CIVL LAW UPDATES OCTOBER 2022[1]

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

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Competition Commission of South Africa v Group Five Construction Ltd [2022] ZACC 36

Jurisdiction- Competition Act 89 of 1998 — interpretation and application of section 62 — exclusive jurisdiction of Competition Tribunal —High Court jurisdiction

On Thursday, 27 October 2022, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal. The Supreme Court of Appeal found that the High Court of South Africa, Gauteng Division, Pretoria (High Court) had jurisdiction to decide a review application brought by Group Five Construction Limited (Group Five) in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the principle of legality, against certain decisions taken by the Competition Commission (Commission).

The underlying factual dispute in this matter is premised on a complaint initiated by the Commission into collusion between construction companies in the process for bidding for tenders to construct stadia for the 2010 Soccer World Cup. Group Five was alleged to be one of the construction companies involved. On 12 November 2014, the Commission subsequently referred a complaint to the Competition Tribunal (Tribunal) against Group Five and the other construction companies involved in the collusion.

Group Five submitted that, because the Commission had previously granted it immunity from prosecution through its Corporate Leniency Policy, its about face by referring a complaint to the Tribunal was oppressive, vexatious, and motivated by bad faith. As a result, Group Five launched an application in the High Court for the review of the Commission's decision. In response to this, the Commission sought an order to declare and set aside the review proceedings on the basis that they constituted an irregular step. The Commission contended that the High Court lacked jurisdiction to hear the matter as it pertained to the interpretation and application of Chapters 2, 3 and 5 of the Competition Act 89 of 1998 (Act), which the Tribunal has exclusive jurisdiction over in terms of section 62(1)(a) of the Act. The High Court found against the Commission and held that the matter instead pertained to the lawfulness and validity of the referral and that this fell within the carve-out in section 62(2) of the Act. According to the High Court, the Tribunal only has the powers

afforded it in the Act and this does not include a review under PAJA or under the principle of legality

The Supreme Court of Appeal held that the issues raised on review by Group Five were not of a specialist nature which section 62(1) exclusively reserves for the Competition Appeal Court and the Tribunal. That Court agreed with the High Court that the matter instead related to the lawfulness and validity of the initiation and referral of the Commission's complaint, which is a jurisdictional question and thus a constitutional matter. The Supreme Court of Appeal thus concluded that the High Court's jurisdiction was not ousted.

In this Court, the Commission submitted that the matter engages this Court's constitutional and general jurisdiction. The Commission further submitted that there is public interest in the Court granting leave to appeal as the Supreme Court of Appeal's interpretation conflicts with the language of the Act and undermines the role and functioning of the Tribunal.

The Commission reiterated its contention in that the Tribunal, in terms of section 62(1), has exclusive jurisdiction over the issues Group Five raised in its review application. It submitted that section 27(1)(c) of the Act, read with rule 42 of the Competition Tribunal Rules, gives the Tribunal the power to review a decision taken by the Commission. The Commission further submitted that the initiation, referral and granting of leniency are all purely competition law issues requiring the interpretation of the Act, and should be determined by the Tribunal. Therefore, in the Commission's view, the High Court ought to have found that it did not have jurisdiction and the Supreme Court of Appeal erred in holding otherwise.

The Commission submitted that section 62(2) must be narrowly interpreted, and that the Supreme Court of Appeal's wide interpretation of section 62(2) overlooked the Act's framework by permitting respondents to delay referrals to the Tribunal. This, the Commission contended further, allows for extensive appeal processes of review applications up to this Court when the Competition Appeal Court ought to be the final arbiter of these issues. The Commission submitted this offends the principle of subsidiarity and renders the Tribunal's statutory review powers nugatory. The Commission further argued that the Supreme Court of Appeal's approach

undermines the policy choice of the Legislature which is geared towards specialisation. In the Commission's view, due deference must be given to the Tribunal's expertise and ability to deal with reviews.

Group Five submitted that leave to appeal ought to be refused because this Court, in Competition Commission v Mondi Limited, Hathorn and Sappi Southern Africa Limited CCT 213/2014, already decided that the High Court has jurisdiction to review decisions taken by the Commission when it dismissed the Commission's application for leave to appeal.

On the merits, Group Five submitted that the threshold to sustain the proposition that the High Court's jurisdiction is ousted is very high and must either be express or flow by necessary implication. There is nothing in the Act, so Group Five argued, that ousts the High Court's jurisdiction to hear reviews in terms of PAJA or the principle of legality. In Group Five's view, the High Court has jurisdiction over all reviews arising from the Commission's exercise of its powers, save for the limited extent in which section 62(1) grants the Tribunal and the Competition Appeal Court exclusive jurisdiction. The issue in this matter, so Group Five contended, fell within the carve out in section 62(2).

In relation to the Commission's policy-based argument, Group Five contended that, because this was raised for the first time in the application for leave to appeal before this Court, it was not desirable for this Court to hear it. Group Five further contended that, in any event, there was no merit in the Commission's policy argument as there is nothing surprising about the notion that a plaintiff might formulate their claim in different ways and thereby bring it before a forum of their choice.

The first judgment, penned by Mlambo AJ (first judgment), found that the matter engaged this Court's constitutional jurisdiction as it concerned the exercise of public power by the Commission and the jurisdictional ambit of the Tribunal. The first judgment also found that the matter engaged this Court's extended jurisdiction as clarifying the jurisdictional ambit of the competition authorities vis a vis the civil courts gives rise to a point of law of general public importance. The first judgment also found that it was in the interests of justice that leave to appeal be granted as

this Court has not yet expressed an authoritative view on the extent to which, if it all, the High Court's jurisdiction to review the Commission's decisions is ousted in favour of the competition authorities, in particular the Tribunal.

On the merits, and considering the contemplated appellate function of the Tribunal under section 27(1)(c), the first judgment found that the Tribunal has the requisite jurisdiction to review the Commission's impugned conduct. The first judgment reasoned that the Commission's powers to initiate a complaint, and to grant or refuse immunity or leniency, fall under the exclusive jurisdiction provisions. As the impugned conduct is classified as an exercise of power under the exclusive jurisdiction provisions, the first judgment held that it falls within the Tribunal's exclusive oversight.

The first judgment further held that the issues on review do not qualify as issues of vires, as they do not require an enquiry into whether the Commission exercised powers beyond its jurisdiction. It held that the issues are, instead, about whether the Commission had improperly exercised the powers that are within its jurisdiction. The first judgment therefore found that a determination of the issues, properly characterised, require the interpretation and application of the exclusive jurisdiction provisions and thus fall within the Tribunal and Competition Appeal Court's exclusive jurisdiction.

The first judgment further found that the Supreme Court of Appeal's wide interpretation of section 62(2), which characterised the issues as giving rise to constitutional matters, cannot be sustained. It reasoned that the Commission's decisions invariably amount to an exercise of a public power. The Supreme Court of Appeal's interpretation, the first judgment held further, would result in almost all the Commission's decisions falling into the carve out, thus undermining the Tribunal's power of review. It reasoned that, from a practical perspective, the Supreme Court of Appeal's interpretation would allow for forum shopping by litigants and thereby frustrate and delay the determination of competition issues by the Tribunal.

Group Fives's attempt to characterise the issues on review as primarily a constitutional matter that falls to be reviewed under PAJA or the doctrine of legality was found by the first judgment to be misguided. It held that the issues are foremost

of a competition nature, and therefore do not fall under the category of issues contemplated in the statutory carve outs in sections 62(2) and 62(3)(b) of the Act. To characterize them as constitutional matters, the first judgment held further, would undermine the legislative policy choice to create a specialist competition review regime to ensure the efficient and appropriate application of the Act in resolving competition disputes. The first judgment therefore concluded that the High Court and the Supreme Court of Appeal erred in dismissing the Commission's jurisdictional challenge.

The second judgement (majority), penned by Majiedt J (Kollapen J, Madlanga J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ concurring) (second judgment), agreed with the first judgment that this matter engaged this Court's jurisdiction, for the reasons it persuasively gave. However, it parted ways with the first judgement on the determination of the central question in this case.

The second judgment found the interplay between sections 62(1) and (2) to be at the core of the dispute. It found that section 62(1) of the Act delineates the shared, exclusive jurisdiction of the Tribunal and Competition Appeal Court. That jurisdiction includes the interpretation and application of various statutory provisions, but excludes a matter referred to in section 62(2). Section 62(2) provides that the Competition Appeal Court has jurisdiction to decide "whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act", as well as any constitutional matter. That, the second judgment holds, plainly confers jurisdiction on the Competition Appeal Court to decide legality or vires challenges; but must be read together with section 62(3)(b), which provides that the Competition Appeal Court's jurisdiction conferred in subsection (2) is neither exclusive nor final.

The second judgment found that properly considered in its context and purpose, the meaning of the Act's unequivocal wording is plain. Matters that fall within section 62(1) fall within the exclusive jurisdiction of the Tribunal and the Competition Appeal Court. Matters that fall within the scope of section 62(2) fall within the jurisdiction of the Competition Appeal Court, but not the Tribunal. Finally, the jurisdiction of the Competition Appeal Court in respect of matters that fall within section 62(2), including legality challenges, is neither final nor exclusive. That is clear from section

62(3)(b). In reaching its conclusion, the second judgment also relied on and reaffirmed the principles laid out by the Supreme Court of Appeal in Agri Wire (Pty) Ltd v Commissioner, Competition Commission [2012] ZASCA 134; 2013 (5) SA 484 (SCA), which held "whether an act by the Commission is within its jurisdiction is a matter within section 62(2)(a) of the Act and is therefore not within the exclusive jurisdiction conferred by section 62(1)(b) of the Act".

Furthermore, section 169 of the Constitution sets out the powers of the High Court. The second judgment held that this section is couched in broad terms and affords original jurisdiction to the High Court to resolve any dispute that is capable of being resolved by resort to law, unless that jurisdiction has been assigned to another forum. The second judgment held that it is well established that ouster of the High Court's jurisdiction must be in unambiguous terms and there is a strong presumption against it. It held further that this entails a high threshold, as ouster must be either expressly excluded or must appear by necessary implication from the statute's provisions, and then only to the limited extent of that necessary implication.

The second judgment found that section 169(1)(a)(ii) of the Constitution specifically provides that the High Court may decide any constitutional matter "except a matter that is assigned by an Act of Parliament to another court of a similar status". It reasoned that the High Court therefore has no jurisdiction to determine constitutional matters which fall within the statutorily assigned purview of specialised forums with similar status. It further held that it is trite that review applications, whether brought under PAJA or the principle of legality, are constitutional matters. The second judgment thus found that the word "assign" in section 169(1)(a)(ii) implies exclusivity; and that if a constitutional matter is not placed within the exclusive jurisdiction of a specialised forum, the High Court's jurisdiction is not ousted.

As such, the second judgment found that section 62(2)(a), read together with section 62(3)(b), makes clear that jurisdiction to hear legality challenges is extended to the Competition Appeal Court, but that this is neither exclusive nor final. It held that review applications in terms of PAJA can therefore be entertained by the High Court, as that Court retains its review powers by virtue of its constitutional status and

powers. The Competition Appeal Court meanwhile, having "a status similar to that of the High Court", and empowered by section 62(2) of the Act, enjoys non-exclusive jurisdiction to hear PAJA and legality reviews in terms of the two provisions of the Act.

The second judgment found that the same is not true for the Tribunal. It is a creature of statute, created in terms of section 26 of the Act. It can exercise no powers other than those contained within the four corners of its empowering Act. Nowhere in that Act is there any conferral on the Tribunal of jurisdiction to deal with any of the matters in section 62(2), and deliberately so. The Tribunal and Competition Appeal Court do not share jurisdiction in a literal sense. Rather, they enjoy appellate jurisdiction, depending on the decision made and the associated right of appeal. The second judgment thus held that the Tribunal enjoys no plenary review jurisdiction.

The second judgment further held that the point is reinforced by the definitions of "tribunal" and "court" in PAJA. Section 6(1) of PAJA limits a party's rights to "institute proceedings in a court or a tribunal for the judicial review of an administrative action". Section 1 of PAJA, defines "tribunal" as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of [PAJA]". This definition, according to the second judgment, plainly excludes a statutory body like the Tribunal. For all these reasons, the second judgment concludes that theTribunal does not have jurisdiction to adjudicate a PAJA or legality review.

The second judgment found the grounds upon which Group Five seeks to review the decision of the Commission to relate to the validity and lawfulness of the initiation and subsequent referral, of the complaint to the Tribunal. These are questions of vires or legality, issues which typically fall within the ambit of the jurisdiction of the superior courts. The second judgment further held that although those questions arise, in this case, out of a complaint referred and initiated under the Act, the issues on review are not pure competition law matters – that is, matters that, according to the Act, fall within the exclusive competence of the Tribunal and the Competition Appeal Court. The second judgment thus found that once the issue is one of vires, it is a matter over which the Competition Appeal Court has concurrent jurisdiction with the High Court, to the exclusion of the Tribunal.

In the result, the majority of the Constitutional Court ordered that leave to appeal be granted and that the appeal be dismissed.

Member of the Executive Council for the Department of Health, Eastern Cape v M[....] (213/2021) [2022] ZASCA 140 (24 October 2022)

Order of court-settlement – action for damages for medical negligence – Rule nisi – whether competent for court to issue rule nisi calling upon a party to show cause why amounts agreed between legal representatives, without its authority, should not be made an order of court.

On appeal from: Eastern Cape Division of the High Court, Mthatha (Brooks J sitting as a court of first instance).

1 The appeal is upheld, with no order as to costs.

2 The order of the high court is set aside and replaced with the following order:

'The rule nisi dated 23 March 2020 is discharged, with no order as to costs.'

Facts: A mother sued the MEC for Health on behalf of her minor child for damages arising from harm caused to the child during birth at Mthatha General Hospital. The High Court found the MEC liable and the determination of quantum was postponed three times for settlement purposes. Pre-trial conferences and extensive discussions and negotiations followed, with the parties agreeing on just over R23 million as fair settlement.

Appeal: Against the order confirming the rule nisi which set out the amounts agreed by the party and noted that the MEC's representatives did not have instructions to settle the matter. The Superintendent General was called upon to show cause why an order should not be granted in terms of the draft order.

Discussion: The rule nisi procedure; the meaning and effect of the order; that the MEC's representatives did not have the authority to bind the MEC to the agreement and to address this, the rule nisi was issued.

Findings: A court is not entitled to direct parties to settle a dispute. It is a fundamental feature of our adversarial system that the parties act autonomously. The granting of the rule nisi was neither procedurally nor substantively within the power of the court. It could not have been confirmed on the return date.

Order: The appeal is upheld, with no order as to costs. The order of the High Court is replaced with one discharging the rule nisi with no order as to costs.

SJ Van Den Berg Attorneys v Tsihlas [2022] ZAGPPHC 716

Summary judgment-- for legal fees

A summary judgment arising from an agreement in which attorneys rendered legal services to Ms Tsihlas (respondent) for her divorce.
Discussed: Respondent's contention that: had it not been for the applicant's unprofessional services she would have received much more than she did from the settlement of the matter; further, that she is excused from making payment to the applicant and is entitled to payment of damages from the applicant once she has quantified same; and that applicant failed to advise her appropriately against signing the settlement agreement.
Findings and order: What the respondent does not say is that the settlement agreement was concluded outside of the applicant's mandate as she had already terminated his services at the time. There is no evidence that the respondent could adduce at trial to substantiate the claim that the services rendered by the applicant are not worthy to be compensated for. The application for summary judgment is granted.

Smith v SCI Essel Offshore Services Ltd and Another (17195/2010 ; A740/2014) [2022] ZAGPPHC 717

Rule 4 – Non-compliance with Rule 4 of the Uniform Rules of Court

The applicant seeks an order declaring that the non-compliance with Rule 4 of the Uniform Rules of Court is condoned regarding electronic service; first respondent's appeal has lapsed for failure to prosecute the appeal within the time periods allowed; judgment of the honourable Court in the main action is final.

Discussed: Evaluation; Rule 4 of the Uniform Rules of Court; condonation application; jurisdiction; the applicant seeks an order for a declaration that an appeal has lapsed, see City of Tshwane Metropolitan v Shai and Another [2007] 30L 1920

1; declaratory relief; section 21 of the Superior Courts Act 10 of 2013; lapse of appeal; no case is made out for a declaratory order based on the appeal being deemed to have lapsed; there is also no case made out for a compelling order for the applicant to file their amendments, including the special plea.

Order: The applicant's non-compliance with Rule 4 is condoned; first respondent's condonation application for late opposition is condoned; applicant's application is dismissed.

Munsami v Standard Bank [2022] 2018-47106 (GJ)

Execution – Residential property – Sale without reserve price – Former owner contending that bank obliged to bring separate Rule 46A application after summary judgment – Such order can be obtained in course of summary judgment application – Requirements met in this case – Uniform Rule 46A.

Facts: Summary judgment was obtained by the bank against Mr Munsami and the property was declared specially executable and the Registrar was authorised to issue a writ of execution without setting a reserve price. The property was his primary residence and the valuation report calculated the value between R3,38 million and R4,94 million. The property was sold in execution for R360,000 at a public auction.

Application: Seeking an order setting aside the sale in execution and transfer to the fourth respondent. The applicant contends that there was non-compliance by the bank with the provisions of Rule 46A prior to the sale and transfer.

Discussion: That the applicant emphasises that this is not a rescission application; the grounds are non-compliance with Rule 46A and the prejudice he has suffered as a result of the sale without any reserve price; and the contention that the bank was obliged to bring a separate Rule 46A application after the summary judgment.

Findings: It was not necessary for the bank to have launched a separate application to focus on Rule 46A; nothing prevents obtaining orders in terms of Rule 46A in the course of a summary judgment application, as long as the relevant allegations are made in the particulars of claim and verified on oath in the summary judgment

affidavit or in another affidavit. The two procedures had been effectively “married” in the current instance. There was no evidence to suggest that when the Judge made the Rule 46A orders, he did not as required by Rule 46A(9) consider whether a reserve price was to be set.

Order: The application is dismissed with costs.

Roets N.O. and Another v SB Guarantee Company (RF) (PTY) Ltd and Others (36515/2021) [2022] ZAGPJHC 754 (6 October 2022)

Urgency – Challenging the Courts finding on question of urgency

It was argued that this court erred in its finding on the question of urgency.

Discussed: It was argued that the court should have granted the interim relief and should not have struck the matter from the roll pursuant to a finding of self-created urgency; whether the applicant can be afforded substantial redress in an application in due course; an applicant only has to show that should interim relief not be granted it will suffer irreparable harm; whether this court is of the view that the appeal would have a realistic chance of success should leave to appeal be granted; whether such an interim order is appealable and will serve any purpose at this stage.

Order: The application for leave to appeal is dismissed with costs.

Lombard Insurance v McCrae [2022] ZAGPJHC 781

Courts – Commercial Court – Actions designated “commercial” in terms of the Commercial Court Directive – Procedural steps in peremptory terms – Where parties choose the commercial track they are ordinarily obliged to adhere to the procedure set out in the Directive – Interpretation and application of Directive.

Facts: Arising out of contractual obligations in a surety document, Lombard Insurance commenced an action against Mr McCrae with a combined summons in 2013. A lack of documents, Mr McCrae changing attorneys and an application for separation of the issues caused delays. In July he appointed new attorneys and they

were not able to proceed with the trial in early October so requested a postponement from Lombard's attorneys.

Application: The requests for postponements being denied, defendant launched a substantive application for postponement.

Discussion: Plaintiff's opposition because the postponement was the third, the current version of the plea was dated August 2016 and that the defendant has been supine in preparing his defence over a very extended period of time; that in February 2019 the action was certified as a Commercial Court case and became subject to the Commercial Court Directive; and the interpretation and application of the Directive.

Findings: There is an obligation on litigants, their legal practitioners and judges, ordinarily, to adhere to the procedure stipulated in the Directive. The Directive was not followed in this case and the issue of documents was a long standing issue, and appeared to be a real impediment to the prosecution of the matter.

Order: The trial is postponed sine die with the wasted costs reserved for determination by the trial court. The parties are directed to approach the Deputy Judge President requesting the appointment of a Case Management Judge for purposes of convening the first case management meeting as contemplated in Chapter 3 Directive.

Capital Profound v Guilt Food [2022] ZAMPMBHC 78

SETTLEMENT AGREEMENT MADE ORDERS OF COURT

Settlement agreement – Made order of court – Litigation not commenced – Dispute insufficient – Issue must be properly before the court, and but-for the settlement agreement, court would have entertained that dispute.

Facts: Applicants and Guilt Food concluded a one-year lease agreement. Guilt Food gave notice of its intention to vacate the leased premises before expiry and a cancellation agreement was concluded. This provided for reinstatement of the premises, hand-over of the keys and for payment of rental and other amounts owing.

Application: To make the agreement an order of court, on the strength of clause 18 which provides that the agreement will be incorporated into and made an order of court.

Discussion: That no litigation preceded the conclusion of the cancellation agreement; the contention that Eke v Parsons (CC) drew a distinction between direct and indirect issues or lis between parties, and that in this case the the matter was indirectly on an issue between the parties; the cases of Growthpoint Properties v Makhonya Technologies (GP); Avnet v Lesira Manufacturing (GJ) and PL v YL (ECG); and whether there had to be litigation between the parties before the court could make a settlement agreement an order of court.

Findings: On a proper construction of Eke v Parsons, the Constitutional Court held that where litigation had not yet commenced, a settlement agreement may not be made an order of court. There must be not only be a dispute between the parties that led to the settlement agreement, but the issue or lis concerned must be properly before the court, and but for the settlement agreement, the court would have entertained that dispute.

Order: The application is dismissed.

Rozani v Qoboka [2022] ZAECMHC 42

Rules of court- disregard for the rules and practice directives

The application sought an order that the appointment of the first respondent as the executrix of the deceased estate be declared unlawful. The court notes that first respondent failed to file heads of argument and a practice note as required in the Practice Directive. The applicants have also failed to comply with Rule 62 of the Uniform Rules of Court and the Practice Directive in that the papers are not properly collated, secured and paginated as required.

Discussion: There appears to be a growing prevalence of failure to comply with the Rules of Court and a total disregard for the Practice Directives. The time has now come to sound a stern warning to practitioners that unless there are justifiable circumstances warranting condonation for the omission or default, courts will not tolerate non-compliance with the Rules of Court and Practice Directives.

Findings and order: This matter has to be struck off the roll and reinstatement thereof will only be allowed once a satisfactory affidavit is filed explaining why the file was

not paginated. The court sounds a warning that in future it will not hesitate to make an order that legal practitioners concerned for both sides be deprived of their fees for preparation and appearances if the matter is struck off the roll for failure to comply with the Rules. The matter is struck off the roll.

JEH v AB [2022] ZAGPJHC 823

Contempt of court- Family – Divorce – Financial Disclosure Form – Failure to properly complete form – Prejudicing fair trial rights of plaintiff – Abuse of court procedures as a device to debilitate and out-litigate the other party should be discouraged by special cost orders.

Facts: After acrimonious divorce proceedings, both parties made various allegations against each other, including the failure to file the Financial Disclosure Form (FDF); failure to pay maintenance; and refusal to allow contact with the daughter.

Application: Each party seeks to hold the other in contempt of court for failing to comply with court orders and directives issued during the course of case management.

Discussion: The principles applicable to contempt applications; an earlier order finding that the defendant (father) posed a risk to their daughter and effectively suspending all contact with her; the misconceived application to suspend High Court civil proceedings involving the interests of the child pending the outcome of criminal charges initiated by the defendant; that the defendant was a practicing advocate with some 20 years' legal experience; and that the defendant failed to file the FDF and then failed to properly complete it.

Findings: The FDF is a mandatory document required to be properly completed and commissioned in all divorce proceedings. The failure to make proper disclosure as required in the FDF strikes at the very core of trial preparation. The defendant cannot be permitted to use his failure to make proper financial disclosure either as a means to delay the trial or to force the other party to accept something less than required just to get the matter to trial. The defendant believes that he can, with impunity, take advantage of the processes of the court in order to undermine their purpose and function.

Order: The defendant's applications (and counter-applications) are dismissed with costs on the attorney-and-client scale. Defendant is ordered to properly complete the FDF. If he fails to, he will show cause in open court why he should not be held in contempt of court. He is held to be in contempt of the Rule 43 order and is ordered to make payment with interest. He is to pay the plaintiffs costs of the application on the attorney-and-client scale.

B v B and Others In re: B v B and Others (135/2019) [2022] ZAFSHC 261 (11 October 2022)

Joinder – Joinder application with the purpose of obtaining a declaratory order

Where a defendant wishes to join a party in a counterclaim it would need leave of the court to join such a party; Rule 24(2) of the Uniform Rules of Court regulates the procedure and the requisites for such joinder.

Discussed: The issue of joinder should not be conflated with the issue of whether the party seeking joinder has a good case against the party sought to be joined; see Gordon v Department of Health, Kwazulu-Natal [2008] ZASCA 99; on behalf of applicant it was submitted that the second and third respondents have a direct interest in the matter and as relief is sought against the trust, they should be joined of necessity; VW v VW and Others [2017] ZANCHC 26; Court having considered the arguments by both parties declare the application should succeed and leave be granted to the applicant to join the second and third respondents as requested.

Order: The second and third respondents are joined as the fourth and fifth defendants respectively in the claim in reconvention in the divorce action under case number 135/2019.

Eastern Cape Council of the LPC v Mfundisi [2022] ZAECMKHC 87

Attorney – Striking from roll – Conviction of fraud – Disciplinary committee recommending sanction of suspension (suspended) – Council can seek relief outside this sanction – Court ultimately decides – Struck from roll – Legal Practice Act 28 of 2014, s 40(8).

Facts: Ms Mfundisi practiced as an attorney under the name of J Mfundisi Attorneys in Makhanda. She was previously employed as a litigation officer at the Road Accident Fund. Arising out of an incident while employed there, she was convicted of fraud and sentenced to a fine of R100,000. Her applications for leave to appeal were unsuccessful.

Application: The council seeks an order striking Ms Mfundisi's name from the roll of attorneys.

Discussion: That the disciplinary committee advised the council that Ms Mfundisi be suspended from practicing for one year, which suspension be suspended for three years; how before this court she stated that "categorically that there is nothing unlawful, untoward or irregular in all what I did"; that the version placed before court was the very same version rejected by the Commercial Crimes Court; whether the council is bound by the sanction of the disciplinary committee; the interpretation of section 40(8) of the Legal Practice Act 28 of 2014; and the roles of the disciplinary committee and the council.

Findings: The purpose of the section is to ensure that the Council acts upon all infractions, as determined by the disciplinary committee. It does not preclude the council from seeking relief outside of the sanction deemed appropriate by the disciplinary committee. It is the court which ultimately determines the appropriate sanction in each case. Despite the finding of the Commercial Crimes Court, Ms Mfundisi unscrupulously denied that her conduct was unlawful. She shows no remorse for her actions and demonstrates no appreciation for her wrongful conduct.

Order: Ms Mfundisi's name is struck from the roll of attorneys.

Oliver NO v MEC for Health, Western Cape [2022] ZAWCHC 208

Litis contestatio – Claim for damages arising out of medical negligence – Plaintiff passing away shortly after amendments to particulars – Amendments re-opened pleadings – Litis contestatio fell away – Non-pecuniary claims for general damages are non-transmissible to the deceased's estate before litis contestatio is reached.

Facts: The deceased instituted action for damages against the MEC based on the alleged negligence of medical staff which led to the amputation of her leg. Her particulars were amended four times, the last of which increased the claim for future

medical expenses. She passed away soon after the amendment and prior to the expiry of the 15-day period afforded to the MEC to file an amended plea in response to the amended particulars of claim.

Issue: The transmissibility of non-pecuniary claims for damages to the estate of the deceased and whether the court should develop the common-law and bring it in line with the Bill of Rights.

Discussion: Claims for damages when the plaintiff dies before or after litis contestatio; Uniform Rule 29(1) and the stages at which pleadings are considered closed; the effect of the decision in Nkala v Harmony Gold Mining (GJ); whether the amendment of the plaintiff's particulars of claim had an effect of re-opening the pleadings and that litis contestatio fell away; that the amendments were substantial and material; section 27 of the Constitution and access to health care services; and the concept of stare decisis.

Findings: A development of the law would need to consider aspects such as susceptibility to abuse, sustainability on the economic sphere and the public purse, and lackadaisical attitudes on the part of the plaintiffs to pursue their claims. The plaintiff's case for the development of common-law should not succeed.

Order: The amendment by the deceased of her particulars of claim had the effect of reopening the pleadings and litis contestatio fell away. The non-pecuniary claims for general damages are non-transmissible to the deceased's estate before litis contestatio is reached. The common-law rule as it stands does not offend the spirit, purpose and object of the Bill of Rights and therefore does not require development.

HLB INTERNATIONAL (SOUTH AFRICA) (PTY) LTD v MWRK ACCOUNTANTS AND CONSULTANTS (PTY) LTD 2022 (5) SA 373 (SCA)

Practice — Judgments and orders — Interpretation — Applicable principles — Linguistic, contextual and purposive approach to be applied, as in interpretation of any legal document.

Practice — Judgments and orders — Correction, alteration or amendment of court's own judgment — Correction of ambiguity, error or omission — Applicable principles — Uniform Rules of Court, rule 42(1)(b).

The Supreme Court of Appeal, faced with an appeal concerning an alteration the Pretoria High Court made to one of its own orders, set out and applied the principles governing the variation and interpretation of judgments and orders (which are essentially the same thing — see [18]).

The facts were that a dispute arose between the appellant (HLB) and the respondent (MWRK) over whether the High Court's order for the sale of certain property meant that the property had to be sold subject to any existing lease. Seeking to resolve the dispute in its favour, MWRK requested the court to correct its order by including an instruction that the sale should be 'free of any lease relating to the property'. HLB objected, arguing that the original order clearly and unambiguously stated that the property was to be sold subject to the lease. The court, however, agreed with MWRK and made an order varying the original order by incorporating a stipulation that the sale was to be free of any lease. The court emphasised that, due to an omission on its part, the original order did not reflect its real intention that the sale should be lease-free.

HLB then launched the present appeal against the second order. After pointing out that the appeal did not concern the correctness of the first order but only its interpretation and correction in terms of the second order, the Supreme Court of Appeal —

Held

Rule 42(1)(b) of the Uniform Rules, in conformity with existing common-law principles, allowed superior courts, on their own initiative or on application by an affected party, to rescind or vary an order or judgment if it contained an ambiguity, or a patent error or omission. This had been interpreted, against the background of the common-law principle of certainty of judgments, to allow a court to vary its own judgment in accordance with its true intention by substituting more accurate or intelligent language, provided that the substance of the judgment was not affected. * The court's inherent power to depart from the general principle in the event of a

patent error was held to be consistent with the doctrine of res judicata and s 173 of the Constitution. (See [19] – [23].)

As to the principles applicable to the interpretation of judgments or orders, there had been significant recent developments in the field, both in this country and in others that follow similar rules to our own. It was now an essentially unitary exercise in which the manifest purpose of the order was determined from the language used in accordance with the established rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it had to be read as a whole to ascertain its intention — Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA) ([2012] ZASCA 49). In addition, regard could be had to the relevant background facts that culminated in the making of the judgment or order. Interpretation now called for a linguistic, contextual and purposive approach. (See [25] – [28], [30].)

Here, proper interpretative analysis led to the inevitable conclusion that the court's omission to state in its first order that the sale of the property contemplated in the order was to be free of the lease, was a 'patent error or omission' in expressing the order, which resulted in the first order not giving effect to the court's true intention. In its second order, the court correctly rectified the patent omission so as to give effect to its true intention, which correction did not alter the intended sense and substance of the order. (See [36].) Therefore, the appeal against it would be dismissed.

SPECIAL INVESTIGATING UNIT AND ANOTHER v ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD 2022 (5) SA 416 (SCA)

Review — Grounds — Legality — Self-review by organ of state — Delay in institution of review proceedings — Assessment — Reasonableness — State's duties to act promptly when in possession of information required to launch review and to explain any delay — Court's discretion to overlook unreasonable delay in interests of justice — Relevant factors.

The appellants, both organs of state, had asked the Pretoria High Court to review and set aside (i) their decisions to award tenders to the respondent; and (ii) the agreements subsequently concluded. The High Court refused the application but granted leave to appeal to the Supreme Court of Appeal. The first tender was awarded in 2011.

The application was triggered by irregularities allegedly uncovered by the first appellant (the SIU) in 2016, during an investigation of the procurement process. Acting on the SIU's advice, the second appellant (the Department of Correctional Services) in August 2016 stopped payment under the contracts and in March 2017 cancelled them.

On 28 March 2018 the appellants launched their High Court application for self-review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality. Crucially for the appeal, they in addition sought condonation for the delay in bringing the application, a request the High Court refused because the delay was unreasonable.

In its judgment the SCA dealt with the following matters: (i) whether PAJA was applicable to the present case; (ii) the assessment of delay in legality reviews; (iii) whether the appellants' delay in seeking review was unreasonable; (iv) whether the delay ought to be overlooked; (v) whether the appellants were able to prove non-compliance with certain statutory prescripts; (vi) the standard of the appellants' conduct throughout the process; and (vii) whether the delay caused the respondent prejudice.

Held

(i) Applicability of PAJA: It was now settled law that an organ of state could not apply for the review of its own decision under PAJA. Proceeding by way of legality rather than PAJA would in any event favour the appellants. (See [24] – [25].)

(ii) The assessment of delay in legality reviews: The test in a legality review was whether the delay was unreasonable. The clock started running from the date that the appellant became aware or reasonably ought to have become aware of the action in question. The reasonableness of the delay was assessed by considering the explanation given for it, which had to cover the entire period of the delay. If found to be unreasonable, then the next question was whether the court ought, on the available facts, to overlook it in the interests of justice. Relevant factors were potential prejudice to the affected parties, the consequences of setting aside the impugned decision, the nature of the decision and the conduct of the appellant.

(iii) Was the delay unreasonable? As far as the SIU was concerned, the clock began ticking in September 2016, when it gained sufficient knowledge of the irregularities. For the Department this was in January 2017, when it was advised by the SIU to cancel the agreement. The Department's failure to provide evidence about what its officials did between the award of the first tender in 2011 and the SIU's eventual involvement in 2016 or about what steps it took to monitor compliance by the respondent, was unsatisfactory. For its part, the SIU provided scant information about what happened between September 2016 and the launch of the application 18 months later. The explanations given by the appellants did not account for the full period of delay. They dithered instead of acting promptly, and the delay was clearly unreasonable. (See [32] – [45].)

(iv) Should the delay nevertheless be overlooked? In the light of the inordinate, insufficiently explained and unreasonable nature of the delay; the egregious conduct of the Department; the fact that the review application had no merit; the prejudice to be suffered by the contracting parties; and the flimsy nature of the challenges to the procurement process, the delay could not be overlooked. (See [83]).

(v) Proof of non-compliance with statutory prescripts: The appellants' allegations regarding the respondent's failure to comply with various statutory requirements were not supported by sufficient facts. The appellants failed to prove significant breaches of the applicable statutory prescripts or the tender specifications, or misrepresentations by the respondent. The appellants' prospects of success in the review application were thus poor. (See [57], [67], [77].)

(vi) Appellants' conduct: The Department remained supine throughout the entire process, even after it was alerted to possible irregularities (see [78]).

(vii) Prejudice: The respondent was certainly negatively affected by the inordinate delay in bringing the review application for projects that had commenced years earlier (see [79]).

The appeal would therefore be dismissed with costs (see [83]).

Z v Z 2022 (5) SA 451 (SCA)

Divorce — Maintenance — Adult dependent child — Locus standi in judicio of parent to claim maintenance from other parent for and on behalf of adult dependent child of their marriage upon their divorce — Divorce Act 70 of 1970, ss 6(1)(a) and 6(3).

Under s 6(1)(a) of the Divorce Act 70 of 1970, 'a decree of divorce shall not be granted until the court is satisfied that . . . the welfare of any minor or dependent child of the marriage' is provided for; and s 6(3) provides that 'a court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage . . . make any order which it may deem fit . . . .'

This case concerned an appeal to the Supreme Court of Appeal, against a High Court order which upheld a special plea in divorce proceedings, that a parent lacked locus standi in judicio to claim maintenance for and on behalf of the parties' adult dependent children from the other parent.

Held

An interpretation of s 6 of the Divorce Act that excluded a claim for maintenance by a parent on behalf of a dependent child who had attained majority would not preserve its constitutional validity, and result in absurdity. An interpretive analysis of the words used in ss 6(1)(a) and 6(3) — their ordinary grammatical meaning, properly contextualised — inevitably led to the conclusion that they vested parents with the requisite legal standing to claim maintenance for and on behalf of their dependent adult children upon their divorce. It followed that the father's special plea must fail, and that the appeal would be upheld.

GKR v MINISTER OF HOME AFFAIRS AND OTHERS 2022 (5) SA 478 (GP)

Consitutional law — Legislation — Validity — Divorce Act 70 of 1979, s 7(3)(a) — Invalid to extent of limiting operation of s 7(3) to marriages out of community of property entered into before commencement of Matrimonial Property Act 88 of 1984 — Such differentiation constitutionally invalid unfair discrimination — Appropriate remedy removing cutoff date — Constitution, s 9(3).

Marriage — Divorce — Proprietary rights — Marriage out of community of property — Division of assets — Constitutionality of Divorce Act's limitation of availablity of redistribution order to marriages entered into before commencement of Matrimonial Property Act 88 of 1984 — Such differentiation constitutionally invalid unfair

discrimination — Appropriate remedy removing cutoff date — Constitution, s 9(3); Divorce Act 70 of 1979, s 7(3)(a).

Section 7(3)(a) of the Divorce Act 70 of 1979 (the Divorce Act) provides the court granting a decree of divorce in respect of a marriage out of community of property concluded before 1 November 1984, with a discretion to make a redistribution order to the effect that any asset, or sum of money, may be transferred from one spouse to another, subject to the provisions of ss 7(4), (5) and (6). No discretion to make such a distribution order is afforded to the court iro marriages out of community of property concluded after 1 November 1984 with the exclusion of the accrual sharing system introduced by the Matrimonial Property Act 89 of 1984 (the MPA), which commenced on that date.

The applicant, Mrs G, and her husband were married out of community of property, excluding the accrual system — in March 1988. Aggrieved that she (and other spouses in her position) were not entitled to apply for a redistribution order, she sought an order declaring s 7(3)(a) unconstitutional and invalid to the extent that its limitation of s 7(3) offended the Constitution's guarantee of equality before the law (s 9(1)) by arbitrarily and irrationally differentiating between people married before and after 1 November 1984; and also constituted unfair discrimination prohibited by s 9(3) since the cutoff date disproportionately impacted women.

Held

As to s 9(1): Since the possibility of granting a redistribution order was created concomitantly with the introduction of the system of accrual sharing, it could be assumed that s 7(3) was intended to be a transitional measure. The legislature arguably did not extend the relief to marriages out of community of property excluding the accrual system, because the MPA provided the option of choosing between a system that included or excluded accrual sharing. By restricting the operation of s 7(3) to marriages concluded before 1 November 1984, the legislature honoured the principle of freedom of contract and pacta sunt servanda. The inclusion of the time bar was therefore not irrational (see [52]).

As to s 9(3): The aim of s 7(3) was to redress the unfair financial imbalance flowing from the very nature of a marriage being out of community of property in circumstances where one party contributed to the other's maintenance or the

increase of the other's estate during the existence of the marriage. The equality issue brought to the fore by this application included economic inequity, which could be addressed by an order in terms of s 7(3)(a) but was available only to spouses who had married out of community of property before 1 November 1984. It could not be gainsaid that s 7(3)(a) of the Divorce Act differentiated between spouses married out of community of property before and after the cutoff date. They find themselves in similar positions, yet only economically disadvantaged parties from the former group may approach a court for the relief provided for in s 7(3)(a), but not economically disadvantaged parties from the latter group — solely based on the date of the marriage.

Thus, inequity persisted where an economically disadvantaged spouse married out of community of property after the cutoff date made a direct or indirect contribution towards the other spouse's estate. Such an economically disadvantaged party's human dignity was impaired if they could not approach the court to exercise the discretion provided for in s 7(3). This differentiation amounted to discrimination and was patently unfair — an economically disadvantaged party who could make out a case for relief in terms of s 7(3), was left without any recourse to the court to address the injustice. Accordingly, the cutoff date contained in s 7(3)(a) unfairly discriminated against people married according to a system of complete separation of property, by denying recourse to the court to address the injustice, on the ground of the date of their marriage. (See [47], [53] – [61].)

As to appropriate relief: This unfair discrimination would be corrected by removing the time bar. (See [65], [68], [71.)

VDB v VDB AND OTHERS 2022 (5) SA 633 (GJ)

Execution — Writ of execution — Arrear maintenance — Procedure for obtaining writ in maintenance court — Whether maintenance debtor having prima facie right to notice of maintenance creditor's intention to apply for writ.

Maintenance — Arrear maintenance — Execution — Procedure for obtaining writ of execution in maintenance court — Whether maintenance debtor having prima facie right to notice of maintenance creditor's intention to apply for writ — Maintenance Act 99 of 1998, ss 27(1) and (2).

The applicant applied on an urgent basis for orders directing the first respondent, his ex-wife, to first furnish him with 10 court days' notice if she intended to apply to any court on an ex parte basis for a warrant of execution against him in respect of arrear maintenance allegedly due to her.

The application was launched after he received a notification from the second respondent, his retirement fund, that a deduction had been made from his retirement annuity fund in accordance with a writ of execution obtained by his ex-wife on an ex parte basis in the maintenance court; and after she indicated that she would affect another such withdrawal. His concern was that the premature withdrawal substantially decreased the value of his investment and was prejudicial to him. He claimed that it was unfair for such an application to be made without notice to him and without any opportunity to make representations to the court.

At issue was the applicant's entitlement to such notice and the right on which such a notice was predicated.

Held

Where the writ was issued by the maintenance court pursuant to the provisions of the Maintenance Act 99 of 1998 (the Act), the procedure for obtaining such a writ was prescribed in ss 27(1) and (2) of the Act. In the case of a dispute about the amount owing under a pre-existing maintenance order, the only remedy for an aggrieved party was to apply under s 27(3) of the Act to set aside the warrant. The Act did not confer the claimed right of notice on the applicant. Where there was a pre-existing maintenance court order, there was no mechanism to resolve a dispute about the quantum owing before the issue of a writ, nor a requirement for a notice before the issue of such a writ. Accordingly, the application would be dismissed.

VOLKSWAGEN FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD v PILLAY 2022 (5) SA 639 (KZP)

Credit agreement — Consumer credit agreement — Debt review — Failure to plead participation in good faith — Not rendering particulars excipiable — Obligation to act in good faith extending to consumer as well — National Credit Act 34 of 2005, s 86(5).

A credit provider's particulars of claim in an action on a credit agreement under the National Credit Act 34 of 2005 are not rendered excipiable by its failure to plead that it participated in the debt review process in good faith as intended in s 86(5) of the Act. The obligation to act in good faith during debt review is a reciprocal one that obliges the consumer to act diligently and proactively the moment it becomes clear that the credit provider is not engaging in good faith or does not respond to his or her proposals for debt review. (See [34] – [36].)

A consumer cannot claim to be overindebted while at the same time retaining possession of the goods forming the subject-matter of the agreement. (See [40] – [41].)

Defensor Electronic Security (Pty) Ltd v MEC for Co-operative Governance, Human Settlements and Traditional Affairs, Northern Cape Province and another [2022] 4 All SA 82 (NCK)

Civil Procedure – Urgency – Rule 6(12)(b) of the Uniform Rules of Court stipulates that in every affidavit or petition filed in support of any urgent application, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course.

Constitutional and Administrative Law – Procurement – Award of tender – Whether decision to disqualify applicant as bidder was rational and lawful – Where decision was procedurally unfair and materially influenced by an error of law, disqualification of applicant declared constitutionally invalid.

The second respondent (“Masicebise”) was the successful bidder for a tender published by the first respondent (the “MEC”). The tender pertained to the appointment of a service provider to render security services for the Northern Cape Department of Co-operative Governance, Human Settlements and Traditional Affairs at certain of its offices. The applicant’s bid was unsuccessful. Its proposal was

deemed unresponsive, because its unit price per security guard charged was inconsistent with the unofficial Private Security Industry Regulatory Authority ("PSIRA") rates. Upon being disqualified, the applicant ("Defensor") brought an urgent application for the review and setting side of the MEC's decision to disqualify it and to award the contract to Masicebise, and to itself be awarded the contract. The Court declared the decision to disqualify Defensor constitutionally invalid, and set it aside, together with the award of the tender to Masicebise. Defensor's and Masicebise's bids were remitted to the MEC to be re-evaluated on price. Reasons for the order were provided by the Court.

Held – The first question was whether the application was indeed urgent. In urgent applications, the court may dispense with form and service provided for in the rules and dispose of the matter at such time and place and in such a manner and in accordance with such a procedure as it deems fit. Rule 6(12)(b) of the Uniform Rules of Court expressly stipulates that in every affidavit or petition filed in support of any urgent application, the applicant must set forth explicitly the circumstances which render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course. The Court found that, regard being had to the facts and circumstances of this case, the motion was urgent.

The next question was whether the mere fact that Defensor's tendered price was below PSIRA rates ipse facto rendered its bid non-responsive. Defensor contended that the basis for the MEC's finding that its tender was non-responsive was fundamentally flawed because neither the Private Security Industry Regulation Act 56 of 2001 nor the Private Security Industry Regulations, prescribe a minimum amount that must be charged by a security company to a client. The undercharging by Defensor was considered a risk because it implied an underpayment in salaries of security personnel. When organs of State contract for goods or services, they must do so in accordance with systems which is fair, equitable, transparent, competitive and cost-effective. An Organ of State may also only act within the powers lawfully conferred upon it. The Public Finance Management Act 1 of 1999, which trumps all other legislation inconsistent with it, places numerous duties on accounting officers and other officials in provincial departments. Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 empowers a court to judicially review an administrative action on various grounds. When any public power is being exercised,

it is required that there be a rational relationship between the exercise of power and the purpose for which the power was given. The competitive system by which government procurement must be effected entails ensuring that the best deal in terms of price and efficiency is selected.

In this case, the MEC's decision to disqualify Defensor from the tender was not only procedurally unfair but also materially influenced by an error of law. The decision was not only taken for a reason not authorised by the empowering provisions, but irrelevant considerations were also taken into account or relevant factors were not considered. The tender did not stipulate prices should not be below PSIRA rates. Consequently, Defensor's prices could not on that fact alone rationally be deemed to be materially deviant. The impugned decision was thus arrived at arbitrarily or capriciously or mala fide as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose. The decision was also not rationally connected to or the purpose for which it was taken.

Hoque and others v Minister of Home Affairs and another [2022] 4 All SA 129 (WCC)

Constitutional and Administrative Law – Judicial review – Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 allowing court to grant any order that is just and equitable, including setting aside of the administrative action and substituting or varying it, instead of remitting for reconsideration – Exceptional circumstances must exist to justify substitution or variation.

Immigration – Permanent residence permits – Judicial review of refusal of permits – In absence of sufficient evidence to justify impugned decisions, review relief had to be granted – Delay in seeking review and failure to exhaust internal remedies condoned in interests of justice.

The applicants were Bangladeshi nationals seeking permanent residence in South Africa. The first applicant had obtained a general work permit in 2009. Upon expiry of that permit in 2019, he applied for a critical skills visa. That, together with his family's applications for visitor's visas, was granted in 2021. Prior thereto, in 2015, the first applicant had applied for a permanent residence permit in terms of section 26(a) of the Immigration Act 13 of 2002. The second applicant, applied for a permit in terms of section 26(b) on the basis that she had been married to the first applicant for more

than five years, and two of the minor children, the third and fourth applicants, applied for permits in terms of section 26(c) on the basis that they were of minority age. The refusal of the applications gave rise to the litigation between the parties. The applicants sought condonation of the delay in instituting their application and the failure to exhaust internal remedies; a declaration that the first applicant was not a prohibited person in terms of section 29(1) of the Immigration Act; and the review and setting aside of the decisions taken by the respondents in rejecting the applications for permanent residence permits.

Held – The application turned on whether the Minister acted lawfully when he rejected the first applicant's application for a permanent residence permit. The applicants argued that the reasons given for the refusal fell to be reviewed and set aside, and that the respondents had infringed the applicants' rights to lawful and reasonable administrative action.

In considering the reasons given for refusing permanent residence permits, the court found that the respondents had failed to place sufficient evidence before the court to justify the impugned decisions, and the review relief sought by the applicants therefore had to succeed. There was nothing in the documents filed of record to substantiate the decisions taken by the respondents.

Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 allows a court in proceedings for judicial review under the Act to grant any order that is just and equitable, including orders setting aside the administrative action and substituting or varying it, instead of remitting the matter for reconsideration by the original decision-maker. Exceptional circumstances must exist to justify substitution or variation. Section 172(1)(b) of the Constitution further grants a court the power to make any order that is just and equitable when deciding a constitutional matter. The Court decided that this was a matter in which it should substitute the decision instead of remitting it to the respondents.

Section 7(1) of the Promotion of Administrative Justice Act requires applications for judicial review to be brought within 180 days of the impugned decision, or from the date on which any internal remedy was finalised. The court has a discretion to condone any delay if in the interests of justice. In this case, the Court was satisfied that it would be in the interests of justice to extend the 180-day period prescribed so

as to allow for the consideration of the review relief sought by the applicants, and to condone the failure to exhaust all internal remedies available.

It was declared that the first applicant was not a prohibited person in terms of section 29(1) of the Immigration Act, and the second respondent was directed to issue permanent residence permits to the applicants.

End for now