LEGAL NOTES VOL 8/2022

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INDEX[1]

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COMPETITION COMMISSION OF SOUTH AFRICA v MEDICLINIC SOUTHERN AFRICA (PTY) LTD AND ANOTHER 2022 (4) SA 323 (CC)

Competition — Promotion of competition — Merger control — Merger — Consideration of mergers — Merger in private healthcare sector — Obligation of Competition Tribunal and Competition Appeal Court, when undertaking assessment in terms of s 12A of Competition Act, to consider impact on right to healthcare services protected in s 27 of Constitution — Competition Act 89 of 1998, s 12A; Constitution, ss 7(2), 27 and 39(2).
Competition — Competition Appeal Court — Powers — To interfere with findings of Competition Tribunal — Powers of Competition Appeal Court not unbridled in this regard — Deference to be shown by Competition Appeal Court to Competition Tribunal — Competition Appeal Court could only interfere with factual findings of Tribunal in event of misdirection or clearly wrong direction.

The present matter concerned the obligation of the Competition Tribunal and Competition Appeal Court, when assessing a merger in the private healthcare sector under s 12A of the Competition Act 89 of 1998, to consider the impact on the right to healthcare as protected in s 27 of the Constitution. This was an application before the Constitutional Court for leave to appeal the decision of the Competition Appeal Court (CAC) to overturn the refusal by the Competition Tribunal to approve a proposed merger in the private healthcare services sector whereby the first respondent, Mediclinic Southern Africa (Pty) Ltd (Mediclinic), would acquire a controlling share in the second respondent, Matlosana Medical Health Services (Pty) Ltd (Matlosana). Mediclinic by means of the transaction would acquire control of Matlosana's two private multidisciplinary hospitals in Klerksdorp (referred to as 'the target hospitals'),

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

this when Mediclinic already owned a private multidisciplinary hospital in nearby Potchefstroom as well as 49 other hospitals throughout the country. The Competition Tribunal was obliged by s 12A of the Competition Act to consider: *(a)* whether the impugned merger was likely to substantially prevent or lessen competition; *(b)* if so, whether the merger would likely result in any pro-competitive gain which would offset the anti-competitive effects of the merger, and would not likely be obtained if the merger is prevented, and the merger could be justified on substantial public interest grounds; and *(c)* irrespective of the answer to *(a)*, whether the merger could be justified on substantial public interest grounds, or whether such grounds weighed against the refusal. (See [91].) The Tribunal had concluded that the proposed merger would lead to a substantial lessening of competition. The Tribunal's critical points in reaching such conclusion were, inter alia, that:

(1) The relevant local geographic market comprised an area including both Klerksdorp and Potchefstroom.

(2) The proposed merger would give rise to a number of harmful competition effects. Most importantly in this regard, the tariffs for the target hospitals would increase significantly, translating into higher prices charged to patients; this was because Mediclinic hospitals were subject to higher tariffs, both in respect of insured and uninsured patients, and Mediclinic would implement those post-merger at the target hospitals. Other harmful effects referred to were increased concentration and regional dominance, and a likely deterioration in patient experience at the target hospitals.

(3) The merger could not be justified on public interest grounds: The private healthcare sector served an essential public good which was protected by s 27 of the Constitution. The proposed transaction would have a significant effect on the healthcare costs of both insured and uninsured patients living in the rural Potchefstroom/Klerksdorp region. Uninsured patients in this area, which were a vulnerable group, would have less choice of cheaper hospitals post-merger and this would adversely affect their ability to switch between cheaper options. This, all in the context of rising private healthcare costs.

The appropriate remedy, the Tribunal had held, was to prohibit the merger: it was not convinced that the merging parties' proposed behavioural remedies would remedy the substantial lessening of competition.

Majority decision — The majority of the Constitutional Court found that leave to appeal should be granted. Firstly, the court had jurisdiction: The merger in question was in the healthcare sector, and the case was essentially about whether access to private healthcare services would be impacted by the merger, and involved the interpretation, protection and actualisation of this constitutional right, and therefore implicated the s 27 constitutional right of access to healthcare services. It also concerned the obligation, imposed by s 7(2) of the Constitution, of the state to respect, promote, protect and fulfil this right, as well as a court's obligation, in terms of s 39(2), to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. Furthermore, the issues raised — competition in the private healthcare sector, the correct interpretive approach to s 12A, and the power of the CAC to interfere with the factual and policy findings, as well as the remedy, of the Tribunal — constituted arguable points of law, of general public importance. (See [36] – [37].) Secondly, it was in the interests of justice that leave be granted (see [39]).

The majority addressed the power of the CAC to interfere with the Competition Tribunal's findings. It held that such a power was not an unbridled one (see [44]). The CAC had to show a measure of deference to the Tribunal, in cognisance of the fact that it was a specialist body possessed of the necessary financial and economic

knowledge and thorough grasp of policy issues required in determining whether or not to approve a merger. The CAC had to be cautious before imposing its own conception of the policy considerations upon a decision adopted by the Tribunal. (See [44].) Further, as an appellate court, the CAC could only interfere with the factual findings of the Tribunal in the event of a misdirection or a clearly wrong direction. This this had to be done for the sole purpose of achieving justice. (See [45].) The CAC, the majority found, in rejecting the Tribunal's factual and policy findings — most importantly, that Potchefstroom and Klerksdorp formed one local geographic market, and that the proposed merger would lead to a substantial lessening of competition — and remedy, had failed to show how the Tribunal had misdirected itself or been clearly wrong (see [48], [59]). The Tribunal's decision in this regard was well reasoned, and should have been left unaltered. The CAC had failed to show sufficient deference to the Tribunal, and its grounds for overturning the Tribunal's decision amounted to no more than a difference of opinion or preference. (See [48] – [52], [59], [70] and [82] – [85].)

The majority held further that, in interpreting s 12A of the Competition Act, the CAC was obliged by s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights; and by s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights (see [9], [10] and [71] – [72]). The majority found that the CAC had not fulfilled these obligations because it failed to have regard to the significant adverse impact that the increase in tariffs at the target hospitals would have on the right, protected in s 27 of the Constitution, of access to healthcare services of patients, particularly uninsured patients, of the target hospitals, and its consequent negative impact on the public interest. (See [55], [74], [77].) The CAC, in the majority's view, had reduced the tariff hike to insignificance (see [61]). But the CAC should have seen the small tariff increase in the proper context: that of the ever rising cost of private healthcare in South Africa, and the need to curb that escalation (see [8], [73], [77], [81]). The CAC in taking the approach it had, the majority held, had undermined the s 27 imperative (see [66]). In contrast, the majority found that the Tribunal had done what it was enjoined to do by the Constitution (see (3) above and see [77]).

The majority accordingly upheld the appeal, and set aside the decision of the CAC (see [85] and [88]).

Minority decision — The minority held that the matter in question did not engage the Constitutional Court's jurisdiction. The appeal, it held, turned on questions of fact with which it could not interfere, ie what was the relevant market; whether the merger would cause a substantial lessening of competition; and whether the merger caused prices at the target hospitals to increase or the quality of services to decrease. (See [89] and [94].) The fact that the merger was in the health sector and accordingly implicated s 27 of the Constitution was not sufficient in itself to engage the Constitutional Court's jurisdiction, as the majority had held. (See [98] – [100].) The minority noted that the majority had further sought to ground the jurisdiction of the Constitutional Court on the basis that the CAC, in its s 12A analysis, had failed to have regard to the fact that the merger might hinder the realisation of s 27 rights by driving up hospital costs, and the matter accordingly concerned the state's obligations to respect, promote and protect the Constitution, and a court's duty to interpret legislation in terms of s 39(2). (See [101].) In this regard the minority stressed that the CAC had in fact found that the merger *would not result in any price increase*. The constitutional rights of patients of the target hospitals could not therefore be said to be imperilled; accordingly, in the context of the public interest assessment under s 12A, there was no need to apply s 27. Further, it could not be said that there was *any binding decision* as to the effect of s 27 on s 12A. (See [104].) The minority finally held that the fact that the CAC might

have erroneously overturned factual findings of the Tribunal did not, as the majority had suggested, raise an arguable point of law of general public importance (see [114] – [115]).

MINISTER OF FINANCE v AFRIBUSINESS NPC 2022 (4) SA 362 (CC)

Government procurement — Procurement process — Validity of regulatory framework — Preferential Procurement Regulations, 2017 — Minister's power to make 'necessary or expedient' regulations to achieve objects of Procurement Act — Meaning of 'necessary or expedient' — To be read conjointly and objectively — Regulations introducing pre-qualification criteria not 'necessary or expedient' for achieving objectives of Procurement Act — Ultra vires and invalid — Preferential Procurement Policy Framework Act 5 of 2000, ss 2(1) and 5(1).

Under s 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act) organs of state must determine their own preferential procurement policy and implement it within the framework laid down in that section; and under s 5(1) the Minister of Finance 'may make regulations regarding any matter that may be *necessary or expedient* to prescribe in order to achieve the objects of [the Procurement Act]'. These objects are stated in its preamble as 'to give effect to s 217(3) of the Constitution, by providing a framework for the implementation of the procurement policy contemplated in s 217(2) . . . and to provide for matters connected therewith'.
In this application the Minister of Finance (the Minister) applied for leave to appeal against a judgment and order of the Supreme Court of Appeal (the SCA), obtained by Afribusiness NPC, a non-profit organisation, on appeal from the High Court. The SCA had held that the Preferential Procurement Regulations, 2017 (the Regulations) — promulgated by the Minister of Finance (the Minister), exercising his powers in terms of s 5(1) of the Procurement Act — introduced pre-qualification criteria which were inconsistent with the Preferential Procurement Policy Framework Act (Procurement Act) and were thus invalid. The SCA suspended its declaration of invalidity for 12 months to enable the Minister to take corrective action. (See [16] – [17].)

The Constitutional Court granted leave and admitted two amici. The main issue was whether the Minister had the power to make the impugned regulations.
Held
The Minister's regulation-making power was limited by a conjoined reading of the words 'necessary or expedient' in s 5(1), and the power afforded organs of state by s 2(1) to determine their preferential procurement policy.
The phrase 'necessary or expedient to achieve the objects of this Act' was about an objective *legal* question — what would be necessary to make it work so as to achieve its objectives. The impugned regulations were meant to serve as a preferential procurement policy. That s 2(1) provided for the determination of such policy by each organ of state, logically meant that the determination of a preferential procurement policy by a person or entity other than each organ of state was not *necessary*. The Regulations sought to achieve that which could already be achieved in terms of s 2(1) of the Procurement Act. Any determination of policy by the Minister would be superfluous, not at all within the ambit of what was *necessary or expedient* (suitable, convenient, practical or appropriate) as envisaged in s 5. A regulation that did not meet

the threshold of 'necessity or expedience' was invalid for being ultra vires the empowering section. (See [102], [108], [111], [114] – [116], [120].)
The Procurement Act stipulated the means of, or adopted a plan for, determining a preferential procurement policy. The Minister was now adding different means or varying the adopted plan. This he could not do. The power to create a system of preference vested in the organ of state, and in it alone. The appeal would accordingly be dismissed. (See [122], [123], [125].)

MINISTER OF FINANCE v SAKELIGA NPC (PREVIOUSLY AFRIBUSINESS NPC) AND OTHERS 2022 (4) SA 401 (CC)

Appeal — Execution — Suspension of decision pending appeal — Application under Uniform Rule 42(1) for variation of Constitutional Court order dismissing appeal on basis of its alleged lack of clarity regarding period of suspension — No confusion possible because position governed by Superior Courts Act — Application without merit and dismissed — Superior Courts Act 10 of 2013, s 18(1).

The applicant, the Minister of Finance, sought direct access to the Constitutional Court (the CC) on an urgent basis for the variation of a CC order which had dismissed his appeal from the Supreme Court of Appeal. * He claimed that the CC's order was ambiguous or lacked clarity and was thus susceptible to variation under rule 42(1) of the Uniform Rules of Court.
The SCA had declared the Minister's regulations made in terms of the Preferential Procurement Policy Framework Act 5 of 2000 invalid, and suspended the declaration of invalidity for 12 months to enable corrective action. The CC's order dismissed the appeal — without any mention of any suspension of the order — but the minority judgment, in a footnote, said that '(t)he period of suspension expired on 2 November 2021'. The Minister contended that the fact that the majority did not address this footnote, resulted in a lack of clarity which was exacerbated by the CC's order simply saying the appeal was dismissed and not setting aside, replacing, substituting or in any way varying the SCA's order. This confusion, said the Minister, gave rise to different possible interpretations of the CC's order. (See [2] – [6].)
Held
The application warranted direct access; it would be inappropriate for any other court to entertain an application in terms of rule 42 pertaining to an order made by this court (see [10]).
A minority judgment was just that. Unless parts of it were adopted either expressly or impliedly, it could not affect the meaning of an order granted by the majority. There was no basis whatsoever for suggesting that the majority judgment adopted the content of the minority judgment footnote. Therefore, the footnote could not have given rise to any confusion (see [11]).
The position was covered by s 18(1) of the Superior Courts Act 10 of 2013. Immediately after the SCA order was granted, the countdown on the 12-month period of suspension began but was halted by the lodgment of the application for leave to appeal. Because s 18(1) suspended the operation and execution of a judgment 'pending the decision of the application [for leave to appeal] or appeal', the countdown resumed after this court dismissed the appeal on 16 February 2022. There was no need for this clear legal position to be confirmed. (See [15] – [18].)

Confusion could only have arisen if the order was interpreted without due regard for the law, ie s 18(1). There was no merit in the Minister's submissions; the application would be dismissed. (See [19] and [22].)

AFRICAN TRANSFORMATION MOVEMENT v SPEAKER, NATIONAL ASSEMBLY AND OTHERS 2022 (4) SA 409 (SCA)

Parliament — Speaker — Request for vote on motion of no confidence in President to be by secret ballot — Manner in which Speaker to exercise her discretion.

In this matter ATM, a political party, tabled in the National Assembly a motion of no confidence in the President, and later asked the Speaker that the vote on the motion be by secret ballot (see [1] – [2]). The Speaker subsequently refused the request and this caused ATM to approach the High Court for the refusal's setting aside, and an order that the secrecy-decision be remitted to the Speaker for taking afresh (see [4]). The High Court however dismissed the application but gave leave for appeal to the Supreme Court of Appeal (SCA) (see [5]).
There, ATM's contention was that the Speaker's decision was vitiated by irrationality owing to the erroneous procedure she had adopted in coming to make it: the Speaker had understood that ATM bore an onus to provide 'compelling reasons' for the vote to be held by secret ballot (see [9] and [19] – [20]).
Held, that the Speaker's approach had indeed been misguided: it suggested an understanding that, absent discharge of such an onus, a motion of no confidence in the President should be by open ballot, where precedent suggested that no default position should be adopted (see [14] and [21]). Rather, the Speaker had in each instance to make a 'judgment call' as to which procedure — open or secret — would facilitate Assembly Members most effectively exercising their oversight powers (see [14] – [16]). Consequently, the failure to take this approach, and the requiring of ATM to discharge an onus, was a procedural error which (as contended) tainted the Speaker's refusal with irrationality (see [22]).
Appeal upheld, the order of the High Court set aside, and substituted with an order that the refusal decision was reviewed and set aside, and the request for the vote to be by secret ballot was remitted for decision afresh (see [24]).

CANTON TRADING 17 (PTY) LTD t/a CUBE ARCHITECTS v HATTINGH NO 2022 (4) SA 420 (SCA)

Arbitration — Arbitration agreement — Existence of agreement to submit disputes to arbitration — Order sought from court that party submit to arbitration in order for arbitrator to decide whether agreement to arbitrate disputes existed — Discretion of court to decide existence of such agreement or to allow arbitrator to do so — Separability — Competence-competence.

In this matter appellant had drafted an agreement under which it would provide respondent, a trust, with certain services. Appellant and respondent never signed the agreement, but despite this appellant provided the services and respondent paid for them (see [4]).

The respondent came to the view that appellant had malperformed and demanded, under the arbitration clause of the unsigned document, that appellant submit to arbitration with it (see [5]). Appellant's response was that there was no agreement on its part to submit to arbitration, that no arbitration agreement existed (see [10]).
Respondent then brought appellant to court on motion, requesting an order that appellant be required under the arbitration clause to submit to arbitration for the arbitrator to determine if indeed there existed an arbitration agreement between them (see [11] and [16]). Appellant in answer denied the existence of an agreement under which it could be compelled to arbitration (see [12]).
The High Court's approach was to decide that it could determine the issue of the arbitration agreement's existence — whether the arbitration clause in the unsigned document had been agreed to by appellant and respondent — on the papers, rather than by referral to oral evidence, found it did exist, and ordered appellant to arbitration for resolution, not of the existence dispute but the malperformance allegations (see [12] – [13] and [18]).
Appellant appealed to the full bench on the basis that the High Court granted relief it had not been requested to grant (an erroneous exercise of its discretion), and that in any event, a real dispute of fact was raised as to the agreement to arbitrate's existence, which ought to have been referred to oral evidence (see [14] and [16]).
The full bench's assessment was that the High Court's approach was correct and that appellant's denial of the agreement's existence was 'palpably untrue' (see [15]).
Appellant here appealed to the Supreme Court of Appeal with its special leave (see [2]). The issue there was: if parties dispute that they had agreed to submit their differences to arbitration, was it for the court, or for the arbitrator, to decide the question of the agreement's existence? (See [30] – [31].)
Held, that, where a court was posed with this issue, it had a discretion. It could determine if such an agreement existed, or it could (except where the alleged agreement was manifestly void) refuse to, and allow, under the
principle of competence-competence, the arbitrators to do so (see [38]). (See also [34] in respect of separability, and [35], competence-competence.)
Thus here, when the High Court realised there was a dispute of fact about whether an agreement to arbitrate existed, it ought to have sought appellant and respondent's submissions and have decided whether it ought to determine the existence dispute by referral of it to oral evidence, or whether this question ought to be left to the arbitrators, the relief respondent had sought from the High Court (see [16], [38] and [43]).
Appeal upheld, the order of the full court set aside, and substituted with an order that the appeal against the High Court's judgment was upheld, the High Court's order set aside, and the matter remitted to the High Court to determine whether the respondent's application should be referred to evidence, or dismissed (see [44]).
Phatshoane AJA, in her minority judgment, identified two errors in the High Court's approach.
The first was to itself (rather than an arbitration tribunal) decide whether an agreement to arbitrate existed. This where the main agreement and its arbitration clause were both on their face valid (the latter incorporated the Arbitration Foundation of Southern Africa's rules providing for an arbitrator to decide existence disputes), and ought to have been effected (see [52] and [58] – [59]).
The second (based on the assumption the court could decide the existence issue) was to decide the issue on the papers and not by oral evidence (see [61]). This where the papers revealed that appellant's version (at [67] – [68] and [73] — see [66] for

respondent's version) was not so far-fetched as to be rejected without hearing oral evidence (see [61] and [78]).
As for relief, it had been premature for respondent to approach the High Court to compel appellant to arbitration: s 15(2) of the Arbitration Act 42 of 1965 and the Arbitration Foundation's rules provided respondent with remedies. Thus its application ought to have been dismissed (see [79]).
But justice and fairness (in the context of appellant's 'flatly refusing' to submit, the elapse of time since the dispute's declaration, and no end in sight) justified the Supreme Court of Appeal employing its s 19*(d)* of the Superior Courts Act 10 of 2013 power to order appellant to submit to arbitration (see [80]).
Ordered, were this the majority judgment, that the appeal would have been upheld in part, with the order of the full court being set aside and substituted with one upholding the appeal to it, and the High Court's order being set aside and replaced with one dismissing respondent's application to it. But further, and as noted, that appellant should submit to arbitration (see [82]).

LA GROUP (PTY) LTD v STABLE BRANDS (PTY) LTD AND ANOTHER 2022 (4) SA 448 (SCA)

Intellectual property — Trademark — Expungement — Mark which, as result of manner of its use, likely to cause deception or confusion — Test — Requiring determination whether mark itself likely to cause deception or confusion — Not contemplating passing-off-type deceptiveness or use of mark based on mark of different trader — Manner of use of trader's own mark to be considered, not likelihood of deception or confusion arising from similarity to mark of other trader — Trade Marks Act 194 of 1993, s 10(13).
Intellectual property — Trademark — Registrability — Distinctiveness — By reason of use to date — Generic mark POLO having become associated in mind of public with proprietor through long-term, continuous and widespread use — Mark capable of distinguishing — Trade Marks Act 194 of 1993, s 10(2)*(a)*.

Virtually identical POLO trademarks were registered and used in South Africa by two clothing and accessories retailers: Ralph Lauren, a US company not party to the present proceedings, and the LA Group (the appellant), a South African company unrelated to Ralph Lauren that had used POLO marks locally since 1976. When Ralph Lauren subsequently decided to enter the South African market, it concluded an undisclosed settlement with the LA Group under which they agreed to a delineation of goods in respect of which each would use its various POLO marks in South Africa.
When a third party, Stable Brands (the respondent), was subsequently granted a licence to sell trademarked US Polo Association (USPA) garments in South Africa, * the LA Group, claiming that the USPA logo was almost identical to its POLO and POLO PONY & PLAYER marks, sued Stable Brands out of the Pretoria High Court for interdictory relief for trademark infringement. Stable Brands counter-applied under s 24 of the Trade Marks Act 194 of 1993 (the Act) for the cancellation of all the LA Group's 46 POLO marks on various grounds, but principally on the ground in s 10(13), namely that the marks were unregistrable because their manner of use was 'likely to cause deception or confusion'. Stable Brands also contended that the LA Group's POLO marks were 'not capable of distinguishing' as intended in s 10(2)*(a)* of the Act. †

Before the High Court could hear the main application, the LA Group withdrew it. But Stable Brands successfully persisted in its counter-application for the cancellation of the LA Group's marks. The High Court found that the confusion or deception proscribed by s 10(13) became a reality when Ralph Lauren was allowed to enter the market and register marks similar to those of the LA Group in respect of similar goods. The High Court also agreed with Stable Brands' argument that the generic 'POLO' word marks were not capable of distinguishing within the meaning of s 10(2)*(a)* because the fashion industry did not consider the word 'polo' to be a badge of origin.

The LA Group appealed to the Supreme Court of Appeal (the SCA), which rendered a split judgment in its favour. Both judgments — Schippers JA for the majority (paras [87] – [209]) and Ponnan JA for the minority (paras [1] – [86]) — principally discussed cancellation under s 10(13).

Stable Brands argued that the LA Group's failure to add distinguishing features to its goods constituted confusing 'use' for the purposes of s 10(13) and that this 'manner' of use was the one that had to be considered in deciding whether it was likely to result in deception or confusion. Stable Brands also reiterated, in respect of its attack under s 10(2)*(a)*, that the word 'polo' was incapable of distinguishing and was not exclusively associated with the LA Group.

The LA Group in turn argued that the High Court had incorrectly interpreted s 10(13) 'as involving a comparison between the use of LA Group's POLO trademarks and the use of Ralph Lauren's POLO trademarks', whereas it could 'only relate to the manner in which the LA Group had itself used its own trademarks . . . and whether, as a result, such use would now be likely to cause deception or confusion'. In respect of s 10(2)*(a)*, the LA Group presented evidence that the POLO marks had over the years become distinctive of its goods through continuous and widespread use, and were therefore, in the light of the proviso to s 10(2), not liable to be removed from the register. The proviso states that 'a mark . . . shall not be liable to be removed from the register by virtue of [s 10(2)] if . . . it has in fact become capable of distinguishing . . . as a result of use made of the mark'.

Held for the majority per Schippers JA

The LA Group had established that its POLO (word) trademarks were capable of distinguishing its goods from those of another person by reason of their use, as envisaged in the proviso to s 10(2). It was clear from the evidence it presented that the marks had, through their long-standing and continuous use by the LA Group for over 40 years, become well known and distinctive of its goods in the eyes of the general public. The High Court, by failing to consider the proviso to s 10(2), had erred in ordering their removal (see [118], [121]).

Stable Brands' arguments failed both on the law and the facts. As to the law, what s 10(13) required was a determination as to whether the mark *itself* was likely to cause deception or confusion. It did not contemplate passing-off type deceptiveness or the use of a mark based on the mark of a different trader. It followed that the High Court had erred in its construction of s 10(13). Instead of considering the LA Group's 'manner of use' of its *own marks*, the High Court compared its marks to those of Ralph Lauren and determined the likelihood of deception and confusion with reference to a test that was, inter alia, a value judgment — 'largely a matter of first impression, without undue peering at the two marks to be considered'. The manner in which the LA Group had used its marks had at all times been lawful and did not constitute use in a manner that was likely to result in deception or confusion as envisaged in s 10(13). And the LA

Group's conclusion of the agreement with Ralph Lauren, indispensable for Stable Brands' case, did not constitute a use of its marks. (See [189], [192] – [194].)
As to the facts, the LA Group and Ralph Lauren's respective marks had coexisted in the marketplace since 2011. Trademark co-existence, where two different enterprises used a similar mark to market a product without interfering with each other's business, was neither novel nor unique. The effect of the agreement had been to give the LA Group free rein in the field of clothing and similar items, while leaving Ralph Lauren to import and sell its brand of cosmetics and skincare products. Consumers buying clothing bearing the POLO mark, or the device of a right-facing pony, were buying the LA Group's goods. It did not matter that they thought they were buying from a well-known US fashion house. The badge of origin function of a mark was fulfilled, provided all items bearing that badge came from the same source. The same applied to consumers buying cosmetics or perfume bearing the Ralph Lauren marks: they were buying Ralph Lauren's goods. Its marks distinguished its goods from those having a different source and thus the badge of origin function of the Ralph Lauren marks was fulfilled. Nor would the goods have been encountered in the marketplace next to each other: Ralph Lauren had no stores in South Africa, and the High Court erred in finding that the LA Group 'mimicked' Ralph Lauren's sales approach. There was no potential for any confusion or deception. (See [200] – [203].)
Therefore, Stable Brands failed to establish that the LA Group's 46 POLO marks — the lifeblood of its business — were liable to be removed from the register under s 10(13) (see [207]).

Held by the minority per Ponnan JA

There was no evidence to support the majority's conclusion that the LA Group and Ralph Lauren had reached a compromise and that their respective marks had co-existed in the marketplace since 2011. Nor was there any warrant for a speculative or conjectural hypothesis in favour of the LA Group that the effect of its agreement with Ralph Lauren was to give the former free rein in the field of clothing and similar items while leaving Ralph Lauren to import and sell its brand of cosmetics and skincare products (see [13]). But even assuming in favour of the LA Group that the matter could be approached on this footing, its case in relation to the s 10(13) enquiry still did not survive scrutiny because it disregarded its clear wording, which did not limit the nature of the confusion which could result from LA Group's use of its own marks, and certainly did not preclude a comparison of its marks with other marks available in the market. Section 10(13) simply required a situation to exist where the manner of use by a mark's proprietor was likely to cause deception or confusion. It neither prescribed, nor limited in any way, the manner of use from which such a likelihood of either deception or confusion was likely to arise. (See [17] – [19].)
It did not matter, as far as s 10(13) was concerned, whether the user of a mark had earlier rights to it. The question was whether the manner of use of the mark was likely to result in deception or confusion. So, whereas initially a mark might have been validly registered, it could become invalid due to the manner in which it was being used, including by seeking to derive a benefit from another party's performance by creating confusion between the registered mark and the mark used by such other party. (See [20].)
Since there was nothing to distinguish the LA Group's marks from those of Ralph Lauren (besides the right- and left-facing ponies, a distinction without difference), then the real question was whether the public might believe that the LA Group's goods and those of Ralph Lauren came from the same undertaking or economically linked undertakings (see [43]). The evidence showed that the manner in which the LA Group

made use of its various POLO and POLO PONY & PLAYER device marks has been such that members of the public are likely to be confused or deceived as to whether the marks used by the LA Group in relation to the goods sold by it and/or services offered by it are associated with that of Ralph Lauren or vice versa. The High Court was therefore correct on the s 10(13) leg of the case. That rendered it unnecessary to deal with the other grounds of attack. (See [45] – [46].)
In the light of the divergence of views on s 10(13), Judge Ponnan went on to state why he would probably have ruled against the LA Group on the other grounds as well (see [47] – [86]). The judge pointed out, in respect of the acquisition of distinctiveness under the proviso to s 10(2), that there was nothing in the use of the LA Group's POLO marks that would indicate to the average consumer that the marks belonged to it. Use did not equal distinctiveness: the question was whether the use *resulted in* distinctiveness, and here there was no evidence to support such a conclusion (see [49], [63]).

LUTCHMAN NO AND OTHERS v AFRICAN GLOBAL HOLDINGS AND OTHERS 2022 (4) SA 529 (SCA)

Company — Business rescue — Liquidation proceedings already initiated — Requirements for business rescue application to be regarded as 'made' for purposes of suspending liquidation — Companies Act 71 of 2008, s 131(6).

In this matter a company (African Global Operations (Pty) Ltd) came to voluntarily enter winding-up and liquidators were appointed to this end (see [1] – [2]). However, when the liquidators began to exercise their powers first-respondent company (African Global Holdings (Pty) Ltd), the shareholder in Operations, sought an order from the High Court that the special resolution to place Operations in liquidation was void. In this it was successful, but the High Court did grant the liquidators leave to appeal to the Supreme Court of Appeal, so suspending the order's operation pending the appeal's outcome (see [3]). Then, during this period of pendency, an accord was reached between the liquidators and Holdings, which was made an order of court and which authorised the liquidators to sell by public auction the movable and immovable properties of Operations on condition that such sale was in consultation with and consented to by Holdings (see [7] – [8] and [16]). Such auction was duly planned but there developed a dispute about whether consent thereto had indeed been granted (see [17]). The liquidators nonetheless pressed ahead with the auction's arrangement, and with the auction days imminent, the Supreme Court of Appeal delivered its judgment, which overturned the High Court's order that the resolution placing Operations in winding-up was void (see [19]). Then, the day before the scheduled start of the auction, Holdings obtained the issue of a business rescue application and had it served on the first-appellant liquidator, had it delivered by a candidate attorney to second-appellant liquidator, did not serve or deliver it to third- or fourth-appellant liquidators, and notified some, but not all of Operations' employees of it — that by electronic means (see [3] and [40] – [41]). Notwithstanding this, the auction commenced and continued through its scheduled course resulting in the sale of the bulk of Operations' assets. Holdings' response was to seek an interdict of the sale of the remainder of Operations' assets pending adjudication of the business rescue application, with both applications coming before the High Court in a consolidated hearing (see [4] – [5] and [20]). It found that the business rescue application had been validly made on the day before the auction, that this had suspended the liquidation

proceedings in terms of s 131(6) of the Companies Act 71 of 2008, and that accordingly the auction had been statutorily barred from proceeding. It found further, that properly interpreted, the consent order did not bestow on the liquidators the power to sell the assets on auction at the time it was held. Accordingly, it granted the interdict. As for the business rescue application, this it dismissed on its merits (see [21] – [22]). It thereafter granted leave to the liquidators to appeal the grant of the interdict and leave to Holdings to appeal the dismissal of the business rescue application (see [5]).

In the Supreme Court of Appeal, the first issue was when a business rescue application was 'made' within the meaning of s 131(6) (see [23]). (Section 131(6) provides that 'If liquidation proceedings have already been commenced by or against the company at the time an application is made [by an affected person for an order placing the company under supervision and commencing business recue proceedings], the application will suspend those liquidation proceedings until *(a)* the court has adjudicated upon the application; or *(b)* the business rescue proceedings end, if the court makes the order applied for'.) *Held*, that on proper interpretation, such an application would only be made when it was issued and served on the company and the Companies and Intellectual Property Commission, and all reasonable steps had been taken to identify affected persons, to obtain their addresses, and to notify them of it (see [24], [28] and [31]).
Had the business rescue application been made (see [35])? *Held*, that it had not been: only one of Operations' four liquidators had been served with the application and only a part of its employees notified thereof, with no indication having been given as to whether reasonable steps had been taken to identify and notify the remainder. Accordingly, given as the application had not been made and the liquidation proceeding and its component auction had not been suspended, the s 131(6) basis for the interdict fell away (see [40] – [42]).
The third issue was the period that the consent order was intended to be operative for. (It made the liquidators' sale of Operations' assets contingent on Holdings' approval of the sale (see [16]).) *Held*, that properly interpreted, the order was intended to lapse on the Supreme Court of Appeal's determination of the appeal against the High Court's finding that the special resolution placing Operations in liquidation was void (see [21] and [46]). Given this and given that the Supreme Court of Appeal's determination was made prior to the auction, the liquidators had indeed been possessed of the power to cause the assets' sale at the auction, a finding that disposed of the sales-interdict's second basis, an alleged lack of such power to sell the assets (see [43]).
As for Holdings' appeal against the High Court's dismissal of the business rescue application, *held*, that given as the application had not been 'made' it ought not to have been dismissed but should rather have been struck from the roll (see [42]).
Ordered that the liquidators' appeal in respect of the interdict was upheld, the related paragraphs of the High Court's order set aside and replaced with an order dismissing Holdings' application. Ordered further, in regard to Holdings' business rescue application appeal, that it be dismissed, the High Court's order set aside, and that order replaced with one striking the business rescue application from the roll (see [49]).

NIMBLE INVESTMENTS (PTY) LTD v MALAN AND OTHERS 2022 (4) SA 554 (SCA)

Land — Land reform — Eviction — Of occupier — On basis of fundamental and irremediable breach of relationship between landowner and occupier — When breach committed — Factors to be considered — Extension of Security of Tenure Act 62 of 1997 (ESTA), s 10(1)*(c).*
Land — Land reform — Eviction — Of occupier — Whether just and equitable as required by s 8(1) of ESTA — Fundamental and irremediable breach of relationship between landowner and occupiers — Occupier unlawfully removing building materials and erecting illegal structure on land, and swearing at landowner — Fundamental breach of relationship justifying eviction — Extension of Security of Tenure Act 62 of 1997, ss 8(1) and 10(1)*(c)*.
Land — Land reform — Eviction — Of occupier — Whether just and equitable as required by s 8(1) of ESTA — Factors to be considered — Opportunity afforded to occupier to make representations before termination of right of residence — Whether opportunity necessary in case of fundamental and irremediable breach of relationship between landowner and occupier — Extension of Security of Tenure Act 62 of 1997, ss 8(1)*(e)* and 10(1)*(c)*.

The present matter concerned an appeal to the Supreme Court of Appeal (SCA) against a judgment and order granted by the Land Claims Court (the LCC). The LCC, on automatic review under s 19(3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA), had set aside an order given by the Stellenbosch Magistrates' Court in September 2019 in favour of the appellant, Nimble Investments (Pty) Ltd, for the eviction of the first respondent (Ms Malan) — a widower and pensioner, and a long-term occupier in terms of s 8(4) of ESTA — as well as family members, the second to ninth respondents, who held title under her, from the farm Topshell Park owned by the appellant.

The appellant had argued before the magistrates' court that it had terminated Ms Malan's right of residence on just and equitable grounds in terms of s 8(1) of ESTA, in particular on the basis that that eviction was warranted in terms of inter alia s 10(1)*(c)* of ESTA, which provided that, in respect of a person who was an occupier as at 4 February 1997, an eviction may be granted against such person if they had 'committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it was not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship . . .'. The allegation in this case was that there had been a breach by Ms Malan of the relationship between herself and the person in charge of the farm in question, one Mr Van der Merwe, the site and farm manager.
The facts giving rise to such breach follow. In around 2012, as a result of the widening of a provincial road in the area, the appellant was forced to forgo a portion of the farm that formed part of land allocated to its anchor tenant, Topshell. This necessitated the provision of alternative land to Topshell. On such land was located 'Cottage 1', which had been occupied by Ms Malan since moving to the farm in 1974 with her late husband, who was granted the right to live there in terms of his contract of employment with the farm's previous owner. In 2012, Ms Malan occupied the cottage on the basis of lease entered into with the farm's previous owner (at a rent of R500 monthly, which was however never paid). The appellant engaged Ms Malan with a view to the

respondents' voluntary relocation to another property. It was agreed in August and September 2016 that Ms Malan would move to Cottage 5 once various repairs and improvements agreed upon had been effected thereto (by the appellant). Ms Malan however reneged on her agreement. Consequently, the appellant sought and obtained an order in the Stellenbosch Magistrates' Court directing Ms Malan and all those living under her to relocate to Cottage 5. The events that took place on the day she moved cottages, on 28 November 2016, gave rise to the eviction application launched by the appellant. Ms Malan's son, the fourth respondent, removed building materials, window frames and various fixtures from Cottage 1. This he did in the presence of Mr Van der Merwe, who had expressly forbade the removal of the materials, police officers called by Mr Van der Merwe, as well as Ms Malan. Ms Malan did nothing to stop the unlawful removal of the materials; instead she swore at Mr Van der Merwe, shouting to him that Cottage 1 was her house and that she could do with it whatever she wanted. Ms Malan later, without the appellant's permission, used such materials to erect a structure annexed to Cottage 5, in contravention of building regulations, and which was used to house persons who had not lived on the farm before, therefore breaching s 6(3)*(d)* of ESTA. The appellant on 18 January 2017 sent a notice to Ms Malan terminating her right of occupation on the grounds that she had committed a material breach of the relationship between the parties; and demanding that she demolish the illegal structure, and return the materials, and finally that she and her family members vacate Cottage 5 (by 1 February 2017), failing which an application for eviction would be brought.

The respondents' non-compliance prompted the appellant to cause the sheriff, on 1 February 2017, to deliver to the first to ninth respondents a notice to vacate the farm. The respondents did not vacate; so, on 28 April 2017, the appellant launched eviction proceedings against them. The magistrates' court granted an order of eviction in favour of the appellant. The LCC however set it aside. It found that there had been no breach as envisaged in s 10(1)*(c)* of ESTA; this was because the appellant had 'the option of claiming compensation' for its building materials if it wished to do so. The LCC furthermore had regard to s 8(1)*(e)* of ESTA, which set out as one of the factors to be considered in determining whether the termination of a residence was 'just and equitable', the 'fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence'. On the basis that the respondents had not been informed of the opportunity to make such representations, the LCC held, the termination could not be said to be just and equitable. The LCC granted the appellant leave to appeal to the SCA. The SCA determined the issues to be (i) whether there had been a breach of the relationship between Ms Malan and the appellant, as envisaged in s 10(1)(c) of ESTA; and (ii) whether the eviction order was just and equitable.

As to (i), the SCA held that the plain wording of s 10(1)*(c)* made it clear that what was contemplated was an act of breaking the relationship on the part of the occupier that was essentially impossible to restore. A fundamental breach of the relationship between an owner and an occupier contemplated in s 10(1)*(c)* related to a social rather than a legal relationship, and this requirement would be met if it was practically impossible for the relationship to continue due to a lack of mutual trust. (See [46].) In determining whether an occupier had committed a fundamental breach of the relationship envisaged in s 10(1)*(c)* of ESTA the SCA held that the following factors had to be considered: the history of the relationship between the parties prior to the conduct giving rise to the breach; the seriousness of the occupier's conduct and its

effect on the relationship; and the present attitude of the parties to the relationship as shown by the evidence. (See [47].)
The SCA held further that the events of 28 November 2016; Ms Malan's conduct in enabling unauthorised persons to occupy the farm by erecting an illegal structure on it; and her ongoing refusal in the face of demands to demolish the structure and return the building materials, resulted in a breakdown of the relationship of trust that had existed between Ms Malan and Mr Van der Merwe, such that it could not be restored. (See [49], [54] and [59].) The LCC had thus erred in concluding that there was no fundamental breach of the relationship between Ms Malan and the appellant, and that the appellant could simply claim compensation for its building materials. The LCC disregarded the nature and seriousness of the respondents' conduct and its effect on the relationship between the parties. (See [60].)
As to (ii), the SCA held that that termination of the first to ninth respondents' right of residence was just, equitable and fair. In reaching this finding, the court took account inter alia of the conduct of Ms Malan on and after 28 November 2016 detailed in the above paragraph. It considered too the competing interests of the parties concerned. In this regard, it held that Ms Malan's continued residence on the farm was untenable given the fundamental breakdown of the relationship between Ms Malan and Mr Van der Merwe as contemplated in s 10(1)*(c)* of ESTA. It held further that it could not be expected of the appellant to continue to tolerate the respondents' occupation of an illegal dwelling on its land — proscribed by ESTA itself. Neither could it be expected to continue supporting them financially by providing free housing and utilities. (In this regard, the SCA noted that only Ms Malan was an occupier in terms of s 8(4), the other respondents holding title under her. Ms Malan received a state pension and had been a domestic worker for many years, and had family near to her who should bear the responsibility of accommodating her or assisting in finding her accommodation. As to the other respondents, they had been living on the property rent-free for many years, despite the fact that most of the adult respondents received an income.) (See [61] – [67] and [72].)
The SCA, in assessing the termination of Ms Malan's right of residence in terms of s 8(1) of ESTA, stressed that, in circumstances where an occupier had committed a fundamental breach of the relationship between itself and the owner, s 8(1)*(e)* — properly interpreted — *did not require that the owner* give the occupier an opportunity to make representations before terminating their right of residence. (See [68] – [71].)
The SCA accordingly held that the appeal should succeed (see [76]).

TMT SERVICES & SUPPLIES (PTY) LTD v MEC, DEPARTMENT OF TRANSPORT, KWAZULU-NATAL AND OTHERS 2022 (4) SA 583 (SCA)

Administrative law — Administrative action — Review — Jurisdiction — Whether court has review jurisdiction determined exclusively by definition of 'court' in s 1 of PAJA — Section 21(1) of Superior Courts Act not applicable — Promotion of Administrative Justice Act 3 of 2000, s 1; Superior Courts Act 10 of 2013, s 21(1).

Appellant had made a bid for a tender advertised by first respondent, but fourth respondent awarded it to fifth respondent (see [2]). Appellant later applied in the Western Cape High Court to review the award and first, fourth and fifth respondents in their opposition raised as a point in limine that the court had no jurisdiction (see [3]). The High Court found that, while it had jurisdiction, it would decline to hear the matter (see [4]). Appellant then appealed to the Supreme Court of Appeal (SCA).

The SCA considered appellant's claim that the definition of 'court' in s 1 of the Promotion of Administrative Justice Act 3 of 2000 gave the Western Cape court jurisdiction in the matter (see [7]). (Read with ss 6 and 8 a court so defined has powers of review and remedy in respect of irregular administrative action (see [11] – [12]).)
'Court' is defined as, inter alia, 'a High Court . . . within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.' (See [12].)
Respondents' assertion, upheld by the High Court, was that the s 1 definition of 'court' had to be read with s 21(1) of the Superior Courts Act 10 of 2013, specifically the guideline that, in applying s 21(1), a court was required to have regard to 'convenience, effectiveness and common sense' (see [17]).
The SCA *held*, that it need not be, and whether a court had jurisdiction in a review of administrative action was determined exclusively by recourse to the definition of 'court' in s 1 (see [28]). Grounding this conclusion was an SCA case's application, in a review, of s 1 alone, to determine jurisdiction (see [18]); an Eastern Cape court's conclusion, on an analogous point — whether a s 1 jurisdictional factor should be subordinated to a common-law jurisdictional requirement — had been in the negative (see [20] and [22]); the principle — applicable here too — that a constitutional right should not be cut down in order to comport with the common law (see [21]); and the language, context and purpose of the definition (see [23]).
The second set of issues the SCA considered derived from two divisions having jurisdiction in the matter (KwaZulu-Natal, where the administrator took the action and where its principal place of administration was, and the Western Cape, where appellant was domiciled and ordinarily resident); appellant's choice to proceed in the Western Cape; and the Western Cape court's refusal, despite it having jurisdiction, to hear the matter (see [29]).
The SCA *held*, following SCA authority, that where two fora might hear an applicant's claim, it was open to the applicant to choose where to bring it as the appellant, quite acceptably, had done here (see [32] and [35]); secondly, that where a matter was brought before a court, in an instance where that court enjoyed concurrent jurisdiction over it with a second court, then the former court had no power, barring an abuse of process, to hear it (see [34]); and thirdly, that jurisdiction was distinct from convenience such that if a jurisdiction-giving factor was present, a court would have jurisdiction, while the convenience of that court hearing the matter could only arise thereafter, on an opposing party making an application under s 27(1) of the Superior Courts Act, for the matter to be removed, on grounds of convenience, to another seat or division (see [35]).
The third issue was respondents' argument that the High Court's refusal to hear the matter was justified because appellant's bringing the matter before it rather than the KwaZulu-Natal court was an abuse of process (see [36]).
The SCA held, firstly, that the High Court did not decline the hearing on this basis; that no evidence suggested appellant brought the matter before the High Court for a reason other than pursuit of the truth; and appellant's making a choice that the law gave it could not be characterised as an abuse of process (see [38]).
The fourth issue was embodied in respondents' assertion that s 6 of PAJA gave courts the power to decline to hear a review (see [39]). The SCA *held* that this was not apparent from the text, which gave a court the power to review an administrative action but said nothing about jurisdiction (see [40]).

The SCA therefore upheld the appeal, set aside the High Court's order and substituted it with an order dismissing the point in limine, namely that the High Court had no jurisdiction to hear the application. The matter was remitted to the High Court. (See [42].)

NEDBANK LTD v MOLLENTZE 2022 (4) SA 597 (ML)

Practice — Judgments and orders — Default judgment — Granting of by registrar — Matters falling under NCA — Registrar not precluded by s 130(3) from granting default judgment in respect of matters falling under NCA — National Credit Act 34 of 2005, s 130(3); Superior Courts Act 10 of 2013, s 23; Uniform Rules of Court, rule 31(5)*(a)*.
Practice — Judgments and orders — Default judgment — Granting of by registrar — 'Claim for debt or liquidated demand' — Including within ambit, cancellation of credit agreement and return of movable property forming part of credit agreement — Uniform Rules of Court, rule 31(5)*(a)*.
Credit agreement — Consumer credit agreement — Debt enforcement — Debt proceedings in court — Default judgment — Granting of by registrar — Whether competent — Meaning of 'court' — Registrar not precluded by s 130(3) from granting default judgment in respect of matters falling under NCA — National Credit Act 34 of 2005, s 130(3).
Words and phrases — 'Court' — Meaning of in s 130(3) of National Credit Act 34 of 2005.

What gave rise to the present matter was the decision of the Registrar of the Middelburg High Court to refer to open court two applications for default judgment arising from sale agreements governed by the National Credit Act 34 of 2005. It did so in the light of s 130(3) of the NCA, which provided that '(d)espite any provision of law or contract to the contrary, in any proceedings commenced in a *court* in respect of a credit agreement to which this Act applies, *the court* may determine the matter only if the court is satisfied that [certain requirements set out in paras *(a)* – *(c)* had been met]'. This section, in its referring to 'the court' had been interpreted in various judgments to preclude a Registrar of a High Court from granting default judgment in respect of any NCA matter; hence the referral to the High Court. The High Court decided to constitute a full court to determine the correct interpretation to be accorded to s 130(3), having regard to s 23 of the Superior Courts Act 10 of 2013, read with Uniform Rule of Court 31(5)*(a)*. Section 23 of the SC Act provided that a 'judgment by default may be granted and entered by the registrar of a division in the manner and in circumstances prescribed in the rules, *and a judgment so entered is deemed to be a judgment of a court of the Division*'. Rule 31(5)*(a)* in turn provided that '(w)henever a defendant is in [default], the plaintiff, [if he or she wishes to obtain judgment by default], shall where each of the claims is for *a debt or liquidated demand*, file with *the registrar* a written application for judgment against such defendant . . .'. The two key questions the court asked to be addressed were: (1) Were registrars prohibited by s 130(3) of the NCA from dealing with NCA matters, despite s 23 of the SC Act, read with rule 31(5)*(a)*? (2) Were registrars prohibited from granting default judgment in the form of cancellation of a credit agreement and return of movable property forming part of a credit agreement.
As to (1), the court found that a registrar was not precluded from granting default judgment in respect of matters falling under the NCA (see [37], [59] and [65]). In reaching this conclusion the court considered the following:

• A decision under s 130(3) of the NCA involved only the determination of procedural issues, and did not call for the consideration of complex legal issues or evidence on disputed issues. It was merely a matter of ticking a check list. (See [30], [37] and [41].) Built-in protections were available to the consumer: should the consumer feel aggrieved by the registrar's decision, they could seek its rescission, the consideration of which would provide to the High Court a level of oversight (see [32], [37] and [57]).

• The word 'court' as it was used in s 130(3) of the NCA, according to its plain meaning, and having regard to the manner in which the word was used in s 23 of the SC Act — in terms of which a judgment entered *by default by the registrar was deemed to be a judgment of a court* — included within its scope a registrar handing down default judgment. (See [21] – [22] and [35].)

• To demand that all applications for default judgment in matters falling under the NCA be heard before an open court before a judge would result in additional costs incurred by already financially distressed consumers, as well as increased delays in the finalisation of matters. (See [27] – [29], [60] and [63].) The purposes of the NCA — inter alia, to promote and advance the social and economic welfare of South Africans, and to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers — would be frustrated. (See [18] – [19], [27], [29] and [60].) Burdening the courts with procedural issues that could easily, quickly and in a less expensive manner be dealt with by the registrar would not be in the interests of the administration of justice as contemplated in s 173 of the Constitution. (See [27] and [38].)

As to (2), the court held that registrars were indeed competent to grant default judgment in the form of cancellation of a credit agreement and return of movable property forming part of a credit agreement. (See [47] and [52].) This, having regard to the purpose of the Act (see [46] – [48]), and broad definition of '(A) debt or liquidated demand' (see [40] – [53]).

THEODOSIOU AND OTHERS v SCHINDLERS ATTORNEYS AND OTHERS 2022 (4) SA 617 (GJ)

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — Settlement of litigation incorporating contingency fee agreement — Whether non-compliance with Contingency Fees Act requirement that affidavits by legal practitioner and client be filed with court, invalidating settlement agreement and court order incorporating same — Whether, if invalid, enrichment claims available for repayment of performance made in terms thereof — Contingency Fees Act 66 of 1997, ss 4 and 5.

Practice — Judgments and orders — Rescission — Orders incorporating setllement agreement — Effect of compromise — Rescission only available at common law and on limited basis of justus error or fraud — Parties to compromise unable to obtain rescission without bona fide defence of iustus error to merits of compromised claims — Such error must nullify or void consent, not relate to disputed merits.

The plaintiffs, the Theodosiou brothers and related trusts and companies, had entered into an oral 'on risk contingency fee agreement' with the first respondent, Schindlers Attorneys, who represented them in litigation against, inter alia, the second and third respondents, Nedbank Ltd and Imperial Holdings. Some time thereafter, a written

contingency fee agreement was concluded. Settlement of the litigation was reached some two and a half years later, and the resulting two settlement agreements (the Imperial and the Schindlers agreements), together with a consent to a money judgment (in favour of Nedbank), were made orders of court.
The plaintiffs subsequently instituted action in the High Court to have these orders declared invalid and set aside, alternatively rescinded in terms of the common law or as erroneously sought and granted under rule 42 of the Uniform Rules of Court. The plaintiffs also sought repayment — based on enrichment — of performance made to Schindlers and to Nedbank.
They claimed that —

- the oral on risk contingency fee agreement was a nullity that could not be rectified by the subsequent written contingency fee agreement, so that the order in respect thereof was erroneously sought and granted; and
- since there was no compliance with s 4 of the Contingency Fees Act 66 of 1997 (the CFA) when the orders were made, all settlements and court orders based thereon were also invalid. (See [6] – [7] and [13].)

This case concerned an exception to the claim, raised by the second and third defendants, that it lacked the necessary averments to sustain a cause of action, alternatively that it was vague and embarrassing, in that, inter alia:

- No basis was laid for an enrichment or restitution claim (see [8.32] – [8.38]).
- A void contingency agreement and/or non-compliance with s 4 of the CFA did not render compromises and/or orders of the court invalid. In this regard the excipients submitted that the purpose of ss 4(1) and 4(2) of the CFA was to prevent overreaching by the client's own attorney, and that the client had remedies under s 5 of the Act to declare the contingency fee agreement void on application to the court, should it not comply with the provisions of s 3 of the Act (see [8.31] and [33]).
- All disputes in respect of the contingency fee agreement that may be regulated by the CFA were compromised and replaced with the settlement agreement (see [8.26] – [8.30]).

Held
Non-compliance with s 3 of the Act rendered the contingency fee agreement invalid and void. Accordingly, the *condictio ob turpem vel iniustam causam* was an available cause of action against Schindlers for repayment. An invalid contingency fee agreement did, however, not invalidate any related settlement agreement made an order of court — without justus error, fraud or public policy considerations being established. Non-compliance with the Act did not alter the parties' cause of action, or contractual or statutory relationship. There was no question of any *condictio* regarding performance in terms of the agreement if the agreement were valid, despite the illegality. A client's remedies for non-compliance with the Act, or an invalid contingency fee agreement, were against their attorneys. (See [17], [28], [30], [56] and [79.2].)

Whether the invalidity of the contingency fee agreement or non-compliance with s 4 of the Act tainted the underlying settlement agreements, rendering them and the court orders illegal nullities and consequently unenforceable, depended on whether the CFA's effect was to void a contract entered into in contravention of its terms. Section 4(1) afforded the court the right or obligation to inquire into the merits of the settlement, to protect the client from extortion or concluding a compromise not in their best interest. The court had minimal discretion to enter the merits of the settlement. This discretion to enter the merits interferes with the parties' right to agree to their bargain freely. Accordingly, it must be restrictively interpreted and limited to prevent the plaintiff's

extortion through an illegal contingency fee agreement or fraud upon the defendant. Given the remedies under s 5 of the CFA, the settlement agreements and court orders could not be challenged on the basis that they were illegal and void through non-compliance with the Act. (See [53] – [55], [57].)
A court's interference with the terms of compromises, absent a dispute as to its respective obligations or validity, would interfere with the parties' contractual freedom to regulate their affairs. Public policy required that parties comply with contractual obligations, including settlements. The court's function was to adjudicate disputes between the parties. If the parties settled their differences by consent through a compromise, then the disputes no longer existed. Once settled, a court had no residual jurisdiction over the compromised claim, even an enrolled action. The validity or enforceability of a settlement agreement was not dependent on the relative strengths and weaknesses of the original cause of action; instead, it created contractual obligations freely and voluntarily. A compromised claim could be challenged on the strength of the common law and only on the limited basis of justus error or fraud. The error must rescind, nullify or void consent; it could not relate to the disputed merits or the reason for the settlement, ie the purpose of compromise. Parties to a compromise could not obtain a rescission without a bona fide defence to the merits of the compromised claims. Accordingly, the exception would be upheld (See [41], [43], [47] – [48], [71], [75], [78], [79.3] and [80].)

SA CRIMINAL LAW REPORTS AUGUST 2022

AYRES AND ANOTHER v MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2022 (2) SACR 123 (CC)

Constitutional law — Legislation — Validity — Drugs and Drug Trafficking Act 140 of 1992, s 63 — Power of Minister to amend schs 1 and 2 to Act — Improper delegation of original legislative power — Breach of separation-of-powers doctrine — Court already having declared section invalid to extent it delegates such power to Minister and court a quo ought to have abided by precedent.
Constitutional law — Courts — Precedent — Doctrine manifestation of rule of law which is founding value of Constitution.
Court — Precedent — Status of — Doctrine manifestation of rule of law which is founding value of Constitution

The applicants applied for leave to appeal directly to the court against a judgment of the High Court in which it had dismissed the applicants' challenge to the constitutional validity of s 63 of the Drugs and Drug Trafficking Act 140 of 1992 (the Act). They had been found in possession in November 2014 of a substance known as MDMA and were arrested. Before pleading to the charge they applied to the High Court for an order declaring s 63 of the Act, as well as the reference to MDMA in part III of sch 2 to the Act, to be inconsistent with the Constitution and invalid. They argued that the power to include, delete or otherwise amend substances listed in the schedules to the Act was a plenary legislative power and, when that power was exercised by a member of the executive, that constituted a breach of the doctrine of separation of powers. The High Court rejected the argument and held that it was permissible for Parliament to delegate the power it had delegated to the Minister of

Health in the present case, and accordingly dismissed the application with costs of two counsel. It did not deal with the judgment of the Constitutional Court in *Smit* despite the averment made by the applicants that their attorney had sent the respondents a copy of the judgment in that matter to bring it to the attention of the judge. The High Court's reasoning and finding that s 63 of the Act was constitutional were in direct and irreconcilable conflict with the binding precedent of the Constitutional Court in Smit.
Held, that, the doctrine of precedent was not simply a matter of respect for courts of higher authority, but a manifestation of the rule of law itself, which in turn was a founding value of our Constitution. Accordingly, the doctrine should have meant that the declaration of invalidity in *Smit* would have informed the High Court's decision in the matter. (See [16] – [17].)
Held, further, that, although the High Court was wrong in concluding in its judgment that s 63 was constitutional, it did not issue a declarator in this regard. It simply made an order dismissing the application. It was nevertheless settled law that an appeal lay against the order of a court and not against the reasons underpinning the order, and the order granted by the High Court in respect of the merits was correct, even if the reasons provided by that court were not. The application ought to have been dismissed because, once the Constitutional Court had declared legislation invalid, it was not competent for the High Court to make the order that the applicants wanted, as such an order had already been made by the Constitutional Court. Accordingly, leave to appeal on the merits had to be refused. (See [18].) The court, however, upheld the appeal against the costs order.

S v GUMBO 2022 (2) SACR 131 (GJ)

Fundamental rights — Fair trial — Language — Right to be tried in language that is understood — No effort made to enquire of Zimbabwean national whether he understood English — In interests of justice that he be granted leave to appeal against convictions and sentence.
Indictment and charge — Charge — Putting of charge to accused — Only one of three charges put to accused — Prosecutor informing court that not necessary to do so, as accused's legal representative had explained charges to him — Effect of.

The accused applied for leave to appeal against his sentence imposed in a magistrates' court for three counts of fraud. It appeared that, at the trial, the prosecutor informed the court that the services of an interpreter were not necessary, whereas there was no indication from the accused or his legal representative that the accused, being a Zimbabwean national, was able to follow the proceedings in English. It appeared furthermore that after the prosecutor had put the first charge to the accused, and before the accused answered, the prosecutor intervened and informed the court that he and the legal representative of the accused had agreed that it was not necessary for the two remaining charges to be put to the accused, since his legal representative had already explained them to him. After the legal representative confirmed to the magistrate that he had indeed explained the charges, the magistrate asked the accused whether he understood all three charges, and he then pleaded guilty to all of them.
Held, that, in the circumstances where no effort had been made to enquire of the accused whether he understood English, and the accused was asked to plead to all

the charges at the same time, while the other charges had not been formally put to him by the prosecutor, leave to appeal against the convictions had to be granted, in the interests of justice. It followed that leave to appeal against sentence also had to be granted. (See [7].)

S v ROHDE 2022 (2) SACR 134 (WCC)

Bail — Pending application for leave to appeal to Constitutional Court from decision of Supreme Court of Appeal — SCA confirming conviction, but reducing sentence — High Court granting order that notice to report be suspended, resulting in interim order of indeterminate duration — Need for time lines to be set for lodging of appeal and sanctions to be imposed which safeguarded applicant's rights and placed him in same position he was when notice to serve sentence within 48 hours was imposed, and also protected state's right to consider stance on quest for bail.

The applicant had been convicted in the High Court of the murder of his wife and was sentenced to 20 years' imprisonment. He was given leave by the Supreme Court of Appeal to appeal against his conviction and sentence. After an application for bail pending the leave to appeal was dismissed, bail was subsequently granted on condition that, in the event of the appeal failing, the applicant was to hand himself over within 48 hours of being notified that he needed to serve his sentence of imprisonment. In the event, the appeal was successful only in respect of the sentence being reduced to 15 years' imprisonment, and the condition of bail requiring him to report became operative. This led to him bringing a bail application pending an application to the Constitutional Court for special leave to appeal against the decision of the Supreme Court of Appeal. The application was brought on 8 October 2021 and stood over from the urgent duty roll for determination on the following court day, namely Monday 11 October 2021. The court granted an order by agreement between the parties that the notice to report was suspended and that the applicant would not be arrested pending the determination of the matter which was to stand over for determination after the weekend. The original notice of motion was subsequently amended to seek the recusal of the judge who was to preside over the determination of the application when it was discovered that it was going to be the same judge who had tried and sentenced the applicant. The applicant's legal representatives based their application for the recusal on a reasonable perception or apprehension of bias on the part of the judge in question.
The court considered the 10 grounds upon which the application for recusal was brought and dismissed each one of them and then proceeded to consider the effect of the suspension of the order to report.
The court held that the suspension of the notice 'pending the determination of this matter' suggested that the order was interim in nature, but there was no set time line as to when any party could expect finality. The matter stood over so that the further conduct thereof could be decided by another court, whereafter the applicant amended the notice of motion and sought to postpone the matter *sine die*. The result was an interim order of indeterminate duration. (See [74].) There was no indication of when the application to the Constitutional Court would be lodged, which resulted in a situation where the entire issue of bail would be held over indefinitely. Without repercussions for non-compliance with set-down directives it was possible that there would be no finality. (See [76].)

The court held that, given the suspension of the order, a specified time line had to be set down which safeguarded both the applicant's pursuit of liberty and placed him in the position he was during the 48-hour period after service of the notice to report, but by the same token served the interests of the respondent to consider its stance on the applicant's quest for bail pending his application to the Constitutional Court for special leave to appeal against the judgment of the Supreme Court of Appeal, and having that heard in a set time frame and with sanctions, should the application not be proceeded with accordingly.
The applicant could not, as a convicted accused, dictate the process for the court to consider whether he should be granted his liberty or not, especially as he was equipped with a suspension of an order to undergo direct imprisonment without specified sanctions, should he not adhere to the time frames set down. (See [91].)
The court accordingly dismissed the application for recusal and the application for the postponement of the bail application *sine die*, and postponed it for hearing on 11 November 2021. Should the applicant not proceed with the bail application, he was to report to the police station in question within 48 hours to serve his sentence of 15 years' imprisonment. (See [90].)

S v SN 2022 (2) SACR 149 (EC)

Child — As victim of crime — Child victim of two rapes committed by her uncle — Importance of interests of children who were victims of crime or abuse being addressed prior to conclusion of trial — Court accordingly making 'Therapy Order' providing for counselling sessions for child with reports to court on six-monthly basis.

The accused pleaded guilty to the rape of his 10-year-old niece on two occasions, two days apart. After the child's father, the accused's brother, found out what had happened, he stabbed the accused. The community also assaulted him, resulting in his hospitalisation for 14 days. The court found that there were substantial and compelling circumstances which warranted a deviation from the imposition of life imprisonment. It remarked further that the interests of children, where they were the victims of crime or abuse, had to be addressed prior to the conclusion of the trial, in order to ensure that the wellbeing of an abused child was taken into account by the trial court. That would pave the way for those children to grow and become emotionally, mentally and physically strong future members of society. If nothing was said about the child victim, other than condemning the unlawful act itself, the child would go back home with no support from the justice system. (See [28].) The court accordingly made a 'Therapy Order' that the child should undergo counselling at the Department of Social Development and that the guardian of the child had to ensure that the child attend the sessions. The social worker tasked with the therapy sessions could exercise their discretion in mandating further sessions as required by the best interests of the child concerned. The social worker also was required to file progress reports with the court every six months. (See [52].) The accused was sentenced to 25 years' imprisonment.

FANOE AND ANOTHER v THE STATE 2022 (2) SACR 166 (ECMk)

Trial — Separation of trials — When to be ordered — Section 157 of Criminal Procedure Act 51 of 1977 — Fourteen accused charged under Prevention of

Organised Crime Act 121 of 1998 — In respect of two of accused (applicants), no common purpose alleged by state in their participation in scheme — Applicants would suffer severe prejudice by being joined in trial — Application for separation had to be granted.

The two applicants had been indicted to stand trial on charges under the Prevention of Organised Crime Act 121 of 1998 (POCA), the main count being money-laundering in contravention of s 4 of POCA. The first alternative count was that of assisting another to benefit from the proceeds of unlawful activities in contravention of s 5, and the second alternative count was the acquisition, possession or use of proceeds from unlawful activities in contravention of s 6. They brought an application for the separation of their trials from those of the other 12 accused who were charged in the same matter, one of whom was facing 27 counts. They contended that they would suffer prejudice by sitting through a protracted trial, day in and day out, in which they would not participate, since lengthy and detailed evidence would be traversed which had absolutely no bearing on their guilt. The respondent on the other hand contended that there was a real likelihood that the prosecution would suffer irreparable harm, should a separation ensue, because of its 'inability to place the whole picture in one trial before the presiding judge' and that 'part of that picture include[d] the response by the accused persons to allegations that implicate[d] them as the state's case unfold[ed] or during the presentation of the defence cases'. The applicants also placed emphasis on the delay which had preceded the commencement of the trial, and that they anticipated further delays.
Held, that it was trite that when consideration was given to an application for separation, the point of departure was that multiple trials ought to be avoided where possible. (See [25].)
Held, further, the delays were not in themselves a reason to grant a separation, and neither was the contention that the state's case was not strong. Perhaps the most meritorious reason to argue for a separation was the probability of serious financial prejudice to the applicants, both with respect to the potential costs associated with the employment of both senior and junior counsel, and the prospective dire consequences of a lengthy absence from running a not insignificant community-serving business concern, with the real prospect of the permanent loss of valued clients and the harm associated with that. (See [27] – [28].)
Held, further, that POCA cases, particularly those relating to racketeering enterprises, were generally distinguishable in applications for separation such as the present. That, however, was not the end of the matter, as scenarios under the auspices of POCA were also distinguishable *inter se*, and each case had to be considered on its own merits. (See [31].)
Held, further, that it appeared that the applicants were excluded from any meetings or any planning regarding the overall scheme and the summary of substantial facts did not take the state's case any further on the issue of common purpose. In the final analysis, for the applicants to remain in a joint trial, so that the court could determine the roles played by various other co-accused and the circumstances surrounding the commission of independent offences, in order to holistically consider respective degrees of blameworthiness, when there were no allegations of common purpose, even remotely, would be far more prejudicial to the applicants than any prejudice which the respondent may suffer through calling a bare minimum number of witnesses at a separate trial. It would also not be in the interests of justice to detain

the applicants any further in what was anticipated to be a very lengthy trial. (See [47] – [48] and [51].) The application for the separation of the trials had to be granted.

S v TM 2022 (2) SACR 184 (GP)

Bail — Application for — Onus — Effect of amendments to Criminal Procedure Act 51 of 1977 by Act 75 of 1995 — Section 60(11) of CPA — Applicant required to prove facts establishing exceptional circumstances — Onus not discharged when statement read into record not in affidavit form and not signed by applicant, but by his attorney.

The appellant was charged in a magistrates' court on a charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was 15 years old at the time and the offence fell within the ambit of sch 6 to the Criminal Procedure Act 51 of 1977. He was legally represented and brought an application to be admitted to bail. An 'affidavit' which was placed before the court was signed on behalf of the appellant by his legal representative, but not by him. After the legal representative read the statement into the record, the court only put the following to the appellant: 'Your legal representative has indicated that he has signed on your behalf.' The appellant answered in the affirmative.
Held, that there was a 'true onus' on an applicant in cases where s 60(11) applied, to prove facts establishing exceptional circumstances, and the discharge of the onus was a central consideration in such applications. The appellant could not, and did not, discharge the onus resting on him when a statement, which was not on affidavit, was read into the record on his behalf. (See [7].)
Held, further, that the magistrate had erroneously accepted the statement as evidence and considered the bail application. This constituted a gross irregularity in the proceedings, irrespective of whether the application was granted or dismissed and effectively rendered the proceedings a nullity, as there was no bail application in terms of s 60(11)*(a)* before the court. It would be an injustice if the matter were not referred back for a bail application to be heard and it would be prudent to require that another presiding officer decide the bail application. (See [9] – [10].)

S v NTHOESANE 2022 (2) SACR 188 (FB)

Trial — Presiding officer — Unavailability of to continue with trial — Part-heard trial — Magistrate having retired, but unwell and unclear when he would be able to return — In circumstances, setting-aside of proceedings and commencement de novo before other magistrate preferable where accused had been in custody for eight months.

In a matter submitted on review it appeared that the trial of the accused was part heard before a magistrate who had retired from active service on 31 March 2022 and, prior to his retirement, he was suffering from an illness from which he had not yet recovered. The acting senior magistrate suggested that the High Court set aside the trial proceedings, since the accused was in custody awaiting finalisation of his trial.

Held, that it was not altogether clear whether the magistrate would recuperate to such an extent that he would be able to return to finalise the trial, but in all probability he would not be able to return and dispose of the matter. The problem was that the accused had been in custody for almost eight months. It would be in the interests of justice to make an order setting aside the proceedings rather than postponing the matter until the magistrate became available again. The proceedings were accordingly reviewed and set aside, and it was ordered that the proceedings commence de novo before another presiding officer as soon as possible. (See [5], [8] and [9].)

S v MABASO 2022 (2) SACR 191 (KZP)

Trial — Irregularity in — What constitutes — Presiding officer failing to give accused opportunity to testify or close case after trial-within-trial — Proceedings halted before conviction — Proceedings set aside, and fresh trial ordered.
Trial — Irregularity in — What constitutes — Presiding officer failing to make ruling on trial-within-trial — Proceedings halted before conviction — Proceedings set aside, and fresh trial ordered.

In a matter submitted for special review it appeared that there was a trial-within-a-trial in the magistrates' court, but at the end of such the accused was not given an opportunity to either testify or close his case, and the magistrate failed to make a ruling on it. It was only during argument on the merits that it was realised that the accused had not testified, and that the magistrate had failed to give a ruling. The proceedings were then stopped and sent on special review.
Held, that there had been two irregularities that had been committed, but that, as the magistrate had not yet pronounced on the accused's guilt or otherwise, there had not been a failure of justice. However, if the proceedings were to proceed, then the irregularities were likely to cause prejudice to the accused. The proceedings accordingly had to be set aside and the trial had to commence de novo before another magistrate. (See [7] – [8].)

S v BROWN 2022 (2) SACR 194 (NCK)

Sentence — Several offences — Globular sentence — When appropriate — Unlawful discharge of firearm in public built-up area in contravention of s 120(7) of Firearms Control Act 60 of 2000 — Maximum sentence of five years' imprisonment prescribed — Court improperly imposing globular sentence of six years' imprisonment for attempted murder in contravention of s 121, read with sch 4 to Act — Sentence altered to six years' imprisonment on first count and three years' imprisonment on second count, ordered to run concurrently.

The appellant was charged in a regional magistrates' court with one count of attempted murder and one count of discharging a firearm in a built-up area. He was convicted on both counts and sentenced to six years' imprisonment, the court taking both counts together for purposes of sentence. On appeal against the sentence, *Held*, that the court could not find that, in weighing the factors influencing sentence, taken into account by the court a quo, the court had misdirected itself. However, the

court should not have taken the different counts together for sentencing purposes, as six years' imprisonment on the second count was not a competent sentence, since it exceeded the maximum sentence prescribed by the Firearms Control Act 60 of 2000, namely five years' imprisonment in terms of s 121 read with sch 4, for a contravention of s 120(7). (See [9] – [11].) The sentence was accordingly amended to provide for a sentence of six years' imprisonment on the first count and three years' imprisonment on the second count, ordered to run concurrently. (See [27].)

MINISTER OF POLICE v LEBELO 2022 (2) SACR 201 (GP)

Arrest — Unlawful arrest — Period of detention — Further detention after court appearance in which bail of R1000 granted — Plaintiff unable to pay bail — Amount of bail could not be said to be so obviously high as to render grant of bail illusory — Inability to pay not forseeable by police, however, and defendant not liable for full duration of plaintiff's detention after bail granted — Plaintiff awarded damages of R100 000.

The appellant appealed against a judgment of the High Court which had held that he was liable for the wrongful arrest and detention of the respondent for the full period of his detention for a period of 101 days. The plaintiff was awarded damages in an amount of R500 000. On appeal the main issue was whether the detention after the plaintiff was granted bail of R1000 (after 16 days of detention), which he was unable to pay, resulting in his detention for 101 days, had been correctly taken into account in determining the damages, it being clear that the initial arrest was unlawful.
Held, at the risk of appearing insensitive or removed from reality, the amount of R1000 could not be said to be obviously so high as to render the grant of bail illusory. The plaintiff had not suggested what amount he would have been able to afford and, if one had careful regard to his testimony, he seemed to suggest that he was unable to afford anything, except the most paltry sum. He was not entitled to bail, on such terms, and, in any event, he had not filed a replication and on his particulars of claim no reference was made to the fact that he had been granted bail but could not afford it. (See [90] – [91].)
Held, further, on the evidence before the court, the plaintiff had been afforded the assistance of legal representation at state expense, and his representative appeared at court on four separate occasions, after which he withdrew. There was no explanation for his withdrawal, but at his first appearance the bail had been set in the amount of R1000 after he stated that he was unable to afford R2000. In these circumstances the harm complained of, namely the further period of detention, was too remote and was interposed by a bail hearing and the setting of bail. It was also highly unlikely that the arresting officer could have foreseen, when effecting the plaintiff's arrest, that the plaintiff would be unable to secure his release on bail because he was unable to afford the amount of R1000, and the defendant was not liable for the period of detention after the 16 days of detention. (See [115] – [118].)
Held, further, that no evidence had been led as regards the circumstances of the plaintiff's arrest, but it required little imagination to appreciate that it must have been a traumatic experience for him. He undoubtedly felt confused and afraid, and he impressed the trial judge, who had the opportunity of observing, as a vulnerable and marginalised member of society. She correctly placed emphasis upon his personal liberty and the importance of an appropriate award to assuage his impugned dignity.

Having regard to his personal circumstances, an appropriate award would be one of R100 000. (See [132] – [133].)

ALL SA LAW REPORTS AUGUST 2022

Commissioner for the South African Revenue Service and others v Dragon Freight (Pty) Ltd and others [2022] 3 All SA 311 (SCA)

Constitutional and Administrative Law – Application for review of decision to seize goods under section 88(1)(c) of the Customs and Excise Act 91 of 1964 – Peremptory requirement in section 96(1) of Act of notice of intention to bring legal proceedings, setting out cause of action, at least one month before instituting proceedings – Failure to comply with section 96(1) fatal to review application.

The first appellant ("SARS") seized 19 containers of clothing on the basis that the respondents had under-declared their transaction value so as to pay less customs duty than they were lawfully required to pay. A related issue was whether the respondents complied with section 96(1) of the Customs and Excise Act 91 of 1964, which proscribes the institution of legal proceedings against the Commissioner of SARS, unless the litigant delivers a written notice setting out its cause of action at least one month before instituting those proceedings.

The respondents succeeded in a review application in the High Court. The court directed SARS to immediately release the goods upon payment of the applicable customs duties and fees, calculated in accordance with the respondents' declared transaction values to SARS.

On appeal, the appellants contend that the orders are incompetent because the respondents failed to comply with the peremptory provisions of section 96(1) of the Act.

The Court had to decide on the lawfulness of SARS' action; and whether the respondents had complied with section 96(1).

Held – The respondents did not deliver a section 96(1) notice of their intention to review the impugned decision. Instead, they relied on a notice (the "February 2020 notice") by the first respondent ("Dragon Freight") to SARS, of its intention to bring legal proceedings against SARS. In the notice of motion in the High Court, the respondents asked for an order that the one-month period in section 96(1)(a)(i) be reduced; alternatively, that their failure to comply with the requirements of the section be condoned. The starting point for an understanding of the meaning and effect of section 96(1) is the language of the provision, in the light of its context and purpose. On its plain language, the section proscribes the institution of any proceedings unless one-month's written notice, setting forth clearly and explicitly the cause of action, is given to the Commissioner.

The section 96(1) notice enables SARS to ensure that a matter is brought timeously to the attention of the appropriate official for investigation or review, thereby promoting the efficient and economic use of resources, in accordance with the basic values and principles governing public administration.

The respondents' reliance on the February 2020 notice was misplaced as the impugned decision had not been taken when that notice was delivered to SARS. It was thus impossible for the respondents to set out any cause of action in that notice, since there was none. Section 96(1)(a)(i) of the Act does not permit a notice in anticipation of a decision not yet taken, by the functionaries referred to in that provision. The High Court was found to have erred in its interpretation and application of section 96(1) and on that basis alone, the appeal had to be upheld.

Section 88(1)(a) and (c) of the Act make provisions for the discrete acts of detention of goods, and then seizure of goods. Only the latter remained relevant in this matter. The respondents, in seeking review of the decision, questioned the rationality, based on section 6(2)(f)(ii) of the Promotion of Administrative Justice Act 3 of 2000. It was contended that the impugned decision was not rationally connected to the purpose for which it was taken. However, the court found that having regard to the purpose of section 88(1)(c) of the Act, the information before the Commissioner and the reasons given, the impugned decision could not be said to be unjustified.

The appeal was upheld.

Minister of Co-operative Governance and Traditional Affairs and another v British American Tobacco South Africa (Pty) Ltd and others [2022] 3 All SA 332 (SCA)

Constitutional and Administrative Law – Limitation on constitutional rights by ban on sale of tobacco during national state of disaster – Whether limitation was justified in terms of section 36 of the Constitution – No scientific justification found for the ban, and extent to which it limited the rights in issue, was disproportionate to the nature and importance of the rights infringed.

Part of the government's response to the Covid-19 pandemic was a series of regulations made by the Minister of Co-operative Governance and Traditional Affairs under section 27(2) of the Disaster Management Act 57 of 2002 (the "Act") – including a prohibition on the sale of tobacco products, e-cigarettes and related products.

The respondents were farmers, processors, manufacturers, retailers and consumers, situated at every level of the supply chain for tobacco and vaping products. In June 2020, they launched an urgent application in the High Court for an order declaring that regulation 45, which prohibited the sale of tobacco, tobacco products, e-cigarettes and related products, except for export, unconstitutional and invalid. The prohibition applied during Alert Level 3 of the national state of disaster. According to the respondents, regulation 45 limited the constitutional rights to dignity, privacy, freedom and security of the person, choice and practice of a trade or occupation freely, and protection against deprivation of property.

The respondents' challenge to the regulation was upheld in the High Court, which found that as regulation 45 did not reduce the strain on the health system, and was therefore not shown to be necessary or to further the objectives set out in section 27(2)(n) of the Act.

That led to an appeal by the Minister.

Held – As it was clear that the rights implicated were limited, the appellants argued that regulation 45 was reasonable and justifiable under section 36 of the Constitution.

The determination of the constitutionality of regulation 45 involved a two-stage analysis. The respondents were required to establish that the regulation limited one or more fundamental rights and if they did so, the burden shifted to the appellants to justify the limitation in terms of section 36(1) of the Constitution. The section 36 limitation enquiry requires a balancing of two sets of interests. On the one hand, there is the right that is limited. To be considered are its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. What must be assessed overall, is whether the limitation is proportional (whether it invades the fundamental right as little as possible, balancing the harm caused against the purpose served) and whether it is reasonable having regard to its purpose and effect.

The Court considered the concerns raised by the appellants in justification of the tobacco ban, and found that the ban was not shown to effectively address those concerns. There was no scientific justification for the continued ban on the sale of tobacco products. Furthermore, the purpose behind regulation 45 was found not to outweigh the limitation of the rights. Instead, regulation 45 was an unjustifiable limitation of the rights to dignity, and bodily and psychological integrity. The extent to which regulation 45 limited the rights in issue, particularly given the lack of factual and scientific evidence to support its promulgation, was disproportionate to the nature and importance of the rights infringed.

The appeal was accordingly dismissed.

Nedbank Limited v Houtbosplaas (Pty) Ltd and another [2022] 3 All SA 361 (SCA)

Banking and Finance – Banking – Customer and banker relationship – Whether bank is entitled, under the Financial Intelligence Centre Act 38 of 2001, to certified copies of the trust deeds of trusts which were not customers of the bank – Bank not entitled to rely on section 21(2) of Act where such Act did not apply at the time when the bank sought to invoke it.

Banking and Finance – Banking – Customer and banker relationship – Whether bank's customers were entitled to damages by way of mora interest because they were deprived of the use of their funds, withheld by the bank in the face of unequivocal instructions by the customers to release the funds – In absence of lawful justification for bank to restrict the accounts, customers entitled to mora interest.

In 2016, Nedbank requested certain information in respect of Houtbosplaas and TBS Alpha (its customers at the time) ostensibly pursuant to the provisions of the Financial Intelligence Centre Act 38 of 2001. The bank sought to be provided with copies of the trust deeds of four trusts, each holding one preference and ordinary shares in the companies. The companies' reluctance to provide one of the trust deeds on grounds of invasion of privacy led to an impasse causing the companies to instruct Nedbank to close the accounts and transfer all funds held therein to another bank. Nedbank refused and froze the accounts until the trust deed was furnished, and only closed the accounts in July 2017. The companies then successfully sued Nedbank for damages (ie *mora* interest) for failing to give immediate effect to their instructions.

The High Court held that Nedbank was not justified in law to require a copy of the withheld trust deed, as none of the trusts exercised 25% voting rights at the companies' general meetings. Further, the court held that nowhere does the Act require bank clients to provide verification documents to a bank when requested to do so.

Held – The issue revolved around the sole question of whether Nedbank was entitled, under the Financial Intelligence Centre Act, to certified copies of the trust deeds of the four trusts, which were not customers of Nedbank. If that question was answered in the negative, a secondary issue would be whether Houtbosplaas and TBS Alpha were entitled to damages by way of *mora* interest because they were deprived of the use of their funds, withheld by Nedbank in the face of unequivocal instructions by the two companies to release the funds, for some five months.

The outcome of the appeal hinged on the proper interpretation of section 21(2) of the Act, which states that "If an accountable institution had established a business relationship with a client before this Act took effect, the accountable institution may not conclude a transaction in the course of that business relationship, unless the accountable institution has taken the prescribed steps to establish and verify the identity of the client". The court found that section 21(2), properly construed consistently with its manifest purpose, did not, on the facts of this case, apply at the time when Nedbank sought to invoke it.

The sole question to decide insofar as the respondents' claim for *mora* interest was concerned was whether there was any lawful justification for Nedbank to restrict the accounts for the reasons upon which Nedbank relied. Nedbank was shown to have been wrong in its reasons for restricting the accounts, and the respondents were entitled to *mora* interest.

The appeal was dismissed.

Ellis v Eden [2022] 3 All SA 381 (WCC)

Civil Procedure – Default judgment dissolving partnership – Application for rescission – Requirement of good cause for default in Rule 31(2)(b) and common law – Where applicant for rescission fails to raise a viable defence and default is considerable, good cause cannot be said to have been established.

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

While Mr Ellis alleged that he and Mr Eden formed a partnership, Mr Eden alleged that he became an employee of a company registered by Mr Ellis, and no partnership existed. In seeking rescission, he alleged that he was unaware of the dissolution action and of the default judgment granted against him. The only defence to Mr Ellis' enforcement application was Mr Eden's contention that the dissolution order, from which the receiver derived his powers, should be rescinded. In the rescission application, Mr Eden relied on rule 42(1)(a), rule 31(2)(b) and the common law.

Held – The rescission application was decisive of both applications.

Rule 31(2)(a) applies to the granting of default judgment by the court where one or more claims in an action are not “for a debt or liquidated demand”, and rule 31(2)(b) provides for the rescission of such judgments. Where a claim is for a debt or liquidated demand, rule 31(5) empowers the registrar to grant default judgment, and reconsideration by the court is governed by rule 31(5)(d). Both rule 31(2)(b) and rule 31(5)(d) require the aggrieved defendant to take action within 20 days of learning of the default judgment. The Court addressed the question of whether, in the case of a claim for a debt or liquidated demand, a plaintiff may seek default judgment from the court rather than the registrar. It concluded that where default judgment is granted by the court, there is no reason to deprive a defendant of the benefit of rule 31(2)(b) and, conversely, there is no reason why such a defendant should not be bound by the 20-day time limit specified in rules 31(2)(b), as would have been the position in terms of 31(5)(d) had the default judgment been granted by the registrar. The court therefore considered the rescission application in terms of rule 31(2)(b).

The rescission application was delivered about one year after Mr Eden learnt of the default judgment, which was unreasonably out of time. To rely on rule 31(2)(b), Mr Eden had to establish good cause for his default in the dissolution application, and with regard to his failure to comply with the 20-day time limit imposed by rule 31(2)(b). Good cause, in both contexts, required the court to assess the delinquent party’s prospects of success in the main case. Mr Eden’s explanation on both counts was unsatisfactory and marked by untruths. In assessing the prospects of success, the court found Mr Eden not to have established a viable defence.

In light of the slim prospects of success, Mr Eden’s delinquency and delay, the court was not satisfied that there was good cause, in terms of rule 31(2)(b), to rescind the dissolution order, or good cause, in terms of rule 27, to condone failure to comply with the 20-day limit in rule 31(2)(b). The rescission application thus failed under rule 31(2)(b) as well under the common law, which involved similar hurdles. Rule 42(1)(a) provides that the court may rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The rule was found to also not assist Mr Eden, as it could not be found that the dissolution order was erroneously granted.

The rescission application was dismissed and Mr Ellis’ enforcement application succeeded.

Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs: Free State v Maluti-A-Phofung Local Municipality and others [2022] 3 All SA 403 (FB)

Local Government – Appointment of managers to municipality under administration – Lawfulness of appointments and of remuneration paid in excess of applicable regulations – Where administrator was excluded from decision regarding appointments and salaries attached thereto, the appointments were unlawful and salaries paid ultra vires – Court entitled to hear matter even if not satisfied that the parties had made every reasonable effort to settle the dispute, as required by the Intergovernmental Relations Framework Act 13 of 2005.

By virtue of sections 154 and 155 of the Constitution, the applicant (the "MEC"), as the executive authority of the Free State Provincial government, was responsible for co-ordination, monitoring and support of municipalities in the province. In this case, the MEC sought to have the court review and declare upon the alleged unlawful appointment of the second and third respondents on alleged unlawfully increased remuneration packages and the resultant unlawful drawing of the salaries.

The first respondent was a municipality which had been placed under administration by mandatory intervention. Consequently, only the administrator had the authority to contract on behalf of the municipality with the second and third respondents.

The respondents acknowledged the standing of the MEC to bring a matter concerning the appointment of a municipal manager to court, but complained about the unreasonable delay in doing so in this case.

Held – Section 152 of the Constitution sets out the minimum standards applicable to a municipality in the execution of its duties.

In explaining the delay in bringing the present application, the MEC referred to attempts to afford the respondents sufficient opportunity to remedy the situation, and to the obstructive conduct of the respondents with regard to the administrator's attempts to discharge his duties. The allegations against the respondents were serious and the conduct of all the parties in dragging their feet in bringing the matter to court brought the administration of justice into disrepute. In that light, the court was constitutionally obliged to excuse the delay and hear the matter.

The first issue addressed by the court was whether the contracts entered into by the respondents were legal on the facts and the applicable legal framework. At the relevant time, the municipality had been experiencing a financial crisis and was in serious and persistent breach of its obligations to provide basic services or meet its financial commitments. The administrator was required to scrutinise all budgetary matters. He had investigated the appointments of the second and third respondents and fixed a salary range foe such appointments. However, the second and third respondents were appointed without the knowledge, involvement or ratification of the administrator – and at variance with the remuneration scale determined by him. That was illegal and *ultra vires* the intervention. Even after realising that their contracts were not legal, the second and third respondents allowed the unlawfulness to persist without seeking to rectify the situation. The consequence of the finding that the contracts were unlawful was that any salary or remuneration pursuant thereto were also *ultra vires* and falling to be set aside.

That left for the court's determination, the question of the remedy in law for the illegal contracts concluded by the respondents.

Applicable to a public interest case such as this, was the local government legislative regime, regulating the powers and function of the municipal council and its resolutions which were subject to salary determinations by the Minister of Co-operative Governance and Traditional Affairs. In terms of the rule of law and the Constitution, the fixing and payment of exorbitant salaries, which were *ultra vires* and in defiance of the needs of the people and constitutional governance, will be illegal in terms of section 2 of the Constitution.

Having regard to section 41 of the Constitution, which vests a court with a discretion to hear a matter even if not satisfied that the parties have made every reasonable effort to settle the dispute, the MEC could not be said to be non-suited by the provisions of the Intergovernmental Relations Framework Act 13 of 2005.

Both impugned contracts were set aside and the payment in excess of that permitted was to be repaid by the second and third respondents.

Rapp van Zyl Incorporated and others v FirstRand Bank and others [2022] 3 All SA 437 (WCC)

Personal Injury/Delict – Defamation – Defence of qualified privilege – Test for defamation – Court is required to establish the ordinary or natural meaning which the reasonable reader of ordinary intelligence would attribute to the words in their context, and to determine whether the ascribed meaning of the words would have the effect of injuring the plaintiff's reputation in the estimation of right-thinking members of society.

A firm of attorneys and its two directors claimed damages from the first defendant bank ("First Rand") and one of its employees, arising from alleged defamatory statements made. The defendants denied that the statements were defamatory and, in the alternative, pleaded that the statements were not unlawful having been made on a privileged occasion.

The fourth defendant ("Meintjies") was an attorney employed by the third defendant. He regularly advised First Rand on insolvency applications, including applications for voluntary surrender which were brought by debtors who had mortgage loans with it. He became suspicious about certain notices of intended surrender of debtors' estates, and became convinced that these were part of a concerted and deliberate stratagem to frustrate judgment creditors such as the bank from being able to execute against their debtors, and he suspected that the notices emanated from a common, organised source. On discovering the identity of that source, he informed them that they were utilising the machinery of the Insolvency Act for purposes for which it was never intended, by causing surrender notices to be published whereby creditors were being notified that applications would be made for the voluntary surrender of debtors' estates, without any actual intention of applying for such surrenders. Based on information before Meintjies, he concluded that the defendants were complicit in that.

Held – Meintjies did not contradict himself in any material respect and stuck to his version in cross-examination and it could not be said that there were any material improbabilities in the evidence which he gave. On the other hand, the second and third plaintiffs were not satisfactory witnesses. The Court expressed scepticism about their alleged ignorance of the true intention of the voluntary surrender applications.

The test in determining whether a statement is defamatory is an objective one. In the first place the court is required to establish the ordinary or natural meaning thereof, being the meaning which the reasonable reader of ordinary intelligence would attribute to the words under scrutiny, in their context. Thereafter, it must be determined whether the ascribed meaning of the words used would have the effect of injuring the plaintiff's reputation by lowering her in the estimation of right-thinking members of society. Confirming that Meintjies' statement was defamatory of the plaintiffs it was rebuttably presumed that the publication was made intentionally (*animo iniuriandi*) and that it was wrongful/unlawful. The sole defence which was raised was one of qualified privilege.

Any protection which is extended on a so-called privileged occasion is qualified and not absolute.

Applying the legal principles to the facts in this matter, the court found that the defendants, particularly Meintjies, did not do what was reasonably expected of them and acted recklessly. Their joining the plaintiffs as respondents on the basis that, as at June 2012, they were participants in the unlawful scheme, was not reasonably appropriate.

Defendants were held liable for plaintiffs' damages.

Right to Know Campaign and others v City Manager of Johannesburg Metropolitan Municipality and another [2022] 3 All SA 466 (GJ)

Constitutional and Administrative Law – Right to protest – City's policy of levying a fee from convenors of protests constituting a limitation of the right to protest – Policy found not to comply with principle of legality or pass rationality test – Levying of fees in terms of the Policy for the holding of gatherings, assemblies, demonstrations, pickets and to present petitions was declared unconstitutional.

Those wishing to exercise their right to protest under section 17 of the Constitution within the Johannesburg Metropolitan Municipality are subject to the City of Johannesburg's Tariff Determination Policy (the "Policy"), in terms of which a fee is levied from the convenor of a planned protest which can range between R170 and R15 000.

The applicants sought a declarator to the effect that requesting a fee in terms of the Policy from those who seek to exercise their constitutional right is unconstitutional and unlawful. According to the applicants, the imposition of a fee was *ultra vires* the Regulation of Gatherings Act 205 of 1993. They argued that the Policy limited section 17, and, because it was a municipal council resolution, not a law of general application, the respondents could not invoke the limitation clause of the Constitution found in section 36 to justify the limitation of the right. It was contended that the Policy would in any event not satisfy section 36 because the limitation was not reasonable nor justifiable in an open and democratic society based on dignity, equality and freedom.

Held – The right to protest is constitutionally guaranteed in section 17 of the Constitution and cannot be easily limited. The manner in which local government regulates protests must therefore be compatible with the Constitution.

The Court described the legislative scheme which governs the exercise of the right to protest and notes that the Regulation of Gatherings Act does not expressly provide for payment of a fee when a public protest is to be held.

The respondents countered the applicants' submission that the Policy was *ultra vires* the Regulation of Gatherings Act, by arguing that the proper course of action would have been to challenge section 75A of the Local Government Municipal Systems Act 32 of 2000, which empowers municipalities to levy fees for services. However, it was later conceded that such an approach would not have been appropriate.

Confirming that it was therefore authorised to conduct a legality enquiry of the Policy, the court pointed out that courts can review the exercise of public power notwithstanding the absence of pleadings in terms of the Promotion of Administrative Justice Act 3 of 2000, because the public power being exercised must, in order to be constitutional, meet the requirement of legality.

The first issue to be determined was whether levying fees in terms of the Policy met the requirement of legality. The requirement of legality requires decisions involving public power to be rational and decision-makers to act only to the extent that they are empowered. Although the Regulation of Gatherings Act does not expressly prohibit the levying of fees, its silence cannot be interpreted to mean that a power exists to levy fees. There is no legislation specifically conferring a power to levy fees in respect of protests. The levying of fees thus falls outside the purview of that which is permitted by the Regulation of Gatherings Act. There being no power in law to levy fees in respect of protest action implies that doing so amounts to acting beyond the powers vested in the municipality. Accordingly, the decision to levy fees from convenors of protests was contrary to the principle of legality.

The test for rationality is whether there was a rational connection between the exercise of power in relation to both process and the decision itself, and the purpose sought to be achieved through the exercise of that power. *In casu*, the court found the City's Policy to fail the rationality test.

It was found further that that levying fees from the convenors of prospective protests constitutes a limitation of the right to assemble freely, and that such limitation was not justifiable.

The levying of fees in terms of the Policy for the holding of gatherings, assemblies, demonstrations, pickets and to present petitions was declared unconstitutional. The court ruled that wherever the Policy purported to apply to a gathering, it would not have any effect as of the date of the judgment.

S v SN [2022] 3 All SA 497 (ECG)

Criminal Law and Procedure – Rape of minor – Sentence – Applicability of prescribed minimum sentence in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 – Where remorse expressed by accused found to be genuine, and accused had suffered punishment by community before being tried in court, such factors constituting substantial and compelling circumstances warranting deviation from the imposition of life imprisonment.

Alleging that between 11 and 13 October 2021 the accused unlawfully and intentionally committed acts of sexual penetration with a ten-year-old girl, the Director of Public Prosecutions ("DPP") for the Eastern Cape Division, prosecuting for and in the name of the State, preferred a rape charge against the accused. As the complainant was under the age of 16 and had been raped more than once, the DPP sought to have the prescribed minimum sentence of life imprisonment imposed in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The accused pleaded guilty to the charge and signed a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, admitting the facts surrounding the rape of the complainant.

Held – The Court having satisfied itself that the accused understood the importance of his statement, convicted him as charged.

On the issue of sentence, the accused testified in mitigation of sentence and requested a sentence of 20 years' imprisonment instead of life imprisonment. Seeking the court's mercy, he expressed remorse and apologised for his actions. On the other hand, the State advanced aggravating factors including the age of the complainant, and the breach of the trust she had placed in the accused.

Section 51 of the Criminal Law Amendment Act 105 of 1997 provides for discretionary minimum sentences for certain serious offences. In terms of section 51(3)(aA), the complainant's previous sexual history; an apparent lack of physical injury to the complainant; the accused's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant prior to the offence being committed shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. The court also referred to the constitutional protection offered to children, which is echoed in the Children's Act 38 of 2005.

Finding that the accused had displayed genuine remorse, the court held that substantial and compelling circumstances existed, which warranted deviation from the imposition of life imprisonment. One of the factors undergirding that conclusion was the fact that the accused had been stabbed by his brother and assaulted by the community upon his crime being discovered.

As the accused had a clean criminal record for the previous 15 years, he was found to be a candidate for rehabilitation.

The court made an order facilitating the complainant receiving therapy for her trauma, and sentenced the accused to 25 years' imprisonment.

South African Breweries Proprietary Limited and others v President of the Republic of South Africa and another [2022] 3 All SA 514 (WCC)

Civil Procedure – Mootness – Where impugned Regulations had been repealed, there was no live controversy when the matter was argued before the court and in that sense, the matter had been rendered moot.

Constitutional and Administrative Law – Promulgation of Regulations by Minister – Ban on alcohol sales during national state of disaster – Lawfulness of decision to make Regulations – Decision to publish Regulations rationally connected to a legitimate purpose of saving lives during pandemic and was thus lawful.

When South Africa entered its second wave of Covid-19 virus infections, the second respondent (the "Minister") published regulation 44 and regulation 86 in *Government Gazette* number 1423 on 29 December 2020, essentially enforcing an alcohol ban. The applicants took issue with the Regulation, contending that they were unlawful because they were not necessary to achieve any of the purposes listed in section 27(3) of the Disaster Management Act 57 of 2002. They approached the court for a declaration that the Regulations were unlawful and of no force and effect. In the alternative, the applicants sought to have the Minister's decision to promulgate the Regulations reviewed and set aside. According to the applicants, the Disaster Management Act did not authorise the Minister to make the Regulations, and the

procedure adopted prior to making the Regulations was not fair and regular in that there was no bilateral engagement with the applicants. A further contention was that it was not shown that the Regulations were rationally connected to the purported purpose of saving hospital space and saving lives.

The application was persisted with after the impugned Regulations were repealed as of 2 February 2021, raising the issue of mootness.

Held – As the Regulations had been repealed, there was no live controversy when the matter was argued before the Court and in that sense, the matter had been rendered moot. The Court found no authority for the proposition that in a challenge as currently formulated by the applicants a court of first instance has the power to decide a matter where there is no longer a live controversy between the parties.

Despite the above finding, the Court went on to consider the remaining issues in dispute.

A critical enquiry was whether the decision to publish the Regulations was rationally connected to a legitimate purpose.

A dispute of fact existed between the parties concerning the nature and extent of the relationship between alcohol consumption and healthcare capacity. Importantly, government had a duty to uphold the right to health care and life, during the height of the pandemic, in circumstances where the virus had mutated into a variant that was 50% more transmissible and where it caused people that were asymptomatic to also spread the virus. Government would have abdicated its responsibility and duties in terms of section 27 of the Constitution, were it to have adopted a pure economic cost-benefit analysis in managing the pandemic – and it was under no duty to provide a scientifically and statistically accurate set of facts to prove that the consumption of alcohol had a significant impact on the number of trauma cases requiring medical attention. The Regulations thus passed the rationality test.

The Court considered the applicants' constitutional challenges raised against the Regulations, and found them not to be sustainable. Having regard to the facts and expert evidence, the court found that the imposition of the temporary alcohol ban was essential given the exigencies that applied to the imperative of saving lives and therefore, it was made "only to the extent necessary" as provided for in section 27(3) of the Disaster Management Act.

Once the Minister discharged the onus of demonstrating that the decision to make the Regulations was reasonable and justifiable, and within the ambit of the powers conferred on her by section 27(2) of the Disaster Management Act, it could not be said that she acted *ultra vires*.

It was concluded that the making of the Regulations was reasonable and justifiable and represented the least restrictive means of achieving the purpose referred to above. The restriction placed on the applicants' rights was proportional to the harm sought to be averted.

The application was dismissed.

In a dissenting minority judgment, it was stated that the issue of mootness should be decided on the basis of the interests of justice; that the respondents failed to satisfy the requirements of section 27(3) of the Disaster Management Act; and that the

constitutional challenge did have merit. In terms of the dissenting opinion, the Regulations were unlawful.

Trustees for the time being of the Humane Society International – Africa Trust and others v Minister of Forestry, Fisheries and the Environment and others [2022] 3 All SA 616 (WCC)

Agriculture and Animals – Protected animals – Hunting and exporting of trophy animals – Determination of quota – Interim interdict – Requirement of prima facie right established through unfairness caused by inviting a party to consult on an issue in which the decision-maker was statutorily time bound and then for her to apply that participative process to a time period in respect of which there had been no consultation.

The first applicant ("HSI-Africa") was the local chapter of an international organisation dedicated to the protection of animals. It sought an urgent interdict pending the review of a decision taken by the first respondent (the "Minister") to fix a quota for the number of leopard, elephant and black rhinoceros that may be lawfully hunted in South Africa and later exported abroad as trophies by foreign hunters during 2022. The Minister was the National Management Authority responsible for the allocation of quotas in terms of regulation 3(2)(k) of the Regulations published under the National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA") in respect of "The Convention on International Trade in Endangered Species of Wild Fauna and Flora" ("CITES Regs"). CITES is a multilateral international treaty which was adopted by 21 countries in 1973. The overall purpose of CITES is to regulate the worldwide trade in endangered species of, *inter alia*, wild animals and plants. In terms of Article XI of CITES, the signatory parties meet from time to time in conference and take decisions which then become binding on such member States affected thereby.

In terms of Regulations issued under NEMBA, the black rhinoceros, leopard and elephant were respectively listed as "endangered", "vulnerable" and "protected" species. A second set of regulations, the "Threatened or Protected Species Regulations" (the "TOPS Regs") aimed to address a wide range of issues relating to the protection of listed fauna and flora as contained in GNR 151, including the control of the captive breeding of wild animals, the issuing of a host of permits for the control of, *inter alia*, game farms and hunting associations, and the hunting and protection of the wild populations of protected species. Thus, the permissible hunting of black rhinoceros, leopard and elephant for trophy purposes is strictly controlled within South Africa via a permit system. The Minister fixes the quotas for such hunting, while the MEC's have the authority to issue individual permits. All such hunting must comply strictly with the hunting methods listed in the TOPS Regs.

HSI-Africa submitted that in terms of regulation 6(3)(c) of the CITES Regs, a permit may only be granted for the export of any protected specimen once the scientific authority has evaluated the proposed quota, and, importantly, has made an NDF ("Non-Detriment Finding"). Regarding the 2021 quota for leopard, HSI-Africa was critical of the evaluation of the scientific authority report. Regarding black rhinoceros, HSI-Africa stated that while a draft was circulated, no final NDF was submitted by the scientific authority for the 2021 quota.

Held – The requirements for the granting of an interim interdict *pendent lite* are establishment of a *prima facie* right to the relief sought; a well-grounded apprehension

of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; the balance of convenience favours the granting of the of interim relief; and that the applicant has no other remedy.

HSI-Africa argued that the Minister's advertising for consultation in relation to the fixing of a quota in a particular year and then applying the determination of the outcome of that consultative process in a subsequent year was impermissible. The Court agreed that it was manifestly unfair to invite a party to consult on an issue in which the decision-maker is statutorily time bound and then for her to apply that participative process to a time period in respect of which there has been no consultation. HSI-Africa thus established a *prima facie* right to the relief sought. The remaining requirements for the interim interdict were also established, and such relief was granted.

END-FOR NOW