LEGAL NOTES VOL 10/2022

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WOMEN'S LEGAL CENTRE TRUST v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2022 (5) SA 323 (CC)

Marriage — Muslim marriage — Non-recognition — Constitutionality — Marriage Act 25 of 1961; Divorce Act 70 of 1979.

This application had its origin in consolidated applications heard by a full bench of the Western Cape Division which had resulted in a declarator that the state was obligated by s 7(2) of the Constitution to enact legislation recognising marriages solemnised under Sharia law as valid marriages, and to regulate their consequences (see [7], [15] and [21]).
On appeal, the Supreme Court of Appeal declared the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 inconsistent with the Constitution in their failure to recognise marriages under Sharia law as valid marriages and to regulate their consequences. It also declared the Divorce Act inconsistent with the Constitution in its omission of protections for minor and dependent children at the dissolution of such marriages, in its omission of provision for redistribution of assets on dissolution, and in its omission of measures for forfeiture of patrimonial benefits. These declarations were referred to the Constitutional Court for confirmation (see [27]). In addition, the SCA declared the common-law definition of marriage to be inconsistent with the Constitution in its exclusion of Muslim marriages (see [27]).
Here, on appeal to the Constitutional Court, the first issue was confirmation (see [1], [28] and [41]).
Held, that the Marriage Act and Divorce Acts' exclusion of individuals married under Sharia law was discriminatory and unfairly so (see [48], [50], [53] and [56]).

[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 exclusion also unjustifiably infringed the rights to dignity and to access to courts of Muslim wives, and was contrary to the best interests of the children born from Muslim marriages (see [57] – [58] and [62] – [63]).
As to the common-law definition of marriage, it had an unfairly discriminatory impact on Muslim widows and was thus unconstitutional and requiring of development, which should be its extension to include Sharia unions (see [65] – [66] and [68]).
The second issue was retrospectivity: in order to achieve the proper balance, the order would apply to marriages under Sharia law subsisting at the date of applicant's application to the High Court and to marriages which at the date of the Constitutional Court's order had been dissolved but in respect of which proceedings had not been finalised (see [78]).
The third issue was whether the state should be ordered to enact standalone legislation on Muslim marriages (see [80]).
Held, that legislation on marriages and divorce existed and that to order the state to legislate under s 7(2) of the Constitution would subvert subsidiarity: the appropriate course would be to challenge the legislation rather than resort directly to the Constitution (see [82]).
The Supreme Court of Appeal's declarations of invalidity confirmed.

FRANNERO PROPERTY INVESTMENTS 202 (PTY) LTD v SELAPA AND OTHERS 2022 (5) SA 361 (SCA)

Land — Land reform — Statutory protection of tenure — Eviction — Onus to prove application of Act — Party invoking Act bearing onus — Need to tender sufficient evidence — Extension of Security of Tenure Act 62 of 1997.

In August 2015, in the North West Division of the High Court, Mahikeng, the applicant, Frannero Property Investments 202 (Pty) Ltd, launched an application in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 for the eviction from its property — portion 35 of the Farm Waterval 306 in Rustenburg, North West Province (the property) — of the first to seventh respondent occupiers (the respondents). The applicant asserted that the oral lease agreements in terms of which the respondents had occupied the property had been lawfully cancelled. Accordingly, by remaining in occupation of the property, the respondents were unlawful occupants under PIE, and the applicant was entitled to the relief it sought. The High Court however found that it lacked jurisdiction to hear the eviction application, because the first to seventh respondents were occupiers in terms of ESTA, and that their occupancy rights had not been lawfully terminated as prescribed in that Act. The full court rejected the appeal to it. The applicant sought from the Supreme Court of Appeal special leave to appeal, and was granted it (see [34]).
Before the SCA, the issue to be determined was whether ESTA was applicable in the present circumstances. That would be the case if the land in question was the type as contemplated in s 2 of the Act, and the respondents qualified as 'occupiers' as defined in s 1(1)*(x)*, ie that they resided on land belonging to another person, and had consent to do so on or after 4 February 1997, and they did not fall under the exceptions set out in paras *(a)* to *(c)* of the definition. (See [22] and [23].) There was no real dispute that the property fell under the scope of the Act (see [26]). The dispute focused on the question whether the respondents were 'occupiers' (see [27]).

Held

Consistent with the basic common-law principle that 'the party who alleges must prove', the burden to prove that ESTA applied in relation to a specific occupier rested on the occupier who invoked the application of the Act. The occupier had to bring herself within the ambit of the Act by proving that she complied with all the components of the definition of an occupier in the Act, including that she was not excluded from the application of the Act under s 1(1)*(x)*. (See [24].)

However, the occupier was assisted by a number of presumptions contained in the Act. In relation to consent, s 3(4) of the Act provided that, '(f)or the purposes of civil proceedings in terms of this Act, a person who continuously and openly resided on land shall be presumed to have consent unless the contrary is proved'. (See [25].) There was also a deeming provision provided for in s 3(5) of the Act in terms of which a person who had continuously and openly resided on land for a period of three years would be deemed to have done so with the *knowledge* of the owner or a person in charge. (See [25].)

Turning to whether the respondents had discharged the onus upon them, the respondents did not need to prove that they had consent to reside on the property: Apart from the fact that the presumptions operated in favour of the respondents, an acknowledgement that the respondents did, at some stage, have consent to reside on the property, or could be presumed to have had such consent, was implicit in the applicant's own case. Such acknowledgement was apparent from the cancellation notices themselves. (See [27].)

As to the applicability of the exceptions, it was apparent from the evidence that the respondents were not labour tenants and they were not using or intending to use the property for industrial, mining or commercial purposes. What remained was for the respondents to prove that their income did not exceed the prescribed amount. (See [28].) The respondents' evidence in this regard was simply a single sentence, amounting to hearsay, in the answering affidavit deposed to by one of the occupants [Chivura], that the '(m)ajority of the Respondents are unemployed and do not earn an income in excess of R5000 per month'. Such a bare averment was not adequate for the discharge of the onus on the respondents to prove that their income did not exceed the prescribed maximum income (except in respect of 15 occupants who had filed confirmatory affidavits verifying their unemployed status). (See [29] and [30].)

Accordingly, in relation to the occupants whose names appear in sch A, the appeal should be dismissed; in respect of the rest, the appeal should be upheld, and the application brought in terms of the PIE Act referred back to the High Court for determination.

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.

MINISTER OF HEALTH AND ANOTHER v ALLIANCE OF NATURAL HEALTH PRODUCTS (SOUTH AFRICA) 2022 (5) SA 392 (SCA)

Administrative law — Administrative action — What constitutes — Making of regulations by Minister — Promotion of Administrative Justice Act 3 of 2000, s 1.

Medicine — Regulation — Natural-health products — Applicability to of regulations under Medicines and Related Substances Act — Regulations ultra vires to extent that they purport to regulate substances other than 'medicine' — 'Medicine' required to have therapeutic purpose — Regulations not applying to 'complementary medicine' or 'health supplement', since they are not required to claim or have therapeutic purpose — Medicines and Related Substances Act 101 of 1965, s 1 sv 'medicine', regs under GN 859 of 2017 sv 'complementary medicine', 'health supplement'.

The respondent (the Alliance) challenged the Minister of Health's 2017 General Regulations governing the market for complementary medicines and health supplements in the Pretoria High Court. The regulations attached obligations (in respect of labelling, professional and patient information, and advertising) to complementary medicines and health supplements. The Alliance claimed the Minister's attempt to regulate substances that were neither medicines nor scheduled substances was ultra vires his rule-making powers. The Minister responded that the definition of 'medicine' in s 1 of the Medicines and Related Substances Act 101 of 1965 (the Medicines Act) was wide enough to include any 'complementary medicine' or 'health supplement' as defined in the regulations.

The Pretoria High Court agreed with the Alliance on the ultra vires ground and made an order (i) that the definition of 'medicine' in s 1 of the Act applied only to substances used or purported to be suitable for the diagnosis, treatment, or prevention of maladies, in order to achieve a medicinal or therapeutic purpose; and (ii) that the regulations were unlawful in the extent that they applied to 'complementary medicines' and 'health supplements' that were not 'medicines' or 'Scheduled substances' as defined in s 1. The declaration of invalidity was suspended for 12 months to allow the South African Health Products Regulatory Authority an opportunity to correct the defect. While supporting the rest of the order, the Alliance cross-appealed against the suspension of the declaration of invalidity, for which it said there was no justification.

Held

Since the making of regulations by a Minister was an instance of administrative action, the matter had to be decided under the Promotion of Administrative Justice Act 3 of 2000 (see [15]).

While s 2A of the Medicines Act conferred the authority to regulate and control medicines and scheduled substances, it did not refer to substances related to medicines, and it was therefore difficult to believe that the Minister's powers encompassed the power to regulate substances that were not 'medicines' as defined in the Act. Nor did the Minister argue otherwise (see [18]). For something to be a 'medicine', it had to have or claim to have a therapeutic purpose (see [20]). From the definition of 'complementary medicine' in the regulations (see [21]), it was clear that it was not restricted to substances that had or claimed to have a therapeutic purpose (see [22]). Nor was the definition of 'health supplement' (see [24]) restricted to substances that had an actual or claimed therapeutic effect (see [25]). Therefore, while some complementary medicines and health supplements as defined would be 'medicines' under the Act, many would not (see [25]). Since the regulations thus purported to regulate substantial numbers of substances that were not medicines under the Act, the court a quo correctly concluded that, to this extent, they were ultra vires and invalid (see [26]).

As to the Alliance's cross-appeal against the suspension of the order of invalidity, the suspension was justified in the light of the public interest in the regulation of complementary medicines and health products (see [28]). Both the appeal and the cross-appeal would therefore be dismissed (see [29]).

A PENGLIDES (PTY) LTD AND ANOTHER v MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND ANOTHER 2022 (5) SA 401 (SCA)

Environmental law — Protection of environment — Marine resources — Appeals to Minister — Position where last day of 30-day period for submission of appeal to Minister falling on day when Department's offices closed — Marine Living Resources Act 18 of 1998.

Second respondent, the Deputy Director-General of the Fisheries Branch of the Department of Agriculture, Forestry and Fisheries (DDG), who was the first respondent's (the Minister of Agriculture, Forestry and Fisheries') delegated authority under the Marine Living Resources Act 18 of 1998, awarded first appellant (appellant) a right to fish two vessel units of the total allowable effort in the large pelagic fishing sector (see [10] – [11]). The DDG also asked appellant to nominate two fishing vessels, each to be designated to fish one of those units (see [11]).

Appellant did so, and its nomination for one unit was a foreign-flagged vessel, Matsufuku Maru No 28 (see [12]).

The DDG approved this arrangement, and said in his standard confirmation letter, that a right-holder who had been granted the right to use a foreign-flagged vessel could do so, subject to the condition that 'No Right Holder will be permitted to nominate access to a foreign flagged fishing vessel to replace the current approved foreign fishing vessel during the duration of the Right. Right Holders shall only be permitted to nominate a South African-flagged vessel to replace a nominated vessel' (see [12]).

A short while later, appellant was informed that the Matsufuku Maru's owner could not make it available to it, and appellant applied to the Department for permission to use another, Koei Maru No 1, in its place (see [13]).

The Department, however, rejected the application. Appellant appealed the rejection to the Minister, asserting that the basis of the Department's decision, the condition set out above, was irrational, and its inclusion in the confirmation letter administratively unfair, it never having been part of the published rights-allocation policy. Appellant accordingly asked that it be set aside (see [13] – [14]).

The Minister's response was to dismiss the appeal, basing his decision on the challenged condition as well as other grounds. The Minister also noted that appellant had submitted its appeal two days late (see [15]).

Appellant then approached the High Court to review and set aside the Minister's dismissal of its appeal; for a remittal to the Minister for redecision; for a declarator that the impugned condition was unlawful; and for a direction that the Minister take account of this in considering the appeal (see [16]).

The High Court's approach, despite respondents not arguing the point, was to centralise the late submission of the appeal, the High Court finding it was lodged late, had lapsed and the Minister had no power to hear it, and accordingly the court could not enter on the substantive point, the legality of the condition (see [17]). Appellant then appealed to the Supreme Court of Appeal.

Its view was that the High Court was wrong to centralise the late-submission issue because this issue was only peripherally raised by respondents, and precedent, which the High Court was obliged to follow, was that it was not for a court to identify the issues, but for the parties to do so. The High Court's approach also barred the Supreme Court of Appeal considering the merits, because the High Court had not done so (see [18]).

Accordingly, the Supreme Court of Appeal was confined to considering only whether the High Court was correct in its finding that appellant's appeal to the Minister was lodged late (see [19]).

The context was that reg 5 of the Marine Living Resources Regulations prescribed that '(a)n appeal by any person in terms of section 80 of the Act shall be submitted in writing to the Minister within 30 days after the appellant has been notified of the decision against which he or she is appealing' (see [19]).

Factually, the Department refused appellant's vessel-substitution application on 17 May 2017, the following day was day 1, and day 29 was Thursday 15 June 2017. Friday 16 June, as a public holiday, was not a 'day' under the Interpretation Act 33 of 1957, Saturday 17 June was, and it was the 30th day, and Sunday 18 June was not counted as a day. The ambiguity was that the Department's offices were closed on Saturday the 17th, so preventing appellant from performing the act of submission (see [20]).

So the question before the Supreme Court of Appeal was: if the day counted as the 30th day (ie not a public holiday or Sunday) was one on which the Department's

offices were closed (and so it was impossible to achieve lodgement), then had an appellant to submit its appeal on the 29th, or could it be regarded as validly submitting its appeal if it did so on the first day after the 30th day when the offices were open (see [21]).

The Supreme Court of Appeal's view, which derived from and aligned with English and South African cases, was that, where the 30th day was a day on which the Department's offices were closed, then an appellant nonetheless validly submitted its appeal on the next day that the Department's offices were open (see [33]).

Furthermore, the High Court's view that an appellant could submit an appeal on the 30th by giving it to the security guards at the offices or by email was inconsistent with the mentioned cases (see [27] and [32]).

The Supreme Court of Appeal accordingly upheld appellant's appeal, set aside the High Court's order (it dismissed appellant's application), and remitted the matter to the High Court for redecision (see [34]).

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]).

STRYDOM AND ANOTHER NNO v SNOWBALL WEALTH (PTY) LTD AND OTHERS 2022 (5) SA 438 (SCA)

Insolvency — Unlawful alienations and preferences — Dispositions without value — Meaning of 'not made for value' — Insolvency Act 24 of 1936, s 26(1).

A company, of which appellants were the liquidators, had sold shares to respondents at less than their alleged reasonable market value, and appellants had applied to the High Court for the setting aside of the transactions as 'dispositions of property not made for value', as intended in s 26(1) of the Insolvency Act 24 of 1936 (see [1] and [5]). Respondents met this with an exception that the allegation failed to ground a s 26(1) claim, contending that 'not made for value' meant for no value at all (see [6]). The High Court accepted respondents' argument, dismissing the notion that paying a discounted price was a giving of no value at all (see [1] and [8]). In an appeal to the Supreme Court of Appeal the issue was the meaning of 'not made for value' (see [3] and [36]).

Held, that it meant for no value at all. This conclusion followed on consideration of the plain words of the phrase, its context, the absurd results that could flow from appellants' interpretation, and case law holding that 'value' need not even be monetary (see [33] – [35]). Appeal dismissed (see [37]).

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.

CHOISY-LE-ROI OWNERS (PTY) LTD v MUNICIPALITY OF STELLENBOSCH AND ANOTHER 2022 (5) SA 461 (WCC)

Local authority — Town planning — Rezoning — Interpretation of municipal spatial development frameworks — Principles of statutory intrepretation applicable — Recourse to historical background limited.

Statute — Interpretation — Municipal spatial development framework — Principles of statutory intrepetation of statutes applicable — Recourse to historical background limited.

Section 22(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) provides that a 'Municipal Planning Tribunal or any other authority required or mandated to make a land development decision . . . may not make a decision which is inconsistent with a municipal spatial development framework [MSDF]'; and s 12(1)(g) that a spatial development framework must 'provide clear and accessible information to the public and private sector and provide direction for investment purposes'.

At issue in this case was the interpretation of the first respondent's MSDF, on which it relied to reject the applicant's rezoning application. The applicant, Choisy-Le-Roi Owners (Pty) Ltd (CLRO), an owner of a vacant erf zoned for use as a 'technology and science park' in Stellenbosch's Technopark development, applied to review and set aside the decision of the Municipal Planning Tribunal to reject its 2017 application for rezoning it to a mixed-use building development, including a residential component. The executive mayor (the Mayor) was constituted as the appeal authority by s 79(1) of the Stellenbosch Municipality Planning Bylaw of 2015. It was common cause that the decision constituted administrative action and was therefore reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

For its interpretation of the MSDF, the Mayor relied on the MSDF's historical background as contextual considerations — specifically earlier drafts thereof and council decisions against a residential component at Technopark — which it was contended placed the proposed development fundamentally at odds with the MSDF's pertinent land-use and development guidelines.

Held

When it came to determining the bounds of the relevant context that might be taken into account in deciding on the meaning of the text at issue, there was an important difference between contracts and statutes. In the contractual context, the enquiry into the meaning of the text was directed at determining, within the limits of the language used, what the parties mutually intended. In the statutory context the enquiry must be into what the effect of the text is on the citizen, who was not party to its articulation. The distinction has a bearing on the readiness with which reference may properly be had to contextual evidence outside of that provided by the instrument itself for the purpose of interpreting it. In issues of statutory interpretation, in general — as distinct from constitutional interpretation — reference to preparatory material should be permitted as an aid to construction which was ambiguous or

obscure or the literal meaning of which leads to an absurdity. (See [36] – [37] and [39].)

Although the MSDF was not a statute, it was evident from its legislative context that it had a similarly binding effect on the municipality and the users and developers of land within its territorial jurisdiction, and it was therefore appropriate to apply the principles of statutory interpretation when construing its provisions. The Mayor was obliged to construe the MSDF with reference to the gazetted text; it was not permitted to resort to the text of earlier drafts to interpret the gazetted text to give it a meaning inconsistent with the language actually used. (See [40].)

The 'operative' parts of the MSDF were not irreconcilable with the possibility of some degree of residential development in Technopark. This would have been evident to the appeal authority, had it adopted a proper approach to the interpretation of the MSDF. The flawed approach to the construction of the document that was adopted, resulted in the Mayor deciding the appeal, having regard to irrelevant considerations, while at the same time failing to have regard to the relevant ones. (See [41].)

The interpretative approach used by the executive mayor was also at odds with the statutory enjoinder in s 12(1)(g), that a spatial development framework must 'provide clear and accessible information to the public and private sector and provide direction for investment purposes'. The application for the judicial review and setting aside of the appeal authority's decision will consequently be upheld. (See [40], [43].)

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.)

MZANSI FIRE & SECURITY (PTY) LTD v DURBAN UNIVERSITY OF TECHNOLOGY AND OTHERS 2022 (5) SA 510 (KZD)

Administrative law — Administrative action — What constitutes — University procuring security services — Promotion of Administrative Justice Act 3 of 2000, s 1.

Education — University — Status — Organ of state as intended in Constitution, s 239 — Its procurement process in respect of security services constituting reviewable administrative action.

First respondent, a university, had put out a tender for the provision of guarding services to its campuses, and appellant had bid for it. It was, though, unsuccessful, third respondent being the eventual awardee. After an internal appeal by appellant failed, it applied to the High Court for the review and setting-aside of the award, and for its substitution as winning bidder. The review, brought under the Promotion of Administrative Justice Act 3 of 2000, met the defence that the award was not administrative action, respondent contending it was not an organ of state, and the award not an exercise of public power (see [1] – [3]).

The court held otherwise: Constitutional Court, Supreme Court of Appeal, KwaZulu-Natal, Eastern Cape, Western Cape and Free State authority was to the effect that universities were organs of state, and an outlier Western Cape case was clearly wrong (see [2], [10], [20] – [21] and [24] – [27]).

Moreover, procuring guarding services was an exercise of public power. Indicia were the source of the power, the university's constitutive statute, and the procurement's governmental rationale: protecting the constitutional right to further education and preservation of publicly funded property (see [7] and [33]).

The award declared invalid and set aside, but the declaration stayed to enable first respondent to readvertise the tender (see [46] – [47] and [51]).

RAYMENT AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2022 (5) SA 534 (WCC)

Immigration — Visas — Visitor's visas — Spousal visas — Foreigner and South African citizen in spousal relationship and parents of child with South African citizenship — Spousal relationship ending and consequently foreign parent's spousal visa terminating with effect that foreign parent required to leave country — Constitutionality — Immigration Act 13 of 2002, s 11.

The applicants, foreign nationals, had formed spousal relationships with South African citizens and had had children with them. These children were South African citizens. In each instance the applicant had been residing and working in the country on a spousal visa, a subcategory of visitor's visa in s 11 of the Immigration Act 13 of 2002. Each was a dutiful parent, sharing parental responsibilities with their partner. In each instance, however, the spousal relationship had ended, with the applicant continuing to be a dutiful parent (see [3] and [4]). Being contingent on an extant spousal relationship, the spousal visas had in each instance expired (s 11(6)(a)), with the result that the applicants were required, by expiry of their status, to leave the country (s 43(b)). Application for a new status could only be made outside the

country (see [15] – [16]). The applicants challenged the constitutional validity of the dispensation (see [20]).

Held, that the applicants and their children's constitutional rights were infringed, respectively, to dignity and to parental care, protection from maltreatment and neglect, and to have their best interests accorded paramount importance (see [40]). These limitations were unjustifiable (see [49]).

Declared, accordingly, that the provisions concerned (ss 10(6), 11(1)(b) and 18(2) of the Act, and reg 9(5) and 9(9) of the Immigration Regulations, 2014) were unconstitutional and invalid (see [81]).

Ordered, further, that the declaration would be suspended to allow parliamentary remediation. While pending, readings-in were to be effected (see [81]).

These would allow individuals in applicants' situation to remain in the country to apply for a new visa, thus allowing them to reside and work in the country in order to fulfil their parental responsibilities (see [73]).

RIGHT2KNOW CAMPAIGN AND OTHERS v CITY MANAGER OF JOHANNESBURG AND OTHERS 2022 (5) SA 570 (GJ)

Constitutional law — Human rights — Right to assemble, demonstrate, picket and petition — Provision of municipality's tariff policy levying fee on convenor of protest for full deployment of municipal police at protest — Constitutionality — Regulation of Gatherings Act 205 of 1993.

Third applicant was the convenor of a protest by second applicant and had followed the applicable procedures in the Regulation of Gatherings Act 205 of 1993 (see [5]). Third applicant had also paid a standard fee levied by the first respondent on convenors of protests for a full deployment of municipal police (see [11] and [24]). The fee itself was levied under a provision of first respondent's Tariff Determination Policy, the Policy having been made under the Municipal Systems Act 32 of 2000 (see [20] and [44]).

Applicants, acting in their own and the public interest, approached the High Court for a declarator that the provision of the Policy imposing the fee was unconstitutional (see [2] and [6]). The challenge itself had two parts: first, that the fee requirement breached the principle of legality; and, second, that it was an unjustifiable limitation of s 17 of the Constitution ('(e)veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions') (see [36]).

The legality challenge split further into two thrusts: that the Policy was ultra vires the Gatherings Act and that it was irrational (see [39] and [44]).

Held, as to the ultra vires contention, that the Policy was indeed ultra vires the Gatherings Act: the Act gave no power to levy such a fee (see [43]).

As to the rationality requirement, the justification of the fee was that it enabled the Johannesburg Metropolitan Police Department to sustain its provision of security services to protests (see [46]). Held, that this was irrational for two reasons: the corollary of the constitutional right to protest was that the state enable the right to be

enjoyed through any deployment of police that would achieve this; and, secondly, the negligible size of the fees could not meaningfully contribute to payment for the policing services (see [47] and [50]).

The Policy also limited the right to protest: authority was that a measure significantly increasing the cost of protesting was a limitation of the right (see [71]); international law was to the effect that mandatory contributions to costs of policing gatherings limited the right of peaceful assembly (see [67]); and the fee had a chilling effect — potential protestors might believe the protest was unlawful or unsafe owing to its receiving lesser police protection (see [71]).

The limitation was moreover insupportable: only a law of general application could justifiably limit a right, and the Policy was not a law (see [86]).

Declared, accordingly, that the Policy, to the extent that it imposed the fee, was unconstitutional (see [100]).

SHOMANG v MOTSOSE NO AND OTHERS 2022 (5) SA 602 (GP)

Land — Land reform — Conversion of permits and leasehold to titleholding — Tension between customary-law notion of ownership of 'family home' and common-law exclusive ownership by title holder — Appropriate remedy — Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988; Upgrading of Land Tenure Rights Act 112 of 1991.

One of the features of apartheid urban South Africa was Black townships, where Black people were conferred rights to stay in urban areas, with a permit to reside, which allowed families to stay in urban areas in what is called 'family homes', reflecting the understanding of the collective rural home. It was possible to pass down these permits through the administrative system. Then, through legislative instruments (the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 and the Upgrading of Land Tenure Rights Act 112 of 1991) it became possible to 'upgrade' these rights to leasehold or ownership, typically by registering the property in the name of an individual nominee (the custodian) who then became the registered owner of the 'family house'. (See [13], [15] – [17], [42] – [47], and n74.)

The Conversion Act provides for an inquiry to be conducted before leasehold rights and ownership are granted, that the Director-General declare a person meeting certain requirements be granted ownership, and transfer of property into the name of such a person once the declaration has been made. Formally, the registered owner is conferred rights that bestow on them the normal entitlements of ownership in terms of the common law, including alienating the property. This goes against the norms that underlie the idea of a 'family home', causing conflict between individual owners and family members living in what they understand to be a collective family house. (See [2] and [46].)

This case concerned such a conflict. The applicant, Ms Shomang, and her late grandfather's son, the subsequently also deceased Mr Johannes Moloi, had entered into a 'family house rights agreement' as part of an adjudication of their competing claims in a property in the Naledi Township, for the purpose of converting their

permit-to-reside rights to title deed. In terms of this agreement, Ms Shomang nominated the deceased as the custodian of the family-house title in respect of the property. They were not registered as co-owners, despite wishing to do so, because they were advised by administrative officials that only spouses could be co-owners.

The first respondent was a son of the deceased Mr Moloi, one Mr Isaac Motsose, who never stayed at the property. After his father's death, he was appointed as executor of his deceased father's estate, replacing Ms Shomang. He claimed ownership and threatened to evict Ms Shomang. The second respondent, the Director-General of the Department of Human Settlement, Gauteng Province (the DG), is the officer responsible for housing matters in terms of the Conversion Act and under the Gauteng Housing Act 6 of 1998. (See [3] – [9] for the other respondents; and [19] – [23], [25] – [28], [30 – [32].)

In response Ms Shomang and two family members approached the offices of the DG, who investigated the matter and noted a caveat against the property to protect it against any alienation, noting also the future registration of a usufruct protecting family rights. Ms Shomang next applied for the court to direct the Registrar of Deeds to cancel the title deed registered in the name of the late Mr Moloi, and to direct the Director-General of the Department of Human Settlement (Gauteng) and the MEC of the Department of Human Settlement (Gauteng) to conduct an inquiry to determine whose name should appear on the title deed of the family home. She also applied, inter alia, for an interdict against Mr Moloi's threats of dispossession. (See [33] – [36].)

Held

The fact that Ms Shomang had to approach the court to help protect her right in the family property indicated that occupiers of family homes still had precarious rights, as the rights in terms of which they occupied were at odds with the registered property rights of a single individual owner. A 'family house' was not understood as 'property' in the common-law sense. Replacing the 'family home' concept of customary law of succession and inheritance with common-law norms of ownership — restricted to a private individual whose name is entered in a title deed — meant a clash of norms, as was evident in this case. Since the Deeds Registration Act 47 of 1937 did not recognise family-house rights, it left people with only bureaucratic protection — but no formal legal protection (See [41], [51] – [55].)

Customary law was an integral part of our law and, like all law, it depended on the Constitution for its ultimate force and validity. Thus, if we recognised the place of customary law in the Constitution as a source of law in its own right, it required that we deal with it on its own terms, and not through the lens of common law. One way of doing so would be to recognise that the right to occupy a family house was a right in property that deserved protection. If only the common law were considered, it would means that when the estate was finalised, the property would be transferred to Mr Motsose and he would be the common-law owner. This property right would then stand in tension with the property right of Ms Shomang, iro the right to the family home — an unregistered property right. (See [56], [60] – [61], [68].)

The South African system of land rights always privileged the institution of ownership; there was a hierarchy of rights, with ownership at the top of the hierarchy, followed by real rights (in this case, registered rights), and at the bottom any personal rights (in this case, the agreement between Ms Shomang and Mr Moloi). This ownership model was an inflexible system that did not allow for alternative models of holding land, especially not the social tenures that operated outside this formal system. Indications were that family members relied on the administrative system itself and the practices of the officials that give greater recognition to the people's conceptions of the family home than what the law did. For property law to transform, what was needed was a fragmentation of land rights, not by abolishing ownership, but by developing a more comprehensive range of rights, such as a property right in a family home, that could sometimes trump ownership. Customary law remained subordinate to common law, despite various rulings of the Constitutional Court to recognise it. To give effect to the Constitution and its transformative imperatives, it requires that property law develop. This urgently needed to be addressed; the main duty rests on the legislature. (See [71], [73] – [74], [78].)

Here, there was an inquiry by the DG that found that the applicant had a right to the family home but that the property should only be registered in the name of Mr Moloi, and there was an agreement to indicate that he was regarded as a custodian of the family home, and that the title deed should indicate that this is family property. Ms Shomang would therefore be granted the relief she requested — an order to make it possible to continue with the family home. The transfer to Mr Moloi would be cancelled and the DG and MEC ordered to reconsider whose name should be entered on the title deed. Mr Motsose would be interdicted from passing ownership, selling or encumbering the property, taking over or alienating the property, until such time as the property has been transferred into the name of Ms Shomang. (See [80] – [82].)

SUPER GROUP TRADING (PTY) LTD t/a SUPER RENT v BAUER AND ANOTHER 2022 (5) SA 622 (WCC)

Company — Proceedings by and against — Proceedings against, based on directing mind doctrine — Particulars to state that action taken by directing mind was (i) within the field of company's operation assigned to directing mind; (ii) not totally a fraud on company; and (iii) by design or result partly for benefit of company — Even then, applicability of doctrine depending on correct context, which must also be pleaded.

Practice — Pleadings — Exception — To particulars of claim on ground that vague and embarrassing — May be upheld, even if defective, where particulars especially vague and embarrassing — In such circumstances, dismissing exception and allowing matter to proceed would compound embarrassment and prevent trial court from effectively delimiting issues — Uniform Rules of Court, rule 23(3).

It is not competent for a plaintiff to advance its claim on a jumble of causes of action. If a plaintiff intends to advance a claim based on more than one cause of action, it must do so by pleading them in the alternative, otherwise the particulars will, at best, be vague and embarrassing. If alternatives are inadequately pleaded, then the

defendant must except to all of them. But where the defendant has difficulty in disentangling a jumble of causes of action, the court should take an accommodating approach to non-compliance by the defendant with its obligation under 23 of the Uniform Rules to set out the grounds of exception clearly and concisely. In such circumstances, dismissing the exception and allowing the matter to proceed to trial would compound the embarrassment and complicate the trial court's task of delimiting the issues. It would be preferable to make an order upholding the exception and directing the plaintiff to deliver amended particulars.

In proceedings against a company based on the 'directing mind' doctrine, the particulars must state that the action taken by the directing mind was (i) within the field of the company's operation assigned to the directing mind; (ii) not totally a fraud on the company; and (iii) by design or result partly for the benefit of the company. Even then, the applicability of the doctrine will depend on the correct context, which must also be pleaded.

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].)

SA CRIMINAL LAW REPORTS OCTOBER 2022

S v PELOEOLE 2022 (2) SACR 349 (SCA)
Murder — Sentence — Factors to be taken into account — Gender-based violence — Police official having shot and killed daughter and wife at close range — Victims vulnerable women in sanctity of their home; and appellant having had service pistol removed following previous assault on wife — Effective sentence of 30 years' imprisonment too lenient, having regard to scourge of gender-based violence in country — Sentence replaced by one of life imprisonment.
Murder — Premeditated or planned murder — Verdict — Failure by trial court to make determination of premeditation in judgment on conviction — Such constituting misdirection, but not fatal where appellant not prejudiced thereby.
Murder — Premeditated or planned murder — What constitutes — Notion that premeditation determined with reference to time, rejected.

The appellant appealed against his effective sentence of 30 years' imprisonment for the murder of his wife and 23-year-old daughter, whom he had shot with his service pistol. The state cross-appealed against the sentence, arguing that the court ought to have sentenced the appellant to life imprisonment on each of the counts of murder. It appeared that the relationship between the appellant and his wife had deteriorated, as had his relationship with his daughter. On the day of the two killings, the appellant had travelled from his home in Pretoria to the North West Province, as he had come to hear of the death of his cousin. On his return, after having drunk brandy and a beer and having visited a tavern, he asked his daughter if there was a problem and

she replied that she was not saying anything. The appellant then went to his bedroom. He returned to the living room with his pistol, walked up to his daughter and shot her. After his wife questioned what he was doing, he fired a shot at her, then another at his daughter and then again at his wife. The trial court failed to pronounce on the question of premeditation in its judgment on conviction, and only did so when considering sentence. On appeal,

Held, as to the effect of not pronouncing on the question of premeditation at conviction, that, even though it amounted to a misdirection, what had to be determined was whether the appellant had been prejudiced by such misdirection. In cases where the proved facts compellingly and ineluctably pointed to premeditation, there could not be any conceivable prejudice to an accused person if the minimum sentence was imposed, despite the fact that a finding regarding premeditation was not made prior to conviction. The accused had been duly warned of the applicability of the minimum-sentencing legislation on the basis of premeditation, and the High Court was therefore justified in finding, during the sentencing proceedings, that the murders were premeditated. It was able to do so, having considered the conspectus of the evidence on which the appellant was convicted on both counts. The failure to pronounce upon the issue of premeditation at conviction had accordingly not prejudiced the appellant, neither did it impact on the fairness of the proceedings. (See [11] – [12].)

Held, further, as to whether premeditation had been proved, that the notion, of determining whether a murder was premeditated was judged with reference to time, had been rejected. On the appellant's own version, which he still maintained, he was hardly able to estimate the period it took to execute the murders. As late as 2019, before he was sentenced, he persisted in accusing his nephew of the murders, even after that version was rejected by the High Court. There was, however, evidence preceding the events which provided the context and accounted for the presence of premeditation. Those facts emerged in detail in the presentencing report and oral evidence of the clinical psychologist who testified in mitigation on behalf and at the behest of the appellant. He had harboured resentment towards his wife and daughter which evolved into a deep-seated rage, and it was evident that the state of his marriage had troubled him. (See [19] – [24].)

Held, further, that, apart from acknowledging that the heinous crimes committed especially against women in the country had reached epidemic proportions, the High Court had failed to consider other aggravating factors such as the manner in which the appellant, without provocation, had shot his daughter and wife at close range; that the victims were unarmed and not a threat to him; that the victims were vulnerable women who were in the sanctity of their home; and that the appellant had previously assaulted his wife and had his firearm taken from him due to concerns about their safety. There was no doubt that the sentence imposed was far too lenient, having regard to the scourge of gender-based violence in our country. The aggravating factors in the case far outweighed the mitigating factors which the High Court had accepted as substantial and compelling, and justifying a deviation from the prescribed sentence. That deviation was a material misdirection which justified the court's intervention on appeal. A balanced consideration of the triad of sentencing called for the imposition of a sentence of life imprisonment. The appeal against sentence was accordingly dismissed and the cross-appeal upheld. (See [28], [30] and [38].)

Held, per Makgoka JA, concurring in the outcome of the majority decision of the court, but that premeditation had not been proved.

S v ZUMA AND ANOTHER 2022 (2) SACR 378 (KZP)

Appeal — Further evidence — Application for hearing of — When permissible — Such application available after conviction and not before — Criminal Procedure Act 51 of 1977, s 316(1), s 316(5) and s 316(13)*(d)* and *(e)*.
Appeal — In what cases — Appeal from dismissal of special plea — Application for leave to appeal before conviction — No legislative basis for such appeal — Criminal Procedure Act 51 of 1977, s 106(1)*(h)*, s 316(1)*(a)*; Constitution, s 35(3)*(o)*.
Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Requirements — Clarity required as to which questions needed to be reserved — Description of questions in instant case too vague to satisfy requirement — Criminal Procedure Act 51 of 1977, s 319.
Appeal — Special entry in terms of s 317 of Criminal Procedure Act 51 of 1977 — Application for — When permissible — Such application available after conviction and not before — Criminal Procedure Act 51 of 1977, s 317 and s 318.
Plea — Prosecutor has no title to prosecute — Adjudication of — Court entitled to exercise discretion to determine plea on affidavits and without hearing viva voce evidence — Criminal Procedure Act 51 of 1977, s 106(1)*(h)* and s 108.

The applicant (the first accused) applied for leave to appeal against the judgment of the court which had dismissed his special plea in terms of s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA), that the prosecutor (Mr Downer) had no title to prosecute. He also made an application to lead further evidence on appeal in terms of s 316(5) of the CPA.
The court noted that the primary issue before the court was only the special plea raised by the first accused, and nothing else, and not an application to have Mr Downer removed as the prosecutor. That was unequivocally clear from the terms of the written plea.
As to the appealability of the order dismissing the special plea, the state contended that an appeal against the dismissal of the special plea was not available to the first accused at the present stage, having regard to the wording of s 316(1)*(a)* of the CPA, alternatively, that if available prior to conviction in the discretion of the court, such an appeal should not be entertained in respect of the court's judgment dismissing the special plea. The court held that the enquiry was on what legislative basis the first accused was prosecuting his appeal at the current stage, namely before conviction. His application for leave to appeal did not identify the legal basis for the appeal, but he seemingly relied on the provisions of s 316(1) of the CPA. (See [43].) The court held that s 35(3)*(o)* of the Constitution did not provide a right to appeal by an accused person at a stage prior to conviction, and applied to appeals against a conviction or resultant sentence, and then 'as provided in terms of national legislation'. A right to appeal after conviction was provided in national legislation, specifically s 316(1)*(a)* of the CPA. (See [47].) The court held furthermore that nothing in the text or context or purpose of s 16(1)*(a)*(i), or elsewhere in ch 5 of the Superior Courts Act 10 of 2013, indicated in unqualified terms that the word 'appeal' in that chapter included an appeal against the dismissal of a plea in terms of s 106(1)*(h)* of the CPA at a stage prior to the accused person's conviction by the High Court. There was no equivalent in the Superior Courts Act to the former s 21(1) of the Supreme Court Act 59 of 1959. If the legislature's intention was to preserve the possibility of an appeal to the Supreme Court of Appeal (the SCA) against a decision by a High Court in a criminal matter prior to the conviction and sentencing of the

accused, on the basis of it being in the 'interests of justice' to do so, then the Superior Courts Act would have contained a provision with wording similar to that of s 21(1) of the Supreme Court Act, or another provision providing expressly for that eventuality, and/or would not have excluded criminal appeals in respect of matters regulated in terms of the CPA from ch 5 of the Superior Courts Act. (See [72].) The court held therefore that an appeal, and hence an application for leave to appeal in respect thereof, should not be entertained at the present stage of the criminal trial. (See [87].)

As to the merits of the application in respect of the prospects of success on appeal, the court held that the issue had been conclusively decided in the Appellate Division as it then was, and subsequently in the SCA, and the court could not second-guess the decisions of that court. The application for leave to appeal accordingly fell to be dismissed on its merits. (See [89] – [93].)

In respect of the argument on behalf of the first accused, that the special plea should have been referred to a viva voce trial with witnesses to be subpoenaed, testifying, being cross-examined, re-examined, and so forth, because of the wording of s 108 of the CPA, that no basis had been advanced to contend that the court's discretion to have the special plea tried on the affidavits had not been exercised judicially, or fell to be set aside, and the first accused had not pointed to any legally cognisable prejudice. Insofar as the argument constituted a separate and additional ground of appeal, it too lacked merit. (See [98] – [99].)

In respect of the application to adduce further evidence on appeal, the court held that the CPA regulated applications to adduce further evidence, after conviction in the High Court, in two instances, firstly, in s 316(5) and, secondly, in ss 316(13)*(d)* and *(e)*. The application for leave to appeal under ss (1) was one after conviction. As the first accused had not been convicted and sentenced, his application for leave to appeal was not brought under s 316(1) of the CPA, and his application for further evidence was consequently not permitted by s 316(5). (See [102].)

In respect of relief sought by the first accused on the grounds of s 317 of the CPA, the court held that the wording of s 318 made it clear that it was only a 'person convicted who may appeal to the Appellate Division' in respect of an entry pursuant to s 317 of an irregularity or illegality. The first accused had not been convicted; accordingly, he could not at the present stage appeal to the SCA on the grounds of s 117. Further, in an application for leave to appeal against the refusal to note a special entry, it was necessary for an applicant to show a reasonable prospect of success before the court deciding the special entry on appeal. Therefore, even if this ground was construed as an appeal against the refusal to make a special entry, the first accused had failed to show that his appeal had prospects of success, and had to be dismissed. (See [112] and [119] – [120].)

In respect of relief sought on the grounds of s 319 of the CPA, that the response was similar to that raised in respect of the relief sought on the grounds of s 317 of the CPA. Further, the first accused did not make it clear which questions he wished to have reserved (see [126]) and had not identified the questions of law to be considered, beyond referring to some of the purely legal grounds of appeal contained in the notice of application for leave to appeal. The description by the first accused, insofar as it might refer to other questions of law, was too vague to satisfy the legal requirement of certainty required for the proper reservation of questions of law. (See [130] – [131].) The court held that the application to reserve questions of law, or for leave to appeal in respect of the refusal to reserve questions of law,

accordingly fell to be dismissed. (See [135].) The application for leave to appeal and related applications were accordingly dismissed, and the court held that the interests of justice required that the matter proceed to trial in respect of the not-guilty pleas of the two accused.

S v KNIGHT 2022 (2) SACR 431 (GP)

Plea — Plea bargain — Plea-and-sentence agreement — Abandonment — Effect — Agreement null and void and no regard could be had to any part thereof — Criminal Procedure Act 51 of 1977, ss 105A(6)*(c)*, (9)*(d)* and (10).

The appellant was convicted of, inter alia, the kidnapping and rape of a 5-year-old child. On appeal, he contended that the sentencing procedures were vitiated by the reliance by the court on a presentence report that he had objected to on the basis that it had been compiled prior to his conviction, and that it had been compiled using the evidence from a plea- and-sentence agreement concluded in terms of s 105A of the Criminal Procedure Act 51 of 1977, that he had abandoned.
Held, that s 105A(10) provided that, where a trial started de novo as contemplated in ss (6)*(c)* or (9)*(d)*, the agreement would be null and void and no regard should be had or reference made to: any negotiation that preceded entering into the agreement; the agreement; or any record of the agreement in any proceedings relating thereto, unless the accused consented to the recording of all or certain admissions made by him or her in the agreement, or during any proceedings relating thereto. (See [22].)
Held, further, that, at the time of compiling the report, the appellant had not been convicted, and the information in the presentence report regarding the conviction pertained to a conviction which was quashed by the appeal court. In essence, at that time, the appellant was not serving any sentence and was in detention awaiting the rehearing of his case, but the report had been compiled as if the appellant had already been convicted and serving sentence at the time. Hence, it referred to his not being able to be rehabilitated and showing no remorse. The court that requested the report was under the mistaken impression that the conviction in terms of the s 105A agreement was still in place and that only sentence was to be considered de novo. Consequently, the report and the information obtained from the consultation with the appellant, presented by the probation officer in court, were inadmissible. (See [40] – [41].)
Held, accordingly, that there had been a miscarriage of justice by admitting the presentence report, which constituted a misdirection that vitiated the trial court's discretion. The sentence imposed by the trial court accordingly could not stand and had to be set aside. The matter was referred to the trial court for consideration of sentence afresh, based on new presentence reports. (See [46].)

S v ROBERTO AND ANOTHER 2022 (2) SACR 442 (FB)

Plea — Plea bargain — Informal plea-and-sentence agreement — Difficulties with such agreements set out — Procedures in terms of s 105A of Criminal Procedure Act 51 of 1977 likely to render more certain outcome.

The two accused were charged separately in a regional magistrates' court, each with one count of motor vehicle theft. They pleaded guilty and on the same day were sentenced to six years' and seven years' imprisonment, respectively, in accordance with the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the CPA). Shortly after imposing sentence the magistrate realised the sentences were not competent, as he could not sentence them to more than five years' imprisonment in terms of that section read with s 276A(2) of the CPA. He accordingly sent the matters on special review requesting that the orders be set aside, and the matters remitted to him to sentence the accused persons afresh. It appeared that the prosecutor and attorney for the accused had approached the regional magistrate in chambers and informed him they were discussing an informal plea-and-sentence agreement, bearing in mind that the accused had been in custody for nearly a year at that stage. In terms of the agreement the accused would plead guilty on condition that the magistrate consider sentences of five years' imprisonment in terms of s 276(1)*(i).* The magistrate was informed that the state would not prove previous convictions against them. He was amenable to act in accordance with the informal arrangement. Contrary to the prosecutor's assurance in chambers, however, the state did eventually prove previous convictions of a serious nature against both accused. The magistrate then found himself bound to sentence the accused persons to a more severe sentence, which he subsequently appreciated he could not.
Held, that the concept of an informal plea agreement was not a new phenomenon, but problems arose when one of the parties afterwards alleged a misunderstanding or breach of the agreement. Matters got worse when the presiding officer was either part of the negotiations, or incorrect information was provided to the presiding officer in chambers pertaining to what was agreed upon. Although such agreements were relatively common occurrences, they had a further disadvantage, in that the prosecutor and the defence team could not enter into a binding agreement in respect of the sentence to be imposed, without the cooperation of the presiding officer. (See [7] – [8].)
Held, further, that arguments by academics that s 105A procedures were too time-consuming and set insurmountable barriers, did not hold water if the certainty obtained was taken into consideration. (See [10].)
Held, further, that the regional magistrate was correct that the imposed sentences were not in accordance with the law and accordingly had to be set aside, as irregularities had occurred which could not be rectified. (See [13] – [15].) The matters were referred back to the regional court for the trials to start de novo before a different presiding officer.

S v PAULSE 2022 (2) SACR 451 (WCC)

Drugs — Mandrax and Tik — Possession of in contravention of s 4*(b)* of Drugs and Drug Trafficking Act 140 of 1992 — Proof of — Accused pleading guilty — No certificate in terms of s 212 of Criminal Procedure Act 51 of 1977 handed in to prove nature of substance — Effect of.

The accused appeared in a magistrates' court on charges of possession of Mandrax and Tik in contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Act). She admitted that she possessed the drugs and the magistrate accepted that the accused possessed an undesirable dependence-producing substance as

listed in part III of sch 2 to the Act, solely on the admissions made by the accused. On review,
Held, that it was clear that, where an accused pleaded guilty to a charge where one of the elements of the crime could only be proven by scientific means, the court had to request the prosecutor to hand up the analysis certificate in terms of the provisions of s 212 of the Criminal Procedure Act 51 of 1977, to satisfy itself during the s 112(1)*(b)* proceedings that the admission had been correctly made. In the present case, the accused admitted to being in possession of an undesirable dependence-producing substance, but the court convicted her without so satisfying itself that such an admission had been correctly made. In the circumstances the conviction and sentence had to be set aside. (See [11].)

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Peloeole v Director of Public Prosecutions [2022] 4 All SA 1 (SCA)

Criminal Law and Procedure – Appeal against sentence pursuant to conviction on charge of murder – Whether trial court was correct in finding that murder was premeditated – Departure from prescribed minimum sentence of life imprisonment not justified where aggravating factors outweighed mitigating factors.

The appellant was convicted on two counts of murder, relating to the fatal shooting of his wife and daughter. During sentencing, the court found that the murders were premeditated, but that there were substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. The appellant was sentenced to an effective term of 30 years' imprisonment. He obtained leave to appeal against his sentence, while the State obtained leave to cross-appeal. On appeal, the appellant contended that the court had erred in finding that the murders were premeditated, while in its cross-appeal, the State contended that the court had erred in finding that there were substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment.

Held – In order for the State to secure a conviction on a murder charge, it must prove all the common law elements of the offence, including the element of intent (*dolus*). The number of shots a perpetrator fires at the deceased is one of the factors a court would consider as indicative of the intent to kill. The term "planned or premeditated" is not an element of murder, but forms part of the minimum sentence legislation provided for in the Criminal Law Amendment Act 105 of 1997, as one of the aggravating factors in the commission of murder. Where one or more aggravating factors are found to be present, the courts are enjoined to impose a sentence not less than the prescribed minimum, which in the case of murder is life imprisonment. Whether the murder was planned or premeditated is thus relevant for sentencing, and not for conviction. Though the perpetrator in his state of mind may have both the intent and premeditation to commit the crime, the intent has to be present during the commission of the crime, while premeditation is limited only to the state of mind before the commission of the crime.

The next question concerned the implication of the failure by the trial court to find and pronounce, before conviction, that the murder was premeditated. The court acquires jurisdiction in respect of the minimum sentences legislation only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the specified elements

are present. The ultimate question remains whether the accused had a fair trial. In this case, the High Court's failure to pronounce upon the issue of premeditation at the conviction stage of proceedings did not prejudice the appellant or impact on the fairness of the proceedings. In considering the factors advanced in mitigation of sentence, the court found that such evidence constituted aggravating factors instead.

In the cross-appeal, the court agreed with State that the High Court, having found that the murders were premeditated, erred when it deviated from imposing life imprisonment. The sentence imposed by the High Court was far too lenient, and was set aside and replaced with one of life imprisonment.

While agreeing with the first judgment on most points, a concurring judgment was reluctant to find premeditation based on the facts. Instead, it was held that the appellant should be convicted and sentenced to life imprisonment based on his apparent intention to commit murder.

Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd [2022] 4 All SA 28 (GJ)

Company law – Misappropriation by director of a corporate opportunity – Whether lease agreements concluded by company were invalid due to director having conflict of interest and failing to make proper disclosure – Fiduciary duties of company directors – Companies Act 71 of 2008, section 75(8) – Director is obliged to make disclosure where he is conflicted and failure to make proper disclosure renders transaction ipso facto void unless a court exercising its discretion declares it valid.

In terms of section 75(8) of the Companies Act 71 of 2008, the applicant ("Atlas") sought to declare valid a lease agreement purportedly concluded between it and the respondent ("Tailifts"). The latter denied that the main lease was signed when alleged – effectively claiming that it was a document manufactured by Mr Van Breda, who happened to be a director in both Atlas and Tailift. Atlas accepted that Van Breda had a direct financial interest in the lease agreements by reason of his directorship in Atlas, but contended that any financial interest that he might have had in any of the upstream entities was indirect. Essentially, Atlas claimed to be entitled to relief under section 75(8) because all necessary disclosures were made regarding its direct personal financial interest in the lease agreements as a related party (due to Van Breda's directorship in Tailifts), but if any necessary disclosures by the entities upstream of Atlas were not made regarding their personal financial interest in the lease agreements (which was disputed by it) then that was only an indirect interest which section 75(5) is designed to exclude from consideration.

While accepting that there was non-compliance with the requirements of section 75(5), Atlas referred to that as a simple failure of *de jure* compliance on its part, contending that it had *de facto* complied with the disclosure requirements of the Act. Tailifts refused to abide by the lease agreements on the grounds that Van Breda was conflicted and the agreement was tainted due to his failure to make proper disclosure and his breach of the provisions of sections 75(5)(e) and (g).

Held – The three questions for determination were whether the provisions of section 75(5) imposed a fiduciary duty on Van Breda to disclose to Tailifts the existence of finance which would allow Tailifts to consider acquiring the property itself; whether an offending director can claim that the company was not able to exploit the opportunity

(the corporate incapacity defence); and whether the court should exercise its discretion in favour of validating the lease agreements under section 75(8).

One of the legal issues raised by Atlas was whether a director only has to disclose a direct personal financial interest that he may have in the transaction or a direct personal financial interest that the director knows a related person has in that transaction. Van Breda, as a director of Tailifts, had a personal financial interest in the lease agreement because he was both a director of Atlas and a person who controlled both it, and the beneficial owners of shares in Atlas by reason of the extended meaning given to the term "control" in section 2(2)(c) and (d). A director is obliged to make disclosure where he is conflicted and failure to make proper disclosure renders the transaction *ipso facto* void unless a court exercising its discretion declares the transaction valid.

The Court finds that section 75 does not exclude a common law fiduciary duty not to misappropriate a corporate opportunity, and that where a director engages in a transaction where he has effectively usurped a corporate opportunity for personal financial advantage through extracting dividend income or other economic benefits via another company, then the requirements of a direct personal financial interest in respect of the matter to be considered is satisfied.

The corporate incapacity defence was rejected by the court, as Tailifts could have accessed the same financing available to Van Breda.

The application was dismissed with costs.

Davids v S [2022] 4 All SA 67 (WCC)

Criminal Law and Procedure – Trial proceedings – Right of accused to choose where trial is held – Whether holding of trial in court located within prison complex violates constitutional right to a fair trial and right to be presumed innocent – Location of court in a building having the aesthetics of a court room and which is resourced with adequate offices which are independent from each other, cannot be said to violate the right to a fair trial merely because it is situated in a correctional facility.

The applicant sought an order that the criminal proceedings against him and his co-accused be heard at the Western Cape High Court in Cape Town rather than at the circuit court situated at the Pollsmoor Medium A Correctional Centre, where the trial was scheduled to be heard.

In response to the parties' objections to having the matter heard at the Pollsmoor Circuit Court instead of at the Cape High Court, the matter was adjourned for an inspection of the Pollsmoor Circuit Court. After the inspection was concluded, the court reconvened at the Cape High Court and the Judge President requested substantive applications in which the parties substantiated their objections to the Pollsmoor Circuit Court. The applicant's objections related to the stigma attached to the Pollsmoor court as it was part of the prison complex which had a notorious reputation. The fact that members of the public would sit in another building viewing the trial proceedings via CCTV was said to give rise to an aura of a secret court and undermined the right to be tried in an open court. The applicant complained that he would stand trial in circumstances different from accused persons whose trials are conducted in the ordinary courts.

Held – The critical questions were whether the hearing of the trial in the Pollsmoor Circuit Court would infringe on the applicant's right to a fair trial and in particular, the right to be presumed innocent. The second question was whether the architectural design of the court created a perception of bias against the applicant and compromised the fairness of the trial.

Section 35(3)(c) of the Constitution provides that every accused has the right to a fair trial, which includes the right to a public trial before an ordinary court. Section 35(3)(h) provides that an accused has a right to be presumed innocent.

High Courts in South Africa are established in terms of section 6(1) of the Superior Courts Act 10 of 2013. The judicial functions relating to the administration of courts are set out in section 8(6) of the Act. Section 7(1) deals with a Judge President's power to establish circuit districts for the adjudication of civil or criminal matters. The respondent submitted that the circuit courts such as that at Pollsmoor were meant to assist with the speedy finalisation of cases, particularly in criminal matters which involved multiple accused as there are not enough courts to deal with such matters in the main seat of the Cape High Court. That was in accordance with section 35(3)(d) of the Constitution which also envisages the speedy finalisation of criminal matters. There was no suggestion that the Pollsmoor Circuit Court does not have the necessary accoutrements of a court room. The sitting of a court in a building which has the aesthetics of a court room and which is resourced with adequate offices which are independent from each other to house the court officials, cannot be said to be offending against the right to a fair trial merely because it is situated in a correctional facility. The right to a fair trial, in particular the right to be presumed innocent, must be understood in conjunction with the constitutional imperatives that vest judicial authority in the courts. The fact that a court is held in a building situated within a prison complex does not compromise the institutional and individual independence of the court and/or the judge. Judicial officers are obliged to conduct criminal trials fairly, impartially and with open minds.

The application was dismissed.

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.

Gqithekhaya and others v Amathole District Municipality [2022] 4 All SA 106 (ECLD)

Labour and Employment – Permissibility of deductions from employees' salaries – Recovery of remuneration paid to employees during period of strike – Section 34 of the Basic Conditions of Employment Act 75 of 1997 deals with deductions that are lawfully permissible against the remuneration of employees and does not countenance unilateral deductions.

After the applicants took part in an unprotected strike between 9 November and 15 December 2020, they continued to receive payment of their ordinary remuneration. However, five months after the event, the respondent (the "employer") informed them of its decision to make deductions against their salaries over a period of two months in order to give effect to its "no-work no-pay" rule adopted with regard to participation in the unprotected strike.

Seeking interdictory relief, the applicants claimed that they were not afforded any opportunity to show cause why the deductions should not be made or to make representations concerning how the recovery strategy was to be implemented. In the first part of the application, the applicants obtained an interim interdict preventing the employer from making deductions against their salaries under the pretext of the "no work no pay" principle and, where applicable, to pay back any money it may already have deducted. In Part B of their application, currently before the court, the applicants challenged the lawfulness of the respondent's decisions and sought declaratory relief in that regard. They contended that the respondent had not followed the provisions of section 34 of the Basic Conditions of Employment Act 75 of 1997 in implementing the recovery strategy, alternatively section 67(3) of the Labour Relations Act 66 of 1995.

Held – An employee has no legal entitlement to be remunerated and should in principle pay back the money if he was paid for his cessation in services rendered whilst participating in an unlawful strike. The Court suggested that it would probably have gone unchallenged had the respondent withheld the *pro rata* portions of the applicants' salaries for the dates of the strike at the time such payment would have been due. The applicants' complaint was that the respondent made its decision months after the fact.

Section 34 of the Basic Conditions of Employment Act deals with deductions that are lawfully permissible against the remuneration of employees. It is a mechanism that does not permit arbitrary deductions but instead requires that due respect be given to an employee's constitutional rights to fair labour practices, of access to court, and the right not to be arbitrarily deprived of their property. The respondent initially made a conscious election to pay the applicants despite their participation in the strike, giving the impression that it was not invoking the no-work no-pay rule. Then after an enquiry it determined that it had made a mistake in not having included them amongst the employees against whom it intended to implement the no-work no-pay rule. That does not suggest an error within the contemplation of section 34(5), but even if it did, unilateral deductions are not countenanced in section 34(1).

The Court held further that the common law doctrine of set-off would only be applicable where the employee had admitted the debt and payment terms, or if a judgment debt already existed, as provided for in section 34(1) because only then

could it be said that the applicants and the respondent were mutually indebted to each other.

Consequently, the deductions were declared impermissible.

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.

Smit v Master of the High Court, Western Cape and others [2022] 4 All SA 146 (WCC)

Wills and Estates – Validity of will – Whether in light of her implication in the death of the deceased, applicant should be declared unworthy to inherit from the deceased's estate – Despite absence on judicial pronouncement regarding guilt of applicant, rule against inheriting has been extended in case law to include forgery of will.

The applicant's husband was murdered on their farm in June 2019. Pursuant to his death, the applicant sought an order that the first respondent (the "Master") accept and register a document dated 12 January 2019 as the last will and testament of the deceased. The application was opposed by the second and third respondents (the daughters of the deceased from a first marriage) on the basis that such document was fraudulent. They contended that a 2018 will was the real will of the deceased.

A critical aspect of the case was the implication of the applicant in the murder of the deceased. The court was thus faced with the question of whether the applicant should be declared unworthy to inherit from the deceased's estate.

Held – The disputed 2019 will was found by a handwriting expert to have been forged. The only person who stood to benefit from that document, and two other documents found to have been forged, was the applicant. The Court could find no fault with the witnesses called by the respondents. Those witnesses testified about the applicant's plotting to have her husband killed, particularly after she gained access to his safe and discovered that she would not inherit in terms of the 2018 will kept there. The Court found the witnesses in question to be honest, credible and eager to assist the court in arriving at a just decision.

That led the court to the question of whether the applicant was entitled to inherit in the estate of the deceased, having caused or participated in his execution. The Court referred to the Roman-Dutch principle that there are classes of persons who are regarded as unworthy to inherit. The novel element in this case was that there had not yet been any judicial pronouncement on the guilt of the applicant in the murder case. The question then was whether murder was the only crime warranting exclusion from inheriting. In the leading authority of *Taylor v Pim* 1903 NLR 484, it was confirmed that the classes of excluded persons may include persons who are deemed unworthy for reasons other than some wrong they have done to the testator or his property.in

In *Pillay and others v Nagan and others* [2000] JOL 6391 (2001 (1) SA 410) (D), the court extended the rule to include a person who had forged a will.

It having been ascertained that the applicant had forged at least three documents and submitted one forged document purporting to be the deceased's last will, public policy required that she forfeited all the benefits that arose from the deceased's estate. The Court ruled her unworthy to inherit, and dismissed her application to recognise the 2019 document as the deceased's will.

Surrogacy Advisory Group v Minister of Health [2022] 4 All SA 187 (GP)

Constitutional and Administrative Law – Constitutionality of regulations made in terms of the National Health Act 61 of 2003 – Whether applicant was, in terms of the subsidiarity principle, limited to bringing a constitutional challenge of the regulations under the Promotion of Administrative Justice Act 3 of 2000 – Making of regulations – Insofar as Promotion of Administrative Justice Act was not promulgated to specifically give effect to any of the rights claimed to have been infringed, applicant not compelled to rely on that Act in seeking review.

Constitutional and Administrative Law – Regulations made in terms of the National Health Act 61 of 2003 – Assessment of justification of constitutional limitation – Sufficient information must be placed before the court to ascertain what the policy is; reason for policy must be clear; and it must be shown that limiting a constitutional right to further the policy is reasonable.

The applicant, a voluntary association of medical-legal lawyers and individuals with experience in infertility and surrogacy, brought this application in the public interest under section 38(d) of the Constitution. It expressed concern that in the context of artificial fertilisation technologies, health care users are not always treated with trust, are stigmatised, and that their personal and moral decisions regarding how they want to build their families are not always accepted and valued, and are subjected "to moralistic censure by the State". The Court was asked to declare certain provisions of the *Regulations Relating to the Artificial Fertilisation of Persons*, and the *Regulations Relating to the Use of Human Biological Material* unconstitutional. The impugned provisions related to the requirement for certain people to undergo a psychological evaluation before undergoing treatment, the prohibition against sex selection pre-implantation and the prohibition on disclosing certain information.

The respondent, the Minister of Health, raised two preliminary points, contending that the applicant should have brought the application under the Promotion of Administrative Justice Act 3 of 2000 and that the attack on the regulations was premature. It was contended that the making of regulations is an administrative act, and that the attack on the constitutionality of the regulations had to be launched under the Promotion of Administrative Justice Act in terms of the principle of subsidiarity.

The second point *in limine* was that the attack on the regulations was premature as the Minister had embarked on amending the regulations. It was submitted that the amendment process must first unfold before the court can pronounce on its constitutionality, and that failure to wait for that would infringe the separation of power principle.

Held – Accepting that making regulations is an administrative action, especially in cases where they impact harshly on individual rights, the next question was whether

the applicant was, in terms of the subsidiarity principle, limited to bringing a constitutional challenge of the regulations under the Promotion of Administrative Justice Act. The relevant principle of subsidiarity states that if legislation has been enacted to give effect to a constitutional right, then conflicts about that right should be adjudicated using that legislation, rather than relying directly on the Constitution or the common law. Explaining that the Promotion of Administrative Justice Act will not be applicable where the cause of action lies in an infringement of human rights (such as challenging the constitutionality of regulations), the Court held that the applicant was not compelled to rely on the Promotion of Administrative Justice Act. The Act was not promulgated to specifically give effect to any of the rights claimed to have been infringed in this case, and therefore subsidiarity was not invoked.

The second preliminary point was also dismissed as the applicant was challenging existing regulations.

After considering the manner in which the constitutional rights flagged by the applicant were said to be infringed by the regulations, the Court explained burden of justifying a constitutional limitation. Sufficient information must be placed before the court to ascertain what the policy is; the reason for the policy must be clear; and it must be shown that limiting a constitutional right to further the policy is reasonable.

Following the above precepts, the Court held regulations 7(j)(ii) and 13 of the *Regulations Relating to the Artificial Fertilisation of Persons* and regulation 6 of *the Regulations Relating to the use of Human Biological Material* to be unconstitutional and invalid. The order of invalidity was suspended for 12 months to allow the executive to amend or replace the regulations.

Trustees for the Time Being of the East London Hebrew Congregation v Galperin and others[2022] 4 All SA 224 (ECLD)

Property – Eviction application based on termination of occupier's employment, where occupation of property was subsidiary to such employment – Termination of employment rendering continued occupation unlawful – Eviction application will only be granted if, after considering all the relevant circumstances, it is just and equitable to make such an order – Justice and equity considerations leading to application being stayed until labour dispute was resolved.

The East London Hebrew Congregation sought the eviction from premises owned by it of the first and second respondents (the "respondents"). The first respondent was appointed to serve the Congregation as its Rabbi, and the right to occupy the property, with his wife, was an incident of his employment by the Congregation.

According to the applicant, the respondents' occupation of the property became unlawful when it terminated the first respondent's services under the contract, including the right to occupy the rabbinical home, due to alleged misconduct on his part. Despite notice to vacate, the respondents remained in occupation of the property.

While the applicant stated that it had complied with all the requirements for eviction as imposed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the respondents opposed the application on procedural and substantive grounds. One of the issues on which the parties were in dispute related to the appropriate forum in which the first respondent could challenge his dismissal. The applicant was of the view that the dispute fell to be settled in terms of the standard

procedures outlined and prescribed in the Labour Relations Act 66 of 1995 while the respondents asserted that the dispute fell to be resolved exclusively before the Jewish Ecclesiastical Court (the "Beth-Din"). The respondents also appeared to assert that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 did not apply to them, while at the same time contending that the requirements of the Act had not been complied with.

Held – While the applicant bore the onus of proving the termination of both the right to occupy and of the first respondent's employment agreement (the right to occupy being subsidiary thereto), the respondents bore an evidentiary burden to allege and prove the facts necessary to justify their plea that they were not in unlawful occupation of the property. The Court pointed out that it was not open to the respondents to dispute that the first respondent's employment had been terminated, ending the contractual entitlement to remain in occupation of the property. That stood as a fact independent of the issue of fairness or validity. That then brought the respondents within the purview of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act as "unlawful occupiers", entitling them to the benefit and protection of the provisions of the Act. The Court was accordingly satisfied that the respondents were "unlawful occupiers" within the meaning of the definition in the Act and that the applicant was, in principle, entitled to an eviction order subject to the constraints imposed by section 4 of the Act. An applicant in an eviction application that is brought within the ambit of the Act is required to establish that the procedural requirements of the Act have also been met.

The respondents took issue with the manner in which the applicants served notice in terms of section 4(2) of the Act. However, the Court held that as long as the applicant ultimately gave the required notice fourteen days before the hearing (after seeking the court's leave), it would meet the necessary procedural requirements of section 4(2).

An eviction application will only be granted if, after considering all the relevant circumstances, it is just and equitable to make such an order. The expectation that the first respondent should be given the opportunity to have a labour dispute finally determined before being evicted accorded with the constitutional objectives of justice and equity. As the first respondent had not yet had a chance to state his case regarding his dismissal, the Court decided to stay the eviction application pending the resolution of the contested issues surrounding the application.

Trustees for the Time Being of the Hunter Family Trust v Duin-en-See (Pty) Ltd and others [2022] 4 All SA 260 (WCC)

Property – Ownership of property by company – Operation of share block scheme – Rights of shareholders to enjoyment of property – Share Block Control Act 59 of 1980, section 4 – A company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of immovable property – Essential requirement is some connection between the holding of shares in the company and the holders' entitlement by virtue thereof to a right or interest in the use of the company's immovable property.

The first defendant ("Duin-en-See") was incorporated in 1958, as a vehicle to acquire land in Plettenberg Bay. An agreement entered into by the original shareholders set out how each would subscribe for a shareholding in the company and acquire a portion of the land for their own benefit. As shareholders in the company, the plaintiffs

exercised their rights in respect of their parcel in accordance with the agreement. Alleging that Duin-en-See intended to dispose of their portion without their consent, the plaintiffs sought an order declaring the company to be operating a share block scheme in terms of section 4 of the Share Block Control Act 59 of 1980, and confirming their rights to the property they acquired as shareholders in the company.

Duin-en-See noted an exception to the particulars of claim.

Held – The first ground of the exception was that the allegations pleaded in support of the declaratory relief sought were insufficient to trigger the presumption in section 4 and/or to satisfy the definition of "share block scheme" in the Share Block Control Act. In terms of section 4, a company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of immovable property or any part of immovable property. A share block scheme is defined in section 1 of the Act to mean "any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property".

The agreement pleaded by the plaintiffs would, if established at trial, constitute a manner by which the holding of the respective blocks of shares referred to therein conferred a right to the use of identified parts or parcels of the company's immovable property. It would not be necessary for the relevant right or interest in the use of the immovable property to be provided for in the definition of the relevant class of shares in the company's memorandum of incorporation in order for the alleged agreement to be effective. The extremely wide definition of the term "share block scheme" acknowledges that such schemes might be devised in various ways. The essential requirement is some connection between the holding of shares in the company and the holders' entitlement by virtue thereof to a right or interest in the use of the company's immovable property. The court dismissed the first ground of exception.

The second ground related to the validity of the transfer of rights to the plaintiffs, with Duin-en-See maintaining that the transfer of rights to the plaintiffs had to be in writing to be valid. That contention was based on the provisions of the General Law Amendment Act 68 of 1957 or the Alienation of Land Act 68 of 1981. However, the transactions which culminated in the trust's acquisition of the shares were sale of shares agreements and not contracts in respect of the sale of land or for the cession of rights in land. The agreements were therefore not subject to the formalities prescribed in either the General Law Amendment Act or the Alienation of Land Act.

The exception was accordingly dismissed.

Van Rooyen NO and another v Mokwena NO and another [2022] 4 All SA 274 (LP)

Insolvency – Application for sequestration of trust on ground that it had impermissibly benefited from funds originating from insolvent company – Admissibility of evidence given at insolvency enquiry into the affairs of insolvent company as contemplated in sections 417 and 418 of the Companies Act 61 of 1973 – Testimony of witnesses who testified before the insolvency enquiry only admissible against such witnesses – In absence of evidence that trust was factually insolvent or unable to pay debts, sequestration is refused.

In their capacities as liquidators of an insolvent estate, the applicants applied for the sequestration of a trust and piercing of the trust veneer on the ground that the trust was the alter ego of the insolvent company ("TMI") and its sole director (Mr Mokwena). At the core of the application were allegations that the trust improperly benefited from funds originating from TMI. The applicants alleged that TMI funds were irregularly transferred to the trust and as such the trust's property was tainted rendering the trust invalid and liable to sequestration.

In February 2021, the applicants obtained the necessary authority to convene an insolvency enquiry into the affairs of TMI as contemplated in sections 417 and 418 of the Companies Act 61 of 1973. They attached copies of the transcription of the enquiry to their founding affidavit and set out a summary thereof in the founding affidavit. The respondents contended that the evidence based on the extracts of transcripts of the insolvency enquiry could not be relied upon in the present proceedings as it constituted hearsay evidence and was obtained in breach of the confidentiality rule applicable between attorney and client.

Apart from disputing that the evidence was hearsay, the applicants sought the admission of the evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

Held – On the issue of the admissibility of evidence given at the insolvency enquiry, that section 3(1)(c) permits the court to admit otherwise inadmissible hearsay evidence if, having regard to the factors set out in subparagraphs (i) - (vii) of the provision, it is of the opinion that such evidence should be admitted in the interest of justice. Based on case law, the testimony of the three witnesses who testified before the insolvency enquiry was only admissible against such witnesses and could not be used against the trust, which was not the subject of the enquiry. The applicants failed to make out a case why the hearsay evidence should be admitted as evidence in terms of section 3(1)(c).

As one of the witnesses at the insolvency enquiry was the legal representative of Mr Mokwena and TMI in all relevant litigation, his testimony at the enquiry was protected under the professional privilege principle. Communications between a lawyer and a client may not be disclosed without the client's consent.

No case was made for the trust veneer being pierced based on alleged trust form abuse by Mr Mokwena.

On the question of whether the applicants' claim was disputed on *bona fide* grounds, the court referred to the requirements of a party challenging an application for winding-up of a company or sequestration as an abuse of the process of court on the grounds that the applicant's claim against the respondent is disputed. While a respondent in an application for winding-up is not required to prove the truth of his defence, it is necessary for it to establish sufficient facts to show that the debt is *bona fide* disputed on reasonable grounds.

The court found that it had not been established that the trust was either factually insolvent or that it had failed to pay its debts. The application was dismissed.

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