LEGAL VOL 9/2022

Compiled by: Matthew Klein

INDEX[1]

SOUTH AFRICAN LAW REPORTS SEPTEMBER 2022

SA CRIMINAL LAW REPORTS SEPTEMBER 2022

ALL SOUTH AFRICAN LAW REPORTS SEPTEMBER 2022

SA LAW REPORTS SEPTEMBER 2022

BARNARD LABUSCHAGNE INC v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER 2022 (5) SA 1 (CC)

Practice — Judgments and orders — Rescission — Tax judgment in terms of s 172, read with s 174, of Tax Administration Act — Whether susceptible of rescission — Scope of bona fide defences available to applicant in rescission proceedings — Tax Administration Act 28 of 2011, ss 104(2), 105, 170, 172 and 174.

Revenue — Assessment to tax and decision — — Dispute — Forum for dispute of assessment or decision — Whether complaint, that certified statement filed by Sars in terms of s 172 of Tax Administration Act (TAA) disregarded payments made in respect of self-assessments, was grievance within scope of ch 9 of TAA — Tax Administration Act 28 of 2011, ss 104(2) and 105.

In terms of s 172(1) of the Tax Administration Act 28 of 2011, '(i)f a person has an outstanding tax debt, Sars may . . . file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by Sars as correct'. In terms of s 174 of the TAA, '(a) certified statement filed under s 172 must be treated as a civil judgment lawfully given in the relevant court in favour of Sars for a liquid debt for the amount specified in the statement'. In this matter Sars, the first respondent, had filed such a statement in the Western Cape High Court recording that the applicant Barnard Labuschagne Inc (BLI), an incorporated firm of attorneys, owed it an amount of R804 747. BLI had subsequently approached the High Court for an order to rescind this 'tax judgment', arguing that the statement — which had arisen from BLI's self-assessments for VAT, employees' tax, unemployment insurance fund contributions and skills development levies — was wrong because BLI had made payments which Sars had failed to appropriate to the relevant assessed taxes.

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

The High Court refused BLI's application. It held that the tax judgment against BLI *was not susceptible of rescission*. Both the High Court and the SCA refused BLI leave to appeal, so it approached the Constitutional Court. The principal issue identified by the CC for argument was whether a certified statement filed with a court in terms of s 172 read with s 174 of the TAA was in principle susceptible of rescission. If it were, a further question was whether the applicant's attack on the certified statement in its rescission application, ie an attack that the certified statement disregarded payments allegedly made in respect of the self-assessments, was a grievance within the scope of ch 9 of the TAA, which provided for a forum for the resolution of disputes concerning an 'assessment' or a 'decision' in terms of s 104.

Jurisdiction — The CC held that BLI's application, on the question of rescindability, raised an arguable point of law of general public importance, because several recent High Court judgments, of which the High Court's judgment in the present matter was the third, appeared to have failed to apply binding precedent, a core component of the rule of law, which was a founding value of the Constitution. This, the court added, was an issue which this court had to redress. The court thus had jurisdiction. (See [6].)

The question of rescindability — The CC highlighted various judgments decided by the Constitutional Court, the Appellate Division, as well as the full bench of the High Court, between 1965 and 2011, dealing with various repealed provisions of the Income Tax (58 of 1962) and Value-Added Tax (89 of 1991) Acts that were forerunners of the present TAA's ss 172(1) and 174 and other sections relevant to the question of the rescindability of a tax judgment. (See [12] – [21].) These cases made statements to the effect that *tax judgments were susceptible of rescission*. Such authorities, the CC asserted, were binding on the High Court in the present case (see [28]); yet the High Court, despite their being referred to its attention, failed to discuss them and either follow them or explain why it thought they were distinguishable (see [29]). The High Court instead chose to follow recent provincial-division cases that in themselves had failed to address binding authority (see [22] – [26]). The High Court's approach in this regard was unacceptable (see [29]).

The respondents had sought to distinguish the earlier cases referred to above on the basis that they had dealt with different legislation (see [32]). The CC held that, since the now repealed provisions of the IT Act and VAT Act were the forerunners of the relevant provisions of the TAA, the earlier cases were only distinguishable if the new provisions brought about substantive changes bearing on the question of rescindability (see [32]). They had not done so, the CC held (see [33] – [39]). The CC concluded that the position thus remained that a tax judgment in terms of the TAA was susceptible of rescission, in terms of s 36(1)*(a)* of the Magistrates' Courts Act or, in the High Court, in terms of the common-law jurisdiction to rescind judgments taken in the absence of the other party. (See [40].)

The CC, however, stressed that the scope of bona fide defences which a taxpayer could raise in an application to rescind a tax judgment was narrowed in the light of the following features of the TAA:

- Section 170 provided that the production of a document issued by Sars purporting to be a copy of or an extract from an assessment was conclusive evidence of the making of the assessment; and, except in proceedings on appeal against the assessment, that all the particulars of the assessment are correct. Accordingly, an applicant would not be able to contest the making and correctness of the assessment in rescission proceedings. (See [8], [15] and [41].)
- Chapter 9 of the TAA provided for a dispute-resolution process initiated by an 'objection', and in terms of which a taxpayer may only object to an 'assessment' or

'decision' of the kind specified in s 104(2). Importantly, if the taxpayer's grievance concerned an 'assessment' or 'decision', s 105 stipulated that the taxpayer may only dispute such assessment or decision in proceedings under ch 9 of the TAA, unless a High Court otherwise directed, ie those relatively rare situations where a High Court regarded it appropriate to grant declaratory relief on legal questions relating to assessments. (See [41].)
Rescindability in the present case — The CC held that the dispute in this case was not covered by the 'conclusive evidence' provisions of s 170, nor was it excluded by s 105. As to s 170, BLI was not challenging the correctness of the self-assessments; *the question was whether they had been paid*. As to s 105, BLI was complaining about neither an 'assessment' nor a 'decision' as defined in s 104(2) of the TAA. Paragraphs *(a)* and *(b)* of s 104(2) were obviously inapplicable. Paragraph *(c)* covered 'any other decision that may be objected to or appealed against under a tax Act'. There was no provision in any relevant tax legislation stating that a dispute about whether an assessment had been paid was subject to objection or appeal. (See [42].) The CC held that the payment dispute was a defence that was indeed available to a taxpayer in rescission proceedings (see [44]). It followed, the CC concluded, that the High Court should have found that the tax judgment was susceptible of rescission and should have considered whether BLI had made out a case for rescission at common law (see [46]). The CC upheld the appeal, set aside the High Court's decision, and remitted BLI's application for rescission to the High Court for hearing before a different judge in order to determine the merits of the application (see [48] – [51]).

COMMERCIAL STEVEDORING AGRICULTURAL AND ALLIED WORKERS UNION AND OTHERS v OAK VALLEY ESTATES (PTY) LTD AND ANOTHER 2022 (5) SA 18 (CC)

Constitutional law — Labour relations — Right to strike — Final interdictory relief against striking employees engaging in actual or threatened unlawful conduct — Only competent if striking employees factually linked to reasonable apprehension of actual or threatened infringement of clear right — Mere participation in strike in which there was unlawful conduct not sufficing to establish required link — Constitution, ss 17 and 23(2)*(c)*.
Labour law — Strike — Right to strike — Final interdictory relief against striking employees engaging in actual or threatened unlawful conduct — Only competent if striking employees factually linked to reasonable apprehension of actual or threatened infringement of clear right — Mere participation in strike in which there was unlawful conduct not sufficing to establish required link — Constitution, ss 17 and 23(2)*(c)*.

The applicants in this unopposed appeal to the Constitutional Court were the Commercial Stevedoring Agricultural and Allied Workers' Union (CSAAWU) and 173 striking workers who were employed by respondent Oak Valley Estate (Pty) Ltd. They sought to appeal a final interdict obtained by Oak Valley — in the Labour Court and upheld on appeal by the Labour Appeal Court — prohibiting them from unlawfully interfering with Oak Valley's operations.
One of the defences that the Labour Court rejected was that Oak Valley had failed to link any of the unlawful conduct complained of to the respondents. The Labour Appeal Court agreed, holding that imposing such a requirement on employers seeking

interdictory relief would be 'a bridge too far' in the 'fraught context of an industrial relations dispute'.
In the present case, a further application for leave to appeal to the Constitutional Court, the main issue was again whether an employer, faced with unlawful conduct committed during a protected strike, could interdict employees participating in that strike *without linking each employee to the unlawful conduct*.
Held
Plainly, if the evidence was insufficient to establish any link between the respondent and the actual or threatened injury, the apprehension of injury could not be reasonable. It followed that there must be *some* link between the respondent and the alleged actual or threatened injury. On a conspectus of jurisprudence, our law required that, notwithstanding the 'fraught context of industrial relations', for interdictory relief to be competently granted a factual link between an individual respondent and the actual or threatened unlawful conduct must be shown. (See [20] and [39].)
Mere participation in a strike, protest or assembly in which there was unlawful conduct did not suffice to establish the required link; if it did, inevitably innocent participants in strike or protest action would get caught in the net of an interdict. Being implicated in a contempt application, whether or not such application was likely to succeed, was prejudicial to innocent bystanders and would have a chilling effect on the exercise of the constitutional rights to strike (s 23(2)*(c)*) and to protest (s 17). A person who lawfully exercised their right to protest, strike or assemble, but was nonetheless placed under interdict, would impermissibly be denuded of their constitutionally protected rights. That mere participation in a strike was an insufficient link could also be distilled from this court's jurisprudence. (See [20] – [23], [41] – [42] and [44].)
Oak Valley did not allege that any person or subgroup within the striking workers was responsible for this conduct, had associated with it or even failed adequately to dissociate from it — and so failed to establish the required link. It therefore also failed to show that it had a reasonable apprehension that it would suffer injury at their hands if they were not placed under interdict. Its case did not sustain a final interdict against them. Accordingly, the appeal in this regard would succeed. (See [62] and [65 – [66].)

AUDITOR-GENERAL v MEC FOR ECONOMIC OPPORTUNITIES, WESTERN CAPE AND ANOTHER 2022 (5) SA 44 (SCA)

Administrative law — Administrative action — Decision of functionary — Auditor-General — Functions performed under Constitution and Public Audit Act — Such not administrative action — Review of properly brought under principle of legality — Constitution, s 188; Public Audit Act 25 of 2004, s 3 and s 4.
Auditor-General — Decision — Review — Functions performed under Constitution and Public Audit Act — Such not administrative action — Review of properly brought under principle of legality — Constitution, s 188; Public Audit Act 25 of 2004, s 3 and s 4.
Principal and agent — Relationship between principal and agent — Agency by representation — Nature of.

First respondent was the Member of the Executive Council of the Western Cape responsible for the Western Cape Provincial Department of Agriculture which had contracted with a state-owned company and a trust to conduct agriculturally related projects in the province (see [1] and [14]). Under the contracts the Department had made payments to each entity, and in its financial statements had classified them as

transfers (see [1] – [2]). When the appellant, the Auditor-General of South Africa, subsequently audited the statements it formed the view that the payments were in fact payments for goods and services, a conclusion reached on the premise that the Department and the entities were in relationships of principal and agent and that the entities had received the payments as agents (see [2]). It consequently qualified its audit reports, which caused the Department to approach the High Court for review and setting aside of the Auditor-General's findings (see [4]). The review was brought under PAJA, alternately the principle of legality (see [4])).

The Department's case was that the accounting standard on which the findings were based was not binding on the Department and that in any event it had complied therewith, and that the relationships of the Department and entities were not ones of principal and agent (see [4]). These contentions the High Court upheld and in doing so it also came to express the view that the Auditor-General's findings were administrative action (see [5]). Thereafter the court granted the appellant leave to appeal to the Supreme Court of Appeal (SCA) but refused such leave in respect of the second respondent, the National Treasury, which had not participated in the proceedings (see [5]).

In the SCA, the first point disposed of was the question around the binding nature of the accounting standard the Auditor-General relied on. It turned out — this had come to light after the High Court had issued its judgment — that the standard had in fact been rendered legally binding by an instruction issued by the Treasury under the Public Finance Management Act 1 of 1999 before the Department had compiled the financial statements in question (see [8]).

The second issue was whether the relationships of the Department and the entities were ones of principal and agent, which resolved to the subissues of the form of agency the accounting standard contemplated and whether that form characterised the parties' relationships (see [10] and [16]).

Held, that the accounting standard envisaged agency in the form of representation, an agency relationship in which the principal confers authority on the agent to bind it to third parties, but that the contracts between the Department and the entities bestowed no such authority at all (see [12] – [13] and [23]).

Accordingly the Auditor-General's findings, contingent as they were on such an agency relationship subsisting, were based on an error of law, which would vitiate them under either of the principle of legality or PAJA (see [24]).

The third issue was whether the Auditor-General's findings were administrative actions under PAJA (see [25]).

Held, on consideration of the Constitution and s 3 and s 4 of the Public Audit Act 25 of 2004, that the Auditor-General, in performing functions under these instruments, was not executing administrative actions under the PAJA, and that their review would be properly brought under the rules stemming from the principle of legality (see [32]).

CENTRAL ENERGY FUND SOC LTD AND ANOTHER v VENUS RAYS TRADE (PTY) LTD AND OTHERS 2022 (5) SA 56 (SCA)

Constitutional practice — Courts — Powers — Declaration of invalidity — Remedial powers — Just and equitable relief — Where contract invalidated — Guiding principles — No profit for either party, no loss for innocent party — Compensation for out-of-pocket expenses — Not creating new category of compensation beyond remedies under principle of legality and PAJA — Award of compensation where corrupt government contract cancelled — Constitution, s 172(1)*(b);* Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*.

Minerals and petroleum — Strategic national crude oil reserves — Sale of by Central Energy Fund and Strategic Fuel Fund — Review under principle of legality and PAJA — High Court's declaration of invalidity on grounds of irregularity, irrationality and corruption upheld — High Court did not, in awarding compensation to innocent contracting parties, create new category of compensation beyond remedies under principle of legality and PAJA — Innocence of contracting parties and seriousness of irregularities committed by state requiring that contracting parties be compensated for out-of-pocket expenses — Appeal dismissed — Constitution, s 172(1)*(b)*; Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*.

In 2015 the Strategic Fuel Fund (SFF — the second appellant), a subsidiary of the Central Energy Fund (the CEF — the first appellant), acting through its CEO, Mr Sipho Gamede, sold the country's entire 10 million barrels' crude-oil reserves in corrupt fashion and on risky terms. [*] There were three individual sales: (i) to Taleveras Petroleum (the third respondent); (ii) to Vitol Energy (the seventh respondent) and its local partner, Vesquin Trading (the sixth respondent); and (iii) to Venus Rays, which played no part in these proceedings. The sales were financed by Contango Trading SA (the fourth respondent) and Natixis SA (the fifth respondent). In terms of a separate agreement, Taleveras transferred all its rights to the oil to Contango on the understanding that Taleveras would later repurchase them.

By February 2016 the CEF was aware of these transactions and their irregular nature but it took no action at all until September 2017, when it and the SFF gave notice of their intention to have them reviewed in court. In March 2018 they implemented the review notice by binging a review application — on materially incomplete papers — in the Western Cape High Court. The SFF sought self-review under the doctrine of legality while the CEF relied on the Promotion of Administrative Justice Act 3 of 2000. Taleveras did not oppose review but Contango, Natixis and Vitol asked for the application to be dismissed with costs. Alternatively, they sought to be compensated for their losses. For its part, Taleveras denied having engaged in collusion or corruption in the sale of the oil.

The High Court (per Rogers J) heard the matter in July 2020. It declared the SFF's decisions to sell invalid due to their clear illegality in the light of Gamede's misrepresentations and corrupt motives. Rogers J found, inter alia, that the SFF had failed to follow a proper tender process and that Gamede's manner of disposal of the oil and insistence on private negotiation rather than competitive bidding were irrational. Gamede had accepted over R20 million in bribes, paid into his bank accounts in cash instalments of between R15 000 and R20 000, and obtained ministerial approval by falsely stating that the transactions had been properly assessed by the SFF. The SFF was *itself* culpable due to the passivity of its senior management, which lamely approved Gamede's corrupt dealings. The Minister, who failed to apply her mind to the SFF's decision before in turn approving it, and the CEF, which for a long time did nothing to challenge the transactions, had likewise failed in their duties. Taleveras' denials of corruption were far-fetched and untenable, the bribes to Gamede having been paid to advance its interests.

Rogers J therefore rescinded the decisions to sell and the resultant transactions. He found that Contango and Vitol were innocent third parties and ordered the appellants to compensate them for their out-of-pocket expenses (not lost profits). The judge chose this remedy because it was fair to the innocent parties and effectively vindicated the rights violated by the impugned decisions and transactions.

In an appeal to the Supreme Court of Appeal, Contango and Vitol accepted that the rescission of the transactions required the oil to be restored to the SFF, and the purchase price and storage fees (plus interest) repaid. The dispute related to whether the SFF should, in addition, be directed to pay the expenses Contango and Vitol had incurred in reliance on the transactions, that is, their out-of-pocket expenses, including hedging losses, insurance, letters of credit and the costs of inspections. The appellants opposed this on the ground that Contango and Vitol had failed to do basic due diligence and were thus not innocent parties. They also argued that Rogers J did not properly consider the public interest when he granted the compensation order.

Held

Section 172(1)*(b)* of the Constitution gave courts a wide discretion to craft just and equitable relief pursuant to declarations of constitutional invalidity, whether under the principle of legality or under PAJA. Section 8(1) of PAJA gives effect to the wide remedial discretion conferred by s 172. The relief it permits is not narrower than that available under a court's original remedial discretion and the listed orders did not comprise a closed list. (See [36] – [38].)

Two principles applied where a contract was set aside: the corrective principle, which states that neither party should benefit from what was performed under such a contract, and the 'no-profit-no-loss' principle, which states that parties should neither benefit nor suffer a loss because of the invalidation of an unlawful contract. The law drew a distinction between parties who were complicit in maladministration, impropriety, or corruption, on the one hand, and those who are not, on the other. The category into which a party fell had a significant impact on the appropriate just and equitable remedy a court could grant; parties who were complicit in maladministration, impropriety or corruption were not only precluded from profiting from an unlawful tender but could also be required to suffer losses. (See [39] – [42].)

The exercise of a remedial discretion under s 172(1)*(b)* of the Constitution and s 8(1) of PAJA constituted a discretion in the true sense. For the present court to interfere, the appellants had to show that the High Court's remedial order was clearly at odds with the law. (See [43].)

The appellants' contention that Contango and Vitol were not entitled to compensation for their out-of-pocket expenses was based on the misconception that it amounted to compensation akin to damages for the loss of the contracts in question. But requiring the SFF to repay those expenses was *restitution*: it restored Contango and Vitol — who were innocent of any wrongdoing and had relied on the appellants' repeated assurances that Contango's title to the oil was good — to the *status quo ante*. Another factor in favour of restitution was the appellants' unexplained and egregious delay in instituting review proceedings, which substantially increased the costs incurred by Contango and Vitol. (See [45], [48] – [49].)

A compensation order would, contrary to the appellants' contentions, serve the public interest. Penalising innocent third parties like Contango and Vitol when the state acted unlawfully would deter international financial institutions from financing transactions crucial to the economy, not only in oil but also in infrastructure and capital projects. (See [58] – [60].)

The no-profit-no-loss principle required Contango and Vitol to be compensated for their out-of-pocket expenses (including hedging costs) incurred in reliance on the relevant agreements and transactions, but not for lost profits. Doing so would restore them to the position in which they would have been had they never contracted with the SFF. (See [63].)

Lastly, Rogers J's order did not create a new category of compensation to make up for the harshness of a setting-aside order. The appellants elected to launch the review application under both the principle of legality and PAJA. Having done so, it was not open to them to criticise the judge for considering the remedies available under both. (See [71] – [72].) Appeals dismissed.

TRUSTEES, BURMILLA TRUST AND ANOTHER v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2022 (5) SA 78 (SCA)

Constitutional law — Human rights — Right of access to courts — Claim for constitutional damages against state respondents for participating in rendering Southern African Development Community Tribunal, where appellants had claim pending, inoperative — Whether facts alleged disclosing cause of action — Constitution, ss 34 and 172(1)*(b)*.
International law — International agreements, treaties and conventions — International tribunal — Power to interfere with municipal court orders effecting judicial expropriation — International tribunal not bound by such orders and could reach different conclusion on proper grounds — Denial of justice not requirement for such interference.

In 1988 Lesotho, a signatory to the Southern African Development Community Treaty (the SADC Treaty), granted five mining leases to Swissborough Diamond Mines (Pty) Ltd (Swissborough), a company incorporated in Lesotho and controlled by one Mr Van Zyl. Swissborough subsequently ceded and transferred all its rights, title and interest, in and to any claim of whatever nature it might have against Lesotho, to the Burmilla Trust (BT).
Only one of the mining leases was directly relevant to the present matter, namely one that pertained to the Rampai area. It transpired that this area would largely be submerged by the execution of the Lesotho Highlands Water Project, a joint venture in terms of a treaty between the second respondent and Lesotho. During 1995 the Lesotho Highlands Development Authority applied in the Lesotho High Court for an order declaring the lease void ab initio, based upon the allegation that under Lesotho law the grant of any rights to land was subject to the consent of the relevant chiefs, and that such consent had not been obtained. The Lesotho High Court granted the relief sought, and during 2000 its order was upheld by the Lesotho Court of Appeal.
Mr Van Zyl and BT had claimed before the Southern African Development Community Tribunal (the SADC claim) that Lesotho had violated the SADC Treaty by expropriating their validly granted mining leases without compensation, in breach of its obligations under the treaty and of customary international law; and that the Lesotho court decisions constituted a denial of justice under international law. On this basis they claimed compensation from Lesotho, inter alia, for the value of the mining leases at the time, and Mr Van Zyl for 'moral damages'.
By 15 February 2011 the SADC claim was ripe for hearing, but by then the SADC Tribunal was rendered inquorate by an earlier resolution by the summit of SADC — consisting of the heads of all the member states — not to renew the terms of office of five SADC Tribunal judges, thereby effectively suspending the SADC Tribunal. On 20 May 2011 the summit decided not to reappoint SADC Tribunal judges, rendering the SADC Tribunal defunct and unable to hear and determine the SADC claim. The summit, with the participation of the then President of South Africa, subsequently replaced the SADC Protocol with one strictly limiting the jurisdiction of the SADC

Tribunal to disputes between states. Aspects of the protracted litigation that followed between the parties were decided by the Supreme Court of Appeal in *Van Zyl and Others v Government of the Republic of South Africa (Van Zyl SCA*; see '' below).

BT and Mr Van Zyl subsequently instituted an action in the High Court for constitutional and moral damages, respectively, as well as interest and costs against the first respondent, the President, in his official capacity as head of state, and the Government of the Republic of South Africa. This on the basis that the now defunct SADC Tribunal would have awarded the claimed amounts, had it not been unlawfully shuttered and dismantled by the SADC summit, with the participation and signature of the then President. The claim for constitutional damages was made under s 172(1)*(b)* of the Constitution, as a just and equitable remedy for the violation of the appellants' constitutional access-to-court-rights (s 34) — based on the state respondents' alleged involvement in a conspiracy to prevent the prosecution of the SADC claim before the SADC Tribunal.

The High Court upheld exceptions that their particulars of claim disclosed no cause of action. It dealt with their claim for constitutional damages as a loss of profit claim, and reasoned that it was bound by *Van Zyl SCA* (as well as the judgment of the Pretoria High Court); and that BT could not escape the consequences of the Lesotho court decisions that the lease had been void ab initio.

The present case concerned their appeal to the Supreme Court of Appeal, where the overarching issue was whether the facts alleged by the appellants disclosed a cause of action in law; and in particular whether the SADC Tribunal could have held that the lease was valid and judicially expropriated by the Lesotho court decisions, despite the absence of a denial of justice.

Held*

The court in *Van Zyl SCA* was not called upon (and was not clothed with jurisdiction) to decide whether the Lesotho court decisions withstood scrutiny under international law or constituted judicial expropriation. *Van Zyl SCA* did not determine the same relief on the same cause of action as in this matter, and it followed that it did not bar the present action (see [51]).

The court a quo erroneously regarded claim A as a claim for loss of profits. The factual averments in the particulars of claim iro constitutional damages (such as 'no compensation paid' and 'prevention of prosecution of the SADC claim') constituted a cause of action in our law. It must be accepted as a matter of law that the deliberate and collusive preclusion of the prosecution of the SADC claim would constitute a violation of s 34 rights. Undisputedly, judicial expropriation of valid rights without compensation would constitute a violation of the SADC Treaty. There was no doubt that in principle the SADC Tribunal could have awarded compensation to BT based on the value of the Rampai lease. (See [14], [24] – [25].)

Under international law an international tribunal may differ from the conclusion of a national court on the validity of property rights under municipal law if there were proper ground for doing so; and an indirect expropriation may be effected by a court order (judicial expropriation). The SADC Tribunal may therefore have interfered with the Lesotho court decisions — despite the absence of a denial of justice — if there were a proper ground for doing so, or Lesotho formally admitted before an international tribunal that a right that was allegedly expropriated was valid, despite decisions of its courts to the contrary (as it admitted in documents before the SADC Tribunal). The SADC Tribunal could therefore have held, on the pleaded case, that the admittedly, or proven, valid lease was judicially expropriated. The particulars of claim accordingly disclosed a cause of action in respect of the constitutional damages claim. The

exception should not have been allowed in respect thereof. In the result, BT's appeal in this regard would be upheld. (See [31], [35], [39] – [40], [42], [52] and [62].)
Mr Van Zyl's claim for moral damages was brought on the basis that the SADC Tribunal would have allowed such claim. However, the SADC Treaty (articulating a trite principle of international law) provided that '(n)o natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'. It was clear from the particulars of claim that Mr Van Zyl did not prosecute this claim against Lesotho in the Lesotho courts. It followed as a matter of law that the SADC Tribunal would have dismissed the claim for moral damages, and therefore the particulars of claim disclosed no cause of action for moral damages. (See [53] – [54].)

ATLAS PARK HOLDINGS (PTY) LTD v TAILIFTS SOUTH AFRICA (PTY) LTD 2022 (5) SA 127 (GJ)

Company — Directors and officers — Director — Personal financial interests — Non-disclosure — Failure to disclose personal financial interest in agreement concluded by company — Application to declare such agreement, approved by board, valid in terms of s 75(8) of Companies Act 71 of 2008 — Ambit and requirements of s 75(3) and 75(5) — Role of common law.

Section 75 of the Companies Act 71 of 2008 sets out the procedures and disclosure rules that apply when company directors, or people or entities related to them, have personal financial interests that conflict with those of the company. Section 75(5) requires directors to, (i) disclose any personal financial interest that they or a 'related person' * have in respect of a matter to be considered at a meeting of the board of directors; and then (ii) to leave the meeting and take no further part in the consideration of the matter. Section 75(3) prohibits a director from entering into agreements in which he or a related person has 'a personal financial interest' (a concept defined in s 1 of the Act), unless the agreement was subsequently ratified by shareholders following disclosure or declared valid by a court under s 75(8), which provides that an interested person may apply to a court to have a board-approved agreement declared valid.

The applicant, Atlas Park, through its director, Van Breda, made an application under s 75(8) to declare valid a purported lease agreement (and a subsequent addendum to it) concluded between Atlas Park, as landlord, and the respondent, Tailifts, as tenant. The application was brought because, when the agreements were signed, Van Breda held directorships in both Atlas Park and Tailifts, as well as in certain 'upstream' (ie holding) entities of Atlas Park. He also had an interest, via a holding company, in the property-owning company.
Atlas Park argued that the requirements of s 75(8) were complied with because the necessary disclosures regarding Van Breda's direct personal financial interest in the matter flowing from his directorship in Tailifts were made. To the extent that any disclosures were not made regarding Atlas Park's upstream entities, this was only in relation to *indirect* interest which, argued Atlas Park, was excluded by s 75. While Atlas Park conceded that there was non-compliance with s 75(5), it contended that this was a simple de jure failure and that it had de facto complied with the disclosure requirements of the Act.
Atlas Park in addition argued that Van Breda's failure to disclose to officers of Tailifts an opportunity to acquire the property for itself was irrelevant because Tailifts would

have been unable to obtain funding (a defence of corporate incapacity). It appeared, however, that Van Breda did not disclose to Tailifts the availability of mezzanine financing to acquire the property. Section 1 of the Act defines a 'personal financial interest' as a '*direct* material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed'. Atlas Park argued that an indirect financial interest was insufficient to attract an obligation to make a disclosure under s 75(5). It also argued that, in the context of the present case, a related person was limited to a company of which the director was also a director.

The key issues before court were whether Van Breda had a direct personal financial interest in the transaction or knew that a related person had such an interest; what disclosures he was obliged to make to Tailifts; whether Tailifts was prejudiced or potentially prejudiced by the failure on the part of Van Breda to make the required disclosures and, if so, whether the consequences of the prejudice were relevant; and, lastly, the exercise of the court's discretion in granting relief under s 75(8).

In its judgment the court covered the following topics: whether s 75(3) imposed a fiduciary duty not to misappropriate a corporate opportunity (see [57] – [63]); whether s 75(5) included failing to disclose a corporate opportunity (see [64] – [72]); whether the acquisition of the property by the respondent was a corporate opportunity (see [73] – [91]; the applicant's defence of corporate incapacity (see [92] – [105]); and the appropriate remedy (see [106]).

Held

The applicant's assertion, that s 75(8) involved asking the court for a simple indulgence to bring a so-called de facto situation into line with some purely formal legislative requirements, was incorrect. However attractive, such an interpretation would minimise the mischief which the section was intended to address and reduce the purpose of the legislation to one requiring the simple ticking of boxes. (See [7].)

The word 'direct' in the definition of 'personal financial interest' could not be taken out of the context of its definition in s 1 of the Act, and therefore had to include the obligation to make a disclosure if the transaction under consideration involved a related person which itself had a personal financial interest — which, by definition, required the interest to be a direct and material one. Such an interpretation would strongly indicate that any shareholding (other than through a unit trust or collective investment scheme) by a director in another company which had an interest in the transaction under consideration would amount to a 'direct' personal financial interest requiring disclosure and recusal. Van Breda's directorship of Atlas Park's upstream entities implied that they possessed, through him, the requisite connection contemplated by s 75(3). (See [50].) The mischief s 75(3) sought to deal with was clear: a director was obliged to make disclosure if he or she was conflicted, and it made an offending transaction ipso facto void unless a court exercising its discretion declared it valid (see [53] and [56]).

Section 75(3) did not exclude the *common-law* fiduciary duty not to misappropriate a corporate opportunity. Where a director engaged in a transaction by which he effectively usurped a corporate opportunity for personal financial advantage by extracting dividend income or other economic benefits via another company, the requirement of a direct 'personal financial interest' (as defined) was satisfied. (See [59] – [60], [63] and [72].)

Section 75(3) had to be understood to be composed of two parts: the underlying common law which determined when a disclosure had to be made, and the trigger that would void the transaction if it was not made. It required an actual financial benefit which the director, or a related party to the director's knowledge, had obtained through

his or her failure to disclose. Any other reading of s 75(3) would lead to the absurdity that a wilful act directed against the company's financial interests or wellbeing would not result in the nullity of the tainted transaction. Section 75(3) served to determine when a transaction would be void in cases of non-disclosure arising from the breach of a fiduciary duty (including a conflict of interest), with the common law identifying when a duty of disclosure would ordinarily arise. (See [80], [90] and [98].)
It was clear that both Van Breda and the entities in which he had an ultimate interest, both in relation to being a shareholder in Tailifts' ultimate holding company and in the property-owning company, had a personal direct and material financial interest, as defined in the Act, of a financial or economic nature, or to which a monetary value could be attributed as required by the Act. (See [91].)
Atlas Park failed to show that Tailifts, had it been properly informed of the availability of the mezzanine finance, would not have taken up the corporate opportunity to acquire the property. Instead, Van Breda had usurped it for his own financial benefit. (See [97].)
To determine whether it should grant the remedy under s 75(8), the court took note of the following factors: whether the applicant, through Van Breda, made the disclosures it failed to make under s 75(3) (it did not); whether there was actual loss or prejudice to the respondent (Tailifts was prevented from acquiring the property); the degree of the director's breach of his fiduciary duty and the advantage obtained by him (Van Breda's breach of his duty to Tailifts was profound); whether a lesser remedy, such as a civil remedy or one of the others provided by the Act, would suffice; and whether the interests of other potentially affected parties ought to be considered (the onus was on Atlas Park to join them or suffer the consequences). (See [107].)
Thus, besides Van Breda's failure to make a full and frank disclosure to the court, other factors were the nature of the breach of his fiduciary duty; his material and wilful non-disclosure; his abuse of his position as director vis-à-vis the clear interests of Tailifts; and the real and substantial direct economic benefit he had gained. (See [108].) For these reasons, the application would be dismissed with costs.

CHANGING TIDES 17 (PTY) LTD NO v KUBHEKA AND OTHERS 2022 (5) SA 168 (GJ)

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Discussion — Uniform Rules of Court, rule 46A(9)*(c), (d)* and *(e)*.
Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Service — Form — Discussion.
Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Sheriff's report — Consequences where absence of sheriff's report — Uniform Rules of Court, rule 46A(9)*(d)*.

Uniform Rule 46A requires that, in applications for execution against residential immovable property, a court must consider whether a reserve price should be set. Subrule (9)*(c)* – *(e)* sets out the process that must be followed when that reserve price is not achieved at a sale in execution and calls for the court to *reconsider* the reserve price and determine how the execution is to proceed. In the present matter in the Johannesburg High Court, Judge Fisher was called to determine four cases brought

by the applicant under rule 46A(9)*(c)* – *(e)* in each of which was sought the amendment of the reserve price that had been set in the respective original successful foreclosure application. The relief was sought by way of an approach to the judge in her chambers. The request for relief took the form simply of a 'submission' by the attorney representing the applicant judgment creditor, on the latter's behalf, along with supporting documents of the sheriff. Such documentation was not filed of record in proceedings, nor served on the judgment debtor. In respect of one of the applications, there was no sheriff's report attached as contemplated in rule 46A(9)*(d)*. The applicant argued that there was no requirement in the rules that the relief envisioned under rule 46A(9)*(c)* – *(e)* be sought by way of a formal application supported by an affidavit, or on notice to the judgment debtor. Various questions arose out of this (see [24]), the court held. What form should the process under rule 46A(9)*(c)*, *(d)* and *(e)* take? Should there be service on the judgment debtor and, if so, what form should such service take? And, also, can an application be considered in the absence of a proper sheriff's report?

Held, that, at the minimum, an application for reconsideration should —

- take the form of a notice of motion in which was sought specific relief, supported by an affidavit deposed to by a person having personal knowledge of the facts or having ascertained them;
- satisfy the court that the auction was properly advertised, at least, in accordance with the rules;
- assert that there were, to the best of the deponent's belief, no reasons other than the reserve price being too high, which could rationally be said to be a reason for the failure to achieve a bid at the reserve;
- be brought as interlocutory to the main application so that the court be afforded access to all documents in the main application and all other interlocutory matters;
- be brought as soon as possible after the sheriff's report was issued;
- explain any failure to hold the sale within six months of the handing-down of the foreclosure order (if held more than six months after the foreclosure order was handed down, a court may wish to be furnished with a fresh sworn valuation);
- place before the court any additional reliable evidence of the true value of the property in question which could assist in the reconsideration process — for example, information relating to other recent property sales in the area. (See [37] and [38].)

Held, that an application for reconsideration had to be on notice to the judgment debtor, and personal service was required. (See [47] and [48].)

Held, further, that the report of the sheriff comprised both a return of service and an aid to the court. Unless the deponent to the affidavit had personal knowledge of what occurred at the sale, the sheriff's report would have to be submitted. This would always be the best evidence and the absence of such a report would have to be fully explained. (See [39].) If an applicant sought an order that the property be sold at the highest bid received at the auction, the absence of the report would be fatal to the application. If the sheriff's report was non-compliant with the rules, a court would be justified in refusing the relief. (See [40].)

Held, that the cases placed before the judge did not constitute applications and were irregular steps. No order would be granted in respect of any of them. (See [49].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v LOUIS PASTEUR INVESTMENTS (PTY) LTD (IN PROVISIONAL LIQUIDATION) AND OTHERS 2022 (5) SA 179 (GP)

Company — Business rescue — Termination — Conversion into liquidation — Application for — Who may apply — Any creditor may apply, not only business rescue practitioner — Companies Act 71 of 2008, ss 132(2)*(a)*(ii).
Company — Business rescue — Termination — Conversion into liquidation — Application for — Nature of — Relationship between conversion application and moratorium on legal proceedings — Conversion application distinguishable from debt enforcement, offering distinct way in which business rescue may be ended — Companies Act 71 of 2008, ss 132(2)*(a)*(ii) and 133(1)*(b)*.
Company — Business rescue — Business rescue practitioner — Duties — Application for conversion of business rescue to liquidation — Practitioner officer of court and obliged to apply for liquidation or at least not oppose liquidation in circumstances where no prospect of better dividend to creditors through continued implementation of plan — In present case, where business rescue plan sham designed to subvert rights of creditors, practitioner's opposition to conversion unreasonable, meriting censure by court — Companies Act 71 of 2008, s 132(2)*(a)*(ii).

The first respondent company (LPI) had been placed under business rescue in June 2012, and in November of that year a business rescue plan was adopted for a 10-year period (see [25]. This unbeknownst to the South African Revenue Service (Sars), which in January 2010 and December 2011 had obtained two judgments against LPI (see [24]). In March 2021 an order was granted in favour of Sars, inter alia, converting LPI's business rescue proceedings to liquidation proceedings (under s 132(2)*(a)*(ii) of the Companies Act 71 of 2008) and placing it in provisional liquidation.
The present case concerned Sars' application for a final liquidation order. It was opposed by, inter alia, LPI and **the business rescue practitioner, one Mr Prakke**, against whom Sars also sought a punitive order for costs *de bonis propriis*. The application was set down for hearing in October 2021 but two weeks before the hearing, one Ms Mia, as an 'affected party', brought an application to intervene and for the rescission of the order that set aside the business rescue proceedings and converted them into liquidation proceedings. An order was made at the commencement of the hearing granting her leave to intervene.
Ms Mia claimed that she had received notice of the application, and made common cause with LPI and Mr Prakke's contention that s 132(2), properly construed, meant that only the business rescue practitioner — not a creditor like Sars — could apply for the conversion of business rescue into liquidation proceedings. In the latter regard LPI and Mr Prakke argued that the provisions of s 132(2)*(a)*(ii) could be invoked if there were first an application by the practitioner in terms of s 141(2)*(a)*(ii) 'for an order discontinuing the business rescue proceedings and placing the company in liquidation'. (See [47] – [50].)
In addition, LPI and Mr Prakke submitted that, since the Sars debt arose prior to the adoption of the business rescue plan, the claims could not be enforced except to the extent envisaged in the business rescue plan; and, further, that the business was in fact capable of being rescued despite the business rescue plan expiring in November 2022 (see [17] – [19]).

Held

Ms Mia was given notice of these proceedings and was kept apprised of the course of proceedings by Mr Prakke. For this reason, her failure to intervene when the matter was heard in October 2020 was advertent and it certainly could not be said that the order granted in terms of s 132(2)*(a)*(ii) was granted in her absence. (See [38] and [42].)

Section 132(2) envisaged three separate scenarios in which business rescue proceedings, once commenced in terms of s 132(1), may be terminated. One such scenario (s 132(2)*(a)*) was where the court ordered the conversion of business rescue to liquidation proceedings. It was apparent from the plain meaning of the section that the enforcement of debt was separate and distinct from a conversion application, which was not a proceeding for the enforcement of any debt. (See [45] – [46] and [53].)

The argument that only practitioners and not creditors may apply for conversion, also ignored that the moratorium on legal proceedings against a company under business rescue (s 133(1)) may be lifted. The provisions of s 133(1) did not provide a 'blanket' moratorium which, once 'wrapped around a company', offered an absolute and indefinite protection against action by creditors. Properly considered, s 132(2)*(a)*(ii) provided a separate and distinct way in which business rescue could be ended in the circumstances of the present application (See [56] – [58].)

There was no doubt, on any consideration of the financial status of LPI, that it was hopelessly insolvent, and that the granting of a final winding-up order was apposite. In such circumstances, the court had a limited discretion to refuse such an order. There was no commercial or rational basis for the continuation of the plan. The court had the power to intervene where it was shown that business rescue practitioners had committed a material mistake in concluding that the continued implementation of the business rescue plan would result in a better return for the creditors of the company. LPI would accordingly be placed in final winding-up. (See [74], [82] – [83] and [96].)

Mr Prakke contributed significantly to a number of entirely avoidable delays before the hearing of the application. His opposition was ill-considered and deliberate, in flagrant disregard of his obligations, and how he conducted himself after filing his report was neither bona fide nor reasonable. Costs *de bonis propriis* would accordingly be ordered against Mr Prakke. (See [89], [91], [94] and [96].)

EX PARTE JCR AND OTHERS 2022 (5) SA 202 (GP)

Children — Parents — Surrogate mother — Surrogate motherhood agreement — Confirmation by court — Need for court to have regard to interests of existing children of commissioning parents and surrogate — Information required by court — Children's Act 38 of 2005, s 295.

This was an application in the Gauteng High Court, Pretoria, under s 295 of the Children's Act 38 of 2005 (the Act), for the confirmation of a surrogate motherhood agreement entered into between the commissioning parents — the first and second applicants — and the surrogate parents — the third and fourth applicants. Certain facts gave the presiding judge considering the matter, Judge Neukircher, pause. The surrogate parents already had two children of their own, a 10-year-old and a 7-year-old. The commissioning parents too had a child, a 10-month-old (in fact born in terms of a previous surrogacy arrangement with the second and third applicants). What impact, the court asked, would the agreement have on these children (see [4], [6], [7] and [17] – [19])? The court also expressed concern for the health risks of the third

applicant undergoing a surrogacy pregnancy: this, having regard to the fact that she had already undergone several pregnancies, one of which was terminated as a result of a miscarriage; four of her pregnancies had resulted in caesarean sections, the last of which had occurred very recently; and she had acted as surrogate on several occasions (see [16] and [19]).

Ultimately, the court satisfied itself that the proposed surrogacy arrangement would not negatively affect the applicants' children, and that there was no real health risk to the third applicant, should she undergo a surrogacy pregnancy (see [23] – [27] and [37]). The court confirmed the surrogate motherhood agreement (see [37]). The court, however, with respect to the concerns it raised in the present matter, deemed it appropriate to set out guidelines for courts faced with applications under s 295 for the confirmation of a surrogate motherhood agreement (see [8] and [36]). The court held that, in circumstances where the commissioning parents or the surrogate already had children, a court had to have regard to any impact on such children. A court was compelled to undertake this exercise, given its role as upper guardian of all children, and in light of the imperatives contained in s 28 of the Constitution and reiterated in s 7 of the Act — to always ensure the best interests of the child in any decision taken affecting them — as well as s 295*(e)* of the Act. Were it to be found that the surrogacy may have a harmful effect on the children's psychological wellbeing, this would be a factor that a court would be able to weigh up in the consideration of whether the agreement should be confirmed or not. (See [8], [34] – [36].)

The court concluded by setting out the information that should be placed before a court to safeguard the interests of the surrogate, as well as the existing children of the commissioning parents and surrogate (see [36]). These were:

- that a clinical psychologist has consulted with the child(ren) of the commissioning parents to —
- prepare the child(ren) for the surrogacy and the outcome;
- make any recommendation that is in the interests of the child(ren), including whether they may need further therapy;
- report on the effect that any previous surrogacy has had on the children;
- that a clinical psychologist has consulted with the child(ren) of the surrogate parents to —
- prepare the child(ren) for the surrogate's pregnancy and the outcome;
- make any recommendation that is in the interests of the child(ren), including whether they may need further therapy;
- report on the effect that any previous surrogacy has had on the children;
- that a full medical assessment of the surrogate must be presented to court, including information on her previous pregnancies, previous caesarean sections, whether any complications arose during any of her pregnancies, and, if so, what, and whether any of her pregnancies resulted in the child not being born alive or whether she miscarried.

FIRSTRAND BANK LTD v BRIEDENHANN 2022 (5) SA 215 (ECGq)

Practice — Applications and motions — Affidavit — Attestation of — Commissioner of oaths — Administering of oath — Declaration by deponent — Requirement that deponent sign declaration in presence of commissioner of oaths — 'In presence of' — Meaning of — Whether requirement met where oath administered in 'virtual' meeting between deponent and commissioner — Justices of the Peace and Commissioners of

Oaths Act 16 of 1963, Regulations Governing the Administering of an Oath or Affirmation, published under GN R1258 in GG 3619 of 21 July 1972, reg 3(1).

Words and phrases — 'In presence of' — Meaning of in reg 3(1) of Regulations Governing the Administering of an Oath or Affirmation, which requiring that deponent sign declaration to affidavit in presence of commissioner of oaths — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, Regulations Governing the Administering of an Oath or Affirmation, published under GN R1258 in GG 3619 of 21 July 1972, reg 3(1).

This was an application for default judgment arising from the breach by the defendant of a mortgage loan agreement it had entered into with the plaintiff. At the hearing of the matter, the presiding judge, Goosen J, raised a concern relating to the affidavit filed by the plaintiff required in terms of rule 14A of the Eastern Cape Rules. Regulation 3(1) of the Regulations Governing the Administration of an Oath, promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, provided, in regard to the oath or affirmation that had to be taken, that: 'The deponent shall sign the declaration *in the presence of the commissioner of oaths*.' In the instant case, the affidavit was commissioned by way of a 'virtual conference', conducted via the video-meeting application Microsoft Teams, between the deponent and the commissioner — they were not in each other's physical presence — during the course of which the deponent took the prescribed oath and appended his electronic signature to the affidavit, and the commissioner in turn appended his. [This approach was motivated in part by the desire to avoid the safety risks of face-to-face meetings, given the prevalence of the Covid-19 virus in South Africa.] The question was whether such a 'virtual' administration of the oath met the requirements of reg 3(1). This formed the focus of the court's attention.

Held, that reg 3(1) — having regard to the language used, in particular the use of the phrase 'in the presence of', read in the context of the Regulations as a whole, as well as the essential purpose of the Regulations to provide assurance to a court receiving an affidavit that the deponent, properly identified as the signatory, had taken the oath — required that the deponent append their signature to the declaration *in the physical presence or proximity of the commissioner*. (See [25].)

Held, further, that the plaintiff's argument, that 'presence' may nevertheless be achieved by sight and sound, and that, on this basis, the 'virtual' presence achieved by the technology used in this case fell within the ambit of the meaning of the phrase 'in the presence of', stood to be rejected. (See [26] – [29].) The plain meaning of the expression did not support such an interpretation (see [29]). The regulation did not therefore cover a deposition in the 'virtual presence' of a commissioner. (The court acknowledged the role innovative technologies could play in transforming and improving justice systems. However, it stressed that adaptation of the process for the commissioning of affidavits, through the use of innovative technologies such as video-conferencing applications, was a task — involving as it did questions of policy — best suited to the legislature. (See [28] and [53] – [55].))

Held, that the Regulations, save where couched in negative terms, were directory. Accordingly, where those regulations had not been followed and adhered to, a court had a discretion whether or not to admit the affidavit. In such circumstances the court would determine whether there has been substantial compliance with the regulations. That determination was one of fact, having regard to the circumstances of the case. (See [48].)

Held, that it was not open to a person *to elect* to follow a different mode of oath administration to that which was statutorily regulated. The Regulations stipulated that the declaration was to be signed in the presence of the commissioner. Unless that could not be achieved, the Regulations had to be followed. The fact that the regulation was directory did not mean that a party could set out to achieve substantial compliance with such regulation rather than to comply with its requirements. (See [51].)
Held, accordingly, that the court would be disinclined to receive the affidavit, given the elected non-compliance with the rules. However, the discretion with which the court was vested had to be exercised judicially, upon consideration of all the relevant facts and in the interests of justice. (See [56].) In this case, the purpose of reg 3(1) had been met. The deponent did take the prescribed oath and affirmed doing so. To refuse the affidavit, and demand that the plaintiff seek afresh default judgment on affidavit properly commissioned, would serve no purpose other than to delay finalisation of the matter and increase costs, and would not be in the interests of justice. Therefore, in the circumstances it was accepted that the affidavit complied in substance with the Regulations, and could be admitted. (See [57] – [58].) (The court went on to grant default judgment in terms set out in [58].)

NGUBANE v ROAD ACCIDENT FUND 2022 (5) SA 231 (GJ)

Damages — Bodily injuries — Claim for general damages — Transmissibility to heirs — Plaintiff dying after having instituted claim but before litis contestatio — Long-standing common-law rule precluding transmitting of claim in such circumstances — Court criticising development of common-law rule in Nkala v Harmony Gold Mining Co (GJ), which concerned certification of class action, to allow transmission of claim — Court expressing preference for minority decision in Nkala, that development of common-law rule regarding transmissibility of general damages prior to litis contestatio should have been restricted to class actions.

This was an application, before Thompson AJ of the Johannesburg High Court, for default judgment in which was claimed, inter alia, general damages in respect of injuries sustained in a motor vehicle accident. Critical for present purposes was the fact that the injured party who had launched summons as plaintiff against the Road Accident Fund (defendant) had died *before the close of pleadings were reached* and was substituted as plaintiff by the executor of his estate. It was a long-established principle of the common law that, where a person suffered personal or bodily injury, and at some later stage died, an action for general damages would only be transmissible to their estate if their death had occurred *after* they had commenced proceedings and *litis contestatio had been reached*, that is, *after close of pleadings*. However, the full bench of the Johannesburg High Court recently departed from that position in *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ). That matter concerned an application for certification of a class action, based in delict, intended to be brought against various mining companies in respect of injuries sustained by mineworkers. The majority of the court found that the common-law principle above should be developed such that, where a person suffered personal or bodily injury, and died after commencing legal proceedings, an action for general damages should be transmissible to such person's estate, even where their death occurred *prior to litis contestatio* having been reached. The minority in *Nkala* disagreed with such approach. It held that the development of the common-law rule regarding transmissibility of general damages prior to litis contestatio *should*

be restricted to class actions where a class member died after the institution of the certification application and prior to finalisation of the class action.
The court in the present matter declined to follow the majority in *Nkala*, preferring the conservative approach taken by the minority. It held that the majority's blanket approach to the development of the common law, with respect to the transmissibility of general damages prior to litis contestatio having been reached, went beyond the permissible realms of the judicial development of the common law and caused the judiciary to impermissibly infringe upon the realm of the legislature (see [37]). A High Court, when faced with a proposed development of the common law, had to apply caution, and consider the wider consequences of the change. The majority in *Nkala*, the court held, had failed to do this. (See [38].) The court further held that, as much as there may have been a need to develop the common law relating to transmissibility of actions for general damages *in respect of class actions*, the same consideration did not necessarily apply to a development of the common law *generally* in this regard (see [39]).
The court declared itself bound to follow the generally accepted common-law position (see [39]). And it followed that the executor's claim for general damages had to be dismissed (see [40] and [42]). (It should be noted that the court stressed that nothing in its judgment should be construed to impact on the class-action-specific declaration of transmissibility of a general damages claim (as set out in para 8 of the order in the *Nkala* judgment), adding that this judgment must only be construed in the context of a *general development* of the common law on transmissibility of a general damages claim. (See [41].))

RAPP VAN ZYL INC AND OTHERS v FIRSTRAND BANK AND OTHERS 2022 (5) SA 245 (WCC)

Defamation — Defences — Privilege — Qualified privilege — Statement made during course of legal proceedings — Requirements for defence — Considerations when statement made by legal practitioner — Discussion.

Insolvency applications- fraudulent scheme that had been uncovered by the fourth defendant attorney (Meintjies),

In an action brought in the Western Cape High Court, the plaintiffs — a law firm (the first plaintiff), and its two then directors (the second and third plaintiffs) — sued the first-defendant bank (the bank), one of the bank's employees (the second defendant), as well as a firm of attorneys (the third defendant) and an ex-director thereof (the fourth defendant), for damages for defamation. The plaintiffs grounded their claim on statements they alleged were defamatory of them that were made in the founding affidavit of an interdict application the bank had brought against them, in which the bank had sought to stop the perpetuation of a fraudulent scheme that had been uncovered by the fourth defendant attorney (Meintjies), who did work for the bank, and on whose instructions the interdict was launched. The defendants, aside from denying that the statements were defamatory, pleaded that they were not unlawful because they were made during legal proceedings in the discharge of their right and duty to seek the relief which they claimed therein, and were relevant thereto, and were accordingly made on a privileged occasion. The question of quantum was to be determined later.

The statements in question were to the following general effect: Firstly, it was averred that the respondents in the interdict matter — which included the company CGS, its director Muller, and the first plaintiff — either collectively, singly or in separate combinations with one another, in the course of providing advice and assistance to judgment debtors of the bank, had perpetrated a fraud against the bank. This they had done, it was alleged, by causing (1) the publication in the *Government Gazette* of notices of intention to surrender in respect of the bank's judgment debtors; and (2) then the forwarding of covering letters notifying the bank thereof. The representation that this constituted — that the debtors referred to in such notice intended to apply on a certain date for the surrender of their estates — was false; there was never any intention for the debtors to surrender their estates; the notices were published and letters sent solely to cause the bank to cancel the sales in execution which were scheduled in respect of the debtors concerned. Secondly, the bank averred that the above-outlined conduct constituted an abuse of the process and machinery of the Insolvency Act, and an abuse of the rights which the bank had to execute upon judgments which had lawfully been granted in its favour, and sought to 'stymie, stifle or harass' it in the exercise thereof.

The plaintiffs alleged that they had been involved in only a few of the 166 matters referred to in the founding affidavit. In those cases they were acting under instruction from CGS, and their role was limited. They had never received instructions to publish surrender notices, but only to inform the bank via covering letter of the *prior publication* thereof. The plaintiffs alleged that they never had any reason to believe that CGS did not have instructions to proceed with the surrender applications at the time when the surrender notices in respect thereof were forwarded to them by CGS for the purpose of notifying the bank thereof. The plaintiffs submitted that the bank's decision to join them in proceedings was malicious and calculated to harm the first plaintiff's business and professional reputation, and was made without due and proper regard for the 'true' facts. According to the plaintiffs, the founding affidavit contained no evidence in support of any of the allegations made therein which were made recklessly and were defamatory of the plaintiffs.

The court accepted that the statements in question were indeed defamatory of the plaintiffs (see [60]). The key question was whether the plaintiffs had established their defence of qualified privilege. (See [61].)

Held, that a defendant seeking to rely on qualified privilege in respect of defamatory statements made in the course of legal proceedings, had to prove that the statements were relevant (or 'germane' or 'pertinent') to the 'occasion' in question, and also that the maker of the statements had 'a reasonable foundation' or 'reasonable cause' for making them (ie there had to be 'some' foundation for it in the evidence or the 'surrounding circumstances'). (See [64], [67] – [68].)

Held, further, having regard to how the above principles had been applied in case law, that it was clear that a legal practitioner who had made defamatory statements in legal proceedings would not be able to rely on qualified privilege where they had made such statements knowing that they were false, or without any proof as to the truth thereof, or where they had made the statements recklessly, not caring whether the averments were true or false. (See [69] – [72].) (The court referred to Canadian legal precedent to the effect that there was a heightened expectation of reasonable due diligence when the person accused of making a defamatory statement was a lawyer; they were duty-bound to take reasonable steps before making statements that were defamatory, especially in cases involving other professional persons, and a court would strictly scrutinise their conduct. (See [94].))

Held, that, in order to determine whether the defendants should succeed with their defence of qualified privilege, the question was whether the allegation that the plaintiffs had engaged in a fraud on the bank, and had participated in an unlawful scheme to frustrate it in its rights, was relevant to the proceedings and the issues raised therein, or to the story which needed to be told. (See [85].) The answer to this was no (see [86]). Neither Meintjies nor the bank had had a sufficient foundation to make the allegations necessary to succeed in their claim for interdictory relief against the plaintiffs, ie that the plaintiffs were participating *in an ongoing, unlawful scheme*, and *with fraudulent intent*. Meintjies and the bank, at the time of launching the interdict proceedings, only had information to the effect that the plaintiffs had, *for a 2 – 3 month period in the past*, participated in the unlawful scheme in question and in a limited way, none of which meant that they were still so involved or had ever acted with fraudulent intent. (See [84] – [87] and [95].) Given the seriousness of the allegations in question, that of accusing an attorney of fraud and of abusing court proceedings, Meintjies should have proceeded with caution, and, before launching proceedings, first verified the current extent of the plaintiffs' involvement in the scheme (see [87] and [95]). In failing to act in the way they ought to have done, the defendants had acted recklessly, and joining the plaintiffs was not reasonably appropriate (see [96]).
Held, that, in the result, the defence of qualified privilege could not be upheld, and the plaintiffs had to succeed.

SAND GROVE OPPORTUNITIES MASTER FUND LTD AND OTHERS v DISTELL GROUP HOLDINGS LTD AND OTHERS 2022 (5) SA 277 (WCC)

Company — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Meeting of shareholders — Whether requirement to convene separate meetings for different classes of shareholders for purposes of seeking approval of proposed scheme of arrangement — Companies Act 71 of 2008, s 115(2)*(a)* and s 114.
Company — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Review — Application for leave to apply to court for review — Standing — Beneficial shareholders — Discussion of — Companies Act 71 of 2008, ss 115(2)*(a)* and 115(3)*(b)*.

Company — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Review — Application for leave to apply to court for review — Late application — Whether can be condoned — Companies Act 71 of 2008, s 115(3)*(b)*.
Company — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Review — Application for leave to apply to court for review — Requirements — Discussion of — Companies Act 71 of 2008, s 115(3)*(b)*, (6) and (7).

The first-respondent company, Distell Group Holdings Ltd (Distell), sought to enter a scheme of arrangement in terms of s 114 of the Companies Act 71 of 2008 (the Act) with the first and second respondents, respectively Heineken International BV and Sunside Acquisitions Ltd. Shareholders of Distell approved the scheme by special resolution in a meeting convened for such purpose, as provided for in s 115 of the Act. In the present matter, heard before Binns-Ward J in the Western Cape High Court, the five Cayman Islands-registered applicant companies — investment funds managed or advised by Sand Grove Capital Management LLP (the Funds) which had *beneficial ownership of Distell shares held in other parties' name* — in terms of s 115(3)*(b)* of the

Act sought leave to apply to court for the review and setting-aside of the scheme. The basis on which the applicants intended to impugn the resolution on review was the following: (i) that the meeting convened to vote on the scheme was unlawfully constituted: separate meetings should have been held for the holders of the two different types of Distell shares — ie one for holders of *ordinary shares* and another for the *holders of B class shares* — instead of, as happened here, a single meeting combining both types; (ii) that the expert report distributed to the shareholders in compliance with s 114(3) contained deficiencies that resulted in inadequate disclosure; (iii) that the vote was materially tainted by a conflict of interest; (iv) in the light of manifest unfairness to a class of holders of the company's securities; and (v) Remgro's votes should have been excluded from consideration.

Aside from contesting the merits of the application, the respondents argued that the applicants did not have standing in the first place to bring an application in terms of s 115(3)*(b)* of the Act; such an application was only available to registered shareholders. The respondents' challenge prompted an application in the names of First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd for leave to intervene in the proceedings as co-applicants in terms of s 115(3)*(b)*. They were indeed the registered shareholders of the ordinary shares in Distell in which the Funds had a beneficial interest, and their representative (Mr Barber) exercised the voting rights attached to those shares to vote against the proposed transaction at the meeting convened in terms of s 115(2)*(a)*. The respondents opposed this application too, on the ground that it was not brought within 10 days of the vote in the shareholders' meeting, as required by s 115(3)*(b)*. Condonation in the circumstances was also not permitted, they argued. At the end of oral argument, the applicants sought an amendment of the notice of motion, such that the relief prayed for under s 115(3)*(b)* was now sought in the alternative to a newly introduced claim for orders declaring that the meeting at which the resolution was adopted was not properly constituted and therefore invalid and void, and that the resolution purportedly adopted at it was accordingly also void.

Standing — The court held that in terms of the Act the applicants, *as beneficial holders of Distell ordinary shares*, had no standing to bring an application under s 115(3)*(b)* (see [34]). In terms of such provisions, the application could only be brought by 'person[s] *who voted* against the resolution', and, in terms of s 115(2)*(a)*, when read with defined meanings of 'voting rights' and 'shareholder', only *'registered shareholders' or their appointed proxy* could *vote* at a meeting convened for the approval of a scheme of arrangement (see [22] – [26], [29] and [34]). Furthermore, Distell's MOI explicitly provided that 'only the Securities Holder shall be entitled to be vested with Voting Rights and to exercise the Voting Rights attaching to the Securities or appoint a proxy to do so' (see [30]). The court added that the relevant scheme of the Act and Distell's MOI were reflective of the generally applied principle of company law that a company concerns itself only with the registered holders of its shares (see [31]).

Application by the nominee companies for leave to intervene as applicants in terms of s 115(3)(b) — The court upheld the respondents' argument that the nominee companies' intervention application contravened the provision of s 115(3)*(b)*, having been brought more than 10 days after the vote. The court also rejected as being without basis the applicants' claim that, where an application in terms of s 115(3)*(b)* was instituted within the prescribed time by any person with capacity to litigate, even if such person lacked standing to be able to claim relief in terms of the provision, *no difficulty presented with admitting an intervening applicant with the*

necessary standing to claim relief under the provision, even after the prescribed time period had elapsed. (See [37] – [43].)

The court further held that it could not condone the lateness of the aspirant intervenors' application: the power to do so could not be found in any interpretative exercise in respect of the relevant parts of the Act (see [61] – [62]). The court confirmed in this regard that a court had no inherent power to condone non-compliance with statutorily imposed time limits for the institution of litigation (see [47] – [60]). The court held accordingly that the application by the nominee companies for leave to intervene had to be dismissed (see [65]).

The application to amend the notice of motion — The court held that the relief sought by the applicants by way of the proposed amendment to their notice of motion — by which means the court held the applicants tried to achieve that which they apprehended they could not by way of the originally sought review relief in terms of s 115 — was not competent. The proceedings the applicant wished to bring impugning the resolution adopted in terms of s 115(2)*(a)* — even though framed as an application for declaratory relief — remained in essence an application for review. And as such, it had to be mounted under s 115 of the Act.

Whether shareholders' meeting unlawfully constituted — The court nevertheless set out its views on the applicants' claim that the meeting convened to vote on the scheme was unlawfully constituted. In this regard, the applicants had relied on the wording of s 114, which provided that 'the board of a company may propose . . . any arrangement *between the company and holders of any class of its securities* . . .'. (See [68].) They contrasted this with the previous s 311 of the old Companies Act, which spoke of a scheme of arrangement between a company and '*its members* or any class of them' (see [68]). In terms of that section, a court had to give directions whether separate meetings had to be convened for different 'classes' of members or creditors (see [71]). It was guided in this task by principles set out in various English judgments, inter alia, that separate meetings should be held for the different classes of shareholders only where there were sufficiently material dissimilarities between shareholders' affected rights to warrant it (see [71] – [78]). Under s 114, the applicants argued, there was no longer scope for this balance weighing with reference to similarity or dissimilarity of rights (see [79]); the effect of s 114 was that, where there was a proposal affecting the rights of the holders of more than one class of shares in a company, separate *schemes had to be put up* to the holders of each class *in separate meetings* held in terms of s 115(2) (see [78]). The court, however, rejected this approach. It held that it would be inimical to effectiveness and efficiency of the scheme of arrangement procedure to adopt an interpretation of s 114 that would require separate meetings of the holders of each class, notwithstanding the absence of a significant dissimilarity between their affected rights and merely because their rights were not identical. The company, when determining how to comply with s 115(2) of the Companies Act, would need to consider whether separate meetings should be held for different classes of shareholders; and in doing so, it had to be mindful of the same considerations the courts used when deciding an application in terms of s 311(1) of the old Companies Act. If the company's determination were to give rise to any of the grounds for review under s 115(7), it would be open to challenge by any qualifying dissentient securities holder. (See [81] – [83] and [87] – [88].) (The court, in addressing the merits of the application for leave, considered that there was not a sufficient dissimilarity between the rights of the holders of the two classes of securities in the company and the effect of the scheme on such rights to warrant that voting on the resolution should have been undertaken in separate meetings (see [106]).)

The merits of the application for leave to take the adoption of the resolution to approve the scheme on review — Despite its findings on the applicants' lack of standing and the applications by the nominee companies for leave to intervene, the court deemed it desirable to state its views on the merits of the application for leave to take the approval of the resolution on review. The court had regard to the prerequisites for the granting of such leave under s 115(6) — ie that it was 'satisfied that [the applicants]' *(a)* were 'acting in good faith'; *(b)* appear 'prepared and able to sustain the proceedings', and *(c)* have 'alleged facts which, if proved, would support an order' upholding an application for review under s 115(7) — and concluded that it would have dismissed the application on the merits. (See [96] – [135].)

SA CRIMINAL LAW REPORTS SEPTEMBER 2022

TSOBO v TSOBO 2022 (2) SACR 233 (SCA)

Domestic violence — Acts of — What constitutes — Series of intermittent *SMS* messages over period of 20 months between parties going through acrimonious divorce — Although some messages containing insults, not constituting domestic violence justifying interim protection order — Domestic Violence Act 116 of 1998, ss 1(vii)*(c), (f)*, 5(2).

The appellant appealed against a decision of the High Court which had dismissed his appeal against a magistrate's order that he had failed to establish that the respondent had committed any act of domestic violence. The only issue which the court needed to determine was whether or not the contents of SMS messages constituted verbal, emotional or psychological abuse and harassment as defined in terms of ss 1(vii)*(c)* and *(f)* of the Domestic Violence Act 116 of 1998 (the Act). The messages in question had been sent between 11 December 2017 and 1 August 2019, in which the respondent accused the appellant of being responsible for the breakdown of their marriage and accused him of not loving her and their child. She also expressed her unhappiness at having been abandoned by the appellant, citing biblical verses and imploring divine justice. She expressed the wish that he had found, in his new partner, someone who would make him happy, albeit in a sarcastic tone. She also appeared to lament the fact that his new partner would have all those things which he apparently did not think she and her son had deserved.

The High Court found that, since there were significant and irregular intervals in the communication between the parties, they were not persistent or repetitive in nature, and found furthermore that, even though some of them contained insults, they did not constitute domestic violence.

Held, that, although the language used in the messages might have been hostile, antagonistic or rancorous, they could by no stretch of the imagination amount to emotional, verbal or psychological abuse. The contents of the messages had to be considered against the backdrop of a fiercely contested divorce in which both parties made serious allegations against the other, and it was not surprising that the tone of the language used by the respondent was occasionally harsh and acerbic. (See [18] – [19].)

Held, further, that the appellant, having relied on innocuous messages which he received from the respondent months before he launched the application for the protection order, was unsurprisingly unable to establish that he would suffer any hardship as a result of domestic violence if a protection order was not issued immediately. He had accordingly not satisfied the court that there was prima facie evidence, as required by s 5(2) of the Act, that the respondent was committing or had committed an act of domestic violence and that he could suffer undue hardship as a result thereof. (See [20] – [21].) The appeal was accordingly dismissed with costs.

S v XABA 2022 (2) SACR 240 (NWM)

Rape — Sentence — Life imprisonment — Court agreeing with regional court's finding that no substantial or compelling circumstances justifying deviation from minimum sentence where grievous bodily harm inflicted — Magistrate, however, in passing sentence, remarking on possible number of rapes committed by appellant at scene, but that remained undetected — Gross misdirection committed — Sentence of life imprisonment replaced with sentence of 30 years' imprisonment.

The appellant was convicted in a regional magistrates' court of rape in which grievous bodily harm was inflicted on the complainant. He was sentenced to the prescribed sentence of life imprisonment, the magistrate finding that there were no substantial and compelling circumstances present that warranted a lesser sentence. On appeal, the court agreed with that finding, in that grievous bodily harm was inflicted on the complainant who was stabbed with a knife in her thigh, arm and breast. It noted, however, that the regional magistrate had remarked, in imposing sentence, that the appellant had taken the complainant to what he described as a lion's den which was filthy. The magistrate had remarked further: 'I wonder how many people have been raped in that place. It could be that there are many it is only that you have been detected.'
Held, that the magistrate's comment amounted to a gross misdirection, as it illustrated that his mind was clouded by the notion that this was not the first and only rape that the appellant perpetrated at the dilapidated house to which the complainant had been dragged. There was no evidence presented to substantiate the unfortunate remark, which was akin to a finding. No previous conviction or convictions for rape was proven by the state and the appellant was in fact a first offender for purposes of sentence. The misdirection was material, as it vitiated the entire sentencing procedure. That being the case, the sentence ought to be set aside and the court was at liberty to impose a suitable sentence. In the circumstances a term of imprisonment of 30 years would be a fit and proper sentence. (See [10] and [13].)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v WOOD AND OTHERS 2022 (2) SACR 245 (GJ)
Search and seizure — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Application for — Disclosure of information — Materiality of non-disclosure of information.
Search and seizure — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Application for — Disclosure of information — Discretion of court — Consequences of discharge of order where extent of non-disclosure limited.

Search and seizure — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Production of evidence by prosecution — Prosecution not required to produce all its evidence at stage of application for restraint order.
Search and seizure — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Requirements for — Whether respondent 'holds' property in terms of Act — Sufficient to show that respondent in substance person who was real beneficiary of property in question, bearing in mind legislative purpose to extend rather than restrict restraint net over affected property.

The National Director of Public Prosecutions (the NDPP) appealed against an order of the High Court which had discharged a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA), granted ex parte on application by the NDPP. The court found that there had been material non-disclosure of two matters, namely a consent order between the trustees of the family trust of the first respondent on the one hand, and the second and third respondents on the other (the Vally J order); and a settlement agreement which had been concluded between the fourth respondent (Regiments Capital (Pty) Ltd) and Transnet (the Transnet settlement).
The NDPP's case on appeal was that the court a quo had erred in finding that the relevant disclosures were material and it contended that the Transnet agreement was at the time not within the knowledge of the advocate who deposed to the founding affidavit. The advocate stated that she became aware of the settlement only after the restraint order had been obtained. She had raised the existence of that settlement in an affidavit filed by her on 22 January 2020 in support of the NDPP's application for a variation of the restraint order, and she submitted that there could not have been a duty on her to disclose facts of which she was not aware. For the purposes of the restraint application, the NDPP relied on evidence obtained from a variety of sources, including documents and transcriptions of sworn testimony provided to the State Capture Commission; forensic legal and technical investigations undertaken at the request of state entities; and papers filed in High Court proceedings relating to and arising from actions launched against some of the defendants by the Transnet Fund, to which Regiments companies provided financial advisory services. The NDPP averred that the evidence demonstrated that the first, second and third respondents, who were directors of the Regiments companies at the relevant time, together with one Mr Essa and one Mr Moodley, formed a criminal conspiracy. She contended that Regiments Capital corruptly and unlawfully obtained contracts from Transnet and that the way in which those contracts were implemented, and the proceeds dealt with, was corrupt. She furthermore averred that the corrupt nature of those contracts, the fraudulent manner in which they were implemented, and the offences committed, had all been identified.
Held, that it was quite plain that the regime established under the Vally J order was to regulate between the first, second and third respondents how the assets of Regiments were to be dealt with, primarily to ensure that the first respondent's interests in Regiments were protected. That order was not akin to the anti-dissipation orders previously granted by two other judges in July and December 2018, respectively. Those orders, which were granted at the behest of the Transnet Fund, prohibited the Regiments companies and the second and third respondents from dealing in any way with their assets. They were anti-dissipation orders in the true legal sense. Quite obviously in the present case, the Vally J order, if disclosed, was

not the answer to the restraint application and objectively speaking, therefore, not materially relevant to the ex parte application. (See [49] and [51].)

Held, further, that the court a quo had erred in rejecting the denial by the deponent to the founding affidavit, of her prior knowledge of the Transnet settlement. In any event, the respondents acknowledged that Regiments had not paid the settlement amount to Transnet and, until such payment was made, the agreement was not relevant to the restraint proceedings. The advocate was under no obligation to investigate and enquire into the Transnet settlement's existence. That agreement was not material to the application for a provisional restraint order. Its non-disclosure was not a valid reason to discharge the provisional restraint, and the court a quo had erred in finding that it was. (See [64] and [68] – [69].)

Held, further, that, even if the court were wrong in its view that there was no material non-disclosure, the court a quo should nevertheless have exercised its discretion in favour of the NDPP. The extent of the non-disclosure was limited and the consequences of discharging the order were grave in circumstances where the NDPP litigates in the public interest, and she had shown that she intended charging the respondents with corruption which the Constitutional Court had said was potentially harmful to our most important constitutional values. (See [85] and [88].)

Held, further, that one of the glaring features of the respondents' responses in their answering affidavits was that they did not commit to a version on the facts. They barely took issue with the factual allegations made by the NDPP, and, where they did, they failed to engage in any substantial way with the averments against them. (See [100].)

Held, further, that at the present stage of the proceedings the NDPP did not have to produce for the court all the evidence it would rely on for the purposes of the prosecution. She made it clear in her affidavits that the investigation was ongoing, and more evidence was likely to come to light. The present proceedings were not criminal and therefore questions of the admissibility thereof for purposes of the criminal trial, whether in general or in respect of the first respondent specifically, were irrelevant. None of the evidence relied on by the NDPP to found reasonable grounds for believing that the defendants might be convicted on the corruption charges, or any of the other offences, was manifestly false or unreliable. This was underlined by the crucial fact that the respondents had failed to put up any substantial answer to the NDPP's case against the respondents on those offences. (See [126] – [127].)

Held, further, that it was not necessary in a matter such as the present where the question was whether the respondent 'holds' the property in terms of POCA, to demonstrate that a notional corporate veil should be lifted or that there had been an 'abuse' or that the trusts in question were the alter ego of the respondents. It was sufficient to show that the respondents were, in substance, the persons who were the real beneficiaries of the property in question and it was important to bear in mind the legislative purpose which was to extend rather than restrict the restraint net over affected property. There was evidence in support of the submission that the first three respondents had used their family trusts to hold their shares in the Regiments companies, which they controlled as directors, and to enjoy the benefit. For that reason, they could not rely on the trust form to distance themselves from the benefits which they obtained through the Regiments companies. (See [216] – [218].) In the circumstances the appeal against the order of the court a quo had to be upheld.

OTUBU v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE 2022 (2) SACR 311 (WCC)

Bail — Conditions — Cybercrime — Older precedents not applicable to new form of crime.
Bail — Application for — Multiple accused — Court approaching matter without individualising each applicant — Such constituting misdirection.

The appellant was one of eight accused arrested in terms of art 13 of the treaty between the US and South Africa governing extradition. Six of the accused had received formal requests for their extradition to the US to face charges relating to a criminal scheme to defraud romance victims via the internet and mobile phones. It was alleged that the appellant was a member of the Neo Movement of Africa, also known as the 'Black Axe'. One consolidated bail hearing was held, with the only evidence led being that of the state. The magistrate refused bail and the appellant appealed against that decision. The state conceded that there was no evidence that the appellant was in fact a member of the Black Axe or that he had committed any acts of violence as purportedly regularly undertaken by that organisation. It also conceded that the appellant might not have real ties within Nigeria any more, whence he had come, but was still a flight risk because of his purported association with Black Axe in South Africa.
The state was more concerned with the fact that, if the appellant did flee South Africa, there was no extradition treaty between Nigeria and the US, but it gave little or scant consideration to the use of possible restrictive bail conditions being imposed. It laid much emphasis on the fact that the appellant had left the borders of South Africa on two occasions to go to Nigeria to attend burial services of his parents, but on both occasions he had returned lawfully, and had remained in South Africa. The evidence showed that the appellant did have a successful agricultural business in Nigeria, but, subsequent to his fleeing Nigeria in 2012, he had not returned. There were no previous cases against the appellant, who stated in his founding affidavit that he generated approximately R30 000 – R45 000 per month from his housing rental business and earned some money from the selling of Nigerian food items to his community. The appellant and his wife, to whom he was married in community of property, purchased a piece of land for an amount of R1,5 million in September 2020. They were also building a house on another property. It was common cause that the appellant had been arrested some six months earlier and there was no certainty as to how long it would take for the extradition enquiry and transfer of the appellant to the US.

Held, that both the investigating officer and the magistrate had based their views on the accused collectively and not individually. This was a misdirection. (See [15] and [24].)
Held, further, that the court applied a 'bail box' approach in denying the appellant bail, in that it should have considered proactive, practical and inventive bail conditions which would serve to balance the interests of society, as well as those of the appellant. Earlier guidelines were restrictive and outdated as they had limited application to the cyber universe that the world had rapidly progressed into. (See [27].)

Held, further, that the appeal against the decision to refuse the appellant's release on bail had to be upheld and replaced with an order granting him bail in an amount of R210 000; that the immovable property be held as security for bail; that conditions be set that the appellant not have contact of any nature with the Black Axe movement; that the appellant's passport be surrendered and that he would not be permitted to apply for any other travel document; that he had to report daily to the local police station and be confined to his place of residence between the hours of 20h00 and 07h00. The appellant was furthermore prohibited from accessing three email accounts and could not register for any new email or use any third-party email and engage in any financial transactions using crypto currency or other virtual currencies, and be prohibited from engaging with 13 specified international banks. (See [39].)

S v MOKHESI AND OTHERS 2022 (2) SACR 326 (FB)

Trial — Pre-trial application — Civil application brought for declaratory order that fair-trial rights infringed — Such preliminary litigation to be discouraged, as accused persons should not be allowed to gain unfair advantage — Relevant provisions of *CPA* simply ignored — Application dismissed — Criminal Procedure Act 51 of 1977, s 85.

Four separate applications were brought by the applicants, who were 5 of 16 accused in a criminal trial in a regional court on various charges relating to a tender for the eradication of asbestos from housing. The main complaint in all the applications was that the prosecution was based on evidence obtained from the State Capture Commission and that such evidence could not be used against the applicants in terms of the provisions of the regulations relating to the State Capture Commission. The applicants contended that their fair-trial rights under s 35(3) of the Constitution were being infringed. There were also complaints of prosecutorial misconduct, but, because of the approach of the court to the matter, it was not necessary to deal with those complaints. The state, as respondent, opposed the application.
Held, that the hallmark of all the applications was that the accused had not yet pleaded to the charges against them, yet each sought declaratory orders without any evidence being led against them. They had given no indication of why those challenges, in respect of the charges and the evidence to be presented, were being brought before the High Court and not the court that would hear the trial, which was the constitutionally compliant forum. Each applicant appeared to have simply ignored the provisions of s 85 and other relevant provisions of the Criminal Procedure Act 51 of 1977, which was promulgated specifically to deal with all aspects of criminal proceedings. (See [43].)
Held, further, that the court was being called upon to consider the applications in a vacuum, so that a proper assessment of all relevant evidence and circumstances was not possible at the present stage. What was clear was that, on the papers, the state had an arguable case in respect of the grounds and relief claimed by the accused. (See [45].)
Held, further, that the applications fell into the category of preliminary litigation arising from criminal proceedings, whereas the established practice in our law was that such litigation was to be discouraged, as accused persons should not be allowed to gain an unfair advantage. The present were civil motion proceedings where, if the *Plascon- Evans* rule was to be applied, the matter would be decided on

the respondent's version, together with aspects of the respondent's version that the applicant agreed with or did not dispute. It was not appropriate for the court to entertain the applications, and they had to fail. (See [52].)

ALL SA LAW REPORTS SEPTEMBER 2022

Commissioner for South African Revenue Service v Capitec Bank Limited [2022] 3 All SA 641 (SCA)

[1] Tax – VAT – Whether the tax fraction of loan cover payouts qualified for deduction in terms of section 16(3)(c) of the Value-Added Tax Act 89 of 1991 – Where loan cover supplied by bank to its customers was for no consideration, it could not be in furtherance of an enterprise and would be an exempt supply rather than a taxable supply – Tax fraction of loan cover payouts not qualifying for deduction.

[2] Words and phrases – "taxable supply" – Value-Added Tax Act 89 of 1991, section 16(3)(c)(i) – A "taxable supply" means any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at the rate of zero% under section 11.

The refusal by the appellant ("SARS") to allow an amount of R71 520 811,85 claimed by the respondent ("Capitec") as a notional input tax deduction was overturned on appeal in the Tax Court. Capitec had claimed the amount as a deduction, representing the tax fraction of the total insurance payouts recovered by Capitec from its insurers under loan cover insurance, which Capitec used to settle loans owed by its customers in the event of their retrenchment or death. Under the insurance policies, Capitec was the insured and became entitled to the benefits, if the loan was not repaid on account of the death or retrenchment of the borrower.

According to SARS, the loan cover payments did not qualify for an input tax deduction in terms of section 16(3)(c) of the Value-Added Tax Act 89 of 1991 because the supply of the loan cover did not constitute a "taxable supply". SARS contended that since Capitec did not charge any consideration for the loan cover, and because the cover was supplied in the course of Capitec's business of providing credit to its customers, it was an exempt supply. That was disputed by Capitec.

SARS appealed against the Tax Court ruling.

Held – The central question was whether the tax fraction of the loan cover payouts qualified for deduction in terms of section 16(3)(c). The determination of the issue depended on whether the loan cover was a taxable supply, ie whether it was supplied in the course or furtherance of an enterprise.

Section 16(3) governs the calculation of tax payable during each period and provides for a deduction of an amount equal to the tax fraction of any payment made to indemnify another person in terms of any contract of insurance. The proviso in section 16(3)(c)(i) is that the paragraph shall only apply where the supply of that contract of insurance is a taxable supply. A "taxable supply" means any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at the rate of zero% under section 11. The definition in the Act of an "enterprise" delineates the type of persons, activities and supplies which are intended to form part of the tax base, as well as those that are meant to be excluded. There is

a general requirement that enterprises participating in the VAT system must charge a consideration for the goods or services they supply.

VAT is a tax that is ultimately meant to be charged upon the consumer in the supply chain. Thus, the obligation to recover or collect VAT is placed on the vendors who are traders, and whose business it is to add value on goods and services.

Where a vendor carries on the business of providing financial services, that remains its main business. The fact that there may be some taxable fees that are earned in the course of its business which can be carved out does not convert what is in essence a taxable supply (and what is in the main an exempt supply) into a taxable supply. Thus, the fact that fees charged by Capitec for its services carried VAT did not mean that the activity of supplying credit lost its exempt nature. Instead, the minor part of its business which was the earning of taxable fees could be carved out as such and claimed accordingly.

As the loan cover supplied by Capitec to its customers was for no consideration, it could not be in furtherance of an enterprise and therefore would not be a taxable supply. The tax fraction of the loan cover payouts thus did not qualify for deduction.

The appeal was accordingly upheld.

Frantzen v Road Accident Fund [2022] 3 All SA 657 (SCA)

Civil Procedure – Evidence – Expert evidence – Correct approach – Expert evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.

Personal Injury/Delict – Claim for compensation for damages allegedly relating to injury sustained in accident – Factual causation – Whether, on a balance of probabilities, it was more probable than not that impairment suffered by appellant was caused by an accident which occurred ten months previously – Evidence not establishing that injury was linked to accident.

The appellant ("Mr Frantzen") instituted a claim against the Road Accident Fund, for compensation for damages resulting from bodily injury caused by a motor vehicle accident in which he was involved on 8 April 2007. It was common cause that he sustained a soft tissue injury of the neck, commonly known as whiplash injury, in the 2007 accident. It was also common cause that the appellant suffered from an involuntary movement disorder, dystonia, which manifested 10 months after the 2007 accident. The core issue between the parties was whether the dystonia was caused by the whiplash injury. The High Court's finding that a causal link between the accident and the movement disorder had not been established was the subject of Mr Frantzen's appeal.

Prior to the 2007 accident, Mr Frantzen had been involved in two other motor vehicle accidents, in which he also sustained whiplash injuries. However, he stated that those injuries resolved within a few weeks of each accident and he resumed his normal daily work without any difficulty. That was not the case with the 2007 accident, which was alleged to have led to Mr Frantzen's permanent incapacitation.

Held – The question of factual causation had to be decided by showing that but for the 2007 accident, the appellant would not have suffered from dystonia. The enquiry

was whether it was more probable than not that the involuntary movements suffered by the appellant were caused by the accident. The standard of proof is a balance of probabilities.

The correct approach in evaluating expert evidence requires the court to be satisfied that the evidence has a logical basis. Expert evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. Isolated statements made by experts should not too readily be accepted, especially when dealing with a field where medical certainty is virtually impossible. In this case, Mr Frantzen called a neurologist as his expert witness, while the respondent called a neurosurgeon and an orthopaedic surgeon as its expert witnesses. The experts agreed on many issues, with the main difference between them related to the issue of factual causation. Mr Frantzen's witness relied on medical literature in advancing his opinion on the accident being the cause of the appellant's dystonia. While it is acceptable for an expert to rely on medical literature, an expert must by reason of his own training, affirm the correctness of the statements made in the article, at least in principle, and such work relied upon must be written by a person of established repute or proved experience in that field.

Evaluating the evidence, the court found that it was not shown, on a balance of probabilities, that the soft tissue injury of the neck and back that Mr Frantzen sustained in the 2007 accident was causally connected to the involuntary movement disorder that manifested 10 months later.

The appeal was dismissed with costs.

Govan Mbeki Local Municipality and another v Glencore Operations South Africa (Pty) Ltd [2022] 3 All SA 675 (SCA)

Local Government – Issuing of by-laws by municipalities – Imposition of embargo on transfer of property – Whether by-laws were enacted within the legislative competence of municipalities as contemplated in section 156 of the Constitution – Where restriction was not incidental to land-use management, by-laws were legislative competence of municipalities and therefore unconstitutional and invalid.

The High Court declared section 76 of the Govan Mbeki Spatial Planning and Land Use Management By-law and section 86 of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management 2016 to be unconstitutional. The municipalities introduced by-laws which placed restraints on the transfer of immovable property within their respective areas of jurisdiction. In terms thereof, an owner could not apply to the registrar of deeds to register the transfer of such property without producing a certificate issued by the municipality, certifying that all spatial planning, land-use management, and building regulation conditions or approvals in connection with the property had been obtained, and complied with the requirements of the by-law. Essentially, the impugned provisions placed an embargo on the registration of transfer of immovable property until the requirements of the by-laws were met. The respondents had approached the High Court for orders declaring the relevant sections of the by-laws to be constitutionally invalid.

The municipalities appealed against the orders of invalidity and the respondents cross-appealed against the High Court's suspension of the declaration of invalidity for a period of six months to allow the competent authority to correct the defect.

Held – The question to be determined was whether the by-laws were enacted within the legislative competence of municipalities as contemplated in section 156 of the Constitution. A finding that the municipalities did not have the power to cause restraint on the registration of transfer of property, on the facts herein, would be dispositive of the matter. However, the High Court determined that, in addition to the conflict with section 156 of the Constitution, the by-laws were also invalid because they conflicted with section 118 of the Local Government: Municipal Systems Act 32 of 2000 and amounted to an arbitrary deprivation of property in terms of section 25(1) of the Constitution.

The Constitution allocates legislative power between national and provincial governments on the basis of the subject matter of the legislation. Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of administering local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Section 156(2) of the Constitution authorises local authorities to exercise legislative powers by passing by-laws.

While national and provincial governments exercise a regulatory role over municipalities, section 151(3) of the Constitution affords a municipality the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Furthermore, section 156(5) of the Constitution permits a municipality to exercise any power concerning a matter reasonably necessary for the effective performance of its functions. Section 156(5) may not be used to increase the functional areas of local government's powers, but rather to enhance the efficacy of administrating an existing functional area. The Constitution therefore requires co-operative government between national, provincial and municipal legislation.

The Spatial Planning and Land Use Management Act 16 of 2013 is the framework legislation that authorised the making of the by-laws. The Act does not give carte blanche to municipalities to make any policy decisions they choose, and lays down the limits within which municipalities may legislate. The embargo in this case could not be incidental to the effective enforcement of a land-use scheme and the impugned by-laws were invalid insofar as they imposed a mechanism which impermissibly regulates the transfer of property. They exceeded the legislative competence of the respective municipalities, and thus offend the principle of legality.

The appeals were dismissed and the cross-appeal upheld.

Cloete Murray NO and others v Ntombela and others; *In re*: Ntombela and another v Cloete Murray NO and others [2022] 3 All SA 689 (FB)

Civil Procedure – Leave to appeal – Test – Section 17 of the Superior Courts Act 10 of 2013 – Leave to appeal may only be given, inter alia, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success.

Liquidators-election of the liquidators not to ratify the contract –review application

In the main application before the court, the applicants (the "Ntombelas") were a family which had purchased immovable residential property from a close corporation ("Phehla") prior to its liquidation. The applicants, in terms of rule 53 of the Uniform Rules of Court, sought the review and setting aside of the election of the liquidators not to ratify the contract. The liquidators delivered a Notice in terms of rule 6(5)(d)(iii).

The court provisionally set aside the filing of the Notice in terms of rule 6(5)(d)(iii) pending the finalisation of the process prescribed in rule 53 dealing with reviews. In the liquidators' application for leave to appeal, the present Court identified the issues for determination as the reviewability of the decision of the liquidators in the circumstances of this case and the ruling on the rule 6(5)(d)(iii) Notice.

Regarding the decision not to proceed with the sale agreement entered into by Phehla, the liquidators maintained that they did not have a record of how the decision was taken and they also did not offer any reasons for their decision.

Held – The liquidators could pursue the rule 6(5)(d)(iii) proceedings only once the rule 53 process was finalised. The record had not yet been filed and the rule 53 process could not continue if the record was not supplied. The liquidators were granted permission to access the court on the same papers duly supplemented after the rule 53 process had been finalised.

The core issue in the application for leave to appeal was the liquidators' contention that the decision not to proceed with the sale agreement was not legally reviewable. Having regard to the potential negative effects of the liquidators' stance, the court pointed to the need to protect vulnerable consumers in such scenarios. While the Constitution does not protect against homelessness in absolute terms, it provides that no one may be evicted from his home without an order of court made in consideration of all relevant circumstances. That demands judicial oversight of the decisions of the liquidator.

In deciding whether to grant leave to appeal, the court is called upon to consider whether another court may reach a different conclusion. That requires a careful analysis of both the facts and the law that have supported the judgment *a quo* and a consideration of the possibility that another court may differ either in relation to the facts or the law or both.

Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given, *inter alia*, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success. The section is peremptory in that it imposes a mandatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success, and not that another court may hold another view.

Finding the test to have been met, the Court granted leave to appeal.

Dissilio Investments (Pty) Ltd v Nedbank Ltd [2022] 3 All SA 715 (GJ)

Banking and Finance – Loan agreement between bank and customer – Early settlement of loan – Bank's entitlement to claim breakage costs and early repayment fee – Proper interpretation of loan agreement leading to conclusion that parties intended all amounts payable to be included in the final sum, including all charges to which bank was entitled, and bank was not entitled to deduct breakage costs and early repayment fee after loan balance was settled.

In October 2013, the defendant advanced a bank loan to the plaintiff for the purpose of financing a retail centre development. The loan term was 75 months from date of registration of the mortgage bond or from date of the advance of the loan to the plaintiff. A schedule to the signed loan agreement made provision for various charges which

included a bank service fee of R2,8 million to be capitalised to the loan. The loan agreement also made provision for early repayment, but a "Fixed Rate Addendum" to the agreement provided for breakage costs in the event that the loan was repaid early. A further addendum (Addendum C) was subsequently signed by the parties, and the plaintiff claimed that that constituted a new agreement replacing the previous ones. The defendant on the other hand, contended that Addendum C did not take the place of the terms and the conditions of the loan agreement and the fixed rate agreement. It stated that save for the amounts amended in Annexure C, the remaining clauses in the loan agreement and the Fixed Rate Addendum remained intact and operable. That would mean that the breakage fee and the fixed rate agreement remained intact.

When the plaintiff attempted to settle the loan early, the bank refused to accept the settlement until the breakage cost and service fee were paid. The plaintiff's case in relation to the service fee was that it was paid off well in advance of the 75 months anticipated in the property loan agreement, and the defendant was therefore not entitled to levy the full service fee of 2,8 million. It therefore sought a pro rata reimbursement of R933 333,33.

Held – The dispute necessitated the proper interpretation of the loan agreement together with the two addenda. The court stated that the starting point is always to consider the plain, ordinary, grammatical meaning of the words in question. A solely literal approach to legal interpretation has been rejected in case law, and the court is enjoined to consider context, language and purpose together. Applying that approach, the court stated that the purpose of Addendum C was to settle all financial claims the defendant had against the plaintiff. It was termed a new loan. The court found it to be clear from a plain reading of Annexure C that the parties intended all the amounts payable to be included in the final sum. The loan balance included accrued interest, fees costs and other charges to which Nedbank was entitled – which would include breakage costs and an early repayment fee. The plaintiff's case was thus upheld with regard to the breakage costs and the early repayment fee.

The bank was ordered to refund the amounts debited from the plaintiff in relation to such charges.

MEC for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and others v Legal Practice Council and others (Chance at Life and another as *amici curiae*) [2022] 3 All SA 730 (ECG)

Civil Procedure – Interim interdict – Suspension of judgments – Requirements for interdictory relief – In absence of prima facie right to relief sought being established, interdictory relief denied.

Local government – Judgments against provincial department – Application to suspend judgments based on impact such judgments had on service delivery – Where relief sought amounted to substantive and far-reaching variation of orders obtained against the provincial department, such relief could not be granted.

The applicants sought an interim interdict suspending the execution of all judgments by judgment creditors having delictual damages awards arising from medico-legal claims. It was alleged that such awards had a deleterious effect on the Eastern Cape Department of Health's finances.

Held – Section 27 of the Constitution provides for everyone to have a right to access to health care services, including reproductive health care. It imposes an obligation on the State to take reasonable legislative, and other measures within its available resources, to achieve the progressive realisation of such rights. Health services is a functional area of concurrent national and provincial legislative competence.

In order to fulfil its obligations and to deliver services to the people of the Eastern Cape, the Eastern Cape Government is funded, partly by its equitable share and allocation of revenue from national government and partly by funds it raises. All money received by a provincial government must be paid into the Provincial Revenue Fund ("PRF") which is controlled by the Provincial Treasury. Money may only be withdrawn from the PRF in terms of an appropriation by a provincial act. In the context of judgment debts, the system of financial and risk management, and the prescribed or agreed periods for payment emerge from the State Liability Act 20 of 1957 which lays out the structural scheme created to ensure satisfaction of a judgment debt against the State.

The Court examined the cause of the applicants' financial predicament. It found that the management of the finances of the Eastern Cape Government, and in particular the Eastern Cape Department of Health, falls far short of the standard demanded by the Public Finance Management Act 1 of 1999.

The relief sought by the applicants amounted to a variation of orders obtained against the provincial department. Rule 42 provides for the variation or rescission of judgments. The judgments in issue were not wrong and were not erroneously sought or granted. The variations sought were considerably more substantive and far-reaching, and would change the terms of the relevant orders.

The prayer for periodic payments constituted a special defence to the "once and for all" rule, which must be properly pleaded. Such defence was not raised at the trial and could not be raised after the issues had been finally decided.

Setting out the requirements for an interim interdict, the Court found that the applicants had not established a *prima facie* right to the relief sought. The application was held to be misconceived and was dismissed.

MEC for the Department of Public Works and others v Ikamva Architects and others [2022] 3 All SA 760 (ECB)

Civil Procedure – Attachment of property of State organ in satisfaction of debt – Issuing of writ in terms of the Uniform Rules of Court can only find application to the extent that it is not in conflict with prescripts of section 3 of State Liability Act 20 of 1957 – Uniform Rule 45(8) authorises attachment of a particular class of property (incorporeal rights) but does not give judgement creditor right to choose which of the judgment debtor's movable property must be attached.

Civil Procedure – Striking out of defence – Validity of order –– Only when court has opportunity to decide that grounds exist for striking out of a defence that application for default judgment may be made – Court's discretion to strike out a defence should only be exercised after the defendant has been given an opportunity to be heard in compliance with the audi alteram partem rule – That court's power to strike out was incorrectly exercised not rendering order invalid, and orders stands until set side.

The first and second applicants (the "Departments") sought the urgent setting aside of two notices of attachment, a writ of attachment, and the attachment of the Department of Health's bank account. The first respondent's attempted execution stemmed from a default judgment granted in December 2015 after their defence had been struck out due to their failure to timeously reply to a Rule 35(3) Notice. The Departments brought an urgent application to set aside the first writ and an order, by agreement, stayed the execution of the writ pending the determination of the self-review application. In the wake of the dismissal of that application, the first respondent ("Ikamva") issued a further writ of attachment for the sum of the default judgment, this time specifically in respect of the second applicant's bank account (the "second writ"), prompting the present urgent application.

Held – The first issue related to the validity of the default judgment. The order striking out the Departments' defence was erroneous as envisaged in Uniform Rule 42(1)(a) as it followed a one- as opposed to two-stage procedure. Uniform Rule 35(7) does not contemplate the striking out of a defence automatically but rather on application on the same papers, amplified if necessary. It is only when a court has had the opportunity to decide that grounds exist for the striking out of a defence that an application for default judgment may be made. A court's discretion to strike out a defence should only be exercised after the defendant has been given an opportunity to be heard in compliance with the *audi alteram partem* rule. That did not happen in this case.

That led to the question of whether the default judgment, which was granted in consequence of the wrongly granted striking out order, was a valid order capable of enforcement by way of execution. The striking out order was found not to fall within the category of orders that may, on the face of it, be regarded as being invalid. An order is not invalid simply because it is erroneous as contemplated in Uniform Rule 42(1)(a). Uniform Rule 35(7) gives the court the power to strike out a defence. That such power was incorrectly exercised did not, *per se*, render the order invalid. The order existed in fact and continued to have legal effect until it was set aside. Similarly, the default judgment could not be disregarded as a nullity. Consequently, the issues raised in these proceedings arising from the execution of the default judgment were addressed on the basis that the judgment was capable of execution.

Section 3 of the State Liability Act 20 of 1957 obliges State departments to pay a judgment debt. When the department fails to do so, it obliges the relevant treasury to pay the debt on behalf of the department. It is only after there has been a total failure to pay the judgment debt that the judgment creditor may seek to attach the property of the department. The issuing of a writ in terms of the Uniform Rules of Court can only find application to the extent that it is not in conflict with the section 3 prescripts.

The Departments argued that attachment of a State organ's bank account is impermissible, and is inconsistent with section 226 of the Constitution. Examining the authorities, the court found those contentions to be unsustainable.

However, the writ and the attachment made pursuant thereto could not stand. The writ was issued in terms of rule 45(1). Uniform Rule 45(8) authorises attachment of a particular class of property (incorporeal rights) but does not give the judgment creditor the right to choose which of the judgment debtor's movable property must be attached. The circumstances favoured a stay of execution of the attachments pending finalisation of the self-review process.

Moyo v Old Mutual Limited and others [2022] 3 All SA 795 (GJ)

Corporate and Commercial – Refusal by company to reinstate employee whose employment was terminated due to breakdown of relationship with company – Whether company's actions were in contempt of court and whether company directors were in breach of their fiduciary duties – Where company acted on reasonable legal advice in refusing to reinstate employee, no finding of contempt could be made – In suspending and terminating employee's employment, company directors not acting in a manner amounting to gross negligence, wilful misconduct or breach of trust, and thus not in breach of fiduciary duties.

During his tenure as Chief Executive Officer of the first respondent ("Old Mutual"), the applicant ("Mr Moyo") was bound by his contract of employment which referred to the employment relationship with Old Mutual being based on trust and mutual respect; and to the fiduciary duties owed by Mr Moyo to Old Mutual. The contract identified a number of specific duties and added that a breach of any of them would warrant termination of his employment. Provision was made for the disclosure and resolution of any conflicts of interest.

Mr Moyo and Old Mutual were shareholders in an entity ("NMT Capital"). His participation in the decision by NMT Capital to declare ordinary share dividends from which he personally benefited to the extent of R28m was in breach of his agreements with Old Mutual. He did not disclose his conflict of interests.

The subsequent decision by the board of Old Mutual to terminate his employment was met with resistance by Mr Moyo. He obtained a reinstatement order and when Old Mutual refused to allow him to resume his duties, he brought an application to declare the company and its directors in contempt of court and to declare the directors to be delinquent.

Held – The applicant's case was marked by numerous procedural inadequacies including a failure to satisfactorily define the issues. The Court eventually itself outlined the issues for determination in each of the applications brought by Mr Moyo.

Moving on to discuss the general principles relating to contempt of court, the Court reminded that committal for contempt for non-compliance with court orders should only be engaged as a matter of last resort.

Mr Moyo sought to have the directors of Old Mutual, cited in the application, committed to prison for failing to allow him to resume his duties. However, it was concluded that by locking Mr Moyo out on three separate occasions the respondents did not defy court orders as alleged, as they had acted pursuant to legal advice received – which version could not be labelled either fictitious or palpably uncreditworthy. No finding of contempt could be made.

On the issue of delinquency, the Court referred to the fiduciary duties of company directors. Such duties have been codified in section 76 of the Companies Act. Mr Moyo asked for the directors to be declared delinquent in terms of section 162(5)(c) of the Companies Act. The crucial question was whether Mr Moyo had established that, by suspending and terminating his employment, the directors had acted in a manner that amounted to "gross negligence, wilful misconduct or breach of trust". That question was answered in favour of Old Mutual.

It was common cause that the relationship between the Old Mutual board and Mr Moyo had broken down. The reasons for the breakdown became irrelevant, with the Court satisfied that Mr Moyo had to leave.

Both the contempt and delinquency applications were dismissed.

Nelson Mandela Bay Metropolitan Municipality v Erastyle (Pty) Ltd and others [2022] 3 All SA 864 (ECP)

Local Government – Claims for damages by municipality against its employees – Unlawful expenditure – Local Government: Municipal Finance Management Act 56 of 2003, section 32 – A municipality is statutorily obliged to recover unauthorised, irregular or fruitless or wasteful expenditure from the incumbents identified therein.

The plaintiff was a municipality and the second to eighth defendants (collectively the "employee defendants") were former senior employees of the municipality.

In its action against the first defendant, the municipality stated that his appointment had occurred in breach of the Constitution and the plaintiff's Supply Chain Management Policy (the "SCM policy" or the "policy"). It claimed payment of amounts paid to the first defendant pursuant to his appointment, on the ground that such payments were effected in breach of the provisions of the Local Government: Municipal Finance Management Act 56 of 2003 (the "MFMA"). The cause of action against the second to eighth defendants arose from their conduct in their employment relationship with the municipality, and was posited on a wrongful and intentional, alternatively negligent breach of their obligations to discharge their duties diligently, transparently, with the utmost good faith, and without prejudice to the municipality.

Held – The matter essentially concerned the procurement of goods and services by the plaintiff and the liability of its employees for incurring unlawful expenditure in breach of their duties of good faith and diligence towards the municipality.

Plaintiff being an organ of State in the local government sphere, the framework in which it procured goods and services was strictly regulated by legislation. Section 217 of the Constitution lays down the minimum requirements for a valid procurement process and requires that the procurement process preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost-effective. Insistence on faithful compliance with procedural formalities in the procurement process serves a threefold purpose. It ensures fairness to participants in the bid process; it enhances the likelihood of efficiency and optimality in the outcome; and it serves as a guardian against a process skewed by corrupt influences.

The liability of employees for unlawful expenditure is regulated by section 32 of the MFMA. In terms of the section, a municipality is statutorily obliged to recover unauthorised, irregular or fruitless or wasteful expenditure from the incumbents identified therein. Whether or not a municipality received value therefor is not a factor that poses a limitation to the exercise of such obligation.

The declaratory relief sought by the plaintiff was characterised as a legality review by the second, fifth and eighth defendants in their special pleas. They raised the issue of undue delay by contending that such relief ought to have been claimed within a reasonable time as a jurisdictional fact necessary to establish the municipality's claims

against them. Regard being had to the scope and complexity of the municipality operations as an Organ of State, the court was of the view that the municipality had acted swiftly and with a sense of purpose in instituting the proceedings. In any event, the issue of undue delay was irrelevant for the purpose of pursuing a claim against the defendants in terms of section 32 of the MFMA.

Section 176 of the MFMA precludes the liability of a municipality and its functionaries from claims by third parties for loss or damage incurred by them where the actions of a municipality or its functionaries were undertaken in good faith. The court rejected the defendants' attempt to argue that the section in any way modified section 32.

The plaintiff's claims against the defendants were found to have been proved, and judgment was granted as claimed.

Tekoa Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality and others [2022] 3 All SA 892 (ECG)

Constitutional and Administrative Law – Procurement – Tender process – Disqualification of bidder for want of a requirement not mentioned in the conditions of tender – Failure to apply preference point system as prescribed in terms of section 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000 – Just and equitable remedy – Tender process declared unlawful and set aside.

The first respondent municipality called for bids for appointment to a panel of consortium service providers for the planning, design and construction of certain water services projects in the municipality. The applicant's bid was disqualified for lack of proof of registration with the Construction Industry Development Board ("CIDB") and the necessary grading. Instead, the third to sixth respondents were appointed to the panel.

Seeking the review and setting aside of the decision to refuse to appoint it to the panel, the applicant contended that registration with the CIDB was neither possible nor necessary. It stated that the tender documents did not expressly indicate that proof of CIDB registration was a compulsory requirement and called for proposals from consulting engineers such as the applicant. Moreover, the CIDB required contractors, not consulting engineers, to register with it and to be in possession of an appropriate contractor grading for specific types of construction work. The applicant alleged that there had been several instances of non-compliance with relevant legislation applicable to the municipality.

Held – The first issue to be addressed was the allegation by the respondents of unreasonable delay in the applicant's seeking review. Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requires proceedings for judicial review in terms of section 6(1) to be instituted without unreasonable delay and not later than 180 days after the date on which the impugned decision was taken, subject to section 7(2) which requires internal remedies to be exhausted before review is sought. In this case, it was established that there was no internal remedy available to the applicant. The next question was when the 180-day period actually commenced. The provisions of section 7(1)(b) stipulate that the 180-day period begins from the date upon which a party was informed or became aware of the decision taken and reasons therefor or might reasonably have been expected to have acquired such knowledge. Taking into

account the date on which the applicant had requested reasons for the decision, it could not be said that its review application was brought out of time.

That led to the question of whether the applicant had a justiciable right capable of protection, notwithstanding its disqualification on the basis of non-responsiveness. The respondents' contention was that the applicant's disqualification meant that it acquired no legal interest in the outcome of the tender process, and the subsequent decision of the municipality to award the tender to others could not, *vis-à-vis* the applicant, be viewed as administrative action. The court clarified that the municipality's decision to treat the applicant's bid as non-responsive was the issue in question. The lack of registration with the CIDB as a reason for the disqualification faced the difficulty that the alleged requirement was not apparent from the conditions of tender. The court discussed the issue of vagueness in tenders. The conditions of tender must spell out, clearly and unambiguously, what is required of a bidder. In the present matter, it was not apparent that the submission of proof of registration with the CIDB was a mandatory requirement. Any suggestion to that effect was vague at best. Consequently, the municipality's decision to disqualify the applicant's bid on the above basis was an irregularity.

The municipality's combination of points for functionality and B-BBEE status level, to the exclusion of price, also amounted to a failure to apply the preference point system correctly, as prescribed in terms of section 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000, and a failure to apply the constitutional principle of cost-effectiveness to the process.

The Court found it to be just and equitable to declare the tender process unlawful and to set aside the appointment of the third, fourth, fifth and sixth respondents. To ameliorate the likely impact on the affected communities, the declaration of unlawfulness was suspended for a limited period of time so as to allow the completion of those projects that were near to completion, where the outstanding work to be carried out was minimal.

TR and others v Minister of Home Affairs and others and a related matter [2022] 3 All SA 918 (WCC)

Immigration – Spousal visas – Limitations attached to spousal visas – Section 11(6)(a) of the Immigration Act 13 of 2002 provides that a spousal visa shall only be valid while the good faith spousal relationship between the parties exists, and section 43(b) provides that upon the expiry of their status foreigners must depart SA – Constitutionality – Provisions violating parents' constitutional rights to dignity as well as those of their children, and the children's constitutional and parental rights, in terms of section 28 of the Constitution and the Children's Act 38 of 2005 – Limitations not shown to be reasonable and justifiable, and provisions declared unconstitutional.

The applicants in two cases consolidated by the court, sought orders declaring the Immigration Act 13 of 2002 or certain sections thereof, read together with certain of the Immigration Regulations which were promulgated in terms thereof, to be inconsistent with the Constitution and therefore unconstitutional, to the extent that they require foreigners who are parents and caregivers of SA children to cease working

and to leave South Africa ("SA") when their spousal relationships with their SA spouses come to an end, or they no longer cohabit together.

Held – The Immigration Act regulates the admission of foreigners to and their residence in SA, which may be temporary or permanent. The visa which was in issue in this matter is the so-called "spousal" visa, which is provided for in terms of section 11(6), as a species of the general category of visitors' visas in section 11 of the Act. Although it affords temporary residence, the nature of the rights and the conditions and obligations which attach to it differ from those which attach to an ordinary visitor's visa, as it is intended to offer a foreign spouse a permanent route to residency.

The Act does not define the circumstances, or moment, when a spousal relationship no longer subsists or exists, or is deemed to no longer subsist or exist. In this case, the spousal relationship which existed between the applicants and their partners had come to an end, and they were accordingly not eligible to apply for permanent residence, in terms of section 26(b) of the Act. Notionally, they would be able to apply for permanent residence in terms of section 27(g) on the basis that they were relatives of their SA citizen children, within the first step of kinship. But the immediate difficulty facing them, even before they were to consider making application for permanent residence on that basis, was that they no longer enjoyed temporary residence rights because section 11(6)(a) provides that a spousal visa shall only be valid while the good faith spousal relationship between the parties exists, and section 43(b) provides that upon the expiry of their status foreigners must depart SA. If they do not, they are considered to be illegal foreigners.

The Court agreed that the effect of the legislative provisions in issue resulted in a violation of both the applicants' constitutional rights to dignity as well as those of their children, and the children's constitutional and parental rights, in terms of section 28 of the Constitution and the Children's Act 38 of 2005. In order for the limitations of the applicants' rights and those of their children to pass constitutional muster, the respondents bore the onus of proving that they were reasonable and justifiable in an open and democratic society which is based on dignity, equality and freedom, having regard to all relevant factors, including the nature of the rights that have been infringed, the importance of the purpose of the limitations and the nature and extent thereof, the relationship between the limitations and their purpose, and whether there were less restrictive means available to achieve the purpose sought to be achieved by the limitations. The respondents failed to show that the limitations concerned were reasonable and justifiable.

The Act, alternatively, the provisions in issue, was declared inconsistent with the Constitution to the extent set out in the order.

END-FOR NOW