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

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[2] But see rule 26 where it refers to all pleadings!

CASES

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

Legal Practice Act 28 of 2014 — constitutionality of section 24(2) — unfair discrimination — provision is not unconstitutional

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

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

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

regulation of the legal profession and the immigration laws of South Africa. The intervening party is Daphne Makombe, a Zimbabwean national who has satisfied the requirements for admission and enrolment as a legal practitioner, conveyancer and notary, save for the citizenship and/or permanent residence requirement.

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

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

The applicants submitted that there are less restrictive means to achieve whatever governmental purposes alleged, as the LPA has sufficient safeguards in the protection of the public against perils such as fraud. Furthermore, that the immigration and employment laws of South Africa have measures in place to ensure that citizens get preference over foreigners in the labour market. They further argued that the admission of foreign nationals will in no way limit the rights of citizens under section 22 of the Constitution.

In a unanimous judgment penned by Tshiqi J, the Court held that this Court's jurisdiction is engaged because the matter concerns the Court's exclusive jurisdiction as a result of the High Court order having declared the provisions of section 24(2) to be unconstitutional and invalid, albeit, to a limited extent. The applicants were not

content with the limited scope of the declaration, and consequently sought to challenge it. The Court concluded it had the necessary jurisdiction in terms of section 167(5) to make the final decision on the declaration. In addition, the Court permitted a direct appeal to it and granted direct access to Ms Daphne Makombe. The Court reasoned that the application also implicated the equality clause in section 9 of the Constitution, therefore granting it jurisdiction.

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

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

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

Zander Burger Properties (Pty) Ltd v Graceful Blessings (Pty) Ltd (2102/2022) [2022] ZAFSHC 182 (25 July 2022)

Spoliation application-lease agreement-not cancelled-order granted

Application – Urgent application in terms of which the applicant sought an order directing the respondent to restore the occupation and possession of a business office including a safe and a filing room to the applicant together with the keys on the grounds that the applicant was despoiled of possession of the premises – Parties concluded a lease agreement in terms of which the respondent let the premises to the applicant – The applicant breached the lease agreement by failing to pay rentals – The only issue which remained to be determined was the merits of the application – The application for a Mandament van Spolie in terms of paragraphs 2.1 to 2.2 of the notice of motion is granted.

www.saflii.org/za/cases/ZAFSHC/2022/182.html

Cibi v Public Service Commission [2022] ZAECMKHC 44 at [12]-[26]

Affidavit – Commissioner of oaths – Deponent recorded as female when attestation clause referring to "he" – Validity of affidavit – Oversight on part of commissioner being presented with typed affidavit – Affidavit valid – Justices of the Peace and Commissioners of Oaths Act 16 of 1963, reg 3(1).

The applicants sought to review and set aside a report of the Public Service Commission on an investigation into allegations of irregular appointments of staff and contractors. Postponements ensued when the applicants' erstwhile attorney of record filed a notice of withdrawal. There was disagreement between the parties about the wasted costs, and in support of the applicants' submissions, an affidavit deposed to by the applicants' attorney of record on the date of hearing was handed up from the bar by the applicants' counsel. The Commission's counsel contended that the attestation clause at the base of the affidavit, which referred to the deponent as "he", in circumstances where the deponent was recorded as being an adult female, rendered the affidavit invalid.

Bands AJ discusses the regulations in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963; Absa Bank Ltd v Botha NO and that this case is often cited by practitioners as authority for the proposition that affidavits are invalid simply if there is a disparity between the gender selected by the deponent and that selected by the commissioner of oaths; that in this case the attestation clause forms part of a pre-typed affidavit, which was placed before the commissioner of oaths and did not emanate from him; the case of Capriati v Bonnox; that the deponent in this case was an attorney; and that the reference to the deponent as "he" was no more than an oversight on behalf of the commissioner of oaths, having been presented with the typed affidavit. The objection to the affidavit must fail. As to costs, the essential basis upon which the postponement was sought was the applicants' inability to have prepared for argument of the matter given the late engagement of their attorney of record and there was a period of almost one year unaccounted for. The applicants are ordered to pay the Commission's costs occasioned by the postponement, on the scale as between attorney and client.

Social Justice Coalition and others v Minister of Police and others [2022] JOL 54591 (CC)

Appeal-leave to appeal- Constitutional Court from matter in Equality court- case remained pending in the Equality Court-no order to appeal agains!

Whether constitutional court enjoys power to make a declaratory order of constructive refusal so as to entertain an application for leave to appeal from the equality court

The Equality Court declared that the allocation of police human resources in the Western Cape and the system employed by the police service (SAPS) to determine the allocation of police resources unfairly discriminated against Black and poor people on the basis of race and poverty. The determination of a remedy remained outstanding, and an application for leave to appeal was brought in the Constitutional Court.

Unterhalter AJ in the majority judgment departs from the minority view on the question of whether the court enjoys the power to make a declaratory order of constructive refusal so as to entertain an application for leave to appeal from the Equality Court – finding that the court does not have the power to effect the remedy

sought by the applicants. As the case remained pending in the Equality Court, there was no order of the Equality Court from which leave to appeal to the Constitutional Court might be sought. Absent an order of the Equality Court from which leave to appeal was sought, the appellate jurisdiction of the Constitutional Court was not engaged [para 127].

Court refers to considerations that weigh against it being approached, as a court of first instance, to enforce an alleged infringement of a litigant's right of access to the courts [paras 140-145].

Leave to appeal is refused.

ABSA Home Loans Guarantee Company (RF) (PTY) Ltd and Another v ERF 1404 Dainfern CC and Others (41403/2019) [2022] ZAGPJHC 490 (28 July 2022)

National Credit Act – Whether the bank granted credit to the defendants recklessly by valuing the immovable property for more than its actual value

Opposed application for summary judgment – Plaintiffs seek summary judgment against the defendants for payment of the full outstanding amount due under a written mortgage loan agreement, together with interest and costs and an order declaring certain immovable property specially executable – Issues for determination – Whether the plaintiffs are entitled to submit a supplementary affidavit consequent upon the amendment of the defendants' plea – Whether an adverse finding in this regard is fatal to the summary judgment application – Whether the immovable property may be declared specially executable – The constitutionality of the National Credit Act – Whether the bank granted credit to the defendants recklessly by valuing the immovable property for more than its actual value – Summary judgment is granted against the first, second and third defendants, jointly and severally – The immovable property is declared specially executable for the said sums.

www.saflii.org/za/cases/ZAGPJHC/2022/490.html

Ashleigh's Mattress Manufacturing CC v Jouberton Furnishers CC t/a Carnival Furnishers [2022] JOL 54729 (GP)

Parties-determination of contracting entities in claim for payment

In two applications for payment for goods sold and delivered, the court had to determine whether or not the applicant contracted with the respondent or with Carnival Zambia, one of its branches. The opposition to the application by the respondent was that another entity or one of its branches, Carnival Zambia, contracted with the applicant and as such Carnival Zambia owed the applicant the amount claimed.

Ndlokovane AJ undertakes an interpretation of the relevant purchase orders and email orders.

Carnival Zambia found to be a registered entity on its own with company registration number: 43778 under the laws of Zambia, and a distinct entity from the respondent.

Both applications dismissed.

Saboath General Traders ta Sausage Saloon v Mthatha Mall [2022] CA04-2022 (ECM) at [9]-[13]

Jurisdiction – Magistrate's court – Whether jurisdiction excluded by clause in lease agreement – Clause describing consent to jurisdiction of certain High Court – Jurisdiction of magistrate's court existing as matter of law and cannot be excluded by contract.

The Sausage Saloon and Mthatha Mall concluded a lease agreement in 2017 for premises at a shop. A clause in the agreement dealt with jurisdiction and provided that the parties "unconditionally and irrevocably consent, without limitation" to the jurisdiction of the Mthatha High Court. In 2018 the Mall instituted action against the appellants (the Saloon and Mr Mngonyama) in the magistrate's court. The appellants filed a special plea that due to the terms of the lease agreement the magistrate's court lacked jurisdiction. The magistrate dismissed the special plea and the appellants now appeal to the High Court.

Zilwa J discusses the Mall's contention that the amount claimed falls within the monetary jurisdiction of the magistrate's court and that the leased premises were within the magisterial district; that the parties merely consented to the jurisdiction of the High Court and that the law on jurisdiction cannot be decreed contractually by the parties; and that the part of the lease dealing with suretyship mentions the magistrate's court as well as the High Court in respect of the surety. The jurisdiction

of the magistrate's court exists as a matter of law and cannot be excluded by contract. The appeal is dismissed.

(Stretch J concurred.)

Standard Bank v Young [2022] ZAKZDHC 30 at [30]-[46]

Execution – Residential immovable property – Founding affidavit and supporting annexures – Manager from bank deposing to affidavit – Allegations which were not true – Full and frank disclosure of all relevant circumstances – Standard expected from legal practitioners – Uniform Rule 46A.

After the defendants failed to make certain of the monthly payments on their home loan, the bank approached the court with an application in terms of rule 46A of the Uniform Rules in which it sought default judgment as well as an order declaring the immovable property executable. The founding affidavit was deposed to by Ms Ngcobo, a home loans legal manager in the employ of the bank. The Judge queried with counsel that certain allegations made in the founding affidavit were not borne out by the annexures, particularly in regard to payments made by the defendants. In a supplementary affidavit, Ms Ngcobo explained that the discrepancy was a regrettable oversight resulting from the defendants not making payments directly into their home loan account but by making use of the bank's general ledger account.

Henriques J discusses the purpose of Rule 46A; that the explanation that payments were made into the general ledger account was already known to the deponent at the time she deposed to the original founding affidavit as it formed part of the annexures to the papers and was reflected in the payment history; that the deponent to the affidavit clearly deposed to an affidavit concerning allegations which were not true; that to say that this was a discrepancy pointed out by the court is factually incorrect and may well amount to an act of perjury; the lack of clarity on the efforts the banks made to assist the defendants to regularise their loan repayments; and that there was no personal service of either the summons and particulars of claim instituting the action, nor the application for default judgment and the Rule 46A application.

The court notes that the attorneys were either remiss or negligent in their obligations not only to the court but to the bank official to ensure that she deposed to an affidavit

which was factually correct. It is becoming common practice and more often than not Judges encounter these applications on the unopposed motion court roll. The impression created is that these applications are prepared by an amanuensis and are copied and pasted from previous applications. No one checks them properly to ensure that they are in order.

Attorneys representing judgment creditors are subject to the same obligations, if not an even greater standard. As officers of the court, and in maintaining the highest standards of the profession, the obligation on legal practitioners cannot be compromised or diminished in any manner whatsoever. Judgment creditors are required to make full disclosure of all attempts made to assist the debtors and full and frank disclosure of all relevant circumstances. More often than not these applications are seldom opposed by the debtors and the court relies solely on the contents of the founding affidavit and supporting annexures. A presiding officer must be able to rely on what is contained in such affidavit.

The application is dismissed with costs. The registrar is directed to send a copy of this judgment to the Legal Practice Council and a copy, together with a full set of the application papers, to the Banking Services Ombudsman.

Matemeku Petroleum (PTY) Ltd v Shell Downstream SA (PTY) Ltd and Another In re: Shell Downstream SA (PTY) Ltd and Another v Matemeku Petroleum (PTY) Ltd (22196/2019) [2022] ZAGPJHC 503 (2 August 2022)

Security- within 10 days or such other time the court deems just in terms of Rule 47(1) of the Uniform Rules of court in the amount –when granted

The first applicant seeks an order directing the respondent to furnish security within 10 days or such other time the court deems just in terms of Rule 47(1) of the Uniform Rules of court in the amount

R 500 000,00 alternatively such amount and form as determined by the Registrar as security for costs in respect of the review application brought by the respondent – Applicable legal principles – In a security for costs application the court must carry

out a balancing exercise, see Giddey NO v J C Barnard and Partners 2007(5) SA 525 (CC) – Held the respondent is ordered to provide the first applicant with security for the costs in the review application – Held pending the provision of security the main application is stayed until such time as security is provided as ordered – Held in the event the respondent failing to provide security within 30 days from the date on which the Registrar has determined the amount, the applicants are granted leave to approach the court on the same papers, duly supplemented, to apply for the dismissal of the respondent's application.

www.saflii.org/za/cases/ZAGPJHC/2022/503.html

Van Der Merwe v Van Wyk Auditors [2022] ZAGPPHC 522 at [26]-[91]

Anton Piller order – Obtained against former auditors – To aid execution of a judgment – Respondents complaining of breach of terms of order during execution.

During 2011 Mr Van Wyk was appointed to act as auditor in all financial and tax related matters for the 1st to 21st applicants (the van der Merwe Group). This appointment was subsequently terminated. In 2021 the applicants requested all the source documents relating to the tax and financial affairs of the van der Merwe Group so that they could appoint an auditor to attend to their outstanding matters, but to no avail. This resulted in two applications to court with the second resulting in an order that the respondents hand over various specified documents. The applicants contended that the respondents deliberately thwarted the order and so obtained an Anton Piller order in the urgent court. The applicants averred that were the respondents to be given notice of the application they would be able to delete the accounting system entries from their computers which would defeat the purpose of the order. Based on these facts the Anton Piller order was granted in camera. On the return day the respondents contended, among other grounds, that unauthorised persons were permitted to be present, thus tainting the execution of the order, the consequence of which they say must lead to its discharge.

Neukircher J discusses the people present during the execution of the Anton Piller order, which included members of the applicants' attorneys firm, the applicants' auditor and a computer operator; the Shoba case and the requirements for the granting of an Anton Piller order; whether the Anton Piller procedure could be used in order to aid in the execution of a judgment; that the applicants rely on the

respondents' obstinate refusal to comply in full with two court orders and in particular with second order; the contention that the remedy is only available to preserve "vital evidence"; the “real threat” argument and that it appeared that certain information had been deleted; full disclosure; the scope of the order; and the respondents’ complaints about the participation of a candidate attorney, the taking of photos and a video, that keyword searches were too wide and that a software program was uploaded onto their computer system to enable the search.

The rule nisi is confirmed and the documents and items in the possession of the Sheriff pursuant to the execution of the Anton Piller order, shall be handed to the applicants. See paras [87]-[90] on the respondents’ attack on the competence and integrity of a Judge and a punitive costs order being warranted.

Legal Practice Council v Craddock [2022] ZAECMKHC 48 at [26]-[57]

Profession – Unprofessional conduct – LPC seeking to have attorney’s name struck from roll – Signing as witness to deed of suretyship – Complaint that surety signature forged – Attorney responding that she could not recall – Insufficient facts presented – Application dismissed.

Facts: Ms Craddock entered the attorneys’ profession in 2005 and no complaints appear to have been received for almost a decade until the complaint of Mr Labuschagne in 2014. He says that he never signed a certain deed of suretyship and it appeared that the signature was a forgery. Mr Labuschagne’s complaint is that Ms Craddock initialled and signed the document as a witness who was present and who therefore witnessed him appending his signature on that document.

Application: The Legal Practice Council seeks to have Ms Craddock’s name struck from the roll of attorneys.

Discussion: Ms Craddock contented that she deals with hundreds of transactions and signs documents either as a witness or otherwise and has no independent recollection of the document being signed; the guilty finding of unprofessional conduct; the LPC’s contention that Ms Craddock failed to give a satisfactory response but maintained that she could not recall the signing; the four-year delay from the complaint and the tardiness in bringing the matter to court; the possible ways the signature could have been attached to the document (paras [23]-[25]); that

the report of the handwriting expect was inconclusive on her signature; the question is whether on a balance of probabilities, it has been established that the signature of the witness in that deed of suretyship is that of Ms Craddock; that Mr Labuschagne himself is conspicuous by his absence in coming up with the information he might have about how the transaction evolved; the court's disquiet at the lack of candour on the part of Ms Craddock; there is a professional and ethical responsibility for attorneys to play open cards with the LPC; and candour with the court and a demonstration of a clear appreciation of one's responsibilities as an attorney and an officer of the court are indispensable attributes of the attorneys' profession.

Findings: There are not enough facts presented on the papers on which the offending conduct can be said to have been established on a preponderance of probabilities.

Order: The application is dismissed with each party to pay its own costs.

JOLWANA J (DAWOOD J concurring) GOVINDJEE J dissenting from para [58].

ZH v Minister of Home Affairs [2022] ZAWCHC 150 at [29]-[68]

Promotion of Administrative Justice Act 3 of 2000, s 6.-Administrative law – Applications for permanent residence – Refusal – Dismissal of appeals – Delay – Internal remedies – Substitution or remittal

Facts: First applicant is a Bangladeshi national who has resided in South Africa since 2009. The second applicant is his wife and they represent their children, who are respectively 15, 10 and 6 years old. First applicant was issued a general work permit which was renewed and he has been permanently employed at an eatery as a manager and accountant. The Minister rejected his application for a permanent residence permit in 2019.

Application: The applicants seek the review and setting aside of the decisions taken by the Minister and the Director-General in rejecting their applications for permanent residence permits, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); condonation of the delay in instituting the application and the failure to exhaust internal remedies; and a declaration that the first applicant is not a prohibited person in terms of section 29(1) of the Immigration Act 13 of 2002.

Discussion: The delay in the institution of the application; the failure to exhaust internal remedies; section 26 of the Immigration Act; the first applicant's application for a critical skills visa in terms of section 19(4); the refusals and the appeal to the Director-General; the appeals to the Minister; the reasons for the refusals and whether the Minister acted irrationally and unreasonably; section 8(1)(c)(ii)(aa) of PAJA and whether the court should substitute the Minister's decision; and the Minister's counsel's contentions for remittal so as not to set a precedent for future litigation against the Department and not to allow the applicants effectively to treat the court as the Department of Home Affairs.

Findings: There was nothing in the documents filed of record to substantiate the decisions taken by the Minister and the Director-General. A substitution order was just and equitable. It was in the interests of justice to extend the 180-day period prescribed by PAJA. The context within which the failure to exhaust internal remedies arose gives rise to exceptional circumstances which justify an exemption being granted to those applicants.

Order: It is declared that the first applicant is not a prohibited person in terms of section 29(1) of the Immigration Act. The decisions dismissing the appeals against the refusals of the applications for permanent residents permits are reviewed and set aside. The applicants' appeals under section 8(6) of the Immigration Act are upheld. The Director-general is directed to issue permanent residence permits to the applicants.

VAN ZYL AJ

Flexi Trade 110 (Pty) Ltd Maselspoort Resort and Another v Capitaux (Pty) Ltd (284/2022) [2022] ZAFSHC 187 (4 August 2022)

Irregular step – Rules 17(3) and 18(1) of the Uniform Rules of Court – Signature of legal representative not on copy of summons and pleadings served on opposing party or before issued by registrar

Did the manner in which the respondents litigate offend against the Rules of Court to the extent that it caused an irregular step or irregularity? – Whether the respondents' presentation, via email, of copies of two pages that purports to represent the whole of the document, remedied the objections of Capitaux and the administration of

justice in general – The application to set aside the combined summons inclusive of the particulars of claim, is granted and is it ordered set aside.

www.saflii.org/za/cases/ZAFSHC/2022/187.html

Uys NO v National Credit Regulator [2022] ZAGPPHC 570 at [11]-[26]

National Credit Act 34 of 2005-Consumer – Simulated transactions – Loan agreements disguised as agreements of sale and rental – National Consumer Tribunal – Penalties – Whether wording too wide – Regarding setting aside of transactions and appointment of auditor

Facts: The National Credit Regulator received two complaints that referenced the appellants who had bought the two complainants' respective properties under market value. Simultaneously with the sale agreements the complainants signed lease agreements with the appellants to lease the same sold properties with an option to repurchase. The National Consumer Tribunal found that the agreements constituted credit transactions and contravened certain sections of the National Credit Act 34 of 2005.

Appeal: The appellants seek the review and setting aside of the findings and sanctions imposed by the National Consumer Tribunal.

Discussion: The Tribunal was correct that the contracts concluded with the complainants were simulated loan agreements disguised to appear as agreements of sale and rental and that the complained of relevant provisions of the Act were contravened, such as pertaining to reckless credit, registration as a credit provider and the affordability assessment; the sanction involving the appointment of an auditor at own cost; and the setting aside sanction made applicable to all transactions.

Findings: The audit sanction was too wide and delegated the powers of the Regulator and Tribunal to an auditor. As to the setting aside of transactions, if the "all" referred to the two complaints then the sanction should stand, but if it relates to transactions that the auditor has to uncover, then the sanction is too wide. Tribunals must carefully word sanctions so as not to have them set aside due to vagueness.

Order: The findings of the Tribunal are confirmed. Two subparagraphs of the sanctions are replaced with wording provided in para [26] regarding the setting aside of transactions and the appointment of an auditor.

POTTERILL J (MBONGWE J and KUMALO J concurring.)

Goodrock Chemworks v CCMA [2022] ZALCJHB 211 at [27]-[43]

Legal representation – CCMA – Commissioner refusing to allow employer to be represented by attorney – Senior employee able to lead his witnesses and cross examine – Not in anyway incompetent to conduct arbitration proceedings – CCMA Rule 25(1)(c).

Facts: Mr Macala had been in the employ of Goodrock Chemworks for over 15 years, with an unblemished disciplinary record. At a disciplinary hearing, the chairperson acquitted Mr Macala of three charges and found him guilty on the fourth charge and recommended his summary dismissal. This charge was for using the company car to go to a supermarket and for using the gate remote instead of the biometric system when he did so. At the CCMA, the Commissioner refused to allow Goodrock to be legally represented and found in favour of Mr Macala.

Application: Goodrock seeks to review and set aside the award of the Commissioner at the CCMA who found that the dismissal was procedurally fair and substantively unfair and ordered Mr Macala's reinstatement coupled with remuneration equivalent to three months' salary. The Commissioner found that nothing in Goodrock's disciplinary code and procedure prescribed dismissal as a sanction for a first offender who used a company vehicle without any authority.

Discussion: Goodrock's contention that the Commissioner ought to have allowed it to be legally represented as the dispute was complex and in the public interest; that AMCU's shop steward was legally trained and very familiar and experienced in conducting arbitration proceedings; that if their experienced attorney who specialised in labour law had participated, the outcome would have been different; Goodrock's contentions on various alleged gross irregularities in how the arbitrator dealt with evidence presented; and Rule 25(1)(c) of the CCMA Rules on legal representation.

Findings: The commissioner correctly found that for the contravention Mr Macala was found guilty of, as a first offender, Goodrock's disciplinary code did not prescribe

dismissal as an appropriate sanction. Goodrock was the drafter and custodian of its policies and can blame no one but itself. The senior employee of Goodrock at the CCMA was able to lead his witnesses and cross examine and it cannot be said that he was in anyway incompetent to conduct arbitration proceedings. During the proceedings, Goodrock's attorney had been available in another room for the senior employee to consult with. The commissioner was correct to dismiss the Goodrock's application on legal representation.

Order: The review application is dismissed.

SETHENE AJ

Goodrock Chemworks v CCMA [2022] ZALCJHB 211 at [27]-[43]

Promotion of Administrative Justice Act 3 of 2000-Administrative law – Firearm licences – Application by security company – Refusal on grounds that responsible person not registered with regulatory authority – Documents submitted sufficient to address any concerns of police or Appeal Board –.

Fidelity ADT v Chairman, Appeal Board [2022] 45583-2019 (GP) at [18]-[20]

Facts: Fidelity made an application for nine new Glock pistols with the police services. At the time of the application, Mr Rautenbach was the nominated responsible person. The application was refused on the basis that the company had failed to appoint a responsible person who was is registered with it as a security service provider with the Private Security Industry Regulatory Authority (PSIRA).

Application: Fidelity seek to review and set aside the decision of the Firearms Appeal Board refusing the appeal for firearms licences, alternatively setting aside and reviewing the original decision of the Commissioner (in his capacity as Registrar of Firearms) to refuse the firearm licences.

Discussion: Section 3 of the Promotion of Administrative Justice Act and procedurally fair administrative action; whether Fidelity was subjected to unfair administrative processes; whether the respondents failed to notify Fidelity that they intended to exercise their discretion against it and afford it an opportunity to make representations; and section 7 of the Firearm Controls Act and applications by persons other than natural persons.

Findings: The respondents did not provide any documentary evidence to support the claims that Rautenbach was not registered with PSIRA or employed by Fidelity as alleged. On interpretation of section 7 of the Firearm Control Act there is no requirement that the nominated person be “linked” to the applicant, nor does it require proof of employment as a pre-requisite. The respondents should have requested Fidelity to provide proof that the responsible person was employed there and this would have easily remedied the issue. The respondents failed to adjudicate the matter properly. The documentary evidence attached to both the initial application and the appeal should have put to rest any concerns the respondents might have had pertaining to Fidelity’s intention.

Order: The review of the original decision by the Commissioner refusing the firearm licences is set aside. The matter is remitted for reconsideration.

Leon JJ Van Rensburg Attorneys v Matlotlo Tranding (PTY) Ltd and Others (04956/2020) [2022] ZAGPJHC 536 (15 July 2022)

Rule 19(1) of the Uniform Rules of Court provides for dies non only in respect of a notice of intention to defend [BUT SEE RULE 26 =ALL PLEADINGS]

Application for condonation – It appears evident that the applicant completely misread the rules of this Court regarding dies non, and has largely advanced its internal dynamics, in its office, as reasons for the late application for leave to appeal – Rule 19(1) of the Uniform Rules of Court provides for dies non only in respect of a notice of intention to defend – Applicant’s internal office dynamics as cause for delays – The applicant and its office resolved to take a very risky business practice of ‘switching all the lights off’ when judgments such as the one under attack presently could be handed down at any time, even emails were shut off – Accordingly, this application is to be dismissed on this basis alone – The test for leave to appeal – The application for condonation for the late filing of the applicant’s application for leave to appeal is refused and application for leave to appeal is refused with costs.

www.saflii.org/za/cases/ZAGPJHC/2022/536.html

Mavudzi v Majola [2022] ZAGPJHC 575 at [33]-[42]

Advocate – Striking off roll – Application brought by layperson – Two accused persons against prosecutor – Complaint pending with Legal Practice Council – Role of LPC and court – Legal Practice Act 28 of 2014, s 44(2).

Facts: SARS suspected that crimes had been committed by Mr Mavudzi and Mr Dube (the applicants) and in October 2014 submitted allegations against them to the NPA. The investigating officer was Captain Gobozi and the NPA assigned Adv Majola as the lead prosecutor. On 17 March 2015 Adv Majola signed off on an application in terms of section 43(1) of the Criminal Procedure Act 51 of 1977 to procure a warrant of arrest. The warrant was issued on 24 March 2015, Mr Mavudzi was arrested and has been incarcerated ever since.

Application: The applicants seek to have the name of Adv Majola struck off the roll of advocates on the grounds of gross unprofessional conduct in that he deliberately misled a court. Applicants contend that the date on the affidavit by Captain Gobozi was 23 March 2015 (the day before the warrant was issued) so could not have been relied on by Adv Majola on 17 March 2015 when he submitted the application to the magistrate. The applicants rely on obiter remarks made by Gilbert AJ in a judgment that dismissed an application by Mr Mavudzi to challenge the lawfulness of his arrest.

Discussion: Whether the applicants had standing to bring a striking off application; the pending complaint and process at the Legal Practice Council; the Legal Practice Act 28 of 2014; whether Gilbert AJ made a finding that Adv Majola misled Du Plessis AJ in an earlier hearing into the lawfulness of the warrant of arrest; how the judgment of Gilbert AJ ought to be read and understood; that Adv Majola tendered an explanation and whether he was denied the benefit of audi alteram partem; dealing with allegations of professional misconduct in a judgment; the roles of the LPC and of the High Court in the discipline of the professions; whether a layperson can bring an application for the striking off of a legal practitioner; the danger of the weaponising of the striking off application to advance personal interests rather than advance the public interest, such as in this case where two accused persons during their trial seek the striking off of the prosecutor.

Findings: It is inappropriate for any lay person or entity to apply ab initio to the courts for a striking off of the name of a legal practitioner from the roll. A complaint of

misconduct against a legal practitioner must be lodged with the LPC or any one of the voluntary regulatory bodies of legal practitioners and the court shall insist on a report from one or more of them in any striking off application that comes before it to facilitate the court reaching a conclusion on appropriate relief. Only where a regulatory body is itself delinquent in performing its functions in addressing a complaint, would it be appropriate for a lay person to approach the court for appropriate relief. Any person aggrieved at the decision of a regulatory body may seek to review its decision. It is unnecessary for this court to express a view about the allegations against Adv Majola because the LPC is required to complete an investigation and reach a conclusion.

Order: The application is dismissed.

Standard Bank v Pit Dog Trading [2022] ZAMPMBHC 69

Affidavits-place of commissioning on stamp differs from place where commissioned-no affect

Intervening Party's founding affidavit was commissioned in Johannesburg by a commissioner of oath (an attorney) who also affixed the stamp of practice that reflects the office address in Menlo Park – Applicant contending affidavit not valid – Raised doubts that it was signed in the presence of the commissioner of oath who operates from Menlo Park office – Legal practitioners not the same as police officers who commission and who are attached to a certain police station – Official stamp by a commissioner of oath who happens to be a legal practitioner, does not evince where the statement was signed, but the registered address of his practice – As to the place where the affidavit was signed, one would have to look elsewhere in the statement as it is required to reflect that too – Court satisfied that affidavit was valid and signed before a commissioner of oath in Johannesburg and that the registered address of the commissioner of oath is in Menlo Park.

Sokanyile v Broad [2022] ZAWCHC 156 at [22]-[49]

Spoliation-eviction – Self-help – Owner frustrated with delays in eviction proceedings – Forcefully ejecting occupants – Mandament van spolie – Restoration ordered pending determination of eviction application – Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998.

Facts: Mr Broad is the owner of a property in Llandudno and sought to evict the applicants, but was frustrated by the delays in the process. He contends that the applicants were not paying rent and that they were going to sub-lease the property to foreign nationals. So he procured a security company to forcefully remove the applicants and to occupy the property to prevent their return.

Application: The applicants were earlier granted an order for restoration of the property and an order interdicting Mr Broad from interfering with their occupation.

Discussion: The mandament van spolie; Mr Broad's defences: that the applicants were not in possession of the property as contemplated by the mandament; that restoration of the property would be impossible due to illegality; and that no case is made out for the grant of the interim interdict.

Findings: The applicants resided at the property and it was their home. Apart from the lease, they would be protected by the Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998 (PIE). They possessed the property and Mr Broad was not entitled to remove them without a court order obtained under the provisions of PIE. The applicants had satisfied the requirements for an interim interdict pending the determination of the eviction application.

Order: Granted earlier.

Gcasamba v Mercedez-Benz Financial Services [2022] 4526-2021 (FB) at [28]-[73]

National Credit Act 34 of 2005, s 130(3)– Default judgment – Registrar of High Court – Not competent for Registrar to grant default judgments in matters to which the National Credit Act applies

Facts: Mr Gcasamba and Mercedez-Benz Financial Services, a credit provider duly registered as such in terms of the National Credit Act 34 of 2005 (NCA), concluded an instalment sale agreement for a 2014 used Mercedes-Benz. Mr Gcasamba fell into arrears with payments and a section 129(1) notice and a summons was sent to his chosen address. The Registrar granted default judgment and the sheriff repossessed the vehicle.

Application: For rescission of the default judgment granted by the Registrar where a credit provider enforced a credit agreement under the auspices of the NCA.

Discussion: Mr Gcasamba's statement that he neglected to inform Mercedes of his new address and his complaint that he was denied his constitutionally entrenched right to defend the action and to have his day in court; that the Registrar is empowered to grant default judgments in terms of section 23 of the Superior Courts Act 10 of 2013 read with Uniform Rule 31(5); that the views of the different courts are not in harmony regarding the Registrar's power to grant default judgments in matters to which the NCA applies; the case of Nkata v FirstRand Bank (CC) and the reliance on Jafta J's concurring judgment; the full court judgment in Nedbank Limited v Mollentze; and ascertaining the legislative intention with section 130(3) of the NCA and the meaning to be given to "court' as used in the section.

Findings: The reasoning in Mollentze, to the effect that the consumer's rights would be protected should the Registrar grant a default judgment because the consumer is entitled to apply for rescission of that judgment at which juncture the court will consider the matter, is not consistent with the legislative intention of s130(3). It is not competent for the Registrar of the High Court to grant default judgments in matters to which the National Credit Act 34 of 2005 applies.

Order: The default judgment granted by the Registrar of the court against Mr Gcasamba is rescinded. The 2014 Mercedes Benz E200 shall immediately he returned to him.

Allison v Road Accident Fund [2022] ZAECMKHC 52

Contingency fees**-** Must set out the attorney's normal fees as required by section 2(1)(b) of the Contingency Fees Act 66 of 1997

Court concerned about the provisions of clause in contingency fees agreement – Does not set out the attorney's normal fees as required by section 2(1)(b) of the Contingency Fees Act 66 of 1997 – Legal practitioner and the client must agree that the legal practitioner shall, in the event of the client being successful in such proceedings to the extent set out in such agreement, be entitled to fees, either equal to or higher than his or her normal fees – Those normal fees must be set out in such

agreement – The contingency fees agreement is declared invalid – Plaintiff's attorney is entitled to fees on an attorney and own client basis.

Chauke v Minister of Police [2022] ZAGPJHC 609 at [12]-[27]

Organs of state – Notice – Plaintiffs contending state organs waived requirements in pre-trial minute – Distinction between the power of the court in condoning non-compliance with statutory time frames and those provided for under the Rules – Institution of Legal Proceedings against Certain Organs of State Act 40 of 2000, s 3(1).

Facts: The plaintiffs are police officers employed by the SAPS and were detained by the Independent Police Investigative Directorate (IPID) at a police station in Tembisa from their arrest on 27 August to their release on 1 September 2015. They were charged with the murder and torture of a person who was arrested during a robbery of motor vehicles. They were later found not guilty and discharged.

Claim: For damages for unlawful arrest and detention. The defendants raised a special plea that plaintiffs failed to give them proper notice as required by section 3(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2000.

Discussion: The contention by the applicants that they are entitled to proceed with the trial because the defendants waived their right to assert the requirements of the Act by signing the pre-trial minute in which the defendants indicated that they suffered no prejudice in the process of preparing for the trial; that a distinction need to be drawn between the approach to failure to comply with the time frames prescribed by the Rules and those by a statute; that there was no dispute that the plaintiffs failed to file the section 3(1) notice within the prescribed six months in terms of the Act; that they also did not file any condonation application; and Rule 27 and an application for condonation for noncompliance with the Rules.

Findings: In the case of noncompliance with the Rules, the court can accept an agreement between the parties to waive compliance. In statutory provisions, the issue of noncompliance is a jurisdictional fact which needs to be satisfied before the court can entertain the dispute. Thus, where there is noncompliance with the

provisions of a statute, the court would have no jurisdiction to entertain such a matter in the absence of condonation.

Order: The plaintiffs have failed to comply with the provisions of section 3 of the Act and are barred from instituting these proceedings against the defendants.

Stellenbosch University v Retolla [2022] LCC63-2021 (LC) at [31]-[37]

Eviction-Property – Eviction – Whether property part of a township and excluded from provisions of ESTA – Extension of Security of Tenure Act 62 of 1997, s 2.

Facts: Mr and Mrs Retolla (the respondents) reside on a property belonging to the university. Mr Retolla is alleged to be a former employee of the university and it now seeks to evict the couple.

Application: The university seeks a declaratory order regarding the status of the property and whether the Extension of Security of Tenure Act 62 of 1997 (ESTA) or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) apply for purposes of the eviction proceedings.

Discussion: ESTA and its application to land other than a township; that the university owns substantial property in Stellenbosch and has existed as an institution of knowledge for over a century; whether land falls within a township; the difficulty in this case involving not only a town founded in 1697, but property on its urban edge; the legislative history relevant to the property; the case law regarding the application of ESTA in the Western Cape; the application of section 2 of ESTA to the property.

Findings: The property is part of Stellenbosch township as developed under law. The property has not been designated for agricultural and is zoned and used for education.

Order: (Granted earlier) For purposes of the eviction proceedings of respondents, the property consists of land in a township established in terms of any law as contemplated in section 2(1) of ESTA and the property is accordingly excluded from the provisions of ESTA.

Ntombana v Nel Mentz Steyn Ellis Inc [2022] ZAECQBHC 23

Attorney-failed to persue claim-prescribed-liable

Ms Ntombana was injured in a motor vehicle accident and sustained severe bodily injury – She instructed Nel Mentz to institute a claim against the Road Accident Fund – Nel Mentz accepted the mandate, but failed to pursue the claim, which has since become prescribed – Ms Ntombana claims damages arising from an alleged breach of mandate – The circumstances of the accident are discussed and that Ms Notmbana failed to keep a proper lookout – Ms Ntombana has established that, but for the negligence of Nel Mentz, she would have recovered 50 % of her proven damages from the RAF – Ordered that the defendant pay the plaintiff R400,000 as damages.

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].)

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.

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.

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].)

END-FOR NOW