lesser period of notice depending on the circumstances. Given the urgency found to have existed, the period of notice given to the respondents

was reasonable in this case. The non-joinder point was also dismissed as at the stage when the main application was launched, Ms Serrano was in the custody and under the control of the Department of Home Affairs.

In considering the merits, the court began by setting out the relevant provisions of the Immigration Act. The section directly applicable to Ms Serrano was section 35(10) which states, "The person in charge of the conveyance is responsible for the detention and removal of any person who was on the conveyance but is refused admission into the Republic". However, Ethiopian Airlines ceased being responsible for Ms Serrano when immigration officials removed her to consult with her attorney and then detained her in a holding facility. From then on, the Department was the entity responsible for her.

The main issue for determination was whether there was legal justification for permitting Ms Serrano to enter the country while she persisted with her review application. Setting out the requirements for interim relief, the court found that a case had been made out for Ms Serrano's release from the inadmissible facility and her entry into South Africa pending the finalisation of the review.

CS and another v Swanepoel and others [2022] 2 All SA 810 (WCC)

Personal Injury/Delict – Claim for damages for sexual assault perpetrated by teacher – Liability – Vicarious liability established by sufficiently close link between delictual act and business of employer – Teacher's liability flowing from having directly committed a delict, and Department of Education bearing liability for having negligently failed to vet teacher before appointing him.

The plaintiffs claimed damages arising from the alleged sexual assault of the second plaintiff (hereinafter referred to as the "plaintiff") by the first defendant some ten years before. The plaintiff was at the time a 12-year-old learner at the school where first defendant was acting principal, and her class teacher.

In a counter-claim, the first defendant claimed damages from the plaintiff, on the basis that she had wrongfully and maliciously set the law in motion by laying a false charge of rape against him.

Held – The plaintiff bore the onus of proving the alleged sexual assault on her by the first defendant, on a balance of probabilities. The Court found her to have amply discharged that onus. Her testimony was compelling and was corroborated in material respects by the evidence two independent witnesses. By contrast, the first defendant was an unimpressive witness. The court took issue with a disciplinary hearing at which the first defendant was exonerated. From an evidentiary point of view, the plaintiff's evidence as to what the first defendant had allegedly done to her was not controverted or refuted, and should have been accepted. However, from the reasons which she gave for her findings, the presiding officer did not appear to consider that the first defendant had failed to testify, and had thus failed to put up any evidence to refute the plaintiff's evidence. The Court pointed to various irregularities in the proceedings leading to a failure of justice. The first defendant's evidence was rejected, insofar as it was at odds with the evidence which was tendered by the plaintiff.

The Court found the plaintiff to have discharged the onus of proving the sexual assault, constituting a delictual act, by the first defendant. The first defendant was thus liable to her in delict for damages.

The liability of the remaining defendants was predicated on an alleged omission relating to the wrongful and negligent breach of a legal duty which allegedly rested on them, to protect the plaintiff from harm. Where harm is caused as a result of an omission, liability does not follow automatically, as *prima facie* an omission is not regarded as wrongful unless there was a legal duty on the person who caused the harm to have acted in a particular manner, instead of sitting back and omitting to do so. Whether such a duty existed in a particular case is an issue which must be determined judicially, on the basis of criteria which include public and legal policy, and constitutional norms. The State has a legal duty to protect and not to harm the children who are entrusted to its care on a daily basis, in public schools. In the context of the pleadings in this matter, that general duty includes the duty to protect (or to take reasonable steps to protect) children from exposure to sexual assault and molestation. The sexual assault committed by the first defendant was sufficiently closely linked to the educational business of his employer, and as such, fell within the ambit of vicarious liability. The Department was also found not to have vetted the first defendant before employing him. Had it followed its own protocols and done that, his criminal record, relating to sexual assault, would have been revealed. Its failure constituted negligence, as a result of which the second defendant was held liable with the first defendant for plaintiff's damages.

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

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

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

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

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

Held – The two issues requiring determination were whether the applicant should be granted condonation in terms of section 9 of the Promotion of Administrative Justice

Act 3 of 2000, and whether the applicant was entitled to the review of the HOD's failure and substitution of his decision.

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

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

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

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

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

Sand Grove Opportunities Master Fund Ltd and others v Distell Group Holdings Ltd and others [2022] 2 All SA 855 (WCC)

Corporate and Commercial – Company law – Approval of scheme of arrangement by shareholders – Application for leave in terms of section 115(3)(b) of the Companies Act 71 of 2008, to apply for review of shareholders' resolution – Only registered shareholders have voting rights for the purpose of any resolution required in terms of section 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve transaction – Holders of beneficial rights in shares registered in another party's name lacking standing to seek review.

The first respondent ("Distell") proposed a scheme of arrangement to its shareholders, entailing restructuring of its business. The eventual outcome of the scheme of arrangement was that Distell would delist and the second respondent ("Heineken") would hold a minimum of 65% of its issued share capital. The scheme required approval by the Takeover Regulation Panel established in terms of section 196 of the Companies Act 71 of 2008.

At a meeting convened to vote on the scheme, the scheme was approved by a majority of Distell shareholders. Section 115(3)(b) of the Act provides that a company may not proceed to implement a resolution without the approval of a court where any person who voted against the resolution obtains leave to apply to court for review of the transaction.

The applicants, who claimed to be the beneficial owners of 3,72% of the issued ordinary shares in Distell that were votable, sought leave in terms of section 115(3)(b) to apply for review of the shareholders' resolution accepting the scheme of arrangement. The applicants (referred to collectively as "Sand Grove") were investment funds. The respondents disputed Sand Grove's standing to bring the application, stating that only registered shareholders have voting rights for the purpose of any resolution required in terms of section 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve the transaction.

Held – As the applicants had beneficial ownership of the shares, but none of the funds was the registered holder of such shares, the first issue to be determined related to their standing to bring the proceedings in terms of section 115 of the Act. The Court referred to the principle of company law that a company concerns itself only with the registered holders of its shares, and agreed with the respondents that the Sand Grove funds, as holders of beneficial rights in shares registered in another party's name, were not persons entitled to exercise voting rights at the meeting. They therefore lacked standing to bring the application.

The problem regarding standing gave rise to an application by the nominee companies who were the registered holders of the shares, for leave to intervene in the proceedings as co-applicants. However, section 115(3)(b) prescribes a 10-business day time limit for the nominee companies to challenge the resolution. That period had elapsed before they lodged their applications for leave to intervene. The court held that it had no power to condone the non-compliance with the time limit, and the application for leave to intervene was dismissed.

Sand Grove also applied for leave to amend their notice of motion by the insertion of a claim for orders declaring that the meeting at which the resolution was adopted was not properly constituted and therefore invalid and void, and that the resolution purportedly adopted at it was accordingly also void. The court rejected the submission that that where different classes of securities were affected by a proposed scheme, separate meetings had to be convened of the holders of each class of security.

Even if the applicants did have standing, the court would not have found that they had made out a case for review based on their submissions.

The application for leave in terms of section 115(6) to apply for a review of the scheme of arrangement was refused.

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

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

The appellants sold their immovable property to the respondents in 2013. A year after the respondents moved into the house, cracks started developing in the structure. A claim lodged with the property insurer was rejected on the ground that the problem was an old and gradual one relating to active clay. The first respondent then employed the services of civil engineers who reported that the cause was clay in the soil under the foundation, and that the cracks had previously been patched up, but would recur as the underlying cause remained. The respondents sued the appellants for damages in the Magistrate's Court, which held the appellants held liable for fraudulent misrepresentation pertaining to latent defects in the property. The Court was satisfied that the respondents had proved on a balance of probabilities that the appellants were aware of the latent defects on the property and that they deliberately concealed the cracks by filling them with plaster and painting over them. That led to an appeal against those findings.

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

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

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

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

The appeal was dismissed by the majority of the court.

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

END-FOR NOW