LEGAL NOTES VOL 7/2022

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SA LAW REPORTS JULY 2022

SOUTH AFRICAN HUMAN RIGHTS COMMISSION OBO SOUTH AFRICAN JEWISH BOARD OF DEPUTIES v MASUKU AND ANOTHER 2022 (4) SA 1 (CC)

Equality legislation — Hate speech — Anti-Zionist statement — Statement, properly interpreted, based on prohibited ground of ethnicity (Jewishness) — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1).
Equality legislation — Hate speech — Determination of whether words hate speech — Approach to s 10(1)*(a) – (c)* — Objective test — Evidence as to context — Evidence as to impact — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1).
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First respondent (Mr Masuku), while representing second respondent (COSATU), made certain comments on a website and at a rally referencing inter alia 'Zionists', which in turn caused the South African Jewish Board of Deputies to complain to the applicant (the Human Rights Commission) that they were hate speech (see [3] – [7]). Concurring, the Commission instituted proceedings in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), and obtained a ruling that the remarks were indeed hate speech as proscribed by s 10(1) of the Act, that they were not protected by s 16 of the Constitution, and that Mr Masuku and COSATU had to apologise therefor to the Jewish Community (see [8], [27] – [29]).

Mr Masuku and Cosatu then appealed to the Supreme Court of Appeal, which set aside the Equality Court's order and replaced it with one dismissing the Commission's

[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!**

complaint (see [8]). In arriving at this conclusion, the court came at the matter by way of s 16 of the Constitution, rather than s 10(1) of the Act, and an examination of whether the utterances constituted hate speech under s 16(2) (see [30] – [32]). (The court disavowed reliance on s 10(1) on its understanding that the Commission had abandoned the s 10(1) point and that the section might be unconstitutional (see [30].) It reasoned that the dictionary distinguished Judaism and Zionism, that the statements implicated Zionism rather than Judaism, and as Zionism was neither something ethnic nor religious, the statements fell outside s 16(2), were accordingly not hate speech, and consequently protected by s 16(1) (see [31]).

The Commission applied for leave to appeal the Supreme Court of Appeal's judgment, and Mr Masuku and Cosatu sought leave to cross-appeal the Equality Court's costs order, which was that they pay the Commission's costs in that court (see [29], [47]).

Proceeding, the Constitutional Court turned first to an application by Mr Masuku and COSATU for Chief Justice Mogoeng's recusal. The facts grounding this were the hearing of the instant matter and later on the Chief Justice's participation in a webinar hosted by an Israeli newspaper, during which the Chief Justice professed his love of Israel (see [76], [78] – [79]).

Held, that viewed in their proper context, the statements did not prompt a reasonable apprehension of bias on the Chief Justice's part, and that the application should hence be dismissed (see [81], [91] – [92]). (For a survey of the test for recusal, see [63] – [69].)

The next issue was whether leave should be granted. *Held*, that it should: the court's jurisdiction was engaged (the matter implicated the interaction of ss 9, 10 and 16 of the Constitution, the interpretation of constitutionally mandated legislation, and the subsidiarity principle), and it was in the interests of justice to hear the case (it implicated the important issue of the bounds of free expression) (see [94] – [96]).

The next point was subsidiarity: had the Supreme Court of Appeal erred in employing s 16(2) of the Constitution rather than s 10(1) of the Equality Act (see [98]). *Held*, that it had (see [118]). The Act was promulgated to elaborate s 16, thus subsidiarity applied (see [112]); and the appeal court had erroneously presupposed that s 16(2) prohibited hate speech (see [99]). (It delineated what was not protected by s 16(1), leaving it to the legislature to proscribe or not proscribe what s 16(2) deemed unprotected (see [100]).)

Moving then to evaluation of the statements, the court noted that relevant issues had recently been clarified: s 10(1) was an objective test (see [122]); the section's subsections *(a)* – *(c)* were conjunctive (see [124]); and *(a)* was impermissibly vague, thence unconstitutional, and had been severed, pending legislative remediation (see [131] – [132]).

This raised how words were to be determined to be hate speech. This required a court to consider whether the words, heard in their proper context by a reasonable person, would lead that person to conclude that they were based on a prohibited ground and intended to incite harm or propagate hatred (see [144]). In this exercise the court could hear the evidence of witnesses on context relevant to its deciding whether the words or their subtext were hate speech, but given that the test was objective, the speaker and listener's understanding of the meaning of the words was irrelevant (see [145] – [146],

A caveat, though, was that testimony of a member of the targeted group on the impact of the statements was relevant to the determination of remedy (see [146]).

The matter thus resolved to whether the Equality Court had been correct to find that a reasonable person would regard Mr Masuku's remarks to be based on the prohibited

ground of religion (Judaism) and intended to incite harm and propagate hatred (see [153]).
To this end the Constitutional Court was required to evaluate the Equality Court's factual findings (who the attendees at the rally were, whether the words had an anti-Semitic innuendo and so on), as well as its legal finding described above (see [153]).
The first finding, namely the one about the first of Mr Masuku's statements (see [3]), was that it referenced ethnicity (Judaism). The court agreed with this conclusion and the Equality Court's analysis (see [156] – [157]). So too, with its finding that a reasonable reader would have taken Mr Masuku to have clearly intended to incite harm and propagate hatred (see [158]). Consequently the Equality Court's finding of s 10(1)'s contravention was unimpeachable (see [160]).
But the same could not be concluded about its analysis of the second, third and fourth statements (see [4] – [6]). Correctly viewed they did not implicate Jewish ethnicity or religion, so rendering the findings of contravention insupportable (see [166]). (For the Constitutional Court's reasoning, see [161] – [165].)
This then left the cross-appeal of the Equality Court's award of costs against Mr Masuku and COSATU. It had to be upheld as they had raised a constitutional defence (the statements were political speech) and consequently the standard rule in constitutional litigation between the state and a private party applied: each party was to bear their own costs (see [169]).
Ordered therefore that the Supreme Court of Appeal's order was set aside and substituted to the effect that the appeal against the Equality Court's order was dismissed; and the Equality Court's order was amended such that it declared Mr Masuku's first statement alone to be a contravention of s 10(1) and ordered Mr Masuku and COSATU to apologise therefor. (The full order is at [172].)

ADVERTISING REGULATORY BOARD NPC AND OTHERS v BLISS BRANDS (PTY) LTD 2022 (4) SA 57 (SCA)

Media — Advertising — Advertising Regulatory Board (ARB) — Complaints relating to advertising by non-members of ARB — Lawful for ARB to consider — ARB not unconsitutionally usurping judicial authority or denying access to court — ARB's members entitled to refuse to publish advertising as part of their right to freedom of expression — Constitution, s 16.
Practice — Judgments and orders — Courts should decide issues defined by parties — Court raising constitutionality of Advertsising Regulatory Board powers mero motu — Inappropriate.

The first appellant, the Advertising Regulatory Board NPC (the ARB), carries on business as an independent, self-regulatory body in the advertising industry. Its members are required to adhere to the Code of Advertising Practice (the Code). Section 55 of the Electronic Communications Act 36 of 2005 (ECA) provides that every electronic broadcaster must adhere to the Code as determined and administered by the ARB. Where an offending advertiser has ignored a reasonable request for co-operation, the ARB may issue an ad alert to its members, who may not carry the offending advertisement.

The second and third appellants, Colgate-Palmolive (Pty) Ltd and Colgate-Palmolive Company (Colgate), and the respondent, Bliss Brands (Pty) Ltd (Bliss Brands), were

competitors in the toiletries business. In December 2019 Colgate lodged a complaint with the ARB that Bliss Brands, in the packaging of its Securex soap, had breached the Code by exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. Although Bliss Brands was not a member of the ARB, it raised no objection to the ARB's jurisdiction and participated fully in its hearings, taking the matter all the way to the ARB's final appeal committee (the FAC), which found in favour of Colgate. (See [4].)

After the FAC dismissed its appeal, Bliss Brands successfully applied to the Gauteng Division of the High Court, Johannesburg (the High Court) to review and set aside the FAC's decision. The High Court had mero motu questioned the constitutionality of the ARB's powers and issued a directive that the parties submit argument on the constitutionality of those parts of the Code and the memorandum of incorporation (the MOI) which authorised the ARB to determine whether the packaging of a product constituted passing-off or breach of copyright. It then declared clause 3.3 of the ARB's MOI unconstitutional, void and unenforceable, because it permitted the ARB to decide complaints concerning advertisements of non-members. In this regard the High Court held inter alia that the ARB's processes infringed the right of non-members of access to court under s 34 of the Constitution and usurped judicial functions in various respects; and that the powers the ARB exercised in relation to the regulation of advertising by non-members was not sourced in law and thus unconstitutional.

The High Court also inter alia declared that the ARB had no jurisdiction over non-members in any circumstances and may not issue any rulings in relation to non-members or their advertising. And it made statements of principle, such as that the ARB was not empowered to determine breaches of the Code under the ECA. It also held that Bliss Brands' submission to the ARB's jurisdiction could not be said to constitute actual consent. (See [6], [8] and [14].)

The whole of clause 3.3 of the ARB's MOI was taken almost verbatim from the order in *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) (*Herbex*), which confirmed a settlement agreement that the ARB's predecessor, the Advertising Standards Authority (the ASA), had no jurisdiction over any person or entity who was not a member and may not — in the absence of a submission to its jurisdiction — require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it. The *Herbex* order however also confirmed that the ASA may consider and issue a ruling to its members (which was not binding on non-members) regarding any advertisement, regardless of by whom it is published, to determine, on behalf of its members, whether its members should accept any advertisement before it was published or should withdraw any advertisement if it had been published. The High Court considered that, except for the part of the order that 'the respondent [the ASA] has no jurisdiction over any person or entity who is not a member of the respondent', the rest of the *Herbex* order was ad personam in nature. (See [28] – [29].)

This case, the ARB's appeal to the Supreme Court Appeal, concerned the correctness of the High Court's order and statements of principle.

Held

The ARB's powers were sourced in law. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) expressly contemplated that a juristic entity other than an organ of state may take decisions constituting administrative action in terms of an 'empowering provision'. The ARB's MOI and Code constituted empowering provisions. The mere absence of a statutory source for these powers was therefore no barrier to the ARB validly exercising public functions. (See 16] – [17].)

A failure to raise any objection to jurisdiction and subsequent participation in proceedings was sufficient to demonstrate submission to jurisdiction. Bliss Brands unquestionably submitted to the jurisdiction of the ARB. Although the appeal could be disposed of solely on this basis, legal certainty required addressing the High Court's pronouncements on the constitutionality of clause 3.3 of the MOI, its declaration that the ARB may not issue rulings in relation to non-members or their advertising, and its statements of principle. (See [13] – [14].)

It was clear from s 55 of the ECA that all broadcast service licensees (whether members or non-members of the ARB) were obliged to comply with the Code as administered by the ARB. The order of the High Court prevented the ARB from performing this statutory duty in terms of s 55 of the ECA, by prohibiting the ARB from determining any complaint in respect of non-member advertising, even where that advertisement was broadcast by a broadcasting-service licensee. (See [20] – [23].)

The declaratory relief which this court granted in *Herbex* — the whole order — was plainly one in rem: it pronounced upon the limits and powers of the ASA in relation to every non-member advertiser, not only Herbex. The High Court's declaration that clause 3.3 of the MOI was unconstitutional, was contrary to the order made and precedent established in *Herbex.* The order in *Herbex* ought to have disposed of Bliss Brands' constitutional challenge. (See [32] and [34].)

The ARB's members were entitled to refuse to publish advertising as part of their right to freedom of expression in s 16 of the Constitution. Its power to consider complaints relating to advertisements by non-members for the benefit of its own members, advanced the right to freedom of association. The Constitutional Court has held that the right of association, 'enable[d] individuals to organise around particular issues of concern' and 'permit[ted] a group to collectively contest and ameliorate the structure of social power within its midst'". This was precisely what the members of the ARB did. They organised around the shared goal of promoting ethical standards in advertising, as reflected in the Code. The right to self-regulation included the right of associations to adopt rules and standards to regulate their conduct in their dealings with the outside world. And the right of freedom of association included the right to dissociate. Bliss Brands' right to dissociate did not give it an unfettered right to dictate to the ARB and its members how they should exercise their rights of association. (See [35] and [41] – [43], [46] and [48].)

The existence of an adjudicative administrative tribunal such as the ARB did not limit the right of access to courts — its decisions were subject to judicial control. There was no principle of law requiring an adjudicative administrative tribunal to adopt the same rules of evidence that apply in courts. The High Court overlooked the flexible requirements of procedural fairness under PAJA. The ARB and the courts were different fora with distinct powers. The ARB operated consensually and may only determine whether its Code has been breached. It did not exercise a judicial function when doing so. (See [50], [55] – [56] and [58] – [59].) In the result the appeal would be upheld.

ESKOM HOLDINGS SOC LTD v LEKWA RATEPAYERS ASSOCIATION NPC AND OTHERS AND A SIMILAR MATTER 2022 (4) SA 78 (SCA)

Electricity — Supply — Eskom — Prima facie right of municipality in default — Whether established for purposes of interim interdict directing Eskom to reverse its decision to reduce bulk supply to force municipality to pay up — Effect of Eskom's

failure to implement statutory dispute-resolution mechanisms — Eskom's appeal against interim interdict dismissed — Constitution, s 41; Intergovernmental Relations Framework Act 31 of 2005, ss 40 and 41.

When two dysfunctional municipalities in the Free State fell over R2 billion behind in their bulk electricity payments to Eskom, the utility decided, unilaterally, to reduce their supply to historically agreed 'Notified Maximum Demand' (NMD) levels, resulting in power cuts and extensive socioeconomic and environmental damage in the affected areas. Those levels were set long ago and were insufficient for the municipalities' present requirements.
The respondents, two ratepayers' associations representing electricity consumers in the affected areas, obtained interim interdicts in the High Court directing Eskom to restore, pending the final adjudication of the respondents' review applications, its former bulk electricity supply to the municipalities. Eskom and the respondents were ad idem that the present matter was one of those exceptional cases in which the interests of justice demanded that the interim interdicts granted by the High Court should be appealable. By mid-2020 the municipalities' arrear indebtedness to Eskom amounted, respectively, to over R1,2 billion and over R1,1 billion. The residents, on the other hand, were all prepaying consumers who bought their electricity from the municipalities. The principal issue before the Supreme Court of Appeal was whether the High Court was correct in finding that the residents had established a prima facie right to the interim interdictory relief it had granted.
Since Eskom and the municipalities were state organs, their relationship fell within the purview of s 41 of the Constitution, which sets out the principles of co-operative government and intergovernmental relations, and ss 40 and 41 of the Intergovernmental Relations Framework Act 31 of 2005 (IRFA), which regulate the conduct of intergovernmental relations.
Held
Eskom permitted the municipalities for years to exceed their contractually agreed NMD supply levels and decided to reduce the bulk electricity supply to them to those levels. Despite Eskom's protestations to the contrary, it was clear at the level of a prima facie right required for an interim interdict that it implemented those decisions in order (i) to collect the outstanding debt owed to it by the municipalities; and (ii) to reduce and manage the rate of escalation of the debts in the event of it agreeing to increase the NMD supply levels to meet their present additional electricity demands. (See [28].)
The disputes between Eskom and the municipalities were intergovernmental disputes as contemplated by s 41 of the Constitution and ss 40 and 41 of IRFA. As such, they triggered the constitutionally and statutorily mandated dispute-resolution mechanism for organs of state prescribed in IRFA, and all efforts to resolve those disputes should have been exhausted under ch 4 of IRFA. Eskom was not, therefore, permitted to unilaterally reduce the bulk electricity supply to the municipalities to their historic contractually agreed NMD levels without it and the municipalities, in collaboration with the other state role players, first making every reasonable effort to settle the intergovernmental disputes. Had the dispute-resolution mechanism been followed, it may well have resulted in the intervention of both the provincial and national levels of government, without which the municipalities were unlikely to turn their fortunes around. Instead, Eskom's decisions rendered the municipalities unable to fulfil their constitutional obligations to their citizenry, resulting in environmental and socioeconomic catastrophe. (See [29] – [31].)

The residents had therefore established a prima facie right, at the level required for interim relief, that Eskom's decisions and their implementation were reviewable and that they had prospects of success in having them set aside on the basis that they undermined constitutional and statutory imperatives. The requirements for the granting of interim interdictory relief having been established, the High Court correctly granted the interim interdicts in all the circumstances of each case. (See [32].) Eskom's appeals dismissed with costs.

JP MARKETS SA (PTY) LTD v FINANCIAL SECTOR CONDUCT AUTHORITY 2022 (4) SA 94 (SCA)

Company — Winding-up — Of solvent company by court order — Application for winding-up by Financial Sector Conduct Authority — Not requirement that preceding investigation had to be concluded — Whether winding-up just and equitable — Requiring consideration of whether objects of FMA would be achieved and of availability of alternative remedies — Companies Act 71 of 2008, ss 81(1)*(c)*(ii); Financial Markets Act 19 of 2012, ss 96*(a)*(i).
Financial institution — Financial Sector Conduct Authority — Application for winding-up of after supervisory on-site inspection or investigation — Not requirement that preceding investigation had to be concluded — Whether winding-up just and equitable — Requiring consideration of whether objects of FMA would be achieved and of availability of alternative remedies — Companies Act 71 of 2008, ss 81(1)*(c)*(ii); Financial Markets Act 19 of 2012, ss 96*(a)*(i).

In terms of ss 96*(a)*(i) of the Financial Markets Act 19 of 2012 (the FMA), the Financial Sector Conduct Authority (the Authority) may, after a supervisory on-site inspection or an investigation has been conducted, and in order to achieve the objects of the FMA, apply for the winding-up of a respondent under s 81 of the Companies Act, as if it were a creditor of the respondent.
Section 81(1)*(c)*(ii) of the Companies Act 71 of 2008 provides that '(a) court may order a solvent company to be wound up if one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that . . . it is otherwise just and equitable for the company to be wound up'.
This case concerned an appeal to the Supreme Court of Appeal against a High Court order placing the appellant, JP Markets SA (Pty) Ltd (JP Markets), under final liquidation at the instance of the Authority. JP Markets had been transacting in over-the-counter (OTC) derivatives when regulations introduced the requirement of an OTC derivative provider (ODP) licence during February 2018. After a number of interactions between JP Markets and the Authority regarding JP Markets' ODP licence application, it was finally submitted to the Authority on 21 August 2020. This was after the Authority provisionally suspended JP Markets' financial service provider licence in June 2020, after investigation of complaints related to OTC derivative transactions. The application for its liquidation was launched on an urgent basis on 7 July 2020, while the ODP licence application was pending.
At issue were whether the Authority met the statutory jurisdictional requirements for the exercise of the power to institute an application for liquidation; and if so, whether it made out a proper case for the winding-up of JP Markets. JP Markets contended that the jurisdictional requirement that 'an investigation has been conducted' had not been met because the investigation had not yet been finalised (see [24]); the Authority

that information gathered from an ongoing investigation informed the liquidation, including that it operated as an ODP without a licence. (See [10] – [18].)

Held

Textually and contextually a formal or final result in respect of an investigation was not a requirement. The court a quo correctly held that the Authority was authorised by s 96 of the FMA to apply for the liquidation. (See [25] – [29].)

In the circumstances of this case s 81(1)*(c)*(ii) of the Companies Act was applicable. Thus, the Authority had to show that it was just and equitable for JP Markets to be wound up. Importantly, a winding-up under s 96 must be aimed at achieving the objects of the FMA. The determination of whether it would be just and equitable to order a winding-up under s 96 was therefore inextricably linked to the achievement of the objects of the FMA — to serve the public interest. Consequently, a consideration of alternative remedies must also take a central place in the enquiry. (See [30], [32].)

The evidence did not establish that the business of JP Markets constituted a systemic risk to its clients or to financial markets generally. It followed that the only remaining relevant factor was that JP Markets had been doing business as an ODP without a licence. The decisive consideration was that JP Markets had applied for an ODP licence. At the time of the hearing of the appeal, that application was still pending before the Authority. The liquidation of JP Markets prior to the determination of its ODP licence application would not achieve the objects of the FMA. Should an ODP licence ultimately be refused, the Authority would have no difficulty in obtaining an order prohibiting JP Markets from continuing to do business as an ODP. In the result, the winding-up of JP Markets was neither just nor equitable. The court a quo erred in finding that it was just and equitable to liquidate JP Markets, and the appeal would therefore succeed.

MAGISTRATES COMMISSION AND OTHERS v LAWRENCE 2022 (4) SA 107 (SCA)

Magistrate — Appointment — Procedure — Listed criteria — All to be considered in respect of each candidate and no one criterion to be prioritised — Upfront disqualification of candidate on account of race without consideration of other listed criteria.

Magistrate — Appointment — Procedure — Quorum — Whether s 5(4) giving person presiding at meeting power to proceed, notwithstanding absence of quorum — Magistrates Act 90 of 1993, ss 5(2) and 5(4).

First appellant, the Magistrates Commission, had advertised permanent positions of magistrate in three districts in the Free State, Botshabelo, Petrusburg and Bloemfontein, and respondent, Mr Lawrence, an acting magistrate, had applied to the Commission for appointment to one of these. However, the Appointments Committee of the Commission, represented by its chairperson, the second appellant, did not place Mr Lawrence on the short list for any of the three (see [1]). This caused Mr Lawrence to approach the Free State Division of the High Court where he obtained a declarator that the Committee's short-listing proceedings were unlawful and unconstitutional; and an order that the Committee's recommendations of appointees, and the Minister of Justice's appointment thereof, be reviewed and set aside. This in turn caused the Commission, the chairperson, the Minister and the Acting Chief Magistrate of the

magisterial cluster concerned, to appeal, with the High Court's leave, to the Supreme Court of Appeal (see [2]).

There, the first issue was the Committee's quoracy during the Bloemfontein proceedings, where s 5(2) of the Magistrates Act 90 of 1993 requires that a majority of members of the Commission shall constitute a quorum for a meeting of the Commission (the provision applies equally to a committee of the Commission — s 6(7)), and where here the Appointments Committee comprised 10 members, of which only five were present at the Bloemfontein short-listing proceedings (see [4] – [5]). Alive to this, the chairperson considered that s 5(4) gave him the power to proceed, notwithstanding the deficit. The provision provides that '(t)he person presiding at a meeting of the Commission may regulate the proceedings and procedure thereat, including the quorum for a decision of the Commission'. *Held*, though, by the SCA (per Potterill AJA) that the requirements of s 5(2) had to be fulfilled before the power in s 5(4) could be exercised (see [6]).

The second issue was the propriety of the Committee's deliberations in respect of Mr Lawrence. Salient governing provisions in this regard were s 174(2) of the Constitution ('(t)he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed') (see [13]); reg 3 of the Regulations for Judicial Officers in Lower Courts (requisites for appointment as a magistrate are that a candidate be appropriately qualified, fit and proper and a South African citizen) (see [15]); reg 5 ((i)n the appointment of . . . a magistrate,

only the qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify for the relevant appointment . . . shall be taken into account') (see [15]); criteria for short-listing under the appointments procedure approved by the Committee ('racial and gender demographics', 'relevant experience', 'qualifications' and 'appropriate managerial experience') (see [17]); and a directive under the appointments procedure that the criteria were not to be 'applied in any fixed order or sequence of preference or prioritisation' (see [18]).

Mr Lawrence met all of the requirements of regs 3 and 5, as well as the requirements specified in the advertisement for the positions, but beyond his name being mentioned three times during the short-listing deliberations, he was simply excluded from consideration for any of the posts, on account of his being white (see [23]).

Held, that the Committee's rigidly exclusionary approach to white candidates had impermissibly fettered its discretion and had also run against the appointment procedure's scheme which was to the effect that all the listed criteria be considered in respect of any one candidate and that no one criterion be prioritised over the others (see [24]). This approach also diverged from case law to the effect that race (here whiteness) could not be used as an upfront disqualifying measure in the process of appointing magistrates (see [33]).

Accordingly the short-listing proceedings had been correctly reviewed and set aside by the High Court and the appeal against its order would be dismissed (see [35]).

Molemela JA agreed that the Bloemfontein proceedings were null owing to the Committee's inquoracy (see [36]).

As for the Petrusburg process, it had not involved a rigid exclusion of white candidates and so was not reviewable on this ground, but it was reviewable for its irrational non-inclusion of women on the short list — a bypass of the constitutional imperative of gender transformation (see [69] – [73]).

However, the Botshabelo-post deliberations passed muster: the record suggested that the short-listing criteria had been appropriately balanced and that a 'rigid exclusion' on the basis of whiteness had not been applied (see [60] – [61], [64] – [65]). It was also

erroneous to colour assessment of the process with comments during the Petrusburg proceeding that evidenced the rigid approach there. This as the deliberations for each post had been conducted separately (see [56] – [57]).
Molemela JA would accordingly have dismissed the appeal in respect of the Bloemfontein and Petrusburg proceedings, but have upheld same in respect of Botshabelo (see [73] – [75]).
Ponnan JA, responding to Molemela JA's judgment, noted it took a piecemeal approach to the evidence (see [81]); relied on statistics of some antiquity not contained in the papers, which were directed at a point not arising in the appeal (see [48] and [81]); and appeared to misconstrue the nature of the case (it was not a challenge to the regulations or the appointments procedure, nor a claim of gender discrimination) (see [83]).
It had, moreover, found that 'lip service was paid to the constitutional imperative of gender transformation', but had not reflected the consequence of this finding that the entire short-listing process would be indefensible (see [85]).
It had also erred in considering each short-listing deliberation to be an 'hermetically sealed' enquiry, where the record suggested that each post's consideration was part of a unitary proceeding (see [86]).
The record furthermore conveyed that the rigid exclusionary approach based on race pervaded the proceedings in respect of each position in the cluster, including that of Botshabelo (see [90] – [91]).
Ponnan JA further noted that the applicants' reliance on s 174(2) of the Constitution for the exclusion could not be grounded in the section's text: unlike s 174(1), it did not set out prerequisites for appointment (see [102]).

BABA AND OTHERS v CLICKS GROUP LTD AND ANOTHER 2022 (4) SA 141 (WCC)

Equality legislation — Discrimination — Race — Injunction against discrimination did not encompass merely hurtful communication — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, ss 7 and 12.
Equality legislation — Discrimination — Race — Prohibition of dissemination and publication of information that unfairly discriminates — Requirement to show clear intention to unfairly discriminate — Subjective views of applicants immaterial — Objective test to be applied — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 12.

In September 2020 a post appeared on social media comprising four images, each of which depicted a different woman. Two were of Black persons of African descent, and two were of White persons. The words accompanying the images of the Black women were respectively 'Dry and damaged hair'; and 'frizzy and dull hair'. The words accompanying the images of the White women were respectively 'fine and flat hair' and 'normal hair'. The words and images were cropped from an advertisement that had appeared on the commercial page of Clicks Retailers' website. The ad was supplied by Unilever SA and advertised their *TRESemmé* brand of hair products. The ad itself had displayed six images of different women, each of which was meant to provide a visual indicator of a particular different hair type, and provided details of the types of *TRESemmé* products best suited to the different hair types. The consequences of the posting were accusations of racism against Clicks and Unilever, nationwide protests, and calls for boycotts against *TRESemmé* products and Clicks

retail outlets. The adverts were swiftly removed, and apologies were made by the CEO of Clicks Group Ltd (CGL) and Unilever SA. Nevertheless, the applicants — Black women of African descent — in the present matter brought an application, in terms of s 20(1) of the Promotion of Equality and Prevention of Discrimination Act (the Equality Act), against CGL, as first respondent, and Unilever SA, as second respondent. They argued that the advertisement propounded the racial inferiority of Black women, in portraying Black women's hair as 'frizzy and dull', and 'dry and damaged', and that this was accordingly in contravention of the injunction against unfair discrimination against any person on the ground of race as per s 7 of the Equality Act. They also argued that the advert could reasonably be understood as demonstrating a clear intention to unfairly discriminate against Black persons, and it was accordingly also in contravention of the prohibition against the dissemination and publication of information that unfairly discriminated as per s 12 of the Equality Act. The applicants also submitted that the advert directly breached ss 9 and 10 of the Constitution. The applicants sought an order declaring the creation and/or publication of the advertisement to be offensive, unlawful, racist and demeaning to Black females, and in breach of the above provisions.

CGL and Unilever opposed the relief sought. CGL argued that it had been cited in error, having no interest in the matter: it was a non-trading listed entity which was the ultimate holding company for the various subsidiary companies making up the Clicks group; the party that should have been cited was the subsidiary Clicks Retailers, that operated Clicks pharmacies and retail stores throughout the country, and that actually owned and controlled the website on which the advert appeared. CGL otherwise argued that the applicants had failed to make out a case in their papers for the relief they sought. For its part, Unilever argued that the public outcry was caused not by the advert, but rather the cropped images that had appeared on social media, for which it could not be held responsible. Unilever argued that the advert itself, when viewed in the form it was published, and objectively with regard to its intentions, did not give rise to a breach of the law, including the Equality Act and the Constitution: it drew attention to the fact that the advert was in fact commissioned as part of a wider marketing campaign aimed at promoting diversity and ensuring that its products catered to the haircare needs of all women, including Black women, and that, when the furore arose, it immediately tendered an apology and undertook to implement remedial steps. There was never an intent to be offensive or hurtful to Black women. Unilever, however, added that communication could not amount to 'unfair discrimination' merely because it caused hurt or was offensive; this would be unconstitutional.

Held, that the relief sought claiming a breach of the Constitution had to be rejected: the Equality Act was enacted to give effect to s 9 of the Constitution and, by virtue of the principle of subsidiarity, a litigant could not circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right (see [41] and [42]).

Held, further, that the point in limine raised by CGL, disputing that it was the correct party cited, fell to be dismissed: the applicants had shown that CGL had a direct and material interest to be cited in proceedings (see [53]).

Held, that it was the cropped images that appeared on social media that had actually caused the public outcry, and not the original advertisement. For this, however, CGL and Unilever could not be held responsible. (See [58].)

Held, nevertheless, moving on to the lawfulness of the original advertisement by Unilever, that the applicants, in alleging that the advertisement contravened s 7 of the Equality Act, had failed to establish that it amounted to 'discrimination' for the purposes

of the Act: they had failed to set out facts which proved that the impugned advertisement directly or indirectly imposed any burdens on them or saddled them with any obligations or disadvantages; nor did they prove that benefits, opportunities or advantages were withheld from them because they were Black. All they could advance was that the advertisement was offensive and hurtful. In this regard, the principle that applied in the context of hate speech — that the prohibition of merely hurtful communication would be an overly extensive and impermissible infringement of freedom of expression — was equally applicable to instances where the alleged infringement was against the equality provisions (see [69] and [70]).
Held, further, that the impugned advertisement could not reasonably be construed as demonstrating a clear intention to unfairly discriminate against Black people. In these respects, the subjective views of the applicants were immaterial, and an objective test had to be applied (see [71]). And an objective, dispassionate and contextual assessment of the impugned advertisement did not support the applicants' contentions that the advertisement was commissioned intentionally with the object to belittle, hurt or mock Black women. (See [72] – [75].) Application accordingly dismissed (see [77]).

BODY CORPORATE OF OVERBEEK BUILDING, CAPE TOWN v INDEPENDENT OUTDOOR MEDIA (PTY) LTD AND OTHERS 2022 (4) SA 167 (WCC)

Constitutional law — Legislation — Validity — National Building Regulations and Building Standards Act 103 of 1977, s 29(8) — Section requiring local authority to seek authorisation of Minister before promulgating bylaw relating to erection of building, failing which bylaw void — Violation of municipalities' independent and exclusive legislative authority to make bylaws in building regulation matters — Breach of constitutionally enshrined mutual-respect and non-encroachment clauses — Doctrine of separation of powers violated — Provisions declared to be constitutionally invalid.
Local authority — Buildings — Erection of — Bylaws relating to — Requirement that local authority seek authorisation of Minister before promulgating any bylaw relating to erection of building, failing which bylaw void — Violation of municipalities' independent and exclusive legislative authority to make bylaws in building regulation matters — Breach of constitutionally enshrined mutual-respect and non-encroachment clauses — Doctrine of separation of powers violated — Provisions of Act setting out requirement declared to be constitutionally invalid — National Building Regulations and Building Standards Act 103 of 1977, s 29(8).

The present matter concerned the constitutionality of s 29(8) of the National Building Regulations and Building Standards Act 103 of 1977. That subsection provided, in para *(a)* thereof, that a 'local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister for approval' and in para *(b)* that, should such regulation or bylaw be promulgated without such approval, it would be void. The second respondent — Independent Outdoor Media (Pty) Ltd (Outdoor) — had sought to rely on the above section in answer to two applications brought against it in the Western Cape High Court for the removal of two outdoor signage advertisements it had placed on the facades of Overbeek Building in Long Street in Cape Town. The claimants in those applications (which were consolidated into one hearing), the applicant — the Body Corporate of Overbeek Building — and the second respondent — the City of Cape Town (the City) — argued that the authorisations that had been granted by the City to Outdoor to advertise on

the spaces in question had long since lapsed and that Outdoor's continued use of them stood in contravention of the City's relevant bylaws relating to the erection of buildings. Outdoor, in a counter-application, sought an order declaring such laws void on the ground that, contrary to the requirements of s 29(8) of the Act, the City had not sought the necessary approval before promulgating them. The City responded by launching a direct challenge against s 29(8) of the Act, seeking an order declaring it to be unconstitutional, invalid and of no force and effect, which challenge formed the focus of the court's attention. Neither Outdoor nor Overbeek took issue with the City on this score (see [11]). Nor, in principle, did the third respondent — the Minister of Trade, Industry and Competition — but took the view that a declaration of constitutional invalidity was wholly unnecessary on the facts of the present case (see [11]).

The High Court noted that the Act came into being at a time when municipalities were subordinate to provincial and national authorities, and exercised only delegated powers, such that all municipal bylaws were, in essence, subordinate legislation. With the coming into effect of the Constitution, legislative authority of the local sphere of government now vested in municipalities, clothing them with original lawmaking powers. (See [15] and [18] – [19].) In this connection the court noted, in terms of the Constitution, municipalities had independent and exclusive legislative authority to make bylaws in respect of matters over which they had the right to administer, which included building regulations. (See [16] – [17], [20], [27] – [29] and [33].)

The court held that the impugned section, by obliging the City to obtain ministerial approval for any bylaw it wished to make relating to the erection of buildings —

- curtailed the City's ability to manage its own affairs and to exercise its powers and perform its functions (see [24], [25] and [30]);
- violated the independent and exclusive legislative authority of the City (see [20] and [21]);
- violated those provisions of the Constitution requiring all spheres of government and all organs of state to respect the constitutional status, institutions, powers and functions of government in the other spheres (see [22]);
- desecrated those provisions of the Constitution demanding lawmakers and the executive to exercise their powers and perform their functions in a manner that did not encroach upon the geographical, functional or institutional integrity of government in another sphere (see [23]); and
- breached the doctrine of the separation of powers (see [31] – [33]).

The court accordingly held that the impugned section was unconstitutional, and that it was obliged by the provisions of s 172(1)*(a)* to declare it to be so (see [35] – [36] and [59]). (The court rejected arguments raised by the third respondent that such a course was unnecessary, ie by interpreting the section such that it did not apply to billboards or advertising, or that it could be read down (see [34] – [42]).) The court rejected the counter-application, finding that such challenge had not been meaningfully engaged with by the first respondent (see [43]), and found that the advertising structures and signs erected on the Overbeek Building were not approved by any applicable municipal bylaw, and were accordingly unlawful, and had to be removed (see [44] – [56] and [59]).

CELL C (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2022 (4) SA 183 (GP)

Revenue — Customs and excise — Tariff determination — Statutory appeal to High Court — Effect on court's review jurisdiction — Wide ambit of appeal rendering review

of tariff determination unnecessary — Court's review jurisdiction ousted by wide appeal — Customs and Excise Act 91 of 1964, s 47(9)*(e)*.

Section 47(9)*(e)* the Customs and Excise Act 91 of 1964 (the CEA) provides that '(a)n appeal against any [tariff] determination shall lie to the division of the High Court of South Africa having jurisdiction'.
In its main application Cell C sought to appeal a tariff determination as provided for in s 47(9)*(e)* of the CEA, and also its review, setting-aside and variation retrospectively. In this application Cell C sought an order in terms of rule 30A to compel the respondent (Sars/the Commissioner) to dispatch a record iro the tariff determination sought to be reviewed under Uniform Rule 53.
At issue was whether s 47(9)*(e)* confined a taxpayer challenging a tariff determination to the wide appeal remedy it provided, thereby precluding the taxpayer from instituting review proceedings. If so, then rule 53 would not apply and there would no basis upon which to compel Sars to produce a record.
Held
A wide appeal by its very nature provided an applicant with proper access to justice as the wide appeal would also encompass grounds of review and would call for a total rehearing which was not confined in any sense. (See [27].)
On a proper interpretation of the CEA the court retained review jurisdiction in certain circumstances, but due to the ambit of a wide appeal, the need for a review fell away when such an appeal was available; availing oneself thereof excluded the possibility of a review. (See [33] and [36].)
It would accordingly be declared that the court did not have review jurisdiction to review the respondent's tariff determination in the light of the wide appeal afforded to the applicant in s 47(9)*(e)* of the CEA; and application in terms of rule 30A to compel would accordingly be dismissed. (See [40].)

DE WET NO v BARKHUIZEN AND OTHERS 2022 (4) SA 197 (ECG)

Curator — Curator bonis — Powers — May, in anticipation of proceedings to be instituted on behalf of de cujus, validly depose to founding affidavit before issuance of letters of curatorship — Doing so not contrary to Administration of Estates Act 66 of 1965, s 71(1) — Appeal against contrary finding by single judge upheld.

The High Court appointed the appellant, Mr De Wet, curator bonis over the property of one C, who had been declared incapable of managing his own affairs. After his appointment, but before the Master had issued him with letters of curatorship (the letters), Mr De Wet decided to apply to set aside C's 2013 sale of the family farm to his niece, the first respondent, Ms Barkhuizen. In anticipation of receiving the letters, Mr De Wet prepared the application and attested to the founding affidavit. Mr De Wet's letters of curatorship were issued three days later and the application made the day after that. At the hearing it was argued on behalf of Ms Barkhuizen that the application lacked foundation because the founding affidavit was void by virtue of s 71(1) of the Administration of Estates Act 66 of 1965, which stated that appointees shall not 'take care of or administer any property belonging to the . . . person concerned, or carry on any business or undertaking of the . . . person, unless he is authorised to do so under letters of . . . curatorship'.
The judge in the court a quo agreed with Ms Barkhuizen that any act performed by Mr De Wet in his capacity as curator before the issue of the letters of curatorship was void

under s 71(1), and dismissed the application on that ground only. In an appeal to a full bench —

Held

While it was true that any act performed contrary to s 71(1) was a nullity, its purpose was to protect the interests of the *de cujus* by preventing conduct by the curator which might have some legal consequence for his or her estate. The preparation and attestation of the founding affidavit, which was no more than a preparatory step taken in anticipation of the later commencement of the application, had no legal consequence and did not place C's property at risk. Any other interpretation would lead to an unbusinesslike result and undermine the purpose of s 71(1). (See [10] – [11].) Nor could the respondents' argument that Mr De Wet had, by deposing to the affidavit, started the application in his capacity as curator, be sustained. The preparation of evidential material could not be equated with the commencement of proceedings. Accordingly, Mr De Wet did not contravene the provisions of s 71(1) of the Act by deposing to the affidavit on 29 June 2018 and the affidavit was admissible as evidence in the application. (See [12].)

FIRM-O-SEAL CC v WYNAND PRINSLOO & VAN EEDEN INC AND ANOTHER 2022 (4) SA 205 (ML)

Company — Business rescue — Effect on directors — Must continue to exercise functions, but subject to authority and instructions of business rescue practitioner — Unauthorised conduct void ab initio and unratifiable — Summons issued by director without practitioner's approval void and cannot subsequently be ratified by practitioner — Companies Act 71 of 2008, s 137(2).

Section 137(2) of the Companies Act 71 of 2008 stipulates that, during business rescue proceedings, company directors continue to exercise their functions but subject to the authority and instructions of the business rescue practitioner. Conduct performed without the knowledge of the practitioner is void ab initio and cannot subsequently be ratified by the practitioner. (See [7], [14] – [15].)

In the present case the directors of the plaintiff, a company under business rescue, issued summons commencing the present action on the instructions of its directors without the approval, or even knowledge, of the business rescue practitioner. The practitioner, having first indicated that he intended to withdraw the action, subsequently signed a power of attorney purportedly authorising the plaintiff to proceed and ratifying any steps already taken in furtherance of the action. The court, applying the abovementioned principles, found that the action by the directors in instructing the plaintiff's attorney to issue summons was void for not having been approved by the practitioner, and that their decision was incapable of being ratified ex post facto. The court accordingly upheld the defendants' special plea challenging the plaintiff's locus standi. (See [16] – [17].)

GORE NO AND ANOTHER v WARD AND ANOTHER 2022 (4) SA 213 (WCC)

Banker — Fraudulent misrepresentation inducing deposit — P, acting as agent of company, fraudulently inducing L to make deposit into company's bank account — Company obtaining effective right against banker to funds — Becoming company's 'property' in wide sense of word, even though stolen — If company, acting through P, makes contractual payment to third party, such payment effective and bank not entitled

to reverse credit — Bank not liable to L but payment constituting voidable disposition as intended in Insolvency Act 24 of 1936, s 26.
Company — Contracts — Authority — Actual authority — Actual authority, such as that possessed by sole director, existing independently of perceptions of third party — To be distinguished from apparent or ostensible authority, when representation by company crucial.
Company — Directors and officers — Directing mind doctrine — Ambit — Not shielding company in contractual setting where normal rules of agency applicable — Sole director of company, having fraudulently procured payment into company's bank account, causing money to be paid out to third party, who received it in context of contract between it and company — Payment constituting disposition by company — Can be clawed back by liquidators if not for value — Insolvency Act 24 of 1936, s 26.
Company — Winding-up — Unlawful alienations and preferences — Voidable disposition — Disposition without value — Payment out of stolen funds in company's bank account — Exercise, whether lawful or not, of company's power of disposal over funds in its account constituting 'disposition' for purposes of Insolvency Act — Conferring no benefits on company but adversely affecting its ability to reimburse victim or pay other creditors — Constituting voidable disposition — Insolvency Act 24 of 1936, s 2 sv 'disposition', s 26; Companies Act 61 of 1973, s 340.

This case involved a claw-back under s 26 of the Insolvency Act 24 of 1936. The applicants, the joint liquidators of a company called Brandstock Exchange (Pty) Ltd (Brandstock), applied for the setting-aside, under s 26 (read with s 340 of the Companies Act 61 of 1973), of payments of R250 000 made to each of the respondents, alternatively for a declaration that the payments were made sine causa. The payments were made by means of transfers from funds held to the credit of Brandstock's bank account into the respondents' bank accounts. The applicants also sought orders directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of s 26 or, alternatively, on the grounds of their alleged unjust enrichment at Brandstock's expense.
The respondents opposed the application on the ground that the payments were made not by Brandstock but by Mr Philp, its sole shareholder and director, using funds he stole by false pretences from one Mr Louw, a business acquaintance. The respondents argue that the funds used to make the payments did not become 'the property' of Brandstock but that Philp had merely used Brandstock's banking account as a conduit for the purpose of fraudulently receiving and disposing of the money that he, not Brandstock, had stolen from Louw. In other words, the respondents denied that Brandstock made 'dispositions' to them within the meaning of the word in s 26. They also denied that they were enriched by the payments.
For their part, the applicants argued that Louw had dealt with Brandstock, a separate juristic entity, and not Philp in his personal capacity. Since Philp's conduct was attributable to Brandstock, a binding contract arose between it and Louw.
To counter this argument, the respondents relied on the 'directing mind' doctrine for their contention that Philp had been on a frolic of his own. Under the directing mind doctrine, the conduct of the directing mind of a company can only be attributed to the company if the conduct was within the field of operation the company had assigned to him or her, was not totally a fraud on the company and was partly for the benefit of the company (see [31]). The respondents argued that since Philp's conduct was as much a fraud on Brandstock as it was on Louw and was not for the benefit of Brandstock, his actions in obtaining and disposing of the money could not be attributed to

Brandstock. They also argued that the funds stolen from Louw could not have become Brandstock's property by virtue of their nature as stolen property.
In deciding whether to sanction the claw-back, the court dealt with the following matter: (i) whether Philp's conduct had bound Brandstock to a contract with Louw so that Brandstock was accountable to Louw for the money stolen by Philp; (ii) the applicability, in the circumstances, of the directing mind doctrine; (iii) whether funds became Brandstock's property in the light of their nature as stolen property; and (iv) whether the payments made by Brandstock were 'dispositions' by Brandstock within the meaning of the term in the Insolvency Act.
Held
As to (i): Since a company had no mind of its own, it could be bound only by a person representing it. That person's authority could be actual or ostensible, in which case a representation by the company was essential. (See [25].) If a transaction was one of a nature that the fraudster was authorised to enter into on the company's behalf, the company was bound by it, notwithstanding that the fraud may have redounded to its prejudice as much as to that of the deceived third party. Philp, as Brandstock's sole director, was its authorised agent with virtually plenipotentiary powers. This authority was actual, not apparent or ostensible. Therefore, Brandstock was accountable to Louw for the money stolen by Philp. (See [28] – [30].)
As to (ii): The applicability of the directing mind doctrine was context-specific and had to be applied flexibly and pragmatically, when appropriate, depending on the facts of the case and the nature of the issue in question. There was no reason to resort to it to displace the normal rules of the law of agency in a situation where they were applicable and available to determine a company's liability *in a contractual context*. Here, there was a contractual nexus between the victim of the fraud, Louw, and Brandstock, and the law of agency applied. (See [33].)
As to (iii): The respondents' argument that Philp's theft of the funds had prevented them from becoming Brandstock's property erroneously equated electronically transferred funds with corporeal goods. There was a contractual context to Louw's payment to Brandstock. This differed materially from the facts in the cases relied on by the respondents, where the recipients did not receive the stolen funds in a contractual context. Because Louw intended to pay Brandstock in terms of his contract with Brandstock, Brandstock had obtained an effective right, as against the bank, to the money. The funds thus became Brandstock's 'property' in the wide sense contemplated by s 2 of the Insolvency Act. The subsequent payments to the respondents were effective, having been made not by Philp in his personal capacity but by the bank on behalf of Brandstock. In summary, the dealings between Louw and Philp resulted in a contract between Louw and Brandstock; Louw's payments were made in terms of that contract; Brandstock received the funds when Louw performed under the contract; and Brandstock (via its agent Philp) stole them from Louw when it made the payments to the third parties. (See [35], [40] – [43], [48] – [50].)
As to (iv): Brandstock had the power of disposal of the funds standing to the credit of its bank account. Once it was exercised, whether lawfully or not, a 'disposition', as (widely) defined in s 2 of the Insolvency Act, was made by Brandstock. While Brandstock did not derive any benefit from the payments, they adversely affected its ability to reimburse Louw or pay its other creditors. It was therefore a disposition without value for the purposes of s 26 of the Insolvency Act. (See [53] – [55].) Application upheld. (In view of its finding on s 26, the court found it unnecessary to deal with the enrichment claim.)

The court accordingly set aside the disputed payments under s 26 and ordered the respondents to pay the sums in question to the applicants, together with interest *a tempore morae* (see [58]).

MINTAILS SOUTH AFRICA (PTY) LTD v MINTAILS MINING SA (PTY) LTD AND OTHERS 2022 (4) SA 238 (GJ)

Company — Business rescue — Reinstitution after final liquidation order — Application by controlling shareholder and major creditor for reinstitution of business rescue on ground that liquidation at stalemate and business rescue would offer better deal for creditors and shareholders — Not for applicant to choose preferred method of winding down business of company — Not entitled to business rescue order merely because dissatisfied with conduct of liquidators — No objective evidence submitted of how better return for all creditors would be achieved — Application refused and counter-application to allow for extension of liquidators' powers to sell company assets granted — Companies Act 71 of 2008, s 128(1)*(b)* and s 128(1)*(h)*.
Company — Winding-up — Liquidator — Provisional liquidator — Powers — Extension by court — Power to sell company assets after final liquidation order granted — Companies Act 61 of 1973, s 386(5).

The present application, launched under s 131 of the Companies Act 71 of 2008 (the Act), was for an order returning a company in liquidation (the first respondent, 'the company') to business rescue. The applicant was an 'affected party' as envisaged in s 128(1)*(a)* of the Act, being both the company's controlling shareholder (96%) and major creditor (R1,3 billion). The company, represented by its provisional liquidators, filed a counter-application for an extension of the powers of the provisional liquidators as envisaged in s 386(5) of the Companies Act 61 of 1973 (the 1973 Act) * in order to secure the sale of the company's remaining assets (shares and claims on loan account held in one of its subsidiaries).
The company — which mined gold-bearing tailings — had been in business rescue between 2015 and 2018. But in 2018 the business rescue practitioner, unable to resolve a dispute about a large environmental rehabilitation liability the company owed the Department of Mineral Resources (DMR), found that there was no reasonable prospect of rescue. A final liquidation order was granted in September 2018.
By the time of the present application, the company had been in final liquidation for more than three years. Its movable assets consisted of shares and claims on loan account in its subsidiaries, but the liquidators' powers were severely curtailed by statutory constraints on their ability to realise them. At the same time, the subsidiaries' own properties were being menaced by criminal elements (known as the 'Zama Zamas'). The need for the liquidators to obtain an extension of their statutory powers to sell these assets became urgent when they received an offer for their purchase from Pan African Resources plc (Pan African). And Pan African's alleged willingness to assume the company's R400 million liability to the DMR intensified the urgency. But the Master's four-month delay in granting the application for extension resulted in further erosion in the value of the company's movable assets, thanks to the ongoing depredations of the Zama Zamas.
The deponent to the applicant's papers, one Moolman, was a director of both the applicant and the company (before its liquidation). He contended on behalf of the applicant that business rescue was appropriate because the liquidation was at a 'stalemate', with the provisional liquidators being unable to wind up the affairs of the

company due, inter alia, to statutory limitations on their powers and their alleged maladministration, delay and ineptitude. The creditors would be in a better position in business rescue because the winding-down process would be quicker. The business rescue practitioners would have access to finance provided by the applicant and would be better equipped to deal with the Pan African deal and the complexities of the company's structure, operations and assets than the liquidators. Defending their conduct, the liquidators stated that they had worked themselves ragged in a challenging liquidation to try and preserve value and a suitable return for the general body of creditors under trying circumstances.

Under s 128*(h)* of the Act, 'rescuing' a company entails achieving either of the goals set out in the definition of business rescue in s 128*(b)* of the Act. The primary goal was to facilitate the continued existence of the company and its recovery to a state of solvency. If this was not possible, the secondary goal was to ensure a higher return for creditors or shareholders than they would otherwise receive under liquidation. By the time the application was heard, it was not in dispute that the primary goal was no longer achievable. Instead, the applicant pinned its hopes on getting a better deal for the company's creditors and shareholders by means of the successful completion of the Pan African deal. ‡ According to precedent, an applicant was required to make out its case for business rescue on either ground on a cogent evidential foundation, which the opposing parties ‡ contended was lacking in the present case.

The court refused the application for conversion to business rescue on, inter alia, the following grounds (see [38] – [39], [41] – [47], [50] – [53]).

- It was not for the applicant to choose its preferred method of winding down the affairs of the company. Moolman's opinions or reservations about the liquidators' ability was not a proper reason for taking the company out of liquidation, particularly since any savings on the costs of the liquidation process would be subsumed by new costs incurred in the business rescue scenario.
- The applicant's promise to assist only in a business rescue scenario and only on its own terms and in pursuit of its own financial interests was a half-baked one that offered only cold comfort.
- The liquidators had done their best to preserve value and negotiate the disposal of assets in a way that would optimise proceeds, as evidenced by the Pan African transaction. The delays were due to the tardiness of the Master and statutory restraints on their powers.
- A conversion to business rescue would mean that the liquidators and service providers who had worked for years without remuneration would become concurrent instead of preferent creditors, and, due to the size of the applicant's claim, receive a small or illusory dividend.
- No objective evidence was tendered in support of the applicant's argument that *all* creditors would receive a better dividend under business rescue.
- It was not clear how a liquidator would be less successful in realising a proper market value for the sale of company property than a business rescue practitioner, particularly where a fair market value for company property had already been determined by the Pan African transaction.
- Uncertainties over pending court cases militated against business rescue, particularly over the company's R400 million environmental rehabilitation liability to the DMR. Litigation could also follow in respect of the Black Hawk claim in respect of security services.
- The potential open-endedness of business rescue proceedings.

- Liquidators had statutory powers to enquire into irregularities that business rescue practitioners lacked.
- Business rescue practitioners would have to come to terms with a process that had been ongoing for years in order to do no more than what the liquidators were already doing.
- It was not possible to determine whether there was a reasonable prospect that the general body of creditors would receive an enhanced dividend under business rescue.
- The inference that the applicant was seeking, through the mechanism of business rescue, to improve its own position by depriving the liquidators of compensation for fees and administration costs.

The court granted the counter-application on the following grounds (see [57] – [59]):

- It was common cause that the company had to be wound down and its remaining assets sold. Without obtaining authorisation for an extension of their powers to enable a sale of the remaining company assets the liquidators would be hamstrung.
- Funds obtained from the sale of certain available assets would inure to the benefit of all creditors, including the applicant.

MUNSAMY AND ANOTHER v ASTRON ENERGY (PTY) LTD AND OTHERS 2022 (4) SA 267 (GJ)

Company — Winding-up — Liquidator — Appointment of liquidators and provisional liquidators — High Court order directing master to appoint final liquidators nominated by creditors — Master only person authorised to do so — No High Court judge so authorised, or to make any recommendations to master in respect of such appointments — High Court order erroneously sought and granted in absence of applicants affected thereby, and also invalid, as court had no power to grant such order — Whether necessary to declare order invalid and set it aside — Companies Act 61 of 1973, s 367.

Section 367 of the Companies Act 61 of 1973 provides that '(f)or the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided'. In *Ex parte Master of the High Court of South Africa (North Gauteng)* 2011 (5) (SA) 311 (GNP)) (*Ex parte Master*) it was confirmed that the master was the only person authorised to appoint liquidators and provisional liquidators of companies and close corporations in liquidation or provisional liquidation; and that no judge of the High Court of South Africa had authority or jurisdiction to affect any appointment of any person to any of the positions referred to, nor to make any recommendations to the master in respect of any appointment to any of these positions. (See [32].)

In this case Astron Energy (Pty) Ltd (Astron) and the Standard Bank of South Africa Ltd sought and obtained a High Court order directing the the master to appoint the persons nominated at a creditors' meeting of Castle Crest Properties 16 (Pty) Ltd (Castle Crest), a company which had been placed in final liquidation, as its final liquidators. Dr Munsamy and his wife, who were not cited in the application for this order, here sought rescission of the order under Uniform Rule 42(1)*(a)*, as having been 'erroneously sought or erroneously granted in the absence of any party affected thereby'.

At issue were the validity of the High Court's order; and if invalid whether it could simply be ignored or if it was necessary for an order declaring it a nullity and setting it aside.

In a separate application the Munsamys also sought to review and have set aside the master's decision to appoint the final liquidators, made after the order directing her to do so. They were also the respondents in an application, brought by the so-appointed final liquidator, for their eviction from property owned by Castle Crest.

Held

It was clear from *Ex parte Master* that a judge may not make any recommendations to the master in respect of any appointment of provisional and final liquidators, and therefore that the order was erroneously sought and erroneously granted, and also invalid, as the court had no power to grant it. (See [36] and [44].)

A court order was presumed to be valid and correct until it was set aside. This position is distinguishable from an order granted by a court which did not have jurisdiction to grant such order, which was a nullity that a later court may refuse to enforce without the need for a formal setting-aside by a court of equal standing. While no order of invalidity was necessary, in view of the other applications which were pending — in particular the review application — to ensure certainty, the court would issue a declaration of the order's pre-existing invalidity and set it aside (See [47], [55] and [58] – [59].)

NORTJE v ROAD ACCIDENT FUND 2022 (4) SA 287 (KZD)

Damages — Bodily injuries — Claim for general damages — Transmissibility — Instituted by executor of deceased estate — Situation distinguished from one where death occurring after institution of claim but before litis contestatio reached — Development of common law to allow transmission refused on grounds that (i) legislative intervention more appropriate route; and (ii) executor failed to adduce sufficient evidence in support of such development.

The sole issue for decision was the transmissibility, to his estate, of one RN's general damages claim against the Road Accident Fund. RN was injured in a motor vehicle accident in November 2011, as a result of which he allegedly suffered pain, shock and discomfort, loss of amenities of life and permanent disfigurement. After RN's subsequent death, the plaintiff instituted a claim, inter alia, for general damages against the Road Accident Fund, as executor of RN's estate.

The common-law principle was that non-patrimonial claims such as those for general damages did not survive the death of the injured party. The cut-off was litis contestatio. In other words, the claim was transmissible if the action had been commenced before the death of the injured party and had reached the stage of litis contestatio (see [7] – [11).

Counsel for the plaintiff argued, however, that South African law had shifted from this approach as a result of the judgment in *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ), which held that, where the plaintiff in a claim for general damages had *died after the institution of his or her claim but before litis contestatio*, the common law should be developed to allow for the transmission of general damages to the deceased's estate.

The present court distinguished *Nkala*, pointing out that in the present case the deceased had died *before the institution of the claim* (see [17], [53]). It refused plaintiff's request to further develop the common law to allow transmission in such cases, on the grounds that (i) legislative intervention was the more appropriate route (see [47] – [48]); and (ii) the plaintiff had in any event not placed sufficient evidence before the court to provide sufficient factual support for the requested development of the common law (see [34] – [35]).

POTTAS v PLATH 2022 (4) SA 301 (GJ)

Harassment — Order — Ex parte application under Protection from Harassment Act (PHA) — Consideration of application and issuing of interim protection order — Appeal against dismissal of application without determining return date — Whether court may dismiss ex parte application for protection order against harassment without application having been considered on return date — Protection from Harassment Act 17 of 2011, ss 3(2) and 3(4).

Mr Pottas, an attorney, applied ex parte under s 2(1) of the Protection from Harassment Act 17 of 2011 (the PHA) to the Magistrate's Court for the District of Randburg, for a protection order against the respondent, one Mr Plath, whom he alleged continually harassed him with daily phone calls. The presiding magistrate raised a query, asking Mr Pottas to explain why he could not 'resolve the matter by simply blocking [Mr Plath's] number'. Mr Pottas' reply did not answer the query but instead contended that the query was a misdirection, inter alia, because the PHA specifically provided that a court may not refuse to issue an interim order premised on the fact that other legal remedies for a victim existed (see [5]). The magistrate then dismissed the application — without determining a return date — on the basis that Mr Pottas refused to comply with the query.

Held

The magistrate erred by dismissing the application without it having been considered on a return date. The Act did not provide that a court may dismiss an ex parte application for a protection order against harassment without it first having been considered on a return date. Quite the contrary, ss 3(3)*(c)* and 3(4) of the PHA provided that the return date must be determined irrespective of whether an interim protection order was issued against the respondent in terms of s 3(2) of the Act, or whether the process provided for in s 3(4) of the Act was followed. The purpose of a return date was clear: first, in terms of s 3(3)*(c)*, its purpose was to provide the respondent with an opportunity to show cause why the interim protection order, where granted, should not be made final; secondly, if the process provided for in s 3(4) of the Act was followed, the purpose of a return date, where an interim order was not granted, was to provide the respondent with an opportunity to show cause why a protection order should not be issued. The appeal would accordingly be upheld. (See [8] – [9] and [13].)

RC v HC 2022 (4) SA 308 (GJ)

Children — Guardianship — Non-parent — Assignment of guardianship to non-parent where child already has suitable guardian — Need for applicant to show non-suitability of existing guardian — Children's Act 38 of 2005, ss 23 and 24.

In an application before the Johannesburg High Court, the applicant sought rights of contact and care in respect of the respondent's 4-year-old son, BC, in terms of s 23 of the Children's Act 38 of 2005, and joint guardianship over the child, in terms of s 24 of the Act. The present judgment dealt with part A of the application, in which the applicant sought an order that the report of a clinical psychologist be obtained to determine whether it was in the interests of BC that care, contact and guardianship be granted to him, and that he be awarded interim contact pending the determination of part B. The court determined that the true judicial task facing it in part A was not simply

to consider whether it was in the interests of BC to permit the assessment process — as the applicant had submitted — but rather to consider whether the interests of BC were served by allowing the applicant to embark on an opposed litigation process in the first place.

The facts, briefly, were the following. The applicant had met the respondent in 2017, through a dating website, at which time the respondent was pregnant with BC. They started a romantic relationship, and, in December 2018, when BC was 1 year old, the applicant asked the respondent to live with him. Through the course of the parties' relationship, the applicant played a role in raising BC and the respondent's other child, DC, who was 11 years old. The applicant formed a particularly close bond with BC. The parties' relationship, however, terminated in around June 2021 when the respondent left the applicant's home. After this, the respondent had initially allowed the applicant contact with the children, but subsequently arrived at the view that it would be in the children's best interests to stop all contact. The applicant was distraught by this, claiming that he could not imagine life without the presence of BC. He expressed concern that the separation from BC would cause irreparable harm to their relationship, as well as damage BC's psyche. The applicant consequently brought the present application. The respondent opposed both parts A and B thereof, on the bases that the applicant lacked locus standi and that, in any event, the relief in both parts was not in the interests of BC, or DC.

Held, that the depth of the 'parental' connection which had been established was not, without more, enough to afford an applicant the necessary locus standi. Put differently, it did not follow, as the applicant had sought to suggest, that merely because there was a loving relationship between a person and a child which had parental hallmarks, such person automatically had the necessary interest contemplated in ss 23 and 24 of the Act. (See [60].)

Held, further, that it was implicit in ss 23 and 24, particularly the latter, that a child was not necessarily benefited by more than one person having parental rights in respect of that child. It may 'take a village to raise a child' but this did not mean that parental rights should be universally enjoyed and easily obtained. Such rights were, by their very nature, not randomly acquired. They were seriously obtained and exercised under the letter of the law. (See [62].)

Held, further, that because of his deep love for BC and the intimate part he had played in his upbringing thus far, the applicant had acquired an inflated sense of his entitlement to legal rights under the Act. This was presumptuous. The applicant had not established that he was a person with the necessary interest to seek the relief that he did in respect of contact and care. (See [63].)

Held, as to the applicant's locus standi to apply for guardianship, s 24(3) required that the applicant had to submit reasons as to why the child's existing guardian was not suitable. If this were not done, *as was the case here,* this was fatal to the application. The non-suitability of the existing guardian was a jurisdictional fact needed for the court to entertain the application. This was because, on a purposive interpretation, the provisions of s 24(3) meant that, if the child had an available and capable guardian, there was no reason to appoint another. (See [68].) Within the architecture of the Act relating to the affording of rights to non-parents, there was pervasive recognition that to needlessly invite dissent by increasing the number of people who have legally enforceable rights in relation to a child, should be avoided in the interests of the child. (See [69].)

Held, in sum, that, if the child was properly cared for by a primary caregiver — such as a natural mother — there would need to be compelling motivation as to why another

person should be accorded legal rights to the child; and, in the case of an application for guardianship, if the child already had a guardian who could not be shown by the applicant to be unsatisfactory, the application could not succeed. (See [70].)
Held, accordingly, that the applicant had failed to establish locus standi (see [71] and [77]). In any event, the applicant had failed to make out a case on the merits as far as care and contact rights were concerned. (See [71] and [73] – [76].) * In stopping contact between the applicant and BC, the respondent had acted as a sensible mother and in the best interest of BC (see [78]). There was no need for the application to go further, and it had to be dismissed. (See [78] – [81].)

SA CRIMINAL LAW REPORTS JULY 2022

DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE v MOKATI 2022 (2) SACR 1 (SCA)
Appeal — By Director of Public Prosecutions — Against too lenient sentence by High Court — State not permitted to seek reversal of findings having bearing on conviction without having sought leave to appeal against conviction through reservation of point of law — Even if leave to appeal granted against sentence generally, that not extending to issues falling within ambit of conviction.
Sentence — Prescribed minimum sentence — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Imposition of sentence higher than prescribed minimum — Court entitled on appeal to increase severity of sentence in appropriate circumstances — In casu, accused convicted of rape and previous conviction suggesting propensity to violence — Crime meticulously planned and committed three days after being released on parole — Sentence of 10 years' imprisonment shockingly inappropriate, and replaced with sentence of 18 years' imprisonment.

The respondent was convicted in the High Court of rape and robbery with aggravating circumstances, for which he was sentenced to 10 and 15 years' imprisonment, respectively. He was acquitted on a count of murder. It was ordered that five years of the rape sentence would be served concurrently with the sentence for robbery. The Director of Public Prosecutions appealed against the sentence imposed on the respondent for rape. It also reserved certain questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA), in respect of the acquittal of the respondent on the count of murder, contending that the 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. The trial court found that he had entered an attorney's office after working hours, found the deceased complainant at her workplace, raped her in various positions, including anally, and had then taken her belongings, namely a cellphone, a laptop computer, a tablet computer and accessories. It further found that the rape was a single continuous act which fell within the purview of s 51(2)*(b)* of the Criminal Law Amendment Act 105 of 1997 (the CLAA). No substantial and compelling circumstances were found warranting deviation from the prescribed minimum sentences. The court also found that the deceased had been on a contraceptive pill for a year prior to the incident, and after the rape she was prescribed other drugs to which she did not respond well and experienced severe nausea which resulted in dehydration. The doctors who initially treated her added further medication which worsened her condition, and she later visited a district hospital where a doctor prescribed a different ARV regimen. Her condition worsened

until she died 15 days after the rape. The state contended that the respondent should be held responsible for her death because, had he not raped her, she would not have had to take the ARV.

In respect of the questions of law reserved by the state, the court, per Phatshoane AJ (Mabindla-Boqwana JA and Unterhalter AJA concurring), held that the questions were not questions of law and there was a deficient factual basis underpinning the supposed points of law. The stated questions were, in truth, questions of fact, and the trial court had erroneously granted leave in this regard. The state's appeal on this ground therefore had to fail. (See [21].)

In respect of the respondent's cross-appeal against the conviction on the rape and robbery counts, the court held that the trial court had been correct in convicting the respondent on those two counts (See [9].)

In respect of the appeal and cross-appeal against sentence, the chief ground of appeal raised by the state was that the trial court had erred in finding that the deceased was only raped once and had not been raped anally. Based on the trial court's conclusion that the rape was 'one continuous act in different positions' it found the respondent guilty on only one count. The state's ground of appeal that there had been multiple acts of rape was, however, not competently placed before the court for re-evaluation. Its contentions on this score had a bearing on the respondent's conviction and no appeal by the state lay against that part of the judgment. It was impermissible for the state, on an appeal against the sentence, to seek a reversal of the trial court's finding on issues having a bearing on the conviction without having sought leave to appeal against the conviction through a reservation of a point of law on them. Even though the trial court granted the state leave to appeal against the sentence generally, that did not extend such leave to issues which fell within the ambit of the respondent's conviction. Therefore, it was not open to the court to re-evaluate whether there had been multiple acts of rape in the present case, and to hold otherwise would lead to manifest prejudice to the respondent. (See [26] – [28].)

The complete disregard of anal penetration by the trial court did not accurately reflect the recorded evidence, which was lamentable, given that this would be an aggravating issue. Non-consensual anal penetration of women and young girls constitutes a form of violence against them, equal in intensity and impact to non-consensual vaginal penetration, but the court was bound by the findings made by the trial court on this point. (See [32].)

Held, further, that rape was undoubtedly a serious offence which invaded the dignity, sexual autonomy and privacy of its victims. The respondent had graduated into being a menace to society and committed the offences three days following his release on parole. He had a previous conviction for assault with intent to do grievous bodily harm, which suggested that he had a propensity to violence. The High Court found that the respondent had meticulously planned his offence and the overwhelming expert evidence adduced provided an adequate measure of the deleterious effects that the offence had upon the deceased, and had evoked ongoing severe psychological and physical distress on the once industrious and perfectly healthy 21-year-old woman until her death. This signified the gravity of the offence, which ought to have been accorded sufficient weight by the trial court (See [34] – [37].)

Held, further, that the fact that the law prescribes minimum sentences did not prevent the court, in appropriate circumstances, from imposing a more severe sentence. The legislature had deliberately left it to the courts to decide whether the circumstances of any particular case called for a departure from the prescribed

sentence in view of the obvious injustice implicit in an obligation to impose only the prescribed sentence in any given circumstances. If the trial court had imposed the minimum sentence in terms of the CLAA, an appellate court might still determine whether the minimum prescribed sentence was disturbingly inappropriate, and accordingly determine the appropriate sentence where the minimum sentence imposed was grossly disproportionate. In the present case, the minimum sentence imposed was disturbingly inappropriate and markedly out of kilter with the sentence the court would have imposed. A sentence of 18 years' imprisonment would best serve all the objectives of punishment. (See [44], [46] – [47] and [53].)
In a minority judgment, per Makgoka JA (Kgoele AJA concurring), the court disagreed with the substituted sentence, and after considering a sample of cases held that a sentence of 18 years' imprisonment was totally disproportionate and therefore not constitutionally compliant. Comparatively, it was also far heavier than the sentences imposed in more aggravating circumstances. Furthermore, there was no juridical basis to interfere with the sentence imposed by the trial court. (See [92] – [93].)

MINISTER OF POLICE AND ANOTHER v HOOGENDOORN 2022 (2) SACR 36 (GP)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Validity of — Investigating officer acting on instruction in police docket by prosecutor that accused could be arrested for fraud and that same should be effected — Investigating officer at that stage not yet having formed suspicion regarding accused — Prosecutor not peace officer and accordingly could not have formed suspicion that would form basis of lawful arrest — Arrest not justified.

The respondent was arrested and charged with fraud. She was detained on 4 November 2010 and held until she was released on bail on 10 November 2010. The charge against her was withdrawn on 19 November 2010. The arrest was based on an allegation that certain deposits had been paid into her bank account as part of a fraud perpetrated by the respondent's husband. The investigating officer acted on an instruction in the police docket made by a prosecutor as follows:

'I have read all the relevant documents and I am of the opinion that [the respondent] can be arrested for fraud. Please effect same.'

The evidence given at the trial by the investigating officer and the prosecutor was subjected to some criticism and the court a quo made adverse credibility findings against both the investigating officer and the prosecutor, whilst on the other hand was satisfied with the evidence of the plaintiff and her credibility as a witness. The prosecutor conceded that her endorsement in the investigating diary to effect the arrest of the appellant was an instruction and that she had done nothing wrong therein. She, however, maintained that the investigating officer could have, in conjunction with his commander, exercised his discretion not to arrest.
Held, that the point of departure was whether the appellants had discharged the onus under s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act) and met the jurisdictional requirements therein for a valid arrest. It was common cause that the investigating officer was a police officer, and the question was whether he entertained a suspicion and, if so, whether that suspicion was that the plaintiff had committed an offence referred to in sch 1 to the Act, and whether his suspicion rested on reasonable grounds. (See [44].)

Held, further, that what was borne out by the objective facts of the matter was that, at the time when the investigating officer went back to the prosecutor for guidance and for an opinion, he had not yet formed a suspicion. He was only armed with four statements from the complainant, which did not implicate the plaintiff, except for her bank-account details, coupled with the bank statements in which it was confirmed that a deposit was made into her bank account. He could not at the time have formed a suspicion that rested on reasonable grounds, and it appeared that the person who entertained a suspicion, notwithstanding the insufficiency of the evidence, was the prosecutor. (See [45].)
Held, further, that there was no doubt that the prosecutor was not a peace officer, and his or her opinion or suspicion did not play a role in s 40 of the Act. Consequently, a police officer who purported to act under that section could not rely on a suspicion of a prosecutor as justifying an arrest without a warrant. (See [48].)
Held, further, that, given the failure to exercise the discretion conferred on him by law, the arrest of the respondent was unlawful. (See [55].)
Held, further, in respect of the claim for malicious prosecution, in the light of the concession that the second appellant set the law in motion and the requirement that the prosecution failed, the court needed only to confine itself to the remaining requirements, namely a reasonable and probable cause, and that the prosecutor was actuated by an improper motive. Regard being had to the totality of the evidence, it could not be said that the prosecutor had acted in bad faith, and thereby acted in malice, when she instituted the prosecution against the respondent. In the absence of the element of malice it followed that not all the requirements for malicious prosecution had been proved, and the appeal against that award of damages had to be upheld. (See [61] and [65].)

MAFE v ACTING DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND ANOTHER 2022 (2) SACR 54 (WCC)

Trial — Mental state of accused — Enquiry in terms of ss 77, 78 and 79 of Criminal Procedure Act 51 of 1977 — Enquiry not precluding hearing of application for bail.
Trial — Mental state of accused — Enquiry in terms of ss 77, 78 and79 of Criminal Procedure Act 51 of 1977 — Requisites for proper enquiry.

The applicant had been arrested on charges relating to the fire which destroyed the National House of Assembly on 2 January 2022. On the following day a report was compiled by a district surgeon who concluded that the applicant suffered from paranoid schizophrenia. On 4 January 2022 he appeared in the magistrates' court for the first time, but the district surgeon's report was not made available to the court, nor to the applicant's legal team. The applicant indicated that he wished to apply for his release on bail and the matter was then postponed to 11 January 2022 without any reference or enquiry into the applicant's ability to follow the proceedings. On 11 January 2022 further charges were added which placed the offences within the ambit of sch 6 to the Criminal Procedure Act 51 of 1977 (the CPA). The state also produced the single-page medical report of 3 January 2022 and requested that the applicant be referred for psychiatric observation at the Valkenberg psychiatric facility for a period of 30 days. This was the first time that the applicant and his counsel were made aware of the district surgeon's report. The applicant's counsel objected to the referral and persisted with the application for bail. No ruling was recorded by the magistrate in response to said application. The court summarily accepted the

medical assessment without granting the opportunity to present evidence in rebuttal, and made a ruling that the state had produced prima facie evidence in terms of s 78 of the CPA, and accordingly referred the applicant for observation in terms of that section.
In the present application, brought on an urgent basis for the applicant to be released on bail pending the criminal proceedings, the applicant sought the review of the proceedings of 11 January 2022.
Held, that s 78 of the CPA required a court to make an assessment based on all the available facts which would be in the interests of justice, and which was aligned with the essence of s 35 of the Constitution. This was an evidential and factual determination which was in some instances based on the adjudicator's own observations or in other instances based on medical evidence presented by either or both parties before court. It therefore followed that all evidence and facts in terms of s 77 had to be noted and recorded by the magistrate, as well as his observations of the applicant which would best inform him whether the applicant was in a position to appreciate the nature of the court proceedings. However, the magistrate had merely made the blanket referral. (See [11] – [12].)
Held, further, that the record reflected that the magistrate did not at any stage dignify the applicant's plea to be heard on bail with any response whatsoever, thereby negatively affecting his rights entrenched in the Constitution. The applicant was entitled to apply for bail, and there was nothing preventing the magistrate from proceeding with such an application. The referral order made in terms of s 78 of the CPA was not done in accordance with justice, but was substantively and procedurally flawed, which resulted in a gross irregularity, and accordingly had to be set aside. (See [17] and [23].)

S v MKOLO 2022 (2) SACR 63 (ECB)
Trial — Presiding officer — Recusal of — Inference of bias — Suggestion of prejudgment by reference to 'corruption that apparently took place' — Presiding judge explaining that expression used in sense of there being allegations that corruption had taken place — Not necessary for presiding officer to proceed as if walking on eggshells — Application for recusal dismissed.

The applicant, accused No 1 in a trial in the High Court arising from alleged procurement irregularities for the funeral of the late State President Nelson Mandela, applied for the recusal of the presiding judge on the basis of what had transpired in chambers on 20 April 2022. The applicant alleged, based on an affidavit by the applicant's attorney who was not present in the judge's chambers at the time, that the judge had indicated that she was not prepared to entertain any further applications for the trial to be adjourned; that she had informed the applicant's attorney that she was not Koen J and that the applicant was not the former president, Jacob Zuma; and that during the course of exchanges with the second accused's attorney, who was motivating for a delay in the commencement of the leading of evidence pending representations to the Director of Public Prosecutions, the judge had said the matter was serious and 'it makes a mockery of President Mandela's funeral and corruption that apparently took place at that time'. After setting out the numerous postponements in the matter (see [19]), the court addressed the allegation regarding her latter comment, which was the thrust of the recusal application, and remarked that if the word 'apparently' triggered discomfort, it was not intended to do so. The court had intended to use a word referring to averments

which had been made, and it was the custom of the court to use the word 'alleged' in this type of exchange. It was, however, not necessary for a presiding officer to proceed every step of the way as if they were walking on eggshells: all the accused had pleaded to the indictment which did not beat about the bush and said in no uncertain terms that the applicant and his co-accused 'are guilty' of the respective crimes. (See [31].) The court gave the applicant and his legal team her full assurance that, when she traversed the rather robust wording of the indictment, she did not conclude that the applicant had in fact committed the offences. The court had over three decades of experience in criminal litigation and trials, and it could safely be accepted that the court knew that an accused person was innocent until proven guilty, no matter what the indictment said, and no matter what witnesses had said or were about to say. The court was alive to the process that was to be followed and that the prosecution carried an onus to prove the guilt of persons it accused, beyond a reasonable doubt. (See [32].) The court accordingly had not 'trampled' on the presumption of innocence, and it could also hardly be suggested that a reasonable, objective, informed person in the position of the applicant would reasonably perceive bias upon hearing such a statement. (See [33].) The court accordingly dismissed the application for recusal. (See [35].)

S v P 2022 (2) SACR 81 (WCC)
Harassment — Nature of — Protection order granted prohibiting appellant from telling any other person that respondent raped her — Conduct constituting act of harassment requiring some form of positive or wilful element — Appellant making public posts regarding allegations of rape against men in respondent's industry, but not consenting to publication of private messages about rape by respondent — Appellant's conduct not constituting harassment, even though might have caused harm to respondent — Order set aside — Protection from Harassment Act 17 of 2011.
Harassment — Proof of — Allegation of rape — Appellant justified in calling respondent rapist, since he had admitted he had raped her — Not necessary for her to have laid charge against him and for respondent to have been prosecuted and convicted before hecould be labelled as rapist — Protection from Harassment Act 17 of 2011.
Harassment — Proof of — Allegation of rape — Court granting protection order failing to attach sufficient weight to fact that appellant was survivor of gender-based violence and was not trying to spread 'salacious gossip' about respondent, but trying to be heard, find healing and protect others from suffering same fate — Appellant had right to speak out and to express herself about experiences she had endured — Protection from Harassment Act 17 of 2011.

The appellant appealed against a protection order granted by a magistrate under the provisions of the Protection from Harassment Act 17 of 2011. The clause in the order that caused the appellant to seek to have it set aside was that it prohibited the appellant from telling any other person that the respondent had raped her. She contended that the order was wrong in law and in fact and that it also constituted regression in the national fight against gender-based violence. The order stood to be overruled, she alleged, both because it was erroneous and because of its impact on millions of women in South Africa.
The parties were in a romantic relationship between 2012 and 2015. The appellant owned a modelling agency and the respondent a streetwear clothing brand. She

alleged that, after concerns about the respondent's temper, and his being placed in a clinic, she ended their relationship. She tried to move on with her life, but the respondent raped her. She was advised by a social worker not to report the rape to the police, but rather to find a way to keep herself safe from any abuse by him. After the termination of the relationship the appellant applied for a protection order against the respondent, but a settlement agreement was concluded subsequent to the withdrawal of the application. In terms of the agreement, they undertook not to make any contact with each other for an indefinite period, unless directed in writing by both parties that such undertaking was no longer of any force and effect. The agreement included, but was not limited to, contact via social media, text messages, phone calls, WhatsApp and electronic mail. It made no reference to the appellant's social-media discussions of the rape allegedly perpetrated on her by the respondent, and there was also no agreement that she would refrain from making the allegation that he had raped her. The reason why the parties came to the agreement was because of a series of WhatsApp and SMS exchanges between them in 2016, prior to the appellant having sought a protection order on 15 December 2016, wherein she repeatedly made the allegation that he raped her, in private exchanges between the two of them. The appellant said that over time she began to tell people about the alleged rape and that, by telling other people about her experience; she created community with other victims, and also saw this as a form of healing for herself. At no time did she publish or publicly name the respondent as her rapist. She did, however, do private posts to a WhatsApp group of survivors and a private Instagram group called 'Calling You Out CT' (CYO), in which she identified the respondent as a rapist. CYO was a private space for women to speak about their experiences, and was not a public platform.

On 3 September 2019 she was alerted to the fact that the private messages about the rape, including the identity of the respondent, had been made public. She never consented to the publication, nor did she know about the publication until she was contacted by a third party, and the publication was in violation of the strict privacy rules of CYO.

On 3 October 2019 the respondent obtained the interim protection order in question and alleged that the appellant had made allegations that he had raped/sexually abused her whenever his business received any favourable media attention; enlisted third parties to harass the respondent through social media or whenever his clothing brand received media attention; and enlisted third parties four weeks prior to the respondent's application for an interim protection order, to allege on social media that the respondent raped/sexually assaulted her. The court granted the interim order and on 26 November 2020 made it a final protection order.

The respondent opposed the appeal, contending that rape culture in South Africa was endemic, but the appellant could not make him the poster child for rape while he had always maintained that he had never raped anyone. He alleged that the horrific state of gender-based violence in South Africa could not be used to make the appellant's unreasonable actions of harassment reasonable. He claimed that he had never had the opportunity to clear his name and tell his version publicly, as the appellant did not want to lay criminal charges because she did not believe in the criminal-justice system. He submitted further that, the way the appellant disclosed to third parties that the respondent had raped her, went beyond her alleged goal to discuss the rape as part of a healing process, and her conduct illustrated malice and was done to cause harm.

Held, that the magistrate was wrong to have drawn a negative inference from the fact that the appellant did not lay a charge against the respondent, in order to conclude that the complaint or allegation that she made against the respondent was not justified or was devoid of any substance or reliability. Even though the present case was not a rape trial or an action for defamation, there had been no consideration given by the magistrate to the circumstances, dynamics and context in which the appellant made the accusation that she was raped by the respondent, in order to assess the veracity and probabilities thereof. (See [24].)
Held, further, that the probabilities overwhelmingly favoured the appellant's version, which is that the respondent had admitted that he had raped her on 6 July 2015 and that it indeed happened, for which he had apologised. She was therefore justified in calling him a rapist because he had admitted that he raped her, and never denied the allegation when she confronted him with it. There was no need for her to lay a charge against him and to have him prosecuted and convicted, to be labelled as a rapist. (See [48].)
Held, further, that the magistrate had clearly misdirected himself by not taking into account the totality of the evidence and by improperly evaluating the evidence, which included the drawing of a negative inference from the appellant's failure to lay a charge against the respondent. The appellant was a survivor of gender-based violence and she was not trying to spread 'salacious gossip' about the respondent. She was trying to be heard, to find healing and to protect others from suffering the same fate. The appellant had the right to speak out and to express herself about the experiences she had endured. (See [52].)
Held, further, that the conduct constituting the act of harassment required some form of positive or wilful element. It could not be as a result of inadvertent conduct which the purported perpetrator did not desire or was not aware of. Whilst the respondent, as well as the court a quo, was of the view that the statements were directed at the respondent, these were general statements against unnamed perpetrators. She had also made public posts regarding allegations of rape against men in the so-called 'streetwear' industry. It was undisputed that the appellant never consented to the publication of the private messages about the rape, and that she had not known about the publication thereof until she was contacted by a third party. (See [60] – [64].)
Held, further, that the appellant's conduct could clearly not constitute harassment and, whilst it may have caused harm to the respondent, such harm was not caused by the conduct of the appellant. The public posts in which she never named or identified the respondent did not constitute harassment, and the appellant did not directly cause harm to the respondent. The protection order accordingly fell to be set aside. (See [72] – [73].)

S v MULLER AND OTHERS 2022 (2) SACR 106 (NCK)
Appeal — Record — Lost, destroyed or incomplete — Reconstruction of — Trial magistrate has important and obligatory role in ensuring that proper and complete record reaches registrar's office.
Drugs — Dagga — Dealing in in contravention of s 5*(b)* of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Fact that individual possession of dagga no longer illegal, factor to be taken into account in determining sentence.
Drugs — Dagga — Dealing in in contravention of s 5*(b)* of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Three appellants each approached on several occasions to sell relatively small quantities of dagga to police trap — Long

delay in charging appellants — Cumulative effect of multiple sentences to be considered — Sentences substantially reduced.

The three appellants were all caught in a police trap selling cannabis to a police agent who had approached each of them (respectively four times, six times and five times). The first and third appellants were both offenders who sold the cannabis to, respectively, fund their family's needs, and to fund their further studies. The state led evidence of a social worker concerning the effects of cannabis on young children. The first appellant was sentenced to an effective term of eight years' imprisonment; the second appellant, who did have previous convictions for drug-related offences and was the person who supplied the other two appellants, was sentenced to an effective 13 years' imprisonment; and the third appellant was sentenced to 10 years' imprisonment.

On appeal against the sentences, the court commenced by raising its concern over the delay in hearing the appeals, largely attributable to the incompleteness of the trial records. The court remarked that what was missing from the magistrate's affidavit (all three appeals relating to sentences imposed by the same magistrate) was the appreciation of the important and obligatory role a trial magistrate had to play in ensuring that a proper and complete record reached the registrar's office. Since it was the judgment of the magistrate which was the subject of the appeal, it remained her responsibility to ensure that a proper record of the proceedings was transmitted to the registrar. She could not abdicate this task. In any event, it was expected of the trial magistrate to go through the record of the proceedings to ensure that it was free from unnecessary mistakes and was a true reflection of the proceedings before her. Doing so would ameliorate the problem of the records being sent back to the trial courts for correction, a process which caused unwarranted delays. (See [10].)

Held, that the state had not tendered any evidence linking the appellants with the supply of cannabis to children. Drawing an inference that the supply of cannabis to police agents would ultimately fall into the hands of children, and using that as a reason to punish the appellants by making an example of them to deter other would-be offenders, was not only unreasonable, but also unfair. (See [24].)

Held, further, that it was significant to note that the last transactions of sales of the second and third appellants happened in October and November 2016 whereas they were only arrested on 8 August 2017. There was no explanation from the state why it took 10 months to apprehend the appellants and it was surprising that they were only charged for transactions that were 10 months old, with no fresh charges. If indeed the purpose of the police operation was to combat dealing in cannabis which would potentially reach children, it made no sense to allow the appellants to continue with their alleged illegal activities for such a long time without police intervention. The inaction of the police defeated their noble intention of combating the crime. (See [25].)

Held, further, it also had to be noted that, unlike before, cannabis could now be lawfully possessed by an adult in circumstances decreed by the Constitutional Court, and this aspect had to make cannabis distinguishable from other drugs which could not be lawfully possessed. This was a factor that should be relevant in the consideration of punishment, especially for small-scale dealers such as the appellants. (See [29].)

Held, further, in respect of the magistrate's imposition of sentences of imprisonment on each of the counts the appellants were charged with, without consideration of taking some of the charges together for the purpose of sentence, amounted to a

misdirection. (See [48].) The sentences were accordingly reduced after all charges were taken together for the purposes of sentence, and the first appellant was sentenced to two years' imprisonment; the second appellant to four years' imprisonment; and the third appellant to three years' imprisonment.

ALL SA LAW REPORTS JULY 2022

Astral Operations Ltd t/a Country Fair Foods and others v Minister for Local Government, Environmental Affairs and Development Planning (Western Cape) and others [2022] 3 All SA 1 (SCA)

Environment – Landfill site – Environmental authorisation – An appeal under sections 35(3) and (4) of the Environment Conservation Act 73 of 1989 against a decision of an officer or employee exercising delegated authority in an application for an environmental authorisation under section 22, involves a complete rehearing and a fresh determination of the merits of the application – Appeal authority is free to substitute his own decision for the decision under appeal.

The appellants were entities conducting farming operations close to the footprint of a proposed regional landfill for the City of Cape Town. They appealed against the High Court's dismissal of their application for review of the decision of the first respondent (the "MEC") when dealing with an appeal against the granting of authorisation under section 22 of the Environment Conservation Act 73 of 1989 (the "Act").

The City had requested advice regarding the identification of sites suitable for a new landfill. Four sites were shortlisted and two of those were chosen as possibilities. A Final Environmental Impact Assessment Report was received relating to the two sites (*viz* the "Atlantis" and "Kalbaskraal" sites), which report contained a comparative evaluation of the environmental impacts of a regional landfill at each of the two potential sites. The City was granted an environmental authorisation to use the Atlantis site. That decision was subject to various appeals, leading to the decision being replaced with one in terms of which the Kalbaskraal site would be used instead.

Held – Sections 21, 22, 33 and 35 of the Act were relevant to the matter. The appellants raised two main issues concerning the interpretation of the relevant provisions. The first was whether the same activity (establishment of a new regional landfill) proposed at different locations is an alternative proposed activity contemplated by sections 22(2) and (3). The second was whether, when determining an appeal in terms of section 35(3) and (4), the MEC may step into the shoes of the first-instance decision-maker (in this case the Director) and take any decision which the Director could have taken, or conversely, whether when the MEC upholds an appeal he must remit the matter to the Director for a fresh decision.

The Court discussed what is contemplated by "alternative proposed activities" in section 22(2) and considered whether the MEC's powers on appeal were limited to a consideration of the application and the decision in respect of one site or whether the MEC had the power to grant environmental authorisation for the activities at a different site.

It was concluded that an appeal under sections 35(3) and (4) against a decision of an officer or employee exercising delegated authority on an application for an environmental authorisation under section 22, involves a complete rehearing and a

fresh determination of the merits of the application with or without additional evidence or information; and further that the appeal authority is free to substitute his own decision for the decision under appeal.

The appeal was dismissed.

Koch NO and another v Ad hoc Central Authority for the Republic of South Africa and another [2022] 3 All SA 17 (SCA)

Civil Procedure – Admission of further evidence on appeal – Section 19 of the Superior Courts Act 10 of 2013 grants a court power, on hearing an appeal, to receive further evidence, but in the interests of finality, such power must be exercised sparingly and in exceptional circumstances.

Family Law and Persons – Children – International child abduction legislation – Removal of child by parent – Defence in terms of article 13(b) of Hague Convention on the Civil Aspects of International Child Abduction, 1980 – Whether there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place her in an intolerable situation – Psychological and emotional trauma to child should she be removed from aunt with whom she had bonded, and on father's history of mental issues, substance abuse and parenting history satisfying requirements for article 13(b) defence.

The High Court's order that a child be returned to the UK subject to certain conditions, was the subject of the present appeal by the child's aunt. The child came to South Africa with her parents in September 2019, as the mother required cancer treatment. The understanding between the parents was that the child and her mother would return to the UK after her treatment. The child's father returned to the UK in October 2019, and the child remained in South Africa with her mother, her maternal aunt (the "second appellant") and her maternal grandmother. When the child's mother realised that she had no prospect of recovery, she expressed the wish that should she become too ill to take care of the child, and in the event of her death, she would like the child to remain in South Africa and be raised by the aunt. That was opposed by the child's father who approached the Central Authority for England and Wales and submitted a request for the return of the child to the UK. That resulted in the High Court order against which the appeal was directed.

Held – Two issues arose on appeal. The first was whether the High Court's rejection of the mother's defence under article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 and ordering the child's return to the UK, was correct. The second issue was whether further evidence should be admitted on appeal. Such evidence related to the events which occurred subsequent to the death of her mother and was relevant to the enquiry into the article 13(b) defence ie whether there was a grave risk that the return of the child to the UK would expose the child to physical or psychological harm or otherwise place her in an intolerable situation.

Section 19 of the Superior Courts Act 10 of 2013 grants a court powers, on hearing an appeal, to receive further evidence. But in the interests of finality,such powers must be exercised sparingly and in exceptional circumstances. The Court found that there were exceptional circumstances in this matter justifying the admission of further evidence in the form of an expert opinion of an educational psychologist based on her assessment of the child after her mother's death.

On the question of the correctness of the High Court's ordering the return of the child to the UK, the Court found that the article 13(a) defence had not been established as the mother failed to establish that the father had consented to the continued retention of the child in South Africa. The High Court was, therefore, bound to order the child's return to the UK unless circumstances under article 13(b) existed.

The article 13(b) defence was based on the psychological and emotional trauma to the child should she be removed from the aunt with whom she had bonded, and on the father's history of mental issues, abuse of alcohol and other substances, his employment history and his parenting of the child when in the UK.

The Court found that the High Court erred in rejecting the mother's evidence.

Upholding the appeal, the Court ruled that the application for the child's return to the UK should be dismissed.

Lutchman NO and others v African Global Holdings (Pty) Ltd and others and a related matter [2022] 3 All SA 35 (SCA)

Corporate and Commercial – Business rescue – When is a business rescue application made within the meaning of the Companies Act 71 of 2008, section 131(6) – Interpretation of section 131(6), which provides for suspension of liquidation proceedings at the time a business rescue application is made – Section 131(6) contemplates that the business rescue application must be issued, served on the company and the Companies and Intellectual Property Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, in order to trigger the suspension of the liquidation proceedings.

African Global Operations ("Operations") was a wholly-owned subsidiary of Global Holdings (previously known as Bosasa). While the Bosasa companies were in a creditor's voluntary winding-up, Holdings applied for an order placing six of the companies under supervision and commencing business rescue proceedings in terms of section 131(1) of the Companies Act 71 of 2008. Holdings on the other hand, sought to prevent the liquidators auctioning off any further assets of the companies. The High Court granted the relief sought in the auction application and dismissed the business rescue application. It gave the liquidators leave to appeal its order in the auction application. It also gave Bosasa and two other parties leave to appeal its order in the business rescue application.

The auction application and appeal were premised on two grounds. The first was that the liquidators were statutorily prohibited from proceeding with the auction and any subsequent sales of the assets of the Bosasa companies due to a suspension of the Bosasa liquidation proceedings in terms of section 131(6) of the Companies Act, because the application for business rescue was brought prior to the commencement of the auction. That ground raised two questions: when is a business rescue application made within the meaning of section 131(6); and whether the business rescue application *in casu* was indeed made within the meaning of that section. Those questions raised the proper interpretation of section 13(6). The second ground of appeal was that the liquidators were not clothed with the requisite power or authority to sell the assets on auction at the time when the auction was held or thereafter,

because they were provisional liquidators, the directors had not consented to the public auction and a second meeting of creditors had not yet been held.

Held – Section 131(6), which provides for the suspension of liquidation proceedings at the time a business rescue application is made, read with the provisions of sections 131(1) to (4) and 132(1)(b), had to be interpreted in accordance with the well-known principles of interpretation. The court found that section 131(6) contemplates that the business rescue application must be issued, served on the company and the Companies and Intellectual Property Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, in order to trigger the suspension of the liquidation proceedings. Those requirements were not complied with in this case. The business rescue application was thus not made within the meaning of section 131(6), and the suspension of the liquidation proceedings, including the public auction and any subsequent sales, was not triggered in terms of the section. The application should have been struck from the roll.

The Court went on to hold that it could never have been the intention of the High Court to have ordered the liquidators never to sell the assets of the six Bosasa companies without consultation with and without obtaining the directors' consent should the liquidators be successful in their appeal.

The auction appeal was upheld and the business rescue appeal dismissed.

G v Minister of Home Affairs and others (Pretoria Attorneys Association as *amicus curiae*) [2022] 3 All SA 58 (GP)

Constitutional and Administrative Law – Section 7(3)(a) of the Divorce Act 70 of 1979 gives court granting a decree of divorce in respect of a marriage out of community of property concluded before 1 November 1984, a discretion to make a redistribution order to the effect that any asset may be transferred from one spouse to another, subject to the provisions of section 7(4), (5) and (6) – Constitutional validity of section 7(3)(a) – Differentiation between parties solely based on the date of commencement of the Matrimonial Property Act 88 of 1984 failing rationality test, rendering section 7(3)(a) unconstitutional.

At issue in this case was the constitutional validity of section 7(3)(a) of the Divorce Act 70 of 1979 and the restriction of the remedy provided for therein to marriages out of community of property that were entered into before 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded. The question posed was whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in section 7(3) of the Divorce Act 70 of 1979. Section 7(3) provides the court granting a decree of divorce in respect of a marriage out of community of property concluded before 1 November 1984, with a discretion to make a redistribution order to the effect that any asset, or sum of money, may be transferred from one spouse to another, subject to the provisions of sections 7(4), (5) and (6). However, the court has no power to exercise the discretion provided in section 7(3) where marriages were concluded out of community of property with the exclusion of the accrual system after 1 November 1984.

The applicant submitted that section 7(3)(a) arbitrarily and irrationally differentiates between people married before and after 1 November 1984, being the date on which the Matrimonial Property Act 88 of 1984 commenced.

Held – The question for determination was whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in section 7(3).

The applicant claimed that the constitutional validity of section 7(3)(a) had to be determined with reference to section 9(1) and section 9(3) of the Constitution. A distinction is drawn between the test for constitutional validity in terms of those two subsections. Section 9(1) requires that all persons in similar positions must be afforded the same rights. Section 9(3) provides a more rigorous prohibition on unfair discrimination. The court undertook the two-stage analysis applicable where there is an allegation that a particular legislative rule violates section 9(3). In the first stage it had to be determined whether the impugned rule differentiated between people or groups and whether the differentiation amounted to discrimination. Once determined that the differentiation amounted to discrimination, it had to be determined whether or not the discrimination was unfair.

After explaining the concepts of a civil marriage and the relevant matrimonial property regimes, the court referred to the prerequisites that must be satisfied before an order can be granted in terms of section 7(3)(a).

Section 7(3)(a) differentiated between parties solely based on the date of commencement of the Matrimonial Property Act in circumstances where parties could either apply to incorporate the accrual system into their existing marriage property regime and for one or other reason, failed, or refrained from doing so, and where parties decided to exclude the accrual system. The differentiation amounted to unfair discrimination based on the date on which a marriage was concluded.

As the time bar imposed by section 7(3)(a) failed the rationality test, the section was declared unconstitutional and invalid to the extent that it limited the operation of section 7(3) to marriages out of community of property entered into before the commencement of the Matrimonial Property Act. The affected words were severed from the section, and the order was referred to the Constitutional Court for confirmation.

Hlophe v Judicial Service Commission and others (Black Lawyers Association ("BLA") as *amicus curiae* [2022] 3 All SA 87 (GJ)

Constitutional and Administrative Law – Judicial Service Commission – Validity of decision of Commission – Whether President or Deputy President can designate their membership in the Commission to an alternate – Proper interpretation of section 178 of the Constitution, which sets out required composition of the Judicial Service Commission, establishing that an alternate can form part of the coram of the Commission in the absence of the President or Deputy President.

In his application to review the decision of the Judicial Service Commission ("JSC") that he had committed gross misconduct, Hlophe JP referred to alleged procedural deficiencies which afflicted the JSC when it considered and decided the matter. He also challenged the decision on the merits. The JSC received a complaint from judges

of the Constitutional Court that Hlophe JP had improperly tried to influence the outcome of cases involving Mr Jacob Zuma.

Held – Every member of the Constitutional Court not only has a direct and substantial interest in any improper attempts to influence the decision-making process required of any member of the Constitutional Court, but a duty to ensure that all Judges who sit in a matter are qualified to do so.

Mbha JA, a senior judge of Appeal and President of the Electoral Court took the place of the President of the Supreme Court of Appeal ("SCA") or the Deputy President of the SCA, who were both conflicted on account of their personal friendships with Hlophe JP. That raised the question of whether the absences of the President and Deputy President of the SCA, and the presence instead of Mbha JA, conflicted with the constitutionally required profile of the JSC such that the decision of the JSC was rendered invalid. Section 178 of the Constitution sets out, *inter alia*, the required composition of the JSC. The question of whether the President or Deputy President can designate their membership to an alternate had to be determined by interpreting section 178. The court set out the rules of statutory interpretation and the rules of constitutional interpretation. Statutory interpretation is a unitary exercise to be approached holistically – simultaneously considering the text, context and purpose. A consideration of the entire constitutional architecture is necessary in that interpretive exercise. When interpreting a provision, courts must seek to ensure that the relevant provision is operable and can be given force and effect. As with statutory interpretation, the correct approach to constitutional interpretation is a purposive approach. In interpreting section 178, the Court is required to ensure a coherent, reasonable and defensible interpretation.

The Court concluded that through an exercise of constitutional interpretation, an alternate such as Mbha JA, can form part of the coram of the JSC in the absence of the Deputy President.

Finding no grounds to warrant a review of the decision of the JSC, the court dismissed the application. It also dismissed an application for an order directing the National Assembly to convene a proper and formal inquiry in accordance with its powers in section 177(1)(b) of the Constitution, for the purpose of exercising its powers about the removal of a Judge.

Maloney and others v Road Accident Fund [2022] 3 All SA 137 (WCC)

Civil Procedure – Evidence – Expert evidence – Purpose of the expert evidence is to give fair, non-partisan and independent testimony, which will inter alia guide and assist the court in its determination of the issue.

Personal Injury/Delict – Claim for damages for loss of support – Whether death of plaintiff's husband by suicide was a result of orthopaedic injuries brought on by an accident which occurred eighteen months earlier – Causation requiring link between negligent act, mental disorder and suicide to be established on a balance of probabilities.

Two years and five months after the first plaintiff's husband was injured in a vehicle collision, he took his own life. A claim he had lodged with the Road Accident Fund ("RAF") in the wake of the accident had not yet been finalised when he died, and the plaintiff issued a second summons against the RAF, arising from the same accident.

She sought damages for loss of support in her personal capacity, as well as her representative capacity on behalf of her two children. The action was brought on the basis that the accident led to the deceased's suicide. The plaintiff contended that the deceased's suicide and death were causally, factually and legally related to the injuries he suffered during the accident and she sought to hold the RAF liable.

Held – In order for the plaintiff to succeed in discharging the onus of proof that rested upon her, the evidence presented had to satisfy the court on a balance of probabilities that the deceased's suicide was a direct or proximate result of the accident.

The primary issue was that of causation. The question was whether the deceased's death by suicide on 6 December 2016, was a result of the orthopaedic injuries brought on by the accident, which occurred on 21 June 2014. Additionally the court had to determine whether there was a sufficient causal link between the negligent act and the suicide. The plaintiff bore the onus of proving on a balance of probabilities that there was a link between the injuries sustained during the accident and the deceased's suicide.

Causation can be proven from either direct or circumstantial evidence. However, the issue of causation cannot be left to speculation, and there should be evidentiary support for the facts upon which the plaintiff relied to establish causation. The link between the negligent act, the mental disorder and the suicide should be established on a balance of probabilities. It was insufficient to simply claim that the deceased, before he took his own life, suffered from a mental disorder and that the disorder caused the suicide. There should be evidence showing that a close connection existed between the negligent act and its factual consequences. No evidence was placed before the court to prove that when the deceased took his life he did not act rationally, due to the injuries he sustained during the accident.

Of particular importance in this matter was the reliability of the experts' opinions. In a case such as the present one, expert evidence must be relied on to establish the causal link between the liability producing incident and the alleged harm resulting therefrom. Evidence of an expert witness is of significant importance in litigation that is technical in nature, or involving specialised areas of knowledge, or where the issue in question is not within the knowledge or scope of the court. Perhaps more importantly, an expert witness is not there to guarantee that a certain verdict is given. The purpose of the expert evidence is to give fair, non-partisan and independent testimony, which will *inter alia* guide and assist the court in its determination of the issue. An expert witness should have a degree of objectivity regarding the proceedings. The plaintiff's expert witnesses did not sufficiently establish that the accident probably caused the deceased to commit suicide.

Little was known of the deceased's state of mind at the time of his suicide, and the evidence contained insufficient indications of reliability to find on a balance of probabilities that the accident caused the deceased to commit suicide.

The plaintiff's claim was accordingly dismissed.

Molosi and others v Phahlo Royal Family and others [2022] 3 All SA 160 (ECM)

Civil Procedure – Interdictory relief – Requirements for interdict are a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other remedy.

Civil Procedure – Urgency – Court exercises a discretion in terms of rule 6(12)(a) which stipulates that, in urgent applications, the court or a judge may dispense with the forms and service provided for in the rules and may dispose of such matter in accordance with such procedure as is appropriate.

Local Government – Customary law – Traditional leadership – Competing claims to kingship – Whether court is required to order that resolution of dispute between the parties should be in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 – Section 21(1)(a) of the Act was interpreted as meaning that, if there is a dispute within the royal family as to who is entitled in terms of customary law to be king or queen and there are different names, the royal family must try and resolve that dispute – Where dispute remained unresolved for extended period, referring it back to the royal family not justifiable.

An appeal was brought against a declaration by the court *a quo* that the third appellant was not a royal family entitled to and responsible for identifying the second appellant as the king of AmaMpondomise.

Held – The issues were whether urgency was established in the court *a quo*; whether respondents established the jurisdictional facts to sustain the requirements for a final interdict; and whether the court *a quo* was correct in not ordering that the resolution of the dispute between the parties should be in terms of the Traditional Leadership and Governance Framework Act 41 of 2003.

Regarding urgency, the court *a quo* exercised a discretion in terms of rule 6(12)(a) which stipulates that, in urgent applications, the court or a judge may dispense with the forms and service provided for in the rules and may dispose of such matter in accordance with such procedure as is appropriate. The court *a quo* exercised its discretion and heard the matter. No reasonable grounds existed for the present Court to interfere with that exercise of discretion.

The requisites for the right to claim an interdict are known to be a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other remedy. The court *a quo* found that a clear right had been established as the second respondent was the direct descendant of a deposed king and therefore, on the face of that, the respondents had a clear right to bring the application. The reasonably apprehended harm lay in the fact that the first and second respondents had applied to the third respondent for the recognition of the second respondent as the king, and a ceremony was being prepared for his installation. The apprehension was that such installation would be disrupted. There was also no other conceivable remedy available to the respondents other than a declarator from the court *a quo*.

That left the question of whether the court *a quo* should have ordered that the resolution of the dispute between the parties should be in terms of the Traditional Leadership and Governance Framework Act. Section 21(1)(a) of the Act was interpreted as meaning that, if there is a dispute within the royal family as to who is entitled in terms of customary law to be king or queen and there are different names, the royal family must try and resolve that dispute. The evidence established however, that the dispute between the two families had been going on for an extended time without any resolution. The third respondent's referring the matter back to the royal family in circumstances where it was clear that there could be no resolution by them was questioned by the court.

The Court agreed with the court below that the resolution by the third respondent identifying the second respondent as queen of AmaMpondomise was unlawful and liable to be set aside. None of the grounds of appeal were upheld and the appeal was dismissed.

National Director of Public Prosecutions v Wood and others [2022] 3 All SA 179 (GJ)

Criminal Law and Procedure – Restraint order – Appeal against discharge – Court a quo erring in discharging provisional restraint order on basis of alleged material non-disclosures, where requirements for confirmation of provisional restraint order were met.

Criminal Law and Procedure – Restraint order – Appeal against discharge – Whether the discharge of a provisional restraint order for non-disclosure is appealable – It is settled law that the discharge of a provisional restraint order is appealable, as such an order is final in effect in the sense required for appealability.

The National Director of Public Prosecutions ("NDPP") obtained, *ex parte*, a restraint order in respect of the property of the first to sixth respondents. The order was subsequently discharged on the ground that the NDPP had failed to make full disclosure of all of the material facts. That led to an appeal.

The NDPP claimed that there were reasonable grounds for believing that the relevant respondents might be prosecuted for the offences of corruption, money laundering and fraud. The first to third respondents were the directors of the Regiments companies, and shareholders of the Regiments' holding company, Regiments Capital. They acquired most of their shares in this entity through their family trusts, who are joined as respondents. One of the contentions of the first to third defendants is that because it is their family trusts that acquired shares in Regiments Capital, the first to third defendants did not themselves benefit from any alleged unlawful activity.

Held – The first question for determination was whether the discharge of the provisional restraint order for non-disclosure was appealable. In order to be appealable, a judicial decision of the High Court had to be a "judgment or order", which, generally speaking meant that it had to be final in effect, that is, unalterable by the court whose judgment or order it was; definitive of the rights of the parties in that it granted definitive and distinct relief; and dispositive of at least a substantial portion of the relief claimed in the main proceedings. The court confirmed that it is settled law that the discharge of a provisional restraint order, whether on procedural grounds or not, is appealable. Such an order is final in effect in the sense required for appealability. While the NDPP could make a fresh application for a new provisional restraint order, the initial provisional order is rendered lifeless consequent on its discharge.

In framing the critical issue of whether the court *a quo* erred in discharging the provisional restraint order on the basis of alleged material non-disclosures, the present Court set out the legal framework for a restraint order.

The next question was whether there were reasonable grounds for believing that the defendants might be convicted of an offence. To succeed in an application for confirmation of the provisional restraint order, the NDPP had to show that there were

reasonable grounds for believing that a confiscation order may be made against the respondents.

The NDPP's application for a variation of the restraint order by the NDPP to increase the *quantum* of the order was held to be competent and was granted.

The Court held that the restraint order had been wrongly discharged in the court below, and the appeal succeeded with the respondents ordered to pay costs.

Nelson Mandela Bay Municipality and others v Qaba and others [2022] 3 All SA 239 (ECP)

Local Government – Municipality – Relationship to municipal council – Section 160 of the Constitution establishes that a municipality holds no power or authority separate from its municipal council, confirming that legal proceeding by a municipality against its own council is not legally and conceptually possible.

In a dispute between political parties represented in a municipal council concerning the choice of person to appoint as the municipal manager, the municipality, city manager and mayor sought interim relief pending a review. The applicants sought to prevent the first respondent from exercising any authority as acting City Manager. The second respondent was the municipal council.

Held – The identity of the parties was a central difficulty posed by this case. The court explained why it is not legally and conceptually possible for a municipality to sue its council, and to seek relief, ostensibly in the interests of the municipality, regarding a determination by the council.

Sections 157, 158 and 159 of the Constitution deal with the establishment, composition, membership and terms of office of municipal councils. Of particular importance in the present matter is section 160 which confirms that a municipality holds no power or authority separate from its municipal council. Nor can it have a legal interest which is separate or distinguishable from that of a municipal council. A municipality acts and performs its functions through the agency of its council. The council consists of democratically elected representatives of the community which forms part of the municipality. In it is vested all of the constitutionally conferred powers and responsibilities of a municipality. Consequently, a suit (whether action or application) brought by a municipality against its council is not legally cognisable.

The second and third applicants, who were cited in their official capacity, faced a similar obstacle. The court described it as inconceivable that the authority to institute legal proceedings which may be delegated to the City Manager or to the Executive Mayor can include the authority to institute proceedings against the council, for reasons already mentioned. While that was dispositive of the matter, the Court went on to consider the merits of the application.

Setting out the requirements for interim relief, the Court found that the applicants had not established a *prima facie* right to the relief sought, or an apprehension of irreparable harm. That rendered it unnecessary to consider the remaining requirements for the interdict, and the application was dismissed.

Passenger Rail Agency of South Africa v Bischoff NO obo Reyners [2022] 3 All SA 255 (WCC)

Civil Procedure – Claim for damages for injury sustained – Special plea of prescription – Whether plaintiff had required mental capacity to instruct attorneys and institute action on time – Where evidence satisfied court that at all times after the incident, plaintiff had capacity to instruct an attorney and to litigate as he had knowledge of the debtor and the facts from which the debt arose, special plea is upheld.

The respondent was the curator *ad litem* to Mr Denzil Reyners, who had sustained injuries to the head after having fallen from the open doors of a moving train operated by the appellant ("PRASA") on 20 February 2001. An application for the appointment of a curator *ad litem* for Mr Reyners was made on 8 January 2013 and an order granting the curator *ad litem* was granted on 7 February 2013. The summons commencing action against the appellant was filed on 23 August 2013, some twelve years after the incident.

PRASA raised a special plea of prescription in response to the claim, but the court *a quo* held that given his personal circumstances, Mr Reyners did not have the intellectual capacity to pursue a claim against the defendant without delay. The issue on appeal is whether or not the trial court correctly dismissed the appellant's special plea on prescription.

Held – There was no evidence presented that Mr Reyners was mentally compromised immediately after the accident and lacked mental capacity to manage his own affairs. He was treated by a specialist who did not make any diagnosis relating to mental illness. For the next ten years, he showed no signs of suffering from mental disability or impediment.

The starting point in determining the point that was raised in the special plea was whether or not in terms of the Prescription Act, extinctive prescription begins to run as soon as the debt is due, and the creditor knows the identity of the debtor and the facts giving rise to the debt. The Court stated that that point should not be answered with the evidence of an expert opinion as the enquiry was factual in nature. Section 12(3) of the Prescription Act requires the creditor to have knowledge of the identity of the debtor and the facts from which the debt arises. Based on the evidence of the respondents' lay-witnesses, PRASA was found to have discharged the onus of proving that Mr Reyners at all times after the incident, had the capacity to instruct an attorney and to litigate as he had knowledge of the debtor and the facts from which the debt arose. The fact that Mr Reyners did not know after leaving hospital that he had a claim against PRASA was not a defence to the running of extinctive prescription. The special plea in the view of the majority had to succeed.

In a dissenting judgment, the view was that the evidence established that Mr Reyners could not manage his own litigation, did not understand the proceedings at a level which was sufficient to allow him to give meaningful instructions to his legal representatives and to make rationally motivated decisions. The dissenting opinion was that the appeal should be dismissed.

Ullman Sails (Pty) Ltd and others v Jannie Reuvers Sails (Pty) Ltd and others and related matters [2022] 3 All SA 290 (WCC)

Civil Procedure – Enforcement of foreign judgment – Provisional sentence proceedings – Defences based on alleged invalidity of cession of judgment debt and on section 8(1) of the Debt Collectors' Act 114 of 1998 found to be without merit, resulting in granting of provisional sentence.

Insolvency – Sequestration – Factual insolvency – Where evidence established on a balance of probabilities that respondents were prima facie, factually insolvent, provisional sequestration order granted.

Three cases came before the court, involving the same entities. In the first application, as cessionary of a judgment debt obtained in the US district court, Ullman Sales commenced action by way of provisional sentence summons for the recovery of the judgment debt from two sail-making companies and, to the limited extent of their joint and several liability for payment thereof in the amount of US 312 439, also against Mr and Mrs Reuvers. In the remaining two cases, Ullman Sails and two related entities applied for the provisional sequestration of the estates of Mr Reuvers and Mrs Reuvers. The applicants' standing in the sequestration applications was founded on Ullman Sails' status as a creditor of the respondents by virtue of it having taken cession of the judgment creditor's rights under the American judgment against the respondents.

The defendants' opposition to all three applications was predicated on the alleged non-enforceability of the ceded claim in the hands of the cessionary by reason of the cession having been *contra bonos mores* or offensive to public policy, and the alleged bar to Ullman Sails' ability to recover the judgment debt by virtue of it not being registered as a debt collector in terms of the Debt Collectors' Act 114 of 1998.

Regarding the provisional sentence application, the Reuvers averred that in the course of restructuring their affairs, their attorney of record (England), who later became chief executive officer of Ullman Sails, became privy to confidential information relating to their personal and business affairs, which he then used to benefit his own estate and that of the companies over which he was the guiding mind.

Held – The Court found no basis upon which to uphold the contention that England's role as the cessionary's representative in the conclusion of the cession, when he had previously acted as the judgment debtors' attorney in the relevant litigation, was a consideration that should justify a refusal by the court to recognise or give effect to the agreement. The Court was also not persuaded that the enforcement of the cession in the peculiar circumstances of the case would be *contra bonos mores* or contrary to public policy.

Section 8(1) of the Debt Collectors' Act prohibits anyone from acting as a debt collector unless they have been registered as such under the statute. Any agreement between a debt collector and his client that is inconsistent with the prohibition in section 8(1) is invalid to the extent of such inconsistency. Ullman Sails instituted the proceedings currently under consideration in its own cause, and not on behalf of some other titleholder. It was found not to be acting as debt collector.

Provisional sentence was granted in the first application.

In the sequestration applications, the applicants alleged that the respondents had committed an act of insolvency of the sort provided for in section 8(c) of the Insolvency

Act 24 of 1936 by attempting to make a disposition of their property which would have the effect of prejudicing their creditors or preferring one creditor above another. It was also submitted that the evidence established on a balance of probabilities that the respondents were factually insolvent. It was found that the applicants had established *prima facie* that the Reuvers were both factually insolvent. Their estates were each placed under provisional sequestration.

END-FOR-NOW