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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

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National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services – Pinetown and another [2022] JOL 54274 (SCA)

National Credit Act-initiation of complaint by national credit regulator into alleged contraventions of national credit act 34 of 2005
The National Credit Regulator (the NCR) initiated a complaint against the first respondent ("Dacqup"), a registered credit provider. The National Consumer Tribunal upheld the complaint but Dacqup successfully appealed in the High Court, leading to an appeal to the Supreme Court of Appeal. The High Court upheld a point in limine by Dacqup regarding whether the NCR had a reasonable suspicion to initiate an investigation.

Nicholls JA considers what constitutes a sufficient trigger for the appellant, to initiate a complaint into alleged contraventions of the National Credit Act 34 of 2005.

Court refers to relevant sections of the Act [paras 4-5]; discusses concept of "reasonable suspicion" [paras 19-20], and is satisfied that the NCR showed that it had a reasonable suspicion to initiate an investigation into the activities of Dacqup. After addressing competence of National Consumer Tribunal to order appointment of an independent auditor to assess extent of Dacqup's overcharging, court upholds appeal.

Van Zyl NO obo AM v MEC for Health, Western Cape [2022] ZAWCHC 133 at [62]-[124]
Absolution granted at close of plaintiff's case – Role of expert witness – Status of joint minute – Plaintiff having made out prima facie case of negligence – Appeal succeeding.
AM was 12 years old when he underwent routine surgery for a hernia. As he was being revived from the anaesthetic he experienced a laryngospasm and his brain was deprived of oxygen for enough time to suffer damage. Proceedings were brought to recover damages and the trial proceeded on the merits. The court heard the expert evidence of the plaintiff, including from an anaesthetist, a neurosurgeon and a clinical neuropsychologist. At the close of the plaintiff's case, and before adducing any evidence on its part, the defendant successfully persuaded the court that there was no longer any difference of opinion between the experts, due regard being had to certain points of agreement allegedly concluded in the joint minute and the cross-examination of the plaintiff's anaesthetic expert, and that the plaintiff had thus failed to establish a prima facie case for negligence. Absolution from the instance was granted and this appeal is before the full bench.
Gamble J discusses absolution from the instance; the evidence of the plaintiff's anaesthetic expert; the treatment of the patient; the joint expert minute; the function of an expert witness; the approach to expert evidence; the status of the joint minute and the effect of agreement between experts; and whether a prima facie case was established by the plaintiff. The court a quo was not bound by the opinions expressed in the minute and was still required to assess whether they were based on facts and underpinned by proper reasoning. In conducting that exercise the court a quo was entitled to receive oral evidence from the experts to explain the medical facts and the basis for their opinions to the court. On the face of it the joint minute does not suggest agreement that treatment of the laryngospasm fell within

reasonable parameters; on the contrary, the minute rather suggests the opposite. It did not appear from the cross-examination of the plaintiff's witness that the factual inferences she drew were in dispute. The court a quo ought to have found that the plaintiff had made out a prima facie case of negligence in that the laryngospasm was not treated in time.
The appeal succeeds and the matter is remitted back to the court a quo for further hearing. (Papier J and Lekhuleni J concurred.)

Sivuka v Ramaphosa [2022] ZAGPJHC 450 at [8]-[72]
Exception – Claim against Mr Ramaphosa, Sibanye and the government – Marikana massacre – Alleged collusion – Alleged interventions and pressure exerted on ministers and police – Several grounds of exception upheld – Exception relating to causation fails.
In 2012 a police tactical response team shot and killed 34 striking workers and seriously wounded and arrested many others, who were part of a gathering on public land near the town of Marikana. The plaintiffs are 329 mineworkers who have instituted action against Mr Ramaphosa, Sibanye (formerly Lonmin) and the government. They seek R977 million as patrimonial loss and R164 million as constitutional/exemplary/punitive damages. Mr Ramaphosa and Sibanye have raised several grounds of exception in relation to the plaintiffs' particulars of claim.
Van Oosten J discusses the approach to exceptions; the contentions that the three defendants were acting in concert and that there was collusion between the state and capital which resulted in the massacre; that the liability of Mr Ramaphosa is premised on emails exchanged between him and his colleagues at Sibanye; and the allegations that his interventions caused pressure to be exerted on the police leadership and that he made several phone calls to ministers to exert pressure on them to take violent action with speed. It is contended that Sibanye breached its duties to its employees and unlawfully colluded with the police with the aim of ending the strike by any means. The court comments on particulars of claim and the pleading of facts, as well as the incorporation of documents, and that irrelevant and superfluous allegations are impermissible. Rule 18(4) requires a clear and concise statement of the material facts relied on.
Mr Ramaphosa contended that the emails and phone calls did not constitute actionable incitement or other wrongful conduct, so the court looks at the contents of the emails and upholds the first ground of exception. As to whether Mr Ramaphosa in his personal capacity, as director of Lomnin, owed any of the listed duties to the plaintiffs, this second ground of exception is upheld because he did not owe them such duties. As to Mr Ramaphosa's interventions and pressure exerted and causation and whether the chain of events was too remote, the court finds that the plaintiffs' allegations satisfied the test of causation and the third ground of exception must fail. The exception relating to the alleged collusion is upheld, as well as the exception relating to the various capacities and duties of Mr Ramaphosa. As to the grounds of exception raised to the claim for punitive, constitutional or exemplary damages, a decision at this stage would be premature and not in the interests of justice. The court then deals with Sibanye's grounds of exception, where there is some overlap with Mr Ramaphosa's grounds.

MEC for Agriculture, Mpumalanga v Kanjani [2022] ZAGPPHC 483 at [15]-[26]

Action – Dismissal – Undue delay – Seven years – Contended that tactic was to hold out for better settlement – Clear abuse of court process – Male fide conduct – Action dismissed.

The department developed a programme to encourage rural communities to till the land and for this required service providers in certain districts. Kanjani was awarded two of the tenders and issued invoices to the value of R190 million. The department has paid R121 million, however after discovering what it regarded as "invoicing irregularities" it stopped paying which led to Kanjani instituting action in 2014. Pleadings were exchanged until 2016 and the matter was set down for trial on several occasion but has never proceeded. The department seeks an order dismissing Kanjani's action with costs for undue delay over some seven years. Sardiwalla J discusses the department's contentions that Kanjani has a hopeless case and that it has unduly delayed in actively advancing the litigation, that its actions are mala fide with the purpose of holding out for a better settlement; the contentions that adjudicating the stale case will be unsatisfactory because of faded and unreliable memories, documentary evidence that can disappear as well as costs involved in wasting taxpayer funded money indefinitely; Kanjani's claim to a right to a fair public hearing and its contentions around the delays and the bona fide impression that there was a real possibility of settlement. The court discusses inordinate or unreasonable delay in prosecuting an action; that there is no rule of court or of practice which lays down a period that must elapse before a summons is regarded as being stale; that an action should only be dismissed where there has been a clear abuse of the process of the court; the issue of prejudice; that it was plain that the the conduct of the Kanjani was male fide and there was real prejudice to the department by refusing to agree on a date for the amended particulars of claim to be submitted and its other conduct. Kanjani's action is dismissed.

BMW v William [2022] ZAGPPHC 450 at [15]-[24]
Irregular step-Setting aside of combined summons – Irregular step and Rule 30 – Defendant also serving notice in terms of Rule 23(1) – Not a further step envisioned in Rule 30(4) – Service of summons found to constitute irregularity
Mr William's attorneys allegedly instructed the sheriff on the 28 June 2021 to serve a combined summons commencing action on BMW at its chosen domicilium citandi et executandi. According to the sheriff, the summons was served on BMW on the 30 June 2021, the date on which Mr William's claim was to become prescribed. Service was allegedly effected by affixing of a copy of the summons at the main entrance gate of BMW as the gate had been kept locked. On that day the attorneys were advised by the sheriff that service had been effected, but the attorneys, despite the sheriff's advice, elected to email the combined summons to BMW and to attorneys Norton Rose Fulbright South Africa Incorporated, the present attorneys of record for the applicant, although they had not been instructed on the matter at the time. BMW seeks that the combined summons be set aside due to a failure to serve same in accordance with Rule 4 of the Uniform Rules of Court.
Mbongwe J discusses BMW's contentions that there was no agreement in place for service of the summons by email, that Norton Rose Fulbright SA Incorporated had not been instructed on the matter at the time so there was no basis for service on them; the denial that the summons was served on its premises; the CCTV footage of the gates at that time; and the contention that BMW had taken a further step by a

notice in terms of Rule 23(1) advising that the particulars of claim were excipiable, so has lost its entitlement to claim relief in terms of Rule 30 and irregular proceedings. The court discusses Rule 30(4) and a "further step" taken and finds that the raising of a further legitimate cause of complaint in the circumstances did not constitute the further step envisioned in Rule 30(4). After examining the circumstances the court finds that there had not been a valid service of the summons on BMW and the mode of service is found to be irregular and invalid. The sheriff's return of service is set aside.

Social Housing Regulator Authority v TBGI Holdings [2022] ZAGPJHC 452

Review- self-review of the decision of the Authority to conclude a Consolidated Capital Grant agreement with TGBI Holdings – Development and construction of 507 social housing units at the value of R134,835,129 – Suspected irregularity in the process leading to the approval of the grant funding – Dispute resolution clause – Authority of deponent – Remedy – Self-review granted – Decision to award grant funding declared unlawful and set aside – Respondents ordered to reimburse R26,963,865.65 paid on the conclusion of unlawful CCGA agreement.

Aqua Bulk v Minister of Police [2022] ZAGPJHC 458

Mandament van spolie – Two commercial industrial vehicles – Disputes arising after separation by brothers of the Aqua Group of companies into separate entities – Police seizing the vehicles from Aqua Bulk's employees during the course of their employment duties – No warrant – Alleged that criminal charges trumped up – Section 20 of the Criminal Procedure Act – Respondents ordered to restore possession of the vehicles.

Tshisevhe Gwina Ratshimbilani Inc v Gijima Holdings [2022] ZAGPJHC 463 at [20]-[40]

Exception – Whether particulars disclosing cause of action – Claim for legal fees – Written mandate – Amendments of particulars of claim to clarify reasons for deviating from capped fee – Exceptions dismissed – Uniform Rule 28.

The law firm instituted action against its erstwhile client, Gijima Holdings, for outstanding legal fees and the defendant raised exceptions to the plaintiff's particulars of claim as disclosing no cause of action and being vague and embarrassing. The plaintiff made application in terms of Rules 28(1) and 28(4) to amend its particulars of claim, which the defendant opposes.
Nichols AJ discusses the amended particulars of claim and the written mandate for professional legal services in relation to a specific and described scope of work; the capped fee of R850,000; the allegations that the plaintiff was in fact required to charge an increased fee due to unforeseen factors beyond its control; that the plaintiff kept the defendant abreast of these developments; its invoice for R1,103,454.21 and the non-payment; and that the plaintiff explains that the purpose and effect of the amendments is to clarify the reasons for the deviation from charging

the agreed capped fee and to position such deviation within the terms and conditions of the written mandate. The court discusses the defendant's contentions that the plaintiff fails to allege the specific facts, terms, and conditions that are required for compliance with clause 5.5 of the written mandate, which regulates the manner in which a party may deviate from the agreed fixed fee.
The court finds that the plaintiff's allegations regarding compliance with the terms of the written mandate and the defendant's breach have been pleaded in a lucid and logical fashion. It has pleaded a complete cause of action, which identifies the issues it seeks to rely on, and on which evidence will be led. The defendant has not shown that the plaintiff's claim is bad in law. The defendant's exceptions are dismissed and the plaintiff's application for leave to amend the particulars of claim is granted.

PNM Short Hauliers v Izusa Carriers [2022] ZAMPMBHC 52 at [19]-[32]
Consolidation of actions – Arising from same motor collision – One in High Court and one in magistrates court – Uniform Rule 11 and Constitution, s 173.

After a motor collision between Mr Nhubunga's motor vehicle and a vehicle belonging to Izusa Carriers, Mr Nhubunga issued summons out of the High Court against Izusa Carriers. Izusa issued a third party notice against PNM Short Haulers wherein it holds its driver to have been the sole cause of the damages of Mr Nhubunga arising from the collision. Izuza instituted an action against PNM Short Haulers in the magistrate's court and abandoned part of its claim to bring it within the financial jurisdiction of the magistrate's court. PNM Short Haulers brings an application in terms of Uniform Rule 11 read with section 173 of the Constitution to consolidate the two actions.
Mashile J notes that the actions concern the same collision, the witnesses are likely to be the same as well as the legal representatives and that, other than Mr Nhubunga, the parties are the same. The court discusses whether the court can develop the common law, taking into account the interests of justice; Rule 11; the required consent of a party for transfer of a case; the avoidance of multiplicity of actions and payment of resultant legal costs; the contention by PNM Short Haulers that legislation clearly provides for transfer of a case from the High Court to the magistrate's court but no similar legislative provisions have been provided for the reverse to occur; and the the availability of lis pendens to PNM Short Hauliers.
The application is dismissed with costs.

Mohale v Road Accident Fund [2022] ZALMPPHC 38

Commissioner of oaths-affidavit not signed by commissioner of oaths

The court made enquiries after questioning an expert affidavit of a doctor which was only signed but not commissioned or affirmed – The issue was the version put before court by counsel which seemed to be misleading the court – Legal practitioners are officers of the court and are expected to act in an ethical manner at all the times and not to deceive the court – The court at para [9] notes concerns regarding the practice

of expert affidavits not being properly commissioned – The court directs that a copy of the judgment be sent to the Legal Practice Council.

Mamadi and another v Premier of Limpopo Province and others [2022] JOL 54408 (CC)

Review proceedings and rule 6(5)(g) of the uniform rules- court interact with rule 53

Applicants' application to the High Court for the review and setting aside of the decision of the Premier of the Limpopo Province to recognise the fifth respondent as acting traditional leader of the Mamadi Community was dismissed. The applicants sought leave to appeal in the Constitutional Court.

Theron J considers the approach to be adopted where disputes of fact, irresoluble on the papers, arise in a review application. More specifically, how does Rule 6(5)(g) of the Uniform Rules of Court – which vests a court with a wide discretion in applications in which disputes of fact arise – interact with Rule 53, which regulates review proceedings?

Court refers to provisions of Rule 53 [paras 26-40]; and considers whether, in review proceedings brought in terms of Rule 53, and after the applicant has obtained the record, a court may in terms of its discretion under Rule (6)(5)(g), on the basis that the matter cannot be decided on affidavit, dismiss the matter without rendering a final decision [para 45]. High Court found to have erred.

Appeal upheld and matter referred for trial before different judge.

Minister of Police v Molokwane [2022] ZASCA 111 at [11]-[25]

Serving summons– Whether failure to serve summons against Minister of Police on State Attorney nullified summons – State Liability Act 20 of 1957, s 2(2).
In 2015, Mr Molokwane instituted action in the High Court against the Minister and the three other appellants, claiming damages for alleged wrongful arrest and assault. Summons was served on these three, who had been acting within the course and scope of their employment with the Minister. However, service on the Minister was to his official place of business and not on the State Attorney as prescribed by s 2(2) of the State Liability Act 20 of 1957. The High Court considered the purpose of s 2(2) of the State Liability Act and reasoned that the non-service on the State Attorney did not render the summons a nullity. At most, the non-service constituted an irregular step, which could be rectified. And in this case the State Attorney later formally placed itself on record on behalf of the appellants and exchanged pleadings with the respondent's attorneys.
Makgoka JA discusses the Minister's contentions: that service upon the State Attorney was mandatory in terms of section 2(2); that the Act does not make provision for condonation for non-compliance; and alternatively, that the action had been extinguished by prescription by the time summons was served on the State Attorney in this case. The court discusses the case law on the approach to the interpretation of similar provisions; whether there has been compliance with the

statutory provisions viewed in the light of their purpose; section 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights; the purpose of section 2(2) that the relevant executive authority is afforded effective legal representation by the State Attorney; that there was a deafening silence on the Minister's part as to what he did with the summons after receiving it; that the State Attorney effectively represented the Minister in this action, by entering appearance to defend; that there was no prejudice suffered by the Minister as a result of non-service of a copy of the summons on the State Attorney; and that the respondent's condonation application for the late service of his statutory notice in terms of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 was granted.
The appeal is dismissed.

R Data v Nordic Light Properties [2022] ZAWCHC 137 at [18]-[45]

Plead-plead over-when-Claim for rental deposit – Lease agreement – Defendant relying on dispute resolution clause – Seeking to stay action – Failure to plead over – Prejudice – Arbitration Act 42 of 1965, ss 3(2)(b) and 6.

Plaintiff (the tenant) instituted action against the defendant (the landlord) on the basis of a lease agreement where the plaintiff had paid a R400,000 deposit, which the defendant was entitled to apply towards arrear rental or any other amount owing. Plaintiff claims the deposit which it alleges that the defendant failed to refund upon the expiry of the lease. The lease agreement contained a dispute resolution clause which provides for the resolution of disputes by negotiation, mediation, or arbitration. The defendant asks that the action be stayed pending the final determination of the dispute in terms of the dispute resolution clause. The plaintiff seeks a declaratory order that the court has jurisdiction to adjudicate the action and contends that as a result of the defendant's failure to plead to the merits of the plaintiff's claim, the main action is effectively unchallenged and it seeks judgment against the defendant as sought in the combined summons. The defendant's response was a Rule 30 application to set aside the plaintiff's application as an irregular step.
Van Zyl AJ discusses the failure to plead over; that in the Western Cape pleading over on the merits has usually not been insisted upon, especially when a defence such as want of jurisdiction or lis pendens has been raised; that the defendant cannot be faulted for delivering a special plea without a plea on the merits; the Arbitration Act; whether the failure to launch an application in terms of section 6 of Act was fatal for the defendant's case; and whether the plaintiff's application could be regarded as one under section 3(2)(b) regarding a dispute not being referred to arbitration. The court finds that the defendant has shown prejudice as required by Rule 30. The plaintiff's application is set aside in terms of Rule 30(1).

Social Justice Coalition v Minister of Police [2022] ZACC 27 at [123]-[151]

Constitutional Court – Jurisdiction – Applicants seeking declaratory order regarding unreasonable delay of Equality Court to convene – Absent an order of the court from which leave to appeal is sought, the appellate jurisdiction of the Constitutional Court is not engaged.

In 2014 the Khayelitsha Commission of Inquiry concluded that there were widespread inefficiencies in policing in Khayelitsha and there was a breakdown of relationships between the police and the community. It found that SAPS system for allocating police resources was systematically biased against poor, Black communities, resulting in the under staffing of police stations which serve the poorest areas in Cape Town. The applicants say they were met by disinterest from the police when they engaged with them about the Commission's recommendations. They approached the Equality Court which declared that the allocation of police human resources (and the system used for allocation) in the Western Cape unfairly discriminated against Black and poor people on the basis of race and poverty.
The applicants were unhappy with the response by the SAPS which they say was a generalised document rather than a remedial plan that aimed at remedying the deficiencies identified in the Equality Court's judgment. They wrote to the court requesting it to set the matter down for hearing on remedy to avoid any further delays. Despite the applicants' attorneys following up both telephonically and in writing with the Equality Court as well as the office of the Judge President regarding the finalisation of the matter, there was no response to their enquiries, which then led to the institution of the proceedings before the Constitutional Court. The applicants seek declaratory relief that the unreasonable delay of the Equality Court in convening so as to decide the issue of remedy, constitutes a constructive refusal of a remedy by that court.
Unterhalter AJ (majority) from para [123] finds that absent an order of the Equality Court from which leave to appeal to the Constitutional Court is sought, the appellate jurisdiction of the court is not engaged. The Rules do not permit the Constitutional Court to make a decision for the other court so as to entertain an appeal from that decision. The Constitutional Court could not assume an original jurisdiction to entertain hundreds of applications to supervise the many ways in which litigants may complain that other courts are failing to carry out their duties under section 34 of the Constitution (access to court). The applicants have, with much persistence, requested the Presiding Judge in the Equality Court to convene his court. His failure to do so is to be deprecated. What is required is an application, brought urgently if there are grounds, to the Equality Court, setting out the infringement of the applicants' rights and requiring the Presiding Judge to convene his court. Leave to appeal is refused.
Note the minority judgment of Kollapen J from paras [1]-[122].

Mohokare Local Municipality v Ngxito and Another (1391/2019) [2022] ZAFSHC 169 (14 July 2022)
www.saflii.org/za/cases/ZAFSHC/2022/169.html

Irregular step-notice of amendment out of time
In this opposed application, the applicant seeks an order in terms of Uniform rule 30 for the setting aside of the respondents' notice of amendment of the particulars of claim on the grounds that it constitutes an irregular step – The plaintiffs' notice of amendment does not conform with the terms of rule 28 – No merit to the plaintiffs' contention that the purported notice of amendment was filed within the 15 days – The notice of amendment is declared an irregular step and is accordingly set aside.

Human Rights Commission v City of Cape Town [2022] 8631-2020 (WCC) at [22]-[99]

Spoliation-Invasion of land – Informal structures – Demolishing of structures by officials – City's reliance on counter spoliation – Whether unconstitutional and invalid.

In 2020 during the covid lockdown, Mr Qolani was dragged, naked, out of his informal structure in a settlement in Khayelitsha, by officials of the City of Cape Town. After this, they demolished his structure with crowbars. The common law defence of counter spoliation was relied on by the City for the summary demolition of the structure by its officials, who unilaterally determined that the structure was unoccupied. The Human Rights Commission and the other applicants seek to have this conduct declared unlawful insofar as it is permitted by the remedy of counter spoliation.
Saldanha J, Dolamo J and Slingers J discuss whether the officials employed by the City acted lawfully in terms of the common law defence of counter spoliation or whether possession was lost and counter spoliation was no longer available to them and their actions required judicial supervision; the winding road of litigation in the matter; the conflation of the relief with the PIE Act; the City's reliance on the common law remedy of counter spoliation to summarily demolish and remove structures before they are occupied as homes; the element of physical control and the requirements for a person to be regarded as a possessor; and the instanter requirement. The conduct of the City in demolishing the structures and effectively evicting the occupiers based on its incorrect interpretation and application of the common law defence of counter spoliation is declared to have been both unlawful and unconstitutional.

SMM obo LPT v MEC for Health, Free State [2022] ZAFSHC 170

Prescription-Claim for damages – For child with cerebral palsy – Prescription – When debt becomes due – Whether the applicant had obtained the necessary knowledge – See paras [24]-[27] and the finding that the claim in plaintiff's personal capacity has become prescribed.

[2] In response to the summons, the First Respondent filed a Special Plea to the effect that the Applicant's claim in her personal capacity had already become prescribed on the 8 February 2014, and to the effect that notice was not given within the period stipulated in Section 3 of Act 40 of 2002. It is common cause that the claim on behalf of the child as not become prescribed because she is still a minor.

[3] The Applicant now approached this court on motion for a declaratory order that her summons was served on the First Respondent within a period of 3 (three) years from the date upon which the debt become due, and that her claim complied with the provisions of Section 12 of the Prescription Act.
In addition, the Applicant
seeks a declaratory order that she has complied in all respects with Section 3 (1), (2) and (3) of Act 40 of 2002, alternatively that her non-compliance with these provisions

be condoned in terms of Section 3 (4) (b) of the said Act. In the present proceedings, the Applicant claims no relief from the Second Respondent.
[4] The first question to be determined is then whether the Applicant's claim had already become prescribed by the time that summons was served on 5 September 2019. South African Courts have been seized with such questions almost on a daily basis in recent years, with the result that there is a plethora of reported judgements dealing with the issue. The judgements show that in each case, the applicable legal principles are time and again weighed up against the particular facts to arrive at a justifiable conclusion. This Court will follow the same course to determine whether the Applicant's claim has become prescribed or not.

[5] Where the Applicant relies in her Notice of Motion on the date upon which the debt became due, reference is obviously made to the provisions of Section 12 (1), (2) and (3) of the Prescription Act.

Investec Securities (PTY) Ltd v Corwil Investments Holdings (PTY) Ltd and Others (2021/11126) [2022] ZAGPJHC 475 (20 July 2022) www.saflii.org/za/cases/ZAGPJHC/2022/475.html

Legal representation-company –non legal person

Application – Investec Securities (Pty) Limited seeks a declarator that the third respondent, Mr N.L. Hittler be prevented from acting on behalf of the first and second respondents (Corwil) in any legal capacity in any legal proceedings that has been ongoing between Investec and Corwil, and in which Hittler was joined as a respondent in his personal capacity by order of court – Whether Mr Mongezi Stanley Manong has what can be described as a right of audience on behalf of the company before his court.

1] Investec Securities (Pty) Limited (Investec) seeks a declarator that the third respondent, Mr N.L. Hittler (Hittler) be prevented from acting on behalf of the first and second respondents (Corwil) in any legal capacity in any legal proceedings that has been ongoing between Investec and Corwil, and in which Hittler was joined as a respondent in his personal capacity by order of court.
[2] The history of the litigation thus far is set out by Manoim J in a judgment dated 5 April 2022.[1] Manoim J held[2]
'[20] Investec argues that he cannot represent Corwil. It argues he is not an attorney or advocate and hence he cannot represent them. Hittler is also not a director of Corwil because despite the dispute over his removal, given his sequestration, he cannot hold the position of a board director.
[21] Thus the legal position is quite clear. He cannot, since he is not a legal practitioner, nor a director represent Corwil in resisting the joinder application and I ruled to this effect at the beginning of argument.'
[3] This finding of Manoim J was due to the fact that Hittler is not an advocate or attorney. He is, as far as it may be relevant, also not a director of Corwil, inter alia, due to him being an rehabilitated insolvent.

[4] Despite the finding of Manoim J, Hittler continued to file papers ostensibly as representative of Corwil. It is common cause that the papers so filed were filed by Hittler, who during argument, said that he acted as representative or agent of Corwil with the approval of the Corwil board. This is also contained in his heads of argument. Hittler further indicated during argument that he intended filing further documents on behalf of Corwil in due course.
[5] The law in relation to representation of companies in legal proceedings in clear and was succinctly stated by Manoim J as set out above.
[6] Hittler made much of the fact that the directors of Corwil authorised him to act on behalf of Corwil by issuing a power of attorney to him to act as 'their' (Corwil's) agent in the proceedings. This however, missed the point. The board of directors may only appoint a person to represent a company in the High Court in civil proceedings who is a qualified legal practitioner. Any authority derived from the directors' resolution does not cure this obstacle. This rule has long since been applied in our courts. In Manong[3] it was said:[4]
'Right of appearance
[3] Before turning to consider the merits of the appeal it is necessary to first consider whether Mr Mongezi Stanley Manong (Mr Manong), the managing director of the company, who signed the heads of argument on behalf of the company and purported to represent it before us, has what can be described as a right of audience on behalf of the company before his court.
[4] The rule that a company cannot conduct a case in this court except by the appearance of counsel on its behalf was laid down in Yates Investments (Pty) Ltd v Commissioner for Inland Revenue. The rule may well have originated in early seventeenth century metaphysical reasoning that a corporation has "no soul, is invisible and cannot do homage". It, according to Viscount Simon LC, secures that a court like this will be served by persons who observe the rules of their profession, are subject to a disciplinary code and are familiar with the methods and scope of advocacy to be employed in presenting argument.
[5] There is nothing to suggest that Mr Manong's decision to secure the benefits of incorporation was not a genuine one. He did after all have the option of establishing and conducting the business as an unincorporated sole proprietorship. There is thus a persuasive argument that having chosen the benefits of incorporation, he must bear the corresponding burdens and not be allowed to escape them lightly.
[6] It has been thought, somewhat cynically I dare say, that the rule is based on some misguided attempt to preserve an unjustified monopoly for legal practitioners. This is not the case. Litigation is based on the adversary system. In determining a dispute, a court is dependent on the way in which the case is presented. Factual admissions or denials are made from time to time and a course of conduct has to be chosen by the litigants. When a corporation instructs an attorney who in turn instructs an advocate the law recognises their authority to bind the corporation for the purpose of litigation. In those circumstances a court need not concern itself about authority. Litigation will become very difficult indeed if a court had to be concerned at every step of the proceedings as to the authority of the person conducting the litigation to make binding decisions. The litigant in person can of course make those decisions without any question of authority, but a corporation cannot act except through its agent and an agent cannot have more authority than the corporation legally gives to it. Yet a further consideration is that corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk. Thus, apart from the fact that there are usually rules of court that preclude a

company from being represented by anyone other than a qualified practitioner, a review of the cases in England, Ireland, Australia, New Zealand and Canada shows that the courts, for pragmatic and policy reasons, have set their face against unqualified persons presenting and conducting cases unless they are doing so on their own behalf. So too, in Zimbabwe and South Africa.
[10] It follows that cases will arise where the administration of justice may require some relaxation of the general rule. Their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. I thus consider that our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings. After all, it seems to me that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative is of necessity an integral part of the rule itself.'
[7] The result is that Hittler may not appear or file documents on behalf of Corwil. Manoim J specifically held that Hittler cannot represent Corwil. Despite this, Hittler continues to purport to represent Corwil and it is in these circumstances that Investec seeks a declarator.
[8] Although Hittler attacks the basis of the entitlement of the declarator, I am of the view that his appearance and submissions are ultra vires, not only since the attorneys from Corwil withdrew but particularly since the finding made by Manoim J who ruled accordingly before hearing the matter that was before him. Despite the ruling, Hittler continues to file documents and continues to appear before this court.
[9] Having regard to the legal position, I find that Investec in entitled to the declarator sought by it. That being so, all the conduct of Hittler purporting to act on behalf of Corwil is irregular and all documents filed by him, purporting to act on behalf of Corwil, is similarly irregular.
[10] The submission by Hittler that the board of Corwil has an absolute right to arrange its own affairs in accordance with its decisions misses the legal obstacle that a legally unqualified person is not so entitled to represent Corwil and such a decision by the Corwil board is irregular.
[11] In so far as Hittler attacks the relief being sought as being a final interdict, and by relying on the requirements of such an interdict, I am of the view that those requirements have duly satisfied. Investec's right not to be harassed by the filing of irregular papers and to be subjected to irregular opposition in matters before the court, speaks for itself. This is clearly an injury to Investec as it has to incur costs to approach the court to obtain relief while Hittler is an rehabilitated insolvent.
[12] This a case where the appropriate relief would be to put an end to the irregular conduct of Hittler by issuing the order sought by Investec.
[13] In the circumstances I issue the following order:
1. The Notice of Withdrawal of the main application dated 30 May 2022, filed by Hittler on behalf of Corwil Investments Limited, is set aside,
2. Hittler is not permitted to represent Corwil in any proceedings under case number 11126/2021.
3. The costs of this application are to be paid by Corwil Investments Limited.

Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited [2022] ZACC 28

Appeal-leave to appeal-direct to CC

Seebed CC brought an application for leave to appeal against a judgment and order of the High Court evicted it from its retail premises. The application concerns the question whether the High Court was entitled to grant the eviction order, notwithstanding a pending dispute between the parties which had been referred to trial.

Jurisdiction

[33] This Court is, in terms of section 167(3)(b) of the Constitution, empowered to decide matters of a constitutional nature and any other matter that raises an arguable point of law of general public importance that ought to be considered by it. Once jurisdiction is established, it must also be in the interests of justice to grant leave to appeal.

[34] In this matter, it is alleged that Seebed has been denied its section 34 right to access the courts, in that it has been evicted in circumstances where the issues raised in the first eviction proceedings have not yet been ventilated and determined by the High Court. This is a constitutional issue. Consequently, this Court's jurisdiction is engaged.

Mhlantla J explains the Constitutional Court's jurisdictional reach and confirms that its jurisdiction was engaged in this matter [para 33-34].

In considering whether it was in the interests of justice to grant leave to appeal, the court had to consider the prospects of success. Court finding that High Court did not err in rejecting a second supplementary answering by Seebed. High Court having a true discretion in that regard, and no basis for interference was found.

High Court correctly granting eviction order, and leave to appeal is refused.

On Wednesday, 20 July 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). This application was brought by Seebed CC t/a Siyabonga Convenience Centre (Seebed) against Engen Petroleum Limited (Engen), and concerns the question whether the High Court was entitled to grant the eviction order, notwithstanding a pending dispute between the parties which had been referred to trial.

Seebed is a licenced retailer operating a fuel and service station business in Robertville, Johannesburg, which is located on premises owned by Engen. In 2009, Seebed entered into a written lease and operation of a service station agreement (lease agreement) with Engen. According to the terms of the lease agreement, the lease period was from 1 April 2008 to 31 May 2010 (original lease agreement). This lease period was subsequently extended, in writing, to 31 July 2017. Seebed and Engen concluded a further written agreement on 24 August 2011, which reduced the extended lease period to 31 July 2015. This agreement contained a "whole contract" clause – which would ordinarily preclude reliance on an oral agreement. Seebed alleged that the reduction of the extended lease period was done pursuant to an oral

agreement, in terms of which the parties agreed that the lease period would be subject to a subsequent extension, which would end on 31 July 2020.

In 2010, Engen decided to introduce a Corner Bakery franchise, under franchisor Retsol Stores (Pty) Limited (Retsol), on the leased premises. Seebed took exception to the franchise agreement and requested that it be amended. Engen refused. Seebed, in turn, refused to sign the franchise agreement. This prompted Engen to cancel the lease agreement and demand that Seebed vacate its property; however, Seebed did not do so.

As a result, during September 2012, Engen launched eviction proceedings against Seebed in the High Court (first eviction proceedings). Seebed opposed these proceedings on the basis that Engen had unilaterally decided to establish the Corner Bakery on the leased premises, without conducting a profitability or feasibility study of the franchise. Seebed also alleged that Engen had committed fraudulent misrepresentation and could not rely on Seebed's refusal to sign the franchise agreement as breach of the extended lease agreement.

The matter was heard by the High Court in May 2016. During the proceedings, Seebed's representatives submitted that Engen's fraudulent misrepresentation precluded it from relying on a breach of the extension agreement as a basis for cancellation and that, as a result of the Engen's misrepresentation, the extended lease agreement was invalid. According to them, this meant that the original lease agreement subsisted between the parties. The terms of the original lease agreement provided that if the parties failed to agree on the extension of the lease agreement, the agreement would remain in operation on a month to month basis, terminable on one month's written notice. Seebed advanced that the parties were engaged in a month to month agreement, which could be terminated on notice by any of the parties.

On 26 May 2016, the High Court referred the application to trial. On 31 May 2016, the Engen gave Seebed one month's notice to vacate; however, Seebed did not comply. On 24 August 2016, Seebed filed a counterclaim, wherein it alleged that the extension of the lease period to July 2017 had been truncated to July 2015, based on Engen's oral undertaking to extend the lease period to July 2020. On these grounds, Seebed contended that it had a reasonable expectation that the lease agreement would be extended to 31 July 2020, therefore, it had a right to remain in occupation of the leased premises until July 2020.

In October 2016, Engen launched the second eviction proceedings, relying on the concessions made on Seebed's behalf that the lease agreement could be terminated on one month's notice. On account of institution of the second eviction proceedings, the first eviction proceedings were postponed sine die. Seebed opposed the second eviction proceedings on the grounds that the matter: was lis pendens; involved a material dispute of fact to be decided during the trial; and the concessions Engen relied on were of law and not fact, and were thus not binding. On 30 June 2017, Seebed referred alleged unreasonable or unfair contractual practices to the Controller of Petroleum Products in terms of section 12B of the Petroleum Products Act. In August 2017, Seebed filed an application to stay the second eviction proceedings, pending the section 12B arbitration, and asked for Engen's consent –

but Engen refused. Seebed also sought to introduce the issue of unreasonable or unfair contractual practices through a second supplementary answering affidavit.

The High Court refused to stay the proceedings on the basis that it had jurisdiction to assess the fairness, reasonableness and equitability of a petroleum contract and that it was well placed to hear and decide the second eviction proceedings, in the light of its inherent jurisdiction to interpret contracts, as well as the need to bring the matter to finality without further delay. The High Court further refused to grant Seebed leave to file a second supplementary answering affidavit, because Seebed had failed to seek the requisite consent from either Engen or the High Court before filing, and that it had not proffered a satisfactory explanation for the delay in placing the information before the High Court.

The High Court held that the issues concerning unfair and unreasonable contractual practices were not central to the second eviction proceedings. It also rejected Seebed's lis pendens defence and held that the causes of action in the two eviction proceedings were distinct. The High Court further held that Seebed had made a factual concession – that the contract that subsisted between the parties was on a month to month basis – and Engen was entitled to cancel the lease agreement on one month's notice. In the result, the High Court upheld Engen's application and granted the eviction order with retrospective effect from 31 July 2017.

Seebed sought leave to appeal to the Full Court of the High Court, but the application was dismissed. Seebed's application for leave to appeal to the Supreme Court of Appeal was dismissed, and so too its application for reconsideration. This led to Seebed launching this application in the Constitutional Court.

Before the Constitutional Court, Seebed submitted that: the matter concerned the proper interpretation of legislation, which implicated the constitutional right to freedom of trade; the matter involved important legal questions surrounding the correct application of the principles of fairness and reasonableness in relation to the Act; and that there are conflicting judgments on the issues. Seebed submitted that it would be in the interests of justice to grant leave and provide legal certainty on the issue.

On the merits, Seebed submitted that the its case was distinguishable from Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd (Crompton), both in fact and in law. Additionally, Seebed submitted that the High Court erred in finding that the standards of reasonableness and fairness were not relevant to the second eviction proceedings. Seebed submitted that it had the right to sell the service station if the eviction is granted, in accordance with clause 41 of the lease agreement.

Engen submitted that this matter does not raise any constitutional issue or arguable point of law of general public importance, and that there are no conflicting judgments on the salient legal issues. Engen further submitted that, in any event, the relief sought by Seebed has been rendered moot, since Seebed was no longer entitled to occupy its premises on the strength of any of its versions, due to the effluxion of time.

On the merits, Engen submitted that Seebed had failed to appreciate the nature of the proceedings, in that the matter referred to trial had no bearing on the second eviction proceedings. Engen further submitted that a request for referral to a section 12B arbitration does not oust the High Court's jurisdiction. The High Court was entitled to exercise a discretion, in terms of section 6 of the Arbitration Act, to decide whether to grant such a stay. Engen argued that the lapse of the lease agreement, as was also the case in Crompton, cannot in itself be considered a contractual practice. Engen further submitted that, in any event, a section 12B referral could be used to compel the parties to enter into a further agreement.

Engen submitted that the argument that Seebed was entitled to sell the service station had been raised for the first time in the Constitutional Court. Additionally, Engen submitted that, due to the expiry of the lease agreement, all of Seebed's claims had prescribed. Thus, Seebed's application should be dismissed for lack of reasonable prospects of success.

The matter was decided without a hearing. In a unanimous judgment penned by Mhlantla J, the Constitutional Court held that this matter raises constitutional issues and thus, the Court's jurisdiction is engaged. Regarding the question whether it is in the interests of justice to grant leave, the Court considered the merits of the matter. On the first issue, it held that the decision to allow the filing of further affidavits after the replying affidavit amounts to a true discretion, and there was no basis to interfere with the High Court's exercise of this discretion. Therefore, the High Court did not err when it refused to allow Seebed to file its second supplementary answering affidavit in the second eviction proceedings.

On the question whether the High Court erred in dismissing Seebed's lis pendens defence, the Court held that the issues to be determined in both the first and second eviction proceedings were distinct and, consequently, Seebed's lis pendens defence was rejected.

With regards to the question whether the eviction order was proper, the Constitutional Court held that the concessions made on behalf of Seebed in the first eviction proceedings were factual concessions which bound Seebed. The Court also held that the High Court was correct in concluding that, on the strength of Seebed's version, the contract that subsisted between the parties at the time of the second eviction proceedings was on a month to month basis and that Engen was entitled to terminate it on a month's notice.

The Constitutional Court further held that Seebed's allegation that Engen had made an undertaking to extend the lease period to 2020 could not be considered as it was not raised during the second eviction proceedings. The Court also held that Seebed's submission that it is entitled to sell the service station if the eviction is granted was raised for the first time in this Court, therefore it was not in the interests of justice to determine that issue as the Court would act as a court of first and last instance. On Seebed's contention that the granting of the eviction order in the second eviction proceedings has precluded it from raising any of its defences in the first eviction proceedings, the Court held that it would not be in a position to take the matter any further as the first eviction proceedings had been rendered moot.

In the result, the Court held that it was not in the interests of justice to grant leave to appeal and ordered Seebed to pay the costs.

Leysath v Legal Practitioners' Fidelity Fund Board of Control (770/2021) [2022] ZASCA 115 (28 July 2022)

Practitioners – Fidelity Fund – Claim for reimbursement in terms of s 26 of the Attorneys Act 53 of 1979 – Appellant alleging that deposits paid by clients to instructing attorneys' firm as cover for counsel's fees constitute an entrustment in terms of s 26 – Alleged payment disputed – Onus on claimant to establish that money had been entrusted on his behalf to the attorney – Onus not discharged.

Mr Leysath is a practising advocate and his claim comprises 51 unpaid tax invoices for services rendered to Costa Attorneys in respect of various clients. He claimed that these clients had paid funds to Costa Attorneys as cover for his fees and that those funds had been entrusted to Costa Attorneys on his behalf, as contemplated by s 26(a) of the Attorneys Act 53 of 1979. He further alleges that Mr Costa misappropriated the monies, causing him to suffer pecuniary loss in the claimed sum. Mr Costa absconded after the Legal Practice Council established that there was a deficit exceeding R30 million in the firm's trust account. Mr Leysath appeals the judgment of the High Court dismissing his application to compel the Legal Practitioners' Fidelity Fund Board of Control to reimburse him the sum of R472,666. Smith AJA discusses Mr Leysath's long professional relationship with Costa Attorneys; how the clients made payments to the attorneys and for what purpose; the firm's policy that it would only engage counsel once a client had paid sufficient funds into its trust account; whether the clients paid deposits to Costa Attorneys as cover for the advocate's fees; whether the monies deposited by clients were "entrusted" to Costa Attorneys as envisaged by s 26; and the High Court's conclusion that an advocate's claim for outstanding fees lies against the attorney and not the client. According to s 26(a) Mr Leysath was required to prove that: (a) he had suffered pecuniary loss; (b) by reason of theft committed by Mr Costa; (c) of money entrusted by or on his behalf; (d) in the course of Mr Costa's practice. Mr Leysath failed to place himself within the purview of s 26, namely to establish that clients entrusted specified sums of money to Costa Attorneys as cover for his fees. The appeal is dismissed.

Legal Practice Council v Kgaphola [2022] ZAGPPHC 537 at [23]-[25]

Practitioner – Attorney – Suspension or removal from roll – Young and inexperienced – Non-compliance relating to being indigent rather than dishonesty – Tardiness in responding to queries by the Legal Practice Council and compliance with its rules – Application dismissed.
Mr Kgaphola was admitted to practice as an attorney in 2020. He is a sole practitioner practising under the style of Kgaphola Incorporated Attorneys. The Legal Practice Council (LPC) seeks his suspension, alternatively, removal from the roll of practising attorneys on the grounds that he practiced without a Fidelity Fund Certificate for the year of 2020; failed to pay membership fees for the 2020/2021 financial year; failed to register for a Practice Management Training Course for the year 2021; his trust bank account and business account are registered in a

jurisdiction which does not tally with where his office is registered; and that he brought the profession into disrepute.
Mngqibisa-Thusi J discusses the background to Mr Kgaphola's admission and practice; and the LPC's contentions, including that the manner in which the he has engaged with it was hostile, dismissive and disrespectful, which conduct amounted to lack of professionalism and brought the profession into disrepute. The court finds that the infractions do not entail an element of dishonesty. They relate mainly to tardiness in responding to the LPC's queries and compliance with its rules relating to the pre-conditions for the issuance of a Fidelity Fund Certificate. Mr Kgaphola has shown himself to lack experience and insight. After he was admitted to practice as an attorney, he set up practice as a sole practitioner which was subject to the mentioned conditions. There is no evidence, with him being a young and inexperienced attorney, that the LPC proffered him any guidance. His non-compliance relate to being indigent rather than dishonesty, an issue facing a lot of young entrants into the profession. The court was satisfied that Mr Kgaphola was not an inherently dishonest person. At the time of the launching of the application, he had substantially complied with the LPC's requirements. The attendance of the training for Practice Management will serve as a corrective measure. He might have been tardy in his responses to the applicant and might have used inelegant language, however, his conduct was not indicative of any intentional disrespect towards the LPC. Instead of launching these proceedings, the LPC could have considered less drastic sanctions than removal or suspension.
The application is dismissed. (Nqumse J concurred.)

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.

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.

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.

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.

MMM

Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others [2022] ZACC 29

Legal Practice Act 28 of 2014 — constitutionality of section 24(2) — unfair discrimination — provision is not unconstitutional- non residents and non RSA citizens

On Tuesday, 2 August 2022 at 10h00, the Constitutional Court handed down judgment in the following consolidated matters: (a) application for leave to appeal against the judgment and order of the High Court of South Africa, Free State Division, Bloemfontein (High Court); a matter which concerned two consolidated applications which were before the High Court; and (b) a direct access and intervention application which emanated from proceedings before the High Court of South Africa, Gauteng Division, Pretoria. The applicants sought the same substantial relief in all applications before this Court.

On 16 September 2021, the High Court handed down judgment declaring section 24(2) of the Legal Practice Act 28 of 2014 (LPA) unconstitutional and invalid to the extent that it precluded foreign nationals who are neither citizens of South Africa or permanent residents from being admitted and enrolled as non-practising legal practitioners.

The applicants in CCT 315/21 and CCT 321/21, are Relebohile Cecilia Rafoneke (Rafoneke) and Sefoboko Phillip Tsuinyane (Tsuinyane), Lesotho nationals who have satisfied all the requirements for admission and enrolment as legal practitioners in terms of section 24(2) of the LPA, save for the citizenship and/or permanent residence requirement. The applicants in CCT 06/22 are Bruce Chakanyuka, Nyasha James Nyamugure, Dennis Tatenda Chadya and the Asylum Seeker Refugee and Migrant Coalition, acting in the interests of its members. The applicants in CCT 06/22 are Zimbabwean nationals facing the same predicament as Rafoneke and Tsuinyane. The respondents in CCT 315/21 and CCT 321/21 are the Minister of Justice and Correctional Services, the Legal Practice Council, the Minister of Trade Industry and Competition, the Minister of Labour and the Minister of Home Affairs, acting in their respective capacities as the statutory bodies tasked with the implementation and regulation of the legal profession and the immigration laws of South Africa. The intervening party is Daphne Makombe, a Zimbabwean national who has satisfied the

requirements for admission and enrolment as a legal practitioner, conveyancer and notary, save for the citizenship and/or permanent residence requirement.

Addressing the issues raised, the High Court held that the LPA should not be viewed in isolation and that the impugned provisions must be adjudged in light of the Constitution and in conjunction with the Immigration Act 13 of 2002 and the Employment Services Act 4 of 2014. The High Court reached the conclusion that the differentiation between citizens and permanent residents on the one hand and non-citizens on the other is indeed rational and serves a legitimate governmental purpose. One of the many points raised by the High Court was that a person who entered the country with a concession to study would, by virtue of completing his or her studies, be allowed to change his or her status without regard to any other legal impediments and that such a process would be in direct conflict with governmental policy and law as it would be tantamount to changing such person's status without the intervention of the Department of Home Affairs. The High Court further held that section 22 of the Constitution limits the rights of non-citizens to practise law in South Africa.

The High Court reasoned that the discrimination in section 24(2)(b) of the LPA is fair insofar as it prohibits foreign nationals from being admitted and enrolled as practising legal practitioners. The High Court however, found the section to be inconsistent with the Constitution as it does not allow non-citizen to be admitted and enrolled as non-practising legal practitioners. The High Court stated that a just and equitable remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect. The High Court also provided non-citizens with interim relief which is to operate during the period of such suspension, allowing non-citizens to be enrolled as non-practicing legal practitioners should they comply with all the requirements.

Before the Constitutional Court, the applicants contended that the impugned provisions offended sections 9(1) and 9(3) of the Constitution in that the differentiation between citizens and permanent residents (on the one hand) and all other foreign nationals (on the other), amounted to unfair discrimination as the impugned provisions did not require applicants, for purposed of admission, to have complied with immigration laws which permit their employment in South Africa. To this end it was argued by the applicants that in its reasoning, the High Court confused the issue of admission with that of employment.

The applicants further argued that should the Court find that the provisions have a governmental purpose, it should not be considered a legitimate one. They contended that the impugned provisions are in conflict with the objectives of the LPA because the stated purpose of the impugned provisions is not reasonably likely to be achieved by those provisions. Further that they are reasonably not likely to optimise opportunities for law graduates nor is it in the purview of the LPA to deal with immigration and employment of foreigners.

The applicants submitted that there are less restrictive means to achieve whatever governmental purposes alleged, as the LPA has sufficient safeguards in the protection of the public against perils such as fraud. Furthermore, that the immigration and employment laws of South Africa have measures in place to ensure that citizens get preference over foreigners in the labour market. They further argued that the

admission of foreign nationals will in no way limit the rights of citizens under section 22 of the Constitution.

Scalabrini Centre of Cape Town, the first amicus curiae urged the Court to take into account that sections 22 and 27 of the Refugees Act 130 of 1998 entitle refugees to live, study and work in South Africa, without any restrictions, and to consider the challenged provisions in a manner consistent with the rights conferred on refugees in terms of these provisions. The International Commission of Jurists, the second amicus curiae, relied on various international instruments, and argued that they impose a duty on State Parties to ensure that all people, irrespective of citizenship or whether their status is documented under domestic law or not, enjoy the right to work. In agreement with the submission of the applicants, the Pan-African Bar Association of South Africa, the third amicus curiae, argued that the impugned provisions frustrate diversity in nationality in the legal profession in the context of the increasingly cross-border and globalised nature of the commercial, public and human rights practice.

On the merits, the Minister of Justice and Correctional Services, first respondent, submitted that the impugned provision is in line with governmental obligations which seek to ensure that foreign nationals do not circumvent immigration and labour laws by securing a license to practice law under the auspices of student visas. The first respondent argued that allowing the parties, who have unsuccessfully applied for permanent residence or exemption, to be admitted would amount to such circumvention.

The first respondent submitted further that the differentiation is justifiable, fair and consistent with section 9(5) of the Constitution. To this effect, the first respondent argued that the preamble of the LPA embraces the provisions of section 22 of the Constitution and one of the reasons for it being promulgated was to regulate the legal profession in the interests of the public. The respondent argued that the practise of law does not require a critical or rare skill as there are numerous citizens and permanent residents who are suitably qualified and are already struggling to secure employment. The first respondent submitted that there is no uniform approach to the limitation of non-citizens rights to practice law and each country favours its own best interests after considering the economic, political, legislative and constitutional context unique to it.

The Legal Practice Council, the second respondent, submitted that the LPA regulates entry into the profession taking into consideration the provisions of section 22 of the Constitution, and that this is one of the grounds informing the Act's differentiation of citizens, permanent residence holders and foreign nationals. The second respondent argued that the right to choose a vocation does not fall within a sphere of activity protected by a constitutional right that is available to refugees and other categories of foreign nationals. The second respondent contends that it is a well-established principle that the rights in the Bill of Rights are mutually reinforcing and should be interpreted in that manner.

The second respondent submitted that the rights that are accorded to a foreign national find expression from compliance with immigration laws, including the right to enter into practical vocational training contracts. The second respondent further

submitted that the impugned provision serves the legitimate purpose of transforming the legal profession to broadly reflect the demographics of South Africa.

In a unanimous judgment penned by Tshiqi J, the Court held that this Court's jurisdiction is engaged because the matter concerns the Court's exclusive jurisdiction as a result of the High Court order having declared the provisions of section 24(2) to be unconstitutional and invalid, albeit, to a limited extent. The applicants were not content with the limited scope of the declaration, and consequently sought to challenge it. The Court concluded it had the necessary jurisdiction in terms of section 167(5) to make the final decision on the declaration. In addition, the Court permitted a direct appeal to it and granted direct access to Ms Daphne Makombe. The Court reasoned that the application also implicated the equality clause in section 9 of the Constitution, therefore granting it jurisdiction.

The Court held that section 22 of the Constitution preserves the rights of citizens to choose their trade, occupation or profession freely and that it also empowers the State to enact legislation to regulate freedom of trade, occupation and profession. The Court held that section 24(2) of the LPA is legislation that regulates the practice, legally related occupations and the profession in general. The Court reasoned that through the enactment of section 24(2) of the LPA, the regulatory competence of the state has been exercised in a manner that is consistent with a citizen's right to choose their profession. The Court concluded that the regulatory competence exercised cannot be said to extend to non-citizens and their choice of profession as section 22 is a right in the Constitution, that does not extend to them. The Court further held that the fact that non-citizens do not have rights that accrue under section 22, does not mean they are not entitled to enter into certain categories of professions in South Africa.

The Court further held that the differentiation between citizens and permanent resident on one hand and foreign nationals on the other does not amount to discrimination which is unfair. The Court reasoned that citizenship is not one of the listed grounds in section 9(3) of the Constitution nor was the Court convinced that citizenship may be classified as falling under the listed ground of social origin. The Court held that the limitation created by section 24(2) is narrowly tailored to the admission of legal practitioners and does not operate as a blanket ban to employment in the profession. Therefore, the activity which the applicants sought constitutional protection for is the enjoyment to choose one's vocation and as such this cannot be held to amount to unfair discrimination, as that right does not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants.

Accordingly, the Court granted leave to appeal and dismissed the application of constitutional invalidity on its merits.

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