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MUNICIPAL EMPLOYEES PENSION FUND AND ANOTHER v MONGWAKETSE 2022 (6) SA 1 (CC)

Pension — Disputes — Pension Funds Adjudicator — Jurisdiction — To determine grievance of person who purportedly admitted as member of Fund when ineligible in terms of Fund's rules — Whether such person 'complainant' as envisaged in Pension Funds Act — 'Complainant' and 'complaint' defined — Pension Funds Act 24 of 1956, s 1 sv 'complaint' and 'complainant'.
Words and phrases — 'Complaint' — Meaning of in s 1 of Pension Funds Act 24 of 1956.
Words and phrases — 'Complainant' — Meaning of in s 1 of Pension Funds Act 24 of 1956.
In terms of ch VA of the Pension Funds Act 24 of 1956, the Pension Funds Adjudicator's function is to investigate and dispose of a 'complaint'. A 'complaint' is defined in s 1 of the Act as 'a *complaint* of a *complainant* relating to the administration of [a pension fund], the investment of its funds or the interpretation and application of its rules, and alleging [the allegations set out in paras *(a)* to of the definition]'. A 'complainant' is defined as '*(a)* any person who is, or claims to be (i) a member or former member, of a fund, (ii) a beneficiary or former beneficiary of a fund, (iii) an employer who participates in a fund, (iv) a spouse or a former spouse of a member or former member, of a fund; *(b)* any group of persons referred to in [the subparas above]; *(c)* a board of a fund or member thereof; *or (d) any person who has an interest in a complaint*'. The principal question in the present case was whether a person seeking to lodge a grievance with the Adjudicator wherein they sought the return from a pension fund of all contributions made on their behalf, *on the grounds that they never in law had become a member*, qualified as a 'complainant'. The background follows.

[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!**

In around February 2012 the respondent, Ms Mongwaketse, when she took up employment on a five-year fixed-term contract with the Ngaka Modiri Molema District Municipality, signed an application form to be admitted as a member of the first applicant, the Municipal Employees Pension Fund (the MEPF or the Fund). The MEPF accepted her membership. The form specified that the respondent would contribute 7,5% of her monthly pensionable emoluments; her employer 22%. However, the respondent, unbeknownst to her, ended up paying the entirety of the contributions by way of deductions from her salary. In around November 2014 the respondent learnt that the MEPF's rules ('the rules') did not in fact entitle fixed-term employees, such as herself, to be members. She stopped making payments in around September 2015. When the MEPF refused to accede to her request that it refund her the contributions she had made, the respondent lodged a grievance with the Pension Funds Adjudicator (Adjudicator) in terms of ch VA of the Pension Funds Act 24 of 1956. The respondent argued that: she was precluded by the rules from becoming a member, and should not have been admitted as a member, and that on this basis she should get all her contributions back. The MEPF argued that the respondent had in fact become a member of the Fund; and that, on her resignation from it in September 2015, she was only entitled to be paid the resignation benefit to which she was due as a member in terms of rule 37(1)*(b)* of the rules, ie the 7,5% contributions (which amount the MEPF did in fact refund to the respondent). In November 2017 the Adjudicator issued its determination. It ruled that Ms Mongwaketse had not met the criteria for membership of the MEPF, had not become a member, and was not bound by the Fund's rules; and, on the basis of unjustified enrichment, that the MEPF had to refund to the respondent the total amount of all contributions, including those deemed to have been made by the Municipality, because the MEPF had not been entitled to receive the contributions. The Adjudicator filed the determination with the Johannesburg High Court in terms of s 30M of the Act. The MEPF answered by launching an application in the High Court wherein, by way of both a judicial review and as 30P appeal in terms of the Act, it contested the Adjudicator's determination. It was unsuccessful there; so too in its appeal to the Supreme Court of Appeal. Here, the Constitutional Court granted the MEPF leave to appeal, and proceeded to the appeal.

The Constitutional Court held that it had no jurisdiction in respect of the MEPF's s 30P appeal, aimed as it was at merely reversing factual findings made by the court below. (See [65] – [65].) The focus of the Constitutional Court's attention was the MEPF's argument, in support of its claim that the findings of the Adjudicator were irrational and accordingly reviewable, that the Adjudicator did not have jurisdiction to entertain the respondent's grievance.

The MEPF argued that, given that the respondent had contended in her grievance that she had not become a member of the MEPF, and because the Adjudicator had agreed, the grievance was not a 'complaint' by a 'complainant' but simply a dispute between private parties outside of the rules. It disagreed with the respondent that she could be accommodated in para *(d)* of the definition of 'complainant'. The MEPF and the respondent differed on the interpretation to be accorded to para *(d)*. The MEPF argued that the category referred to a person who had an interest in *an existing complaint* made by a person in para *(a)*, *(b)* or *(c)* of the definition (see [44]). The respondent, in contrast, argued for a wider interpretation, namely that it *added an additional class* of persons who may initiate a complaint, namely any person who had an interest in a grievance of the substantive nature contained in the definition of 'complaint' (see [45]).

The CC held that the respondent's wider interpretation was to be preferred (although both had merit) (see [46]). It held that, on the face of it, the words 'of a complainant' referred to a complaint lodged by *any person* listed in the 'complainant' definition. (See [47].) While it might be true, the court held, as the MEPF had argued, that the wide meaning of para *(d)* would render paras *(a)* – *(c)* superfluous — in the sense that persons in paras *(a)* to *(c)* of the definition of 'complainant' would self-evidently have an interest in the complaint (see [44]) — tautology in legislation was not unknown. The legislature may use wide and overlapping language to ensure that a field was comprehensively covered, and the presumption against rendering words in a statute superfluous must not be applied to create differences of meaning where such differences were not intended by the lawgiver. Paragraphs *(a)* – *(c)* would still serve the purpose of identifying the obvious classes of persons who would have an interest in pursuing a 'complaint'. (See [46].)

The MEPF had argued that, given the incorporation in para *(d)* of a cross-reference to 'a complaint', which was in turn defined as a complaint 'of a complainant', the only way to avoid irresoluble circularity was to read the phrase 'of a complainant' as only referring to persons falling within paras *(a)* – *(c)* of the 'complainant' definition (see [44]). The CC disagreed with this reading. It held that the addition of the words 'of a complainant' to the definition of 'complaint' merely acknowledged that a grievance of the substantive nature identified in the definition (of 'complaint') may be lodged only by a person contemplated in the 'complainant' definition. (See [47] and [49].) In determining whether a person had an interest in a 'complaint' for purposes of para *(d)* of the 'complainant' definition, it was the substantive component of the 'complaint' definition that was relevant. (See [49].)

As to whether the grievance raised by the respondent amounted to a 'complaint' for the purposes of the Act, the key question in this case, the court held, was whether it concerned 'the administration' of the MEPF. It did: acts of admitting people to membership and receiving contributions in respect of their membership were the core activity of a pension fund, and at the heart of pension fund administration. The fact that the grievance concerned administration that was ultra vires did not take it out of the scope of 'administration'. (See [53] – [55].)

RAFONEKE AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2022 (6) SA 27 (CC)

Legal practitioner — Admission and enrolment — Prohibition on admission and enrolment of foreigners who not permanent residents — Constitutionality — Whether such prohibition amounting to unfair discrimination — Prohibition found to be constitutional — Constitutional Court declining to confirm order of High Court declaring provision unconstitutional to extent that it prevents admission and enrolment of foreigners as 'non-practising practitioners' — Legal Practice Act 28 of 2014, s 24(2), read with s 115.

Constitutional law — Legislation — Validity — Legal Practice Act 28 of 2014, s 24(2), read with s 115 — Prohibition on admission and enrolment of foreigners who not permanent residents — Whether such prohibition amounting to unfair discrimination — Prohibition found to be constitutional — Constitutional Court declining to confirm order of High Court declaring provision unconstitutional to extent that it prevents admission and enrolment of foreigners as 'non-practising practitioners'.

Section 24(2)*(b)* of the Legal Practice Act 28 of 2014 sets out as a requirement for admission as a legal practitioner that the applicant be (i) a South African citizen; or (ii) a permanent resident in the Republic. In separate applications in the Free State High Court, two foreign nationals lawfully present in the Republic who, except for the above, had met all requirements for admission as legal practitioners — they had studied, obtained LLB degrees and completed their practical vocational training in South Africa, and passed the required attorneys' admission examinations — sought orders declaring s 24(2)*(b)*, read with s 115, of the LPA to be unconstitutional. The grounds on which they impugned the provisions' lawfulness were that they precluded persons who were neither citizens nor permanent residents of South Africa, and who were not admitted as legal practitioners in designated foreign jurisdictions, from being admitted and enrolled as legal practitioners in South Africa. Those applications were opposed by the Minister of Justice and Correctional Services and the Legal Practice Council of South Africa (the LPC). The High Court ultimately declared the provisions of s 24(2) unconstitutional and invalid, but *only* to the extent that they did not allow foreigners who were not permanent residents in South Africa to be admitted and authorised to be enrolled as *non-practising legal practitioners*. The applicants, dissatisfied with the award, sought the Constitutional Court's leave to appeal against it. The CC granted such leave. Those applicants' applications were dealt with by the CC as a consolidated application, along with other matters that were brought and intervened in, by non-citizens similarly placed to the original applicants, and raising similar issues. The Constitutional Court further granted leave to a number of interested parties to assist the court as amici curiae.

The applicants' submission was that the impugned provisions breached the right to equality protected in s 9 of the Constitution. The applicants argued that they differentiated between citizens and permanent residents, on the one hand, and non-citizens who were not permanent residents, such as themselves, on the other; they also differentiated between non-citizens admitted as practitioners in designated jurisdictions and non-citizens who had not been so admitted. They argued further that the differentiation bore no rational connection to a legitimate governmental purpose. They argued too that the differentiation amounted to direct discrimination on the listed ground of social origin, as well as the analogous ground of nationality or citizenship, and that such discrimination was unfair because it infringed the rights to equality and dignity of the groups precluded from being admitted. The violation of s 9 of the Constitution, they argued further, was not justifiable under s 36. (See [43] and [45] – [48].) The relief that they sought was a declaration of invalidity, subject to a 24-month suspension to allow Parliament to deal with the constitutional defect, and that during the suspension period para *(b)* should be read as, in addition to South African citizens and permanent residents, including *persons 'lawfully entitled to live and work in South Africa'*. The Minister and LPC argued that the impugned provisions passed constitutional muster (see [4]).

Held

In deciding whether the impugned provisions were consistent with s 9 of the Constitution, the first question was whether there was differentiation on the basis of citizenship and permanent residency. That was uncontroversial, and had to be answered in the affirmative. (See [72].)

The next question was whether the differentiation bore a rational connection to a legitimate government purpose. (If it did not, there would be a violation of s 9(1) of the Constitution.) (See [72].) This had to be answered in the affirmative, for the reasons that followed: In order to assess the rationality of the enactment of s 24(2) of the LPA,

its provisions had to be considered with due regard to the right in s 22 of the Constitution to freedom of trade, occupation and profession. No right in the Constitution could be elevated above other rights, and the rights contained in the Bill of Rights were mutually reinforcing. (See [77].) That provision provided that '*every citizen* [had] the right to choose their trade, occupation or profession freely'. It also, however, empowered the state to regulate the practice of such a trade, occupation or profession. (See [73].) It was in terms of such powers that the legislature had enacted s 24(2) of the LPA, with a view to regulating the legal practice. (See [74].) In enacting s 24(2), the state had been obliged to respect citizens' right of choice under s 22. There was no issue that the state had not done so. (See [77].) But the legislature was at liberty to decide how far to extend admission into the legal profession to non-citizens, and could in fact bar their entry completely; *the right in s 22 did not avail non-citizens*. Here, the legislature had opted to draw the line at permanent residents. (See [77] and [79].) In differentiating between such a group and other kinds of non-citizens, it did so in terms of a government policy aimed at serving the legitimate purpose of protecting job opportunities for South Africans. That could not be said to be irrational or arbitrary. (See [82], [83] and [87].)

The next question was whether the differentiation amounted to discrimination. It could be assumed that the differentiation in question amounted to discrimination on the unlisted ground of citizenship. (The court rejected the notion that citizenship might be classified as falling under the listed ground of social origin). (See [94] – [96].)

The final question was whether the discrimination was unfair. The contention in this regard was that, because the impugned provisions restricted the rights of applicants to be admitted into the legal profession, they impaired their human dignity. This, however, ignored the fact that the restrictions did not prevent the applicants from ever working in South Africa, and doing so by providing legal services that did not require admission. Section 24(2) of the LPA was narrowly tailored to the admission of legal practitioners. They did not operate as a blanket ban to employment in the legal profession as a whole. (See [98].) The applicants were not left destitute with no alternative source of employment. The activity which the applicants sought constitutional protection for was the enjoyment to choose one's vocation and as such this could not be held to amount to unfair discrimination, as this right did not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants. (See [102].)

It followed that, as the discrimination was not unfair, there was no violation of s 9(3) or s 9(4) of the Constitution. Accordingly, the appeal had to be dismissed. (See [103].) There was no point in declaring, as the High Court had done, the provisions inconsistent with the Constitution to the extent that non-practising lawyers were not eligible for admission. That order would not be confirmed. (See [104] and [106].)

ALBERTS AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2022 (6) SA 59 (SCA)

Practice — Parties — Joinder — Misjoinder — Multiple plaintiffs with separate causes of action — Suit not barred provided issues of fact and law substantially same for each plaintiff — Significant overlap required — If so, court may allow single action provided convenience and absence of prejudice to defendant shown — Uniform Rules of Court, rule 10(1).

The present appeal arose from a summons sued out of the Port Elizabeth High Court by 138 plaintiffs, each of whom claimed damages from the Minister. All the claims arose from alleged assaults on the plaintiffs at a particular prison on two consecutive days. The assaults were alleged to have been perpetrated by correctional services officials employed by the Minister. Different injuries and sequelae were pleaded for each plaintiff and each plaintiff claimed R500 000 in general damages. The plaintiffs annexed 138 separate sets of particulars to the summons. This prompted the Minister to enter a special plea raising two defences, namely (i) that the annexing of 138 sets of particulars of claim to a summons by the individual plaintiffs, rather than one set referring to all of the plaintiffs, was irregular for failing to comply with rule 17(2)*(a)* read with form 10 of the Uniform Rules; and (ii) that the plaintiffs were guilty of a fatal misjoinder because they did not comply with the requirement of rule 10(1), that the individual claims had to depend on the determination of substantially the same question of law or fact. It was argued that precedent suggested that under the common law several plaintiffs with separate causes of action could jointly sue the same defendant.

The Port Elizabeth High Court upheld the special plea and dismissed plaintiffs' claims. The plaintiffs appealed to the Supreme Court of Appeal, where they addressed the same two issues for determination.

Held

As to (i)*:* There was no reason why the annexing of several documents containing the particulars of each plaintiff's claim should result in the dismissal of all the claims. After all, if a single, composite set of particulars had been annexed, the action would simply have included paragraphs describing each plaintiff's claim in turn. The Minister's reluctance to press this point on appeal made sense, particularly since an overly formal approach to pleadings had consistently been discouraged by the courts. If there was an irregularity, it was not a fatal one that warranted the dismissal of the claims. (See [7].)

As to (ii)*:* While the default position at common law was that plaintiffs could not join to sue a defendant on separate causes of action, an exception was made where convenience dictated that they be heard together — a recognition of the High Courts' inherent jurisdiction to regulate their procedure, as underpinned by s 173 of the Constitution and the courts' right under rule 27(3) to condone non-compliance with the rules. (See [11].)

The test for compliance with rule 10(1) was whether each plaintiff's right to relief depended on 'the determination of substantially the same question of law or fact which . . . would arise on' the actions if brought separately. Since the legal issues were in the present case the same for each action, the only remaining question was whether the pleaded facts amounted to substantially the same questions of fact which would arise in the notionally separate actions. (See [12] – [13].) In context 'substantially' connoted that there had to be a significant overlap of facts to be determined, which was indeed the case here (see [16], [18]). Added to this was the convenience of calling common witnesses only once on the assault issue, which would result in a considerable saving of time and expense, both at trial and in preparation for trial.

In the result, the joinder of the plaintiffs in one action was appropriate and inoffensive, and the special plea should have been dismissed. (See [20] – [21].)

CAPITAL APPRECIATION LTD v FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS 2022 (6) SA 67 (SCA)

Companies — Shares and shareholders — Shares — Purchase by company of more than 5% of any class of its shares — Shareholder voting against special resolution approving company repurchasing shares from shareholders — Shareholder's right to determination by court of its shares' fair value and to order that company pay it such amount — Companies Act 71 of 2008, ss 48(8)*(b)*, 114(4), 115(8) and 164(14).

Appellant, a company, notified its shareholders that it planned to repurchase more than 5% of its issued share capital and it advised that this transaction would be subject to ss 48, 114 and 164 of the Companies Act 71 of 2008, and conditional on shareholders' approval by special resolution in terms of s 115 (see [3]). At the general meeting concerned, a shareholder voted against the resolution but it was nonetheless passed, and the shareholder then asked that the company buy its shares for their fair value (see [4]).
The company offered 80 cents for each share, but the shareholder rejected its offer, and applied to the High Court for it to determine its shares' fair value in terms of s 164(14) (see [4]). The company then contended that s 164 did not apply, with the consequence that the shareholder had no right to an appraisal, and it had no obligation to pay the court-appraised amount (see [5]).
The High Court found that s 164 did apply, and it ordered, inter alia, the appointment of an appraiser to aid it in the appraisal task (see [6]).
The company later asked the High Court for, and was granted, leave to appeal to the Supreme Court of Appeal.
The Supreme Court of Appeal *held*, following on interpretation of the provision concerned, that s 48(8)*(b)* was linked by way of ss 114 and 115 to s 164, and the shareholders' compliance with the requirements of s 115 and s 164 entitled it to the appraisement it had prayed for (see [28] – [29]). Appeal dismissed (see [30]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v CAPITEC BANK LTD 2022 (6) SA 76 (SCA)

Revenue — Value-added tax — Input tax — When deductible — Tax fraction of loan-cover insurance payouts — Loan cover not made for consideration, and so not qualifying as taxable supply — Loan cover supplied in course of business of providing credit, and so qualifying as exempt supply — Value-Added Tax Act 89 of 1991, s 16(3)*(c)*.

Section 16(3)*(c)* of the Value-Added Tax Act 89 of 1991 provides for a deduction of an amount equal to the tax fraction of any payment made to indemnify another person in terms of any contract of insurance, subject to the proviso in subpara (i) of s 16(3)*(c)*, that this only applies where the supply of the insurance contract is a 'taxable supply'.
The Commissioner disallowed Capitec's claimed input tax deduction (under s 16(3)*(c)*) of the tax fraction of the total insurance payouts recovered by it under policies covering the risk of its unsecured loans becoming irrecoverable upon borrowers' death or retrenchment. The tax court upheld Capitec's appeal against the Commissioner's assessment, and the Commissioner appealed to the Supreme Court of Appeal. At issue was whether the loan cover was a taxable supply, ie was supplied in the course or furtherance of an enterprise.

Held
Participating in the VAT system required that 'enterprises' (as defined in s 1 of the Act) charge consideration or a price for the goods or services they supplied. The facts and the clear and unambiguous terms of the loan contract showed that the loan cover was supplied by Capitec to its customers for no consideration. The implication of not meeting this requirement was that supplies made for no consideration were not made in the course or furtherance of an enterprise, and hence were not a taxable supply. (See [18], [29] – [30].)
The only supply between Capitec and its customers was the supply of credit, which was exempt. The credit insurance policies ensured the recovery of the credit advanced to customers. Thus, the loan cover was supplied in the course of making exempt supplies; and, as an exempt supply, it was not deductible by Capitec in its VAT return. The appeal would accordingly be upheld. (See [33], [37], [50].)

DVT v BMT 2022 (6) SA 93 (SCA)

Domestic violence — What constitutes — Whether, on reasonable construction, contents of SMSes constituted acts of domestic violence as defined — Domestic Violence Act 116 of 1998, ss 1(vii)*(c)* and 1(vii)*(f)*

Included in the definition of 'domestic violence' (in the Domestic Violence Act 116 of 1998) is 'emotional, verbal and psychological abuse' (ss 1(vii)*(c)*) and 'harassment' (ss 1(vii)*(f)*). Each of these is further defined in s 1 of the Act, the former as 'a pattern of degrading or humiliating conduct towards the complainant (ss 1(xi) and (xii)); the latter as 'engaging in a pattern of conduct that induces the fear of harm to a complainant'. (See [10].)
At issue in this appeal to the Supreme Court of Appeal was whether the contents of SMSes sent by Mrs BMT to her ex-husband, Mr DVT, constituted verbal, emotional or psychological abuse or harassment as defined in terms of ss 1(vii)*(c)* and *(f)* of the Act. The appeal was from the High Court, against its dismissal of Mr DVT's appeal from the magistrates' court. Both courts refused to grant him a domestic protection order based on the impugned SMSes.
Held
The High Court had correctly found that, absent the requisite pattern of repeated conduct, the SMSes did not constitute domestic violence. Nothing in the SMSes could, by any stretch of the imagination, be construed as insulting the appellant to the extent that it amounted to emotional, verbal or psychological abuse. There were significant intervals between them; they were irregular and not persistent or repetitive in nature. The contents and tone of the SMSes must also be considered against the backdrop of a fiercely contested divorce in which both parties made serious allegations against the other. Mr DVT accordingly failed to establish, on a balance of probabilities, that Mrs BMT committed an act of domestic violence. The appeal would therefore fail. (See [12] – [14], [17] – [19] and [21].)

FLOWER FOUNDATION PRETORIA HOMES FOR THE AGED NPC v REGISTRAR OF DEEDS, PRETORIA AND OTHERS 2022 (6) SA 99 (SCA)

Housing — Housing development scheme for retired persons — Alienation of land subject to right of occupation — Occupation right holders' consent to alienation — Whether required where only portion of land over which scheme registered being sold — Housing Development Schemes for Retired Persons Act 65 of 1988, s 4B.

Section 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988 prohibits the alienation of land over which a housing development scheme is registered, without at least 75% of the holders of rights of occupation in such scheme consenting thereto.
This case concerned an appeal to the Supreme Court of Appeal by the Flower Foundation Pretoria Homes for the Aged NPC, against the High Court's dismissal of its application to declare that the transaction between itself and a third party — selling a proposed portion of land it owned and over which a housing development scheme was registered — did not transgress the provisions of s 4B. The appellant contended that this was so because the life-right holders' housing interests in relation to the housing scheme were limited to the occupation of their respective units only, so that their rights of occupation were not affected by the contemplated sale of the portion of land which they did not occupy. It was not disputed that the required consent was not obtained.
Held
The appellant's contention disregarded the fact that the life-right holders bought into a scheme as described in the consolidated title deed. There was only one property and one title deed; every inch of the land formed part of the scheme. Therefore, the housing development scheme was established on the entire property and not just a portion thereof. Section 4B clearly prohibited the appellant from alienating the proposed portion without the 75% consent of the life-right owners. The appeal would therefore be dismissed. (See [11], [14], [17] and [20].)

GOVAN MBEKI LOCAL MUNICIPALITY AND ANOTHER v GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD AND OTHERS 2022 (6) SA 106 (SCA)

Constitution — Local government — Validity of municipal bylaws — Scope of municipal legislative competence — Not extending to regulating transfer of immovable property — Constitution, s 25(1) and s 156 read with part B of sch 4; Local Government: Municipal Systems Act 32 of 2000, s 118; Spatial Planning and Land Use Management Act 16 of 2013, s 32.

Similarly crafted bylaws promulgated by three different municipalities barred transferors of property from applying to the registrar of deeds to register transfer, without the municipality certifying compliance with municipal bylaws on spatial planning, land-use management and building regulation conditions or approvals (see [12]).
The High Court had declared these restrictions unconstitutional and invalid in that, by regulating the transfer of property, they constituted an arbitrary deprivation of property (Constitution, s 25(1)); fell outside the scope of powers assigned to local government under s 156 read with part B of sch 4 of the Constitution; and conflicted with s 118 of

the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) by exceeding the functional area of 'municipal planning'.
This case concerned appeals by two of the municipalities against the High Court's order to the Supreme Court of Appeal, and a cross-appeal by the respondents — purchasers seeking transfer — against the High Court's suspension of the order of invalidity for a period of six months (so as to give the municipality an opportunity to rectify impugned bylaws).
The SCA agreed with the High Court's findings (see [41]), except iro the suspension of the order (see [42]). It approached the matter on the basis that the legality issue would be dispositive of the matter; and dealt specifically with the contention the impugned bylaws were enacted as an enforcement mechanism to ensure compliance with municipal planning and land-use functions, in the context of municipal planning and within the framework legislation of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), s 32.

Held

SPLUMA was the framework legislation authorising bylaws to regulate, control and enforce municipal planning in land-use schemes. However, this power must be exercised within prescribed parameters. It did not give municipalities carte blanche to make any policy decisions; it laid down the limits within which municipalities may legislate. And, although it afforded a municipality a wide discretion to invoke enforcement for non-compliance, the system of enforcement envisaged in s 32 of SPLUMA did not provide for imposing a restriction on the transfer of land. If SPLUMA intended to authorise municipalities to introduce an embargo on registration of transfer of properties as an enforcement mechanism, it would have provided for that expressly. That the embargo did not apply when a property was leased, rendered it an ineffective method of preventing the unlawful use of land or buildings as contemplated in SPLUMA — and arbitrary. (See [31] – [32], [36] – [37].)
Even though the impugned provisions appeared to deal with municipal planning, they restricted the transfer and registration of ownership in immovable property, constituting an embargo on transfer unless their requirements were fulfilled. This strayed beyond municipal planning. Matters pertaining to the transfer and registration of property were regulated by the Deeds Registries Act 47 of 1937, a national Act, not a provincial one. The competence with regard to deeds registration was not a municipal function; it was the domain of national government. (See [33] – [35], [38].)
The registration of transfer of property was expressly regulated by the Deeds Registries Act and s 118 of the Systems Act. The restriction on transfer of land was not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme were already provided for in ch 9 of the bylaws. There was no room for an implied municipal power to regulate the registrar's statutory power to register the transfer of properties. The bylaws exceeded the legislative competence of the respective municipalities, and thus offend the principle of legality. The appeal would accordingly be dismissed (See [40], [43].)

MAGIC EYE TRADING 77 CC t/a TITANIC TRUCKING AND ANOTHER v SANTAM LTD AND ANOTHER 2022 (6) SA 120 (SCA)

Insurance — Indemnity — Right of insured to claim indemnity from insurer — When prescription on claim begins to run.

Second respondent trucking company (Imperial) alleged that first appellant's (Magic Eye's) truck driven by its employee, second appellant, forced its truck off the road, so causing it damage of R450 000, which Imperial was now claiming from Magic Eye (see [2]).
Magic Eye denied liability to Imperial, and initiated first respondent insurer's (Santam's) joinder as a third party, and the separation of the issues between them from those in Imperial's action against Magic Eye (see [3]).
Between Magic Eye and Santam, Magic Eye's indemnity insurer, Magic Eye sought a declarator that, if it was found liable to Imperial, Santam would indemnify it for the amount it was ordered to pay Imperial (see [4]).
Santam asserted that Magic Eye's right against it to indemnification had prescribed, in that more than three years had passed since any of three dates on which Magic Eye's right might have vested: the date of the incident, the date Magic Eye gave Santam notice of Imperial's claim, and the date when Santam rejected Magic Eye's claim (see [5] and [7]).
The High Court ruled that Santam's liability to Magic Eye arose when the event occurred, and that Magic Eye's right to claim a declarator of its right to indemnification arose when Santam repudiated its claim, where Magic Eye had only proceeded for the declarator more than three years after the repudiation (see [9]). The High Court granted Magic Eye leave to appeal to the Supreme Court of Appeal (see [4]).
The Supreme Court of Appeal found, following established authority, that a claim by an insured for indemnification by an insurer only arose when the insured was found liable to a third party in a certain amount, and concomitantly, prescription of an insured's claim for indemnification against the insurer only began to run on the date that the insured was found liable to the third party in a determinate sum (see [15] and [23]).
Thus, Magic Eye's claim for indemnification, contingent on Magic Eye's being found liable, had not in fact arisen (there having been no finding of liability), and so prescription could not have begun to run on it (see [23]).
Appeal upheld, order of the High Court set aside, and substituted with an order dismissing Santam's special plea (see [24]).

MHLONGO AND OTHERS v MOKOENA NO AND OTHERS 2022 (6) SA 129 (SCA)

Court — High Court — Jurisdiction — Concurrent jurisdiction with circuit courts — High Court practice directive issued by Judge President determining jurisdictional boundaries of certain circuit courts falling within area of division — Whether competent for such practice directive to oust jurisdiction of High Court in respect of circuit courts' boundaries — JP, in issuing such directive, acting beyond powers, and practice directive accordingly invalid — Power to determine jurisdictional area of division of High Court reserved for Minister — Superior Courts Act 10 of 2013, ss 6(3), 7(1), 21 and 50(2).

Jurisdiction — High Court — Concurrent jurisdiction with circuit courts — High Court practice directive issued by Judge President determining jurisdictional boundaries of certain circuit courts falling within area of division — Whether competent for such practice directive to oust jurisdiction of High Court in respect of circuit courts' boundaries — JP, in issuing such directive, acting beyond powers, and practice directive accordingly invalid — Power to determine jurisdictional area of division of High Court reserved for Minister — Superior Courts Act 10 of 2013, ss 6(3), 7(1), 21 and 50(2).

On 1 September 2017, acting under s 7(1) of the Superior Courts Act 10 of 2013 (the Act), the Judge President of the Gauteng Division of the High Court (the High Court) issued a practice directive with a view to determining the jurisdictional boundaries of the Mbombela and Middelburg circuit courts of the Mpumalanga Division. Clause 1.5 of the directive, which was the point of controversy in the present matter, provided that '(t)he Gauteng Division of the High Court shall, with the coming into effect of this Notice, cease to have jurisdiction in any matters emanating and arising in and from the Magisterial Districts set out in parts A and B respectively [that is, in the areas of Mbombela and Middelburg]'. The present matter in the Supreme Court of Appeal concerned an appeal against a decision of the Pretoria High Court to dismiss a matter brought to it in May 2018 by the appellants on the basis of lack of jurisdiction, because it had arisen in one of the magisterial districts mentioned in clause 1.5 of the practice directive mentioned above. The appellants contended that the High Court had jurisdiction in terms of s 21 of the Act, which provided, inter alia, that '(a) Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction . . .'.

The key issues to be determined, the SCA held, were (1) whether the High Court had jurisdiction to hear the application; and (2) whether the Judge President, Gauteng, had the power in terms of s 7(1) of the Act, when constituting circuit courts in Mpumalanga by way of the notice dated 1 September 2017, to exclude the jurisdiction of the High Court in respect of the matters arising in the area of jurisdiction of those circuit courts.

Held, that on a proper interpretation of ss 7(1), 21 and 50(2) of the Act, which were clear and unambiguous, a particular division retained jurisdiction in respect of matters which have been initiated in circuit courts falling within that division's area of jurisdiction (see [10]). Furthermore, it was clear from the provisions of s 21, read with ss 7 and 50(2), respectively, that the circuit courts that were established in terms of the practice directive were not established as self-standing divisions (see [10] and [13]). At the time of the launching of the application with which the present matter was concerned, the Gauteng Division still, as per s 50(2) of the Act, functioned as the Mpumalanga Division. And, as at the date of the publication of the practice directive, on 1 September 2017, the Minister had not yet constituted the Mpumalanga Division of the Gauteng High Court as a separate division within the contemplation of s 6(3) of the Act. That was to occur only on 1 May 2019. Accordingly, until such date, the Gauteng High Court continued to retain its jurisdiction over Mbombela and Middelburg as circuit courts. (See [10], [11] and [13].)

Held, further, that the powers of a Judge President in relation to the establishment of circuit court districts and their boundaries were circumscribed by legislation; the Judge President could not exercise any more power than that granted to him or her by legislation. It was clear that, in terms of s 6(3) of the Act, only the Minister had the power to determine the jurisdictional areas of the various divisions of the High Court. The fact that a Judge President may, in terms of s 7(1), alter the boundaries of any circuit courts that had been established under a particular division should not be equated with the power, granted exclusively to the Minister, to determine the area under the jurisdiction of that division. (See [12].) It followed that the Judge President did not have the power, when constituting circuit courts in Mpumalanga by virtue of the notice dated 1 September 2017, to exclude the jurisdiction of the Gauteng divisions, that was bestowed on them in terms of s 21 of the Superior Courts Act, in respect of the matters arising in the area of jurisdiction of those circuit courts prior to the date on which the Minister promulgated the determination of the Mpumalanga

Division of the High Court. In purporting to oust the jurisdiction of the Gauteng divisions by dint of clause 1.5 of the practice directive, he acted beyond his powers, which conduct was invalid. (See [14].)
Held, further, that the High Court erred when it found that it had no jurisdiction to entertain the appellants' application (see [13]).
Held, in conclusion, that the appeal should be upheld, and the order of the Pretoria High Court set aside and replaced with one dismissing the point in limine raised relating to jurisdiction (see [16]). Furthermore, clause 1.5 of the Practice Directive ought to be declared null and void ab initio (see [14] and [16]).

NEDBANK LTD v HOUTBOSPLAAS (PTY) LTD AND ANOTHER 2022 (6) SA 140 (SCA)

Financial institution — Compliance — Fica verification — Existing clients — Whether bank entitled to refuse longstanding client's request to close bank accounts with it, on grounds of client's failure to accede to bank's request under Fica to provide it with information concerning trust shareholder — Obligation of bank to ascertain details of shareholder where 'business relationship' between bank and client already established at time of Fica taking effect in 2002 — Bank's refusal to execute client's instructions unlawful — Financial Intelligence Centre Act 38 of 2001, s 21(2); Regulations in terms of Financial Intelligence Centre Act 38 of 2001, reg 7*(f)*(ii).

The present appeal before the Supreme Court of Appeal concerned a question whether a bank was justified in refusing to fulfil a longstanding client's instructions to close its bank accounts with it, on the grounds that the client had declined the bank's previous request under the Financial Intelligence Centre Act 38 of 2001 (Fica) to provide it with information concerning a trust shareholder. The relevant background was as follows. The first and second respondents — Houtbosplaas (Pty) Ltd (Houtbosplaas) and TBS Alpha Beleggings (Pty) Ltd (TBS Alpha), respectively — were decades-long clients of the appellant Nedbank. The shareholders in the companies were the companies' sole director and representative, retired Judge Van Dijkhorst — he held one preference share in each company — and four trusts — they each held one preference share and one ordinary share in each company. In 2016 Nedbank, purportedly acting pursuant to the provisions of Fica, asked for certified copies of the trusts' trust deeds. The companies acceded, begrudgingly, to Nedbank's request in respect of three of the four trusts, but were only willing to allow Nedbank to inspect, and photograph, the trust deed of the other trust. That was not sufficient for Nedbank. The parties had reached an impasse: Nedbank contended that the companies were obliged under Fica to provide the requested documentation; the companies asserted that they were not. In January 2017 the companies' representative, acting on behalf of the companies, gave written notice to Nedbank to close the companies' bank accounts and transfer all funds therein to Absa Bank. Nedbank declined to do so, because the companies had failed to comply with Nedbank's request to provide it with all the trusts' trust deeds, and, as a result, the accounts were restricted/frozen in accordance with the prescripts of Fica. Despite the companies' protestations, Nedbank would not relent. Ultimately, in June 2017 the companies provided the sought-after documentation, and in July 2017 Nedbank finally closed the companies' bank accounts and effected the requested transfers. However, being aggrieved by what they viewed as Nedbank's unjustifiable and unlawful conduct

in failing to give immediate effect to their written instructions to close their bank accounts with it, the companies brought an application to the Pretoria High Court for damages from Nedbank equivalent to the loss of mora interest. The High Court found in favour of the applicants. The High Court refused Nedbank's application for leave to appeal, but it was subsequently granted by the Supreme Court of Appeal on petition to it.

Nedbank argued that the provisions of s 21(2) of Fica, pre-amendment, read with reg 7*(f)*(ii) of the regulations promulgated in terms of s 77(1), obliged it to obtain the particulars of the trusts before closing the bank accounts. Section 21(2) provided that ' (i)f an accountable institution had established a business relationship with a client before [Fica] took effect, the accountable institution may not conclude a transaction in the course of that business relationship, unless the accountable institution has taken the prescribed steps *(a)* to establish and verify the identity of the client . . .'. Regulation 7*(f)*(ii) provided that 'an accountable institution must obtain from . . . the South African company with which it is establishing a business relationship or concluding a single transaction, . . . [certain information] concerning the . . . *trust holding 25% or more of the voting rights at general meeting of the company concerned*'. Nedbank argued that, on a proper interpretation of the companies' memoranda of incorporation, each of the trusts in question held 25% of the voting rights at general meetings of the company concerned, and not 22% as the companies had argued; this, having regard to the fact that, with respect to certain matters, holders of preference shares were not eligible to vote at general meetings. Nedbank argued that, accordingly, so long as the companies did not comply with its request, it was justified in restricting their bank accounts.

Held, that s 21(2) pre-amendment applied to existing clients of an accountable institution which had already established a business relationship before Fica took effect. Its spotlight was thus cast on ensuring that an accountable institution — Nedbank in this instance — had established and verified the identity of the client — Houtbosplaas and TBS Alpha in the context of the facts of this case — before concluding a transaction in the course of that business relationship. Accordingly, s 21(2) required that, *at the inception of Fica*, Nedbank had to comply with Fica's prescripts before concluding any further transaction in the course of that relationship. Once this had happened, however, there would be no need or basis for Nedbank to verify the companies in respect of each and every transaction to be concluded in the course of the parties' existing business relationship. There was no evidence that Fica was not complied with at its inception. (See [25] and [41].)

Held, accordingly, that s 21(2), having regard to the object, scope and purpose of Fica, and properly construed consistently with its manifest purpose, did not, on the facts of this case, apply at the time when Nedbank sought to invoke it. (See [41].)

Held, further, that reg 7*(f)*(ii) did not avail Nedbank either (see [42]). Its introductory part made it plain that it applied only in instances where an accountable institution was 'establishing a business relationship or concluding a single transaction'. In this case it was not in dispute that, when Fica took effect on 1 February 2002, both companies had long before then established business relationships with Nedbank. Thus, reg 7*(f)*(ii) found no application where, as here, a business relationship was already in existence when Fica took effect. Moreover, in terms of s 1 of Fica a single transaction was defined as one concluded otherwise than in the course of a business relationship. Accordingly, Nedbank's reliance on reg 7*(f)*(ii) was misplaced. (See [42].)

Held, further, that on a proper interpretation of the companies' memoranda of incorporation, preference shareholders were precluded from exercising their voting rights only in relation to matters concerning the assets or profits of the companies that

would benefit them or their estates either financially or materially. Other than that, their voting rights were untrammelled. (See [48].) In such light none of the four trusts exercised 25% of the voting rights at general meetings of the companies. (See [55].)
Held, accordingly, that Nedbank had no lawful basis in refusing to give effect to the companies' instructions to close the relevant bank accounts. In doing so, Nedbank acted in breach of its obligations. In such circumstances, the companies were rightfully entitled to judgment in the amount claimed, representing mora interest calculated from 20 January 2017 (ie date of demand) to 10 July 2017 (ie the date on which effect was finally given to their instructions to close the accounts and pay over the various funds held in those accounts to Absa). (See [56] and [57].) Appeal dismissed. (See [57] and [58].)

PAF v SCF 2022 (6) SA 162 (SCA)

Marriage — Divorce — Proprietary rights — Accrual system — Days before divorce trial spouse with greater accrual establishing foreign trust and donating sum of money to it — Whether trust veil could be pierced and amount of donation deemed part of spouse's estate for purposes of calculating his accrual.

Applicant and respondent were married out of community of property but with accrual, and during their marriage applicant's estate grew to a greater size than respondent's. Ultimately, applicant sued for a divorce and respondent counterclaimed for half of the difference between their accruals (see [2]).
Then, days before the start of the divorce trial, applicant caused a trust to be established in the British Virgin Islands, and made a substantial donation to it, and, shortly after the start of the trial, transferred a substantial sum to his father, ostensibly in repayment of a loan made years earlier (see [3] – [4]).
Respondent then became aware of these transactions and amended her claim to ask that the amounts concerned should be included as a part of applicant's estate in the calculating of his accrual (see [5]).
The High Court then gave judgment, granting a decree of divorce, and finding that the transactions were made with fraudulent intent to deprive respondent of her full accrual claim. Accordingly, the court ordered that the sums concerned be deemed to be a part of applicant's assets in the calculating of said claim (see [5]).
Applicant then applied for leave to appeal to the full court, which the High Court granted, but applicant failed to prosecute his appeal in time, resulting in its lapse (see [6]).
Thereafter, before the full court, applicant sought condonation for the late prosecution of the appeal, and for leave to introduce further evidence. He abandoned his appeal in respect of the donation to his father (see [6]). The full court refused both applications, and applicant applied to the Supreme Court of Appeal (SCA) for its special leave to appeal both rulings (see [7]).
There, the issues, as foreshadowed, were the propriety of the full court's refusal of further evidence and its non-condonation of the late appeal, with the latter issue resolving to two questions: whether the full court had correctly exercised its discretion and the related issue of whether there were good prospects of success on appeal (see [7], [12] and [15]). As to the further evidence, this consisted in a written opinion by senior counsel to the effect that establishment of the trust and the donation thereto were lawful (see [8]).

Held, by the SCA, that it would refuse the evidence's admission: exceptional circumstances justifying it doing so were not present, nor the further criterion that it be conclusive of the issue concerned — here the legality of the transactions described (see [10] – [12]).
In regard to the non-condonation, the SCA noted that its discretion to condone was a wide one, allowing it only to interfere on limited grounds (see [22]). Here, the non-condonation rested on the unsatisfactory explanation for the delay (misunderstanding by the attorney of rules 49(6) and (7) and delay at the transcribers) and its extent (nine months) (see [13] and [17] – [18]).
Held, that no misdirection could be detected, and so interference was unwarranted (see [23]).
As to prospects on the merits, this required negating the High Court's conclusion that the donation should be deemed part of applicant's estate (see [25]). This resolved to three challenges: procedural, legal and factual.
The procedural assertion was that respondent had never clearly put her case to applicant at the trial (see [28]). (That being abuse of the trust form, and consequent grounds for veil-piercing and deeming (see [29]).)
Held, that, albeit its imprecise framing, the claim had been fully ventilated (see [30]).
As to the legal thrust, this was that the High Court had had no power in law to pierce the trust's veil and to make the deeming (see [32]).
Held, that authority for the contention would be overruled: the veil-piercing power had its source in the common law, as did the power to deem trust assets to be part of an estate for the purpose of calculating an accrual (see [37] and [39] – [40]).
As to the factual premises supporting the High Court's conclusion that there should be the deeming, *held*, that these were sound (see [46]).
They were the timing and non-consultation on the establishment of the trust, its location, and the absence of need therefor (see [46]).
Held, accordingly, that, given the unimpeachability of the full court's non-condonation of applicant's delay in prosecuting his appeal and the absence of prospects for his case on appeal, applicant's application for special leave to appeal should be dismissed (see [54] – [55]).

WK CONSTRUCTION (PTY) LTD v MOORES ROWLAND AND OTHERS 2022 (6) SA 180 (SCA)

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Claim based on professional negligence — Prescription beginning when known facts should have caused plaintiff, on reasonable grounds, to suspect negligence and seek further advice — Claim against auditor for loss resulting from failure to notice fraud — Prescription beginning once plaintiff has reasonable suspicion of negligence by auditor — Confirmation by expert not required — Prescription Act 68 of 1969, s 12(3).

Appellant construction company (WK) had employed as financial director one Maartens, who between 2006 and 2013 had defrauded WK by posting fraudulent transactions in its books of account. Over that same period the respondents, a partnership of auditors (then known as Mazars) had been retained by WK, and in each year had failed to detect the transactions, issuing clean audits (see [1]).
On 23 August 2016 WK served summons on Mazars, alleging breach of the auditing contract. Mazars raised a special plea of prescription which was upheld by the Durban High Court. WK appealed to the Supreme Court of Appeal. The appeal involved the

application of s 12(1) and s 12(3) of the Prescription Act 68 of 1969, which provide, respectively, that 'prescription shall commence to run as soon as the debt is due' and that 'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.
The question was when WK had acquired actual or deemed knowledge of the facts giving rise to the debt. If this was before 23 August 2013, the debt had prescribed on 23 August 2016, that is, before the action had commenced. This required an assessment of what comprised the relevant knowledge in cases of professional negligence.
WK, while conceding that it was aware of Maartens' fraud before 23 August 2013, nevertheless argued that it did not by this date have knowledge of *the facts giving rise to liability on the part of Mazars*, which according to WK included the knowledge that the money could not be recovered from the primary debtor, Maartens. WK contended in this regard that Mazars did not prove that WK knew it could not recover from Maartens. (See [23] – [24] and [26].)
Held, that the cases cited by WK did not support the existence of a prerequisite that, for prescription to begin, knowledge of the primary debtor's inability to pay was required (see [26], [28] and [31]).
The second pillar of WK's argument involved the degree of detail required to be known before prescription commenced to run. WK argued that knowledge of the applicable accounting standard and that it was breached was required, which WK did not possess before 23 August 2013. (See [32].) WK urged the court to apply a Canadian test under which a claim was discovered only when a plaintiff had actual or constructive knowledge 'of the material facts upon which a plausible inference of liability on the defendant's part [could] be drawn'.
Held, rejecting WK's contention, that the Canadian test did not accord with South African precedent, in terms of which the facts required to be known were merely those objectively grounding a suspicion of negligence, and that WK was cognisant of such facts before 23 August 2013. Expert advice confirming the suspicion was not required for prescription to commence. (See [34] – [35], [38] – [41].)
The High Court was accordingly correct in upholding the special plea. Appeal dismissed (see [41] – [42]).

BAYETHE PROJECTS CC v NELSON MANDELA BAY MUNICIPALITY AND ANOTHER 2022 (6) SA 196 (ECMk)
Appeal — Costs — Where appeal having no practical effect or result — When departure from usual rule that costs awarded to successful party justified — When need to investigate merits arising — Superior Courts Act 10 of 2013, s 16(2)*(a)*(i).

Section 16(2)*(a)*(i) and (ii) of the Superior Courts Act 10 of 2013 state that when, in an appeal, 'the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone' and that '(s)ave under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of [the] costs' incurred in the court a quo (see [8] – [9]). If the appeal court finds that the issues raised in the appeal are generally factual in nature and that no question of law or other issue of importance was being raised, then there is no reason for it to allow the appeal to proceed on the merits.

This would leave only the issue of costs in the appeal, which would, save in exceptional circumstances, go to the successful party. Each case would turn on its own and there should be no limit to the types of circumstances which may, in a particular case, make it unjust that the usual order should follow. Relevant considerations include —

- the reasons that, and the stage at which, the appeal had lost its utility;
- when the parties became aware, or could reasonably have been expected to become aware, of that fact;
- the steps taken by the appellant to avoid the unnecessary expenditure of costs and court time;
- the need not to discourage parties from settling proceedings at an early stage by the making of adverse costs orders;
- the impact of the order of costs on the appellant that may be disproportionate when weighed against his or her prospects of success, had the appeal been decided on the merits.

The extent to which the last consideration might ask the court to investigate the merits of the case would depend on the amount of costs at stake, the conduct of the parties, and the fact that the issues are moot. The prospects of success of the appellant on the merits may be of little significance when weighed against other relevant considerations. The overriding objective must be to do justice between the parties without incurring unnecessary court time and hence additional costs. (See [13] – [15].)

BOUWER NO AND ANOTHER v THE MASTER 2022 (6) SA 204 (GP)

Curator — Curator bonis — Accounts — Realisation of capital assets of estate of patient under curatorship — Whether to be reflected as income or capital — Administration of Estates Act 66 of 1965, s 84, read with Administration of Estates Regulations, regs 7 and 8.

Curator — Curator bonis — Powers and supervisory role of Master.

The issue in the present case was whether, if a curator bonis sells a capital asset of a patient under his or her curatorship to meet the expenses of the patient's estate, the proceeds should be reflected as income or capital. The issue arose when the applicants, the curators of one JD, realised the three capital assets in JD's estate (a credit balance in a cheque account, a recovered debt and a car), allegedly to meet the estate's immediate expenses. The applicants subsequently approached the Pretoria High Court for a declaratory order stating that the realised proceeds constituted income collected during the existence of the curatorship, thus entitling them to 6% fees under reg 8(3)*(a)* of the Administration of Estates Regulations (1972) (the regulations). They argued that an income-earning asset reduced to cash in a specific year had to be deemed income received during that year and reflected as such in the curator's account. The Master of the High Court opposed the application, arguing that the proceeds were clearly of a capital nature, entitling the applicants to 2% fees under reg 8(3)*(b)* of the regulations.

The court referred to s 84 of the Administration of Estates Act 66 of 1965 (remuneration of curators) and regs 7 and 8 of the regulations (accounts and tariffs of curators — see [6] of the judgment) and ruled that the proceeds in question were of a capital nature since they did not increase the value of the estate (see [15]). The court also emphasised the supervisory powers of the Master, pointing out that, under the order of curatorship read with s 84(1)*(b)* of the Act, the applicants were not entitled to realise the estate's capital assets without the Master's prior consent (see [16], [21]).

BRUWER NO AND OTHERS v TRUSTEES, PHILLIP FOURIE FAMILY TRUST 2022 (6) SA 214 (WCC)

Prescription — Extinctive prescription — Commencement — Claim for restitution consequent on repudiation of contract — Arising when creditor accepting repudiation and electing to cancel — Applicability of policy considerations in respect of inactive creditor — Prescription Act 68 of 1969, s 12(1), s 12(3).
Prescription — Extinctive prescription — Commencement — Claim for enrichment — Arising when debtor obtaining benefit to which not entitled — Where payment made subject to unfulfilled condition, debt to make restitution arising when clear that condition will not be fulfilled — Prescription commencing on that date — Prescription Act 68 of 1969, s 12(1), s 12(3).

Under s 12(1) of the Prescription Act 68 of 1969, prescription begins to run when a debt is due, that is, payable or immediately claimable at the election of the creditor. But there is a difference between when a debt — defined as an obligation to pay or render to another (see [11]) — comes into existence and when it becomes recoverable, although the dates may coincide. A right to claim performance under a contract ordinarily becomes due according to its terms, or, if nothing is said, within a reasonable time, which may be immediately. If a debtor fails to perform, it does not give rise to a fresh debt unless the creditor cancels the contract, but if it does not, it remains entitled to sue for performance. The claim for restitution arises on cancellation as a matter of law. Similarly, the claim for damages resulting from the repudiation accrues only when the creditor elects to cancel. Thus, in respect of both restitutionary and damages claims, a 'debt' as intended in s 12(1) becomes due when the creditor elects to cancel the contract and to treat it as at an end. A claim for enrichment arises when the debtor obtains a benefit to which it is not entitled. However, where the benefit is subject to a condition, the obligation to make restitution only becomes due when it becomes settled that it will not be fulfilled. (See [9] – [18], [22].)
In the present case the defendant raised a special plea of prescription against the plaintiffs' July 2020 claim for restitution, alternatively damages, alternatively enrichment, flowing from defendant's alleged repudiation of an oral agreement concluded in April 2016. The plaintiffs stated in the particulars that they accepted the repudiation and cancelled the agreement on 11 June 2019.
The defendant placed significant reliance on the 2018 Constitutional Court judgment in *Trinity v Grindstone* (see [19]), which highlighted the policy-based principle that a creditor should not by its own inaction delay the running of prescription, which induced the courts to accept as a general rule that, in respect of debts payable on demand, prescription began to run on the conclusion of the contract.
Held
On the principles set out above, prescription on the plaintiffs' restitution and damages claims only began to run on 11 June 2019. *Trinity v Grindstone* was distinguishable because it did not deal with restitution or restitutionary damages and therefore could not be read as changing the state of the law with regard thereto. As to the further alternative claim of unjustified enrichment, it only became clear that the condition agreed to between the parties would not be fulfilled when the letter of cancellation was sent, namely on 11 June 2019. In the result the special pleas of prescription fell to be dismissed. (See [20] – [23].)

ESSACK AND ANOTHER v SUN INTERNATIONAL SOUTH AFRICA (PTY) LTD AND OTHERS 2022 (6) SA 221 (GJ)

Gaming and wagering — Gambling — Casino — Delictual liability for gambling losses incurred by 'excluded person' — No ground for recognising claim based on casino's breach of statutory duty — Legal convictions of community remaining that no duty of care owed by casino — No need to develop common law to recognise claim — Claim failing at exception stage — Regulations under North West Gambling Act 2 of 2001 (NW), regs 22 and 23.
Gaming and wagering — Gambling — Casino — Regulation — Failure to adhere to prescripts in respect of 'excluded persons' — Not affording excluded gambler with delictual remedy for gambling losses incurred when casino failed to prevent him from gambling — Regulations under North West Gambling Act 2 of 2001 (NW), regs 22 and 23.

The present matter was considered at exception stage. The plaintiff, Essack, a problem gambler and designated 'excluded person', sustained massive gambling losses when he was, despite his excluded status, allowed to gamble at the first defendant's casino. The crux of Essack's claim was that the casino didn't do what it was supposed to do to prevent him from gambling and losing money. He advanced two causes of action: (i) breach of a statutory duty (statutory liability) and (ii) breach of common-law duty of care (Aquilian liability). The implicated statutory duties were those found in regs 22 and 23 of the regulations governing the casino's conduct (promulgated under s 84 of the North West Gambling Act 2 of 2001). Under reg 22 it was an offence for excluded persons to enter a casino and partake in gambling activities from which they were excluded, while reg 23 imposed a duty on casinos not to knowingly allow excluded persons to enter a casino or participate in gambling. Failure to comply with the regulations constituted an offence under s 82(1)*(i)* of the Act. (See [6] – [7] and [25] – [28].) The alleged common-law duty allegedly breached by the casino was that of ensuring that Essack did not enter the casino to gamble. (See [9] for details.) The casino excepted to the particulars of claim on the ground that they did not disclose a cause of action under either of the heads.
In 2004 the Johannesburg court, in *Junmao Li v Akani-Egoli (Pty) Ltd t/a Gold Reef City Casino and Theme Park* 2004 WLD 3/11870, upheld an exception like the one raised here, pointing out that the statutory duties imposed by the identical Gauteng Gambling Act and regulations were for the benefit of the state and not the compulsive gambler. The court concluded that an excluded person did not have a common-law delictual claim flowing from the Gauteng statutory provisions. Essack argued, however, that while that was the status of the law in 2004, the boni mores of society had changed and that current legal convictions favoured a delictual claim in these circumstances. Essack cited foreign case law to show that such claims were now recognised in overseas common-law jurisdictions.
Held
As to the claim based on breach of a statutory duty*:* The duties imposed by the regulations were for the benefit of the community, not compulsive gamblers. Essack was the author of his own misfortune, and his proposition that reg 23 imposed a duty on the casino implied that a compulsive gambler could retain his winnings when transgressing the regulations but hold the casino liable for his losses, which would serve neither the purpose of the provision nor the public interest. The regulations — considered as a whole and in the context of the regulation of gambling overall — did

not provide Essack with a civil remedy where a licensee such as the casino did not adhere to the prescripts of reg 23. In the result, the casino's exception, that the particulars did not disclose a cause of action on the basis of the breach of a statutory claim, would be upheld. (See [29] – [35].)
***As to the Aquilian claim**:* None of the foreign decisions relied on by Essack supports his proposition that there had been a shift in the boni mores in common-law jurisdictions in favour of recognising a claim as pleaded by him. Since he was also unable to point to any South African cases or academic articles to support his proposition, *Junmao Li* still correctly reflected the legal convictions of the community. (See [39], [51].) The exception would accordingly be upheld on both grounds.

KRUINKLOOF BUSHVELD ESTATE NPC v CHAIRPERSON, PANEL OF APPEAL ARBITRATORS AND OTHERS 2022 (6) SA 236 (GJ)

Arbitration — Award — Correction of any clerical mistake or patent error arising from any accidental slip or omission — 'Accidental slip' — Meaning of — Arbitration Act 42 of 1965, s 31(2) sv 'accidental slip'.
Words and phrases — 'Accidental slip' — Meaning of in s 31(2) of Arbitration Act 42 of 1965.

A dispute arose between the applicant, a homeowners association (Kruinkloof), and the third respondent, Ms Adlam. The latter had purchased a property in terms of building and sale agreements with the developer, Kopane, in terms of which she had been obliged to become a member of Kruinkloof upon transfer of the property into her name. Kruinkloof claimed that Ms Adlam owed it an amount of R1,4 million, comprising monthly levies, penalty levies and interest. The dispute was referred to arbitration, and the appointed arbitrator, Mr Amm, granted an award in favour of Kruinkloof. Ms Adlam appealed to the Appeal Panel, where she was partially successful; the Appeal Panel rejected Kruinkloof's claim for penalty levies, finding that Ms Adlam was only indebted to Kruinkloof for monthly levies. In the present application, in the Johannesburg High Court, in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965, Kruinkloof sought the review and setting-aside of the Appeal Panel's award.

- Kruinkloof argued that the Appeal Panel had exceeded its powers, and committed an irregularity, in ordering it to *pay the costs of arbitration proceedings — in which Ms Adlam had sought to cancel the agreement of sale it had entered into with Kopane — to which Kruinkloof had not been party*.

Ms Adlam in fact conceded that the Appeal Panel erred in awarding costs against Kruinkloof in the above aspects; she argued, however, that such an error was one that a court could be asked to correct by way of an application in terms s 31*(b)* of the Arbitration Act; she brought such an application. She argued that the error had arisen from an 'accidental slip', thereby entitling her to rely on the section. Ms Adlam, in arguing that an application in terms of s 31*(b)* was a sensible way of correcting the error, also submitted that the costs award was completely separate and severable from the Appeal Panel's award, and the panel's faulty reasoning in no way impacted the rest of the award on the merits, which could stand.

- Kruinkloof argued that the Appeal Panel had exceeded its powers in another way, that is, by deciding the appeal on grounds (set out in paras 72 and 73 of the award) which had not been raised in the notice of appeal, that is, by rejecting the claim for penalties because the sale and building agreements had been lawfully cancelled.

In considering the first ground of review, the court had regard to various pronouncements of English courts and academic authorities as to the kind of errors that could be corrected on the basis of the 'slip rule', for example, that the error in question had to be one 'affecting the expression of the tribunal's thought, not an error in the thought process itself' (see [19]); that the rule could be used 'to give effect to the original intention of the court', but could not be used to permit the revision of a judgment on the grounds of the presiding officer having 'second thoughts' (see [20]); and that 'if the tribunal assesses the evidence wrongly or misconstrues or fails to appreciate the law, it cannot correct the resulting errors in its award under the slip rule' (see [21]). With the above in mind, and having regard to the entire award granted, the court found that the Appeal Panel's ruling that Kruinkloof pay the costs of the unrelated arbitration proceedings to which it had not been party, was a 'slip'; it was clear that it had in fact been its intention that Kruinkloof be liable only for the costs of the hearing under consideration, ie the appeal. (See [27] – [28].)

The court added that, were it wrong on this issue, it would be driven to conclude that this tainted portion of the award should be disregarded as a nullity; the Appeal Panel had no jurisdiction to make an order in respect of the costs of an arbitration where it was not presiding and where one of the litigants was not even a party. (See [29] – [30].)

The court further held that it could safely excise the objectionable part (concerning costs) of the award whilst leaving the rest untouched: the objectionable part was clearly separable from, and in no way tainted, the rest of the award, which remained good. (See [31] – [33] and [36].)

As to the second ground of review, the court accepted that the ground set out in paras 72 and 73 of the Appeal Panel's award constituted an exceeding of its powers (see [1] and [43] – [47]). It however noted that there was another ground upon which the Appeal Panel had rejected the claim for penalties, ie that the discretion available to Kruinkloof to award penalties in terms of its Rules did not allow an automatic imposition of any penalties in the absence of any demand prior to the litigation. Such ground was within the scope of the issues the parties had referred to arbitration, and the Appeal Panel could accordingly not be said to have exceeded its powers in rejecting penalties on this basis. (See [1], [48] and [53] – [57].) (The court noted in any case that Kruinkloof had only taken issue with paras 72 and 73 of the award (see [57]).) The court further stressed that this ground was separate from, and could survive the rejection of, the ground as contained in paras 72 and 73 of the award (see [1] and [48] – [51].) In the course of its reasoning the court also rejected the arguments of Kruinkloof that an appeal tribunal's jurisdiction was limited to the grounds set out in the notice of appeal (while it did concede that the parties could agree that this was the case) (see [39], [56] and [57]).

The court accordingly granted the relief as set out in [63].

DM v CM 2022 (6) SA 255 (GJ)

Marriage — Divorce — Proprietary rights — Accrual system — Parties declaring commencement values of their estates in antenuptial contract — Declared value conclusive proof of commencement value — Party to antenuptial contract entitled to challenge declared commencement value on common-law grounds only — Matrimonial Property Act 88 of 1984, s 6(3).

Marriage — Divorce — Proprietary rights — Accrual system — Value of estate at dissolution — Alienation of assets with sole purpose of reducing accrual claim — Proof of.

The parties were married out of community of property, in terms of an antenuptial contract incorporating the accrual system as provided for in ch 1 of the Matrimonial Property Act 88 of 1984. Plaintiff had declared a commencement value of nil, and defendant one of R68 746 000. This case dealt with one of the remaining disputes in their divorce action — whether an accrual was payable by the defendant to the plaintiff. It was common cause that the declared commencement value of the defendant's estate, adjusted with the consumer price index (the CPI), exceeded the value of his estate at the time of divorce and therefore that it showed no accrual. Plaintiff's case was that she was entitled to prove that defendant had overstated his estate's commencement value. In this regard she initially claimed (in her plea to defendant's later abandoned counterclaim) that the declared commencement value was 'false', but later amended her plea to a denial that it was 'accurate'. She also claimed that he had alienated assets with the sole purpose of reducing her accrual claim.
The main issues arising from these contentions were (1) whether the declared value was only prima facie proof of the commencement value or was conclusive, and under what circumstances a party may challenge it; and (2) whether alienation of assets affecting the accrual calculation at the date of dissolution of the marriage was proved.
Held
(1) The declared commencement value was not merely prima facie proof but conclusive, unless attacked on common-law grounds. For that reason, the court would not consider evidence which was led to prove the inaccuracy of such value, unless a case were made out on common-law grounds such as for contractual remedies pursuant to misrepresentation, duress or undue influence, etc. The remedy of rectification would also be available if the requirements for such a rectification of an antenuptial contract were met. The plaintiff did not plead fraud or any one of the recognised grounds for setting aside the declared commencement value. (See [38] – [44], [48].)
(2) The intention with which the alienation took place was the determining factor; if it were made to frustrate the accrual claim of a spouse, the value of the asset would be deemed to be part of the alienator spouse's estate. Here, the plaintiff failed to prove that defendant deliberately and intentionally disposed of assets to negatively affect the plaintiff's accrual claim. Consequently, the plaintiff failed to prove an accrual and her application would be dismissed. (See [74], [162], [172] and [182].)

MEC, DEPARTMENT OF PUBLIC WORKS AND OTHERS v IKAMVA ARCHITECTS AND OTHERS 2022 (6) SA 275 (ECB)

Execution — Against state — Incorporeal property — Permissibility of attachment of incorporeal property belonging to state in execution of money judgment granted against it — State Liability Act 20 of 1957, s 3.
Execution — Stay — When granted — Principles discussed.

The principal issue in the present application, heard before a full bench of the Bhisho High Court, was whether the State Liability Act 20 of 1957 permitted the attachment of incorporeal property belonging to the state in the execution of a money judgment granted against it. The matter stemmed from a default judgment, in the sum of R41

031 279,58, granted by Malusi AJ on 1 December 2015 against the first and second applicants, respectively the MEC for the Department of Public Works and the MEC for the Department of Health (referred to collectively as 'the Departments') in favour of the first respondent, Ikamva Architects (Ikamva). On 11 March 2016 Ikamva obtained a writ of attachment in execution of such judgment (the first writ), on the strength of which the sheriff issued two notices attaching 'all office furniture and related office equipment and vehicles' of the Departments. Further execution was stayed to allow the Departments to finalise an application to rescind the default judgment. Such application was dismissed, and all avenues for appeal were exhausted when, on 29 July 2019, the Constitutional Court refused leave to appeal such dismissal. Subsequently, however, further execution was again stayed pending determination of a self-review application the Departments had then brought. Such self-review was however dismissed by Beshe J on 16 February 2021. Leave to appeal was refused on 30 April 2021. Presently, a decision was pending in a petition for special leave that followed. In the meantime Ikamvu issued a further writ (the second writ) on 10 March 2021 for the sum of the default judgment, this time directing the sheriff to attach the Department of Health's bank account. Next day the sheriff issued a 'notice of attachment in execution in incorporeal property or incorporeal property rights in property', warning the department concerned that the amounts specified in the second writ should remain in the bank account until payment thereof was demanded from it. This prompted the Departments' present application — in which the third applicant, the MEC for the Department of Finance, EC, successfully intervened — seeking the setting-aside of the two notices of attachment dated 11 March 2016; the second writ; and the attachment of the Department of Health's bank account. In the alternative, the applicants sought the stay of further execution of the writs, and the upliftment of the attachment of the bank account, pending final determination of the application for leave to appeal in the Beshe application, as well as any consequent appeals.

The issues for determination include the following:

— Whether the second writ for the attachment of the bank account should be set aside.

— The primary issue here was whether the State Liability Act permitted the attachment of state moneys in the execution of a money judgment. The applicants argued that it did not. Section 3 of the Act — which dealt with the satisfaction of final court orders against the state sounding in money — allowed the attachment of '*movable property*' provided the necessary preliminary steps had been taken. The question was whether such term could be read so as to include both corporeal and incorporeal property.

— The applicants argued further that the second writ violated s 226 of the Constitution, which provided that money may be withdrawn from a Provincial Revenue Fund only *(a)* in terms of an appropriation by a provincial Act; or *(b)* as a direct charge against the Provincial Revenue Fund, when it was provided for in the Constitution or a provincial Act. Neither of those conditions were met here, it was argued.

— Whether the second writ otherwise failed to meet the formalities prescribed by the Uniform Rules.

• Whether the notices of attachment arising from the first writ should be set aside, on the grounds of their failing to comply with the formalities prescribed by the Uniform Rules.

• If the notices did not fall to be set aside, whether the alternative relief of a stay of execution should be granted.

Held, that s 3 of the State Liability Act did permit the attachment of incorporeal movables belonging to the state, such as a bank account, in satisfaction of a money judgment against it: For one, applying the proper rules of interpretation to s 3 — which in ss (7)*(c)* pertinently referred to the attachment of '*any* movable property owned by the state and used by the department concerned' — there was nothing that pointed to a conclusion that 'movable property' in the section had to be limited to corporeal movables (see [41] and [43]). Further, interpreting the section in the manner favoured by the state would give rise to an unjustifiable differentiation between a judgment creditor who obtained judgment against the state, whose incorporeal assets *could then not be* attached, and a judgment creditor who obtained a judgment against a private litigant, whose incorporeal assets *could be* attached. (See [41].) Furthermore, the process of attachment of incorporeal movables, which was regulated in terms of Uniform Rule 45(8), was not inconsistent with the prescripts of, and the framework created by, s 3 for execution against the movable property owned by the state (see [46]).

Held, further, that the core argument advanced for giving a restrictive interpretation to s 3 of the Act, to only provide for attachment of corporeal movables, was to address the potential disruption of the functioning of state departments through the attachment of bank accounts. However, interpreting the Act and its references to 'movable property' in a way that permitted judgment creditors to execute against state bank accounts would not threaten service delivery any more than the attachment of corporeal movables. Furthermore, there were safeguards built into s 3 to prevent disruption of service delivery as a result of the attachment of state assets: the sheriff and a department official may agree in writing on movable property that may not be removed (see s 3(7)*(b)*); and an interested party may, before the attached movable property was sold in execution of the judgment debt, apply for a stay (see s 3(10)). (See paras [44] and [45].)

Held, further, that the second writ for the attachment of the bank account did not violate s 226 of the Constitution: it was entirely unclear how funds held in a departmental bank account, which had to be accepted to constitute an 'appropriated budget', were unavailable for attachment under s 226. (See [54].)

Held, that, while recent developments had in fact rendered moot the relief sought in respect of the second writ (see [67] – [68]), it was appropriate to comment on its validity (see [69]). It could not stand: Firstly, it was not permissible under the Uniform Rules for a writ to indicate, like the instant one did, *precisely which* movable property was to be attached, ie a specific bank account; this was contrary to the requirements of Uniform Rule 45(1), read with Uniform Rule 45(8). (See [73].) Further, the sheriff failed to afford the department the opportunity, in terms of Uniform Rule 45(3), to point out sufficient movable property, other than the bank account, to satisfy the writ. (See [74] – [76].)

Held, as to the 2016 notices of attachment, that, on the face of it, the process of attachment followed by the sheriff in this case — in terms of which assets were attached in broad terms, without the listing of the exact items attached — contravened the requirement in Uniform Rule 45(3) that specificity be provided in the notices of attachment as to the property attached. (See [56] – [58].) However, such a general practice, a sensible one in the circumstances, had been in existence for several years without complaint from the Departments concerned. To now raise the issue of non-compliance with the strict formalities of Uniform Rule 45(3), in circumstances where a functional procedural deviation had developed in conjunction with governmental departments, was dilatory and opportunistic. Such finding was fortified by those

authorities that explained that a long delay in applying to set aside a writ may be a bar to relief, as was acquiescence. (See [59] and [60].) The notices would not be set aside. *Held*, nevertheless, that the court would grant a stay of execution in the terms sought by the Departments in the alternative prayers. This, having regard to the irreparable harm that would result were execution not stayed; that the amount in question was significant and there was at least some possibility that the underlying cause might ultimately be removed; and that Ikamva's claim was adequately secured and there was little danger that it would not be paid in full once the Departments' appeal processes were exhausted. (See [93].)

VAN DEN HEEVER NO AND OTHERS v POTGIETER NO AND OTHERS 2022 (6) SA 315 (FB)

Practice — Pleadings — Exception — On ground that pleading vague and embarrassing — Preceding notice to rectify under rule 23(1)*(a)* — Late filing constituting irregular step — Court's discretion to condone — Prejudice — Uniform Rules of Court, rules 23(1)*(a)* and 30(3).

Since November 2019 para *(a)* of rule 23(1) of the Uniform Rules of Court requires a party wishing to except to a pleading on the ground that it is vague and embarrassing to notify the other party, within 10 days of the receipt of the pleading, that it has 15 days to remove the cause of complaint (see [17]). Paragraph *(a)* must be complied with before the exception may be delivered (see [20]).
In casu the plaintiffs sought an order setting aside the defendants' rule 23(1)*(a)* notice on the ground that it was delivered late.
The circumstances were that when the defendants failed to file their plea within 20 days of their notice of intention to defend, the plaintiffs filed a notice of bar under rule 26. The defendants' subsequent rule 23(1)*(a)* notice was met with a rule 30(2)*(b)* notice that it constituted an irregular step because it was flied more than 10 days after receipt of the summons. The defendants argued that the notice should stand as it was a timeous and proper response to the notice of bar. The plaintiffs in turn argued that the filing of the rule 23(1)*(a)* notice was not a proper response to the notice of bar.
Held
The defendants' failure to file their rule 23(1)*(a)* notice within the 10-day period meant that it constituted an irregular step which could be set aside under rule 30(3) at the discretion of the court (see [21] – [23]). According to precedent, the absence or presence of prejudice was normally decisive in this regard (see [24]). Since the plaintiffs would be prejudiced if the rule 23(1)*(a)* notice were to stand (they would be prevented from obtaining the relief they might otherwise be entitled to as a result of the defendants being under bar), the court would exercise its discretion in their favour by setting the notice aside (see [25] – [26]).

S v QURASHI AND OTHERS 2022 (2) SACR 459 (SCA)

Evidence — Trial-within-trial — When to be held — Court erred in proceeding to hold trial-within-trial without attempting to identify evidence, which was subject of admissibility trial — Importance of distinguishing between real and testimonial evidence.
Evidence — Admissibility — Hearsay evidence — Evidence by wives of telephonic conversations with deceased husbands — Sufficient safeguards in other evidence in trial to justify admission.
Evidence — Admissibility — Hearsay evidence — Evidence of co-conspirator who was in protective custody as witness, but absconded before trial — Unsafe to rely on such hearsay statements — Pointing-out by witness, however, admissible.

The appellants appealed against convictions for contravening s 9(1)*(a)* of the Prevention of Organised Crime Act 121 of 1998 (participation in criminal gang activity); two counts of robbery with aggravating circumstances; four counts of murder; kidnapping; attempted extortion; and conspiracy to commit kidnapping. The prosecution had alleged that the appellants (and others) had either individually or collectively committed the various offences and had lured four fellow-Pakistani nationals to a town in the Free State where they were robbed of a BMW sedan, Nokia cellphones and two firearms. They were then murdered and buried in a shallow grave. Five months later they kidnapped another victim and threatened to kill him unless his relative paid them R2 million. They subsequently killed their victim. They were sentenced to life imprisonment. It was contended on their behalf that the search of the premises of a property in Bloemfontein violated the appellants' right to privacy, so too the search of their persons,vehicles and houses upon their arrest. They also contended that a trial-within-a-trial was necessary to determine the validity of the evidence thereby procured. The state agreed with the proposed procedure and the court duly held a trial-within-a-trial. The appellants further contended that the evidence of telephone calls made by the wives of two of the deceased to their husbands before their deaths was inadmissible, being hearsay evidence. They had the same complaint in respect of statements made by a co-conspirator who had been put into witness protection, but decamped before the trial.
Held, as regards the procedure adopted in holding a trial-within-a-trial, that the court a quo was wrong in proceeding to do so without so much as even attempting to identify the evidence, the subject of the admissibility trial. A notable feature of the Constitution's specific exclusionary provision (s 35(5)) was that it did not provide for the automatic exclusion of unconstitutionally obtained evidence. It had to be excluded only if it rendered the trial unfair or was otherwise detrimental to the administration of justice. As no evidence was adduced on that score on behalf of the appellants, the trial court was simply unable to make that assessment. Moreover, it was important to recognise the distinction between real and testimonial evidence, and that unfairness in the method of obtaining the evidence did not necessarily result in unfairness in the trial. The court in the present case was not dealing with 'self-incriminatory' or 'constructive' evidence where the so-called alleged constitutional infringement had resulted in the creation of evidence which would not otherwise exist. (See [26].)

Held, further, that that there was much in the evidence that lent material support to the evidence of the two wives and therefore sufficient by way of safeguards in the evidence, if viewed holistically, that ought to satisfy a trier of fact as to the reliability of the hearsay evidence tendered by each of those witnesses. (See [33].)
Held, further, that the court a quo had erred in admitting into evidence the hearsay evidence of the statements made by the co-conspirator. A witness who testified in open court did so under oath or affirmation and the potential liability for perjury operated as a natural deterrent against false testimony. Cross-examination was a potent tool in the truth-finding exercise and discerning who was telling the truth was essential to the fact-finding role of the court. Historically, the exclusion of hearsay evidence had been considered necessary to guard against the danger that the trier of fact might place undue weight on such evidence, despite its inherent weaknesses. However, the pointing-out by the co-conspirator stood on a different footing and had led to the discovery of the bodies of four of the deceased. That evidence could not be left out of the reckoning. (See [34] and [38].)
Held, accordingly, that the points raised on appeal, when viewed either individually or collectively, could hardly tilt the scales in favour of the appellants, meaning that the appeal had to fail. (See [58].)

WILLIAMS AND OTHERS v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE 2022 (2) SACR 481 (WCC)
Trial — Separation of trials — Application for — Proper forum for adjudication of — Application to be determined by trial court, and brought after accused has pleaded — Criminal Procedure Act 51 of 1977, s 157(2).
Prevention of crime — Prevention of Organised Crime Act 121 of 1998 — Gang-related activities in contravention of s 9 of POCA — Joinder of multiple accused — Obiter: mere fact that accused may be prejudiced, not sufficient grounds to order separation of trials — Interests of society as well as justice requiring that all members of criminal gang be tried together, subject always to accused's right to fair trial.

The three applicants were part of a group of accused who were indicted in the High Court. They faced a total of 101 charges. These could be divided into two groups, namely three charges of the contravention of s 9 of the Prevention of Organised Crime Act 121 of 1998 (POCA), while the other 98 offences related to the 'pattern of criminal gang activity' referred to in the POCA charges. They sought an order by way of notice of motion that their respective trials be separated from the other accused persons mentioned in the indictment in terms of s 157(2) of the Criminal Procedure Act 51 of 1977 (the CPA). The state alleged that the applicants, together with their co-accused, had been members of a criminal gang, 'the JCY', and had aided and abetted criminal activity for the benefit thereof, by committing the 98 offences; that they had performed acts aimed at causing, bringing about, promoting or contributing towards a pattern of gang activity by committing those offences; and had wrongfully and unlawfully instigated, incited, commanded, aided, advised, encouraged or procured other persons to commit or perform or participate in the pattern of criminal gang activities.
The applicants contended that it was not necessary for them to be charged with the other accused for the respondent to secure convictions on the POCA charges, and that the respondent had failed to show that it could not prove its case against the

applicants if the trials were separated. They submitted that there was therefore no reason for the applicants and the other accused to be charged jointly, simply on the basis of POCA charges; that charging them jointly would render their trials unfair; that a separation of the trials would not hinder the respondent from prosecuting its case against the other accused and them; and that they would be prejudiced if their trials were not separated, whilst the respondent and the other accused would suffer no prejudice if their trials were to be separated.
The respondent submitted that the applicants were attempting to ignore the charges and the gang-related contents of the other charges, and, by requesting the court to separate the trials from the other accused, undermined the aims and purpose of POCA.
The court raised the question mero motu whether the court sitting in motion- court proceedings was the appropriate forum for raising an interlocutory application that had to be dealt with in the course of the criminal trial as intended by s 157 of the CPA. The respondent submitted that the meaning of 'at any time during the trial' in ss (2) was not clear and, when a trial commenced, was one of those concepts that could have different meanings, depending on the circumstances and context.
Held, that an application such as the present ought to be brought when the trial has commenced before a judge or magistrate after an accused had pleaded. Section 157(2) of the CPA even went so far as to state that the court may abstain from giving judgment in respect of any of the accused and that was a clear indication that such an application could only be made after the accused had entered a plea to the charge. (See [47] – [48].)
Held, further, that the present court was not seized with the criminal trial, and only that court could deal with such an application. For this reason alone, it fell to be dismissed. (See [58].)
The court nonetheless proceeded to consider the question obiter and concluded that, having regard to the aims and objectives of POCA, it was in the interests of society, as well as justice, that all members of a criminal gang be tried together, subject always to an accused's right to a fair trial. The mere fact, that an accused may be prejudiced, was not sufficient grounds to order a separation of trials where it would be in the interests of justice to do so. Especially in a case such as the present, where an accused would stand trial with members of the same gang he or she belonged to, and where they committed criminal acts in the furtherance of the interests of the gang, which formed part of a pattern of criminal gang activity to which they contributed. (See [96] and [99].) The application was dismissed. (See [100].)

S v WHITE 2022 (2) SACR 511 (FB)

Intimidation — Contravention of s 1(1)*(a)* of Intimidation Act 72 of 1982 — Use of section for trivial offences deprecated.

The accused pleaded guilty to a charge of intimidation in contravention of s 1(1)*(a)* of the Intimidation Act 72 of 1982 and was sentenced to a fine of R1000 or six months' imprisonment, wholly suspended for a period of five years. The conditions of suspension were incorrectly referred to as precluding a subsequent conviction of ss 2 and 3 instead of the same section under which the accused was charged and convicted. The matter was sent on review with the request that the sentence should be reviewed and corrected, as well as questioning whether the conviction should

also not be set aside. It appeared that the conviction had been based on a threat that the complainant should stop dating a certain named woman.
Held, that the crime of intimidation was never intended to be applicable to the usual threats that appeared every day between members of the public, but with no real consequences or harm. The purpose was rather to punish people who intimidated others to conduct themselves in a certain manner, such as not to give evidence in court, not to support a certain political organisation, not to pay their municipal accounts or to support a strike action. The section ought to be used only in deservingly serious matters. The application to the present circumstances, where English was clearly not the mother tongue of any of the role players, had also led to serious problems with the interpretation of the provisions of the charge-sheet. If such simple mistakes could be made, there was ample opportunity for not only confusion about language, but also more importantly, legal principles such as whether the accused really understood what the offence of intimidation entailed. In the circumstances the conviction and sentence had to be reviewed and set aside. (See [17] – [23].)

MINISTER OF POLICE AND OTHERS v FIDELITY SECURITY SERVICES (PTY) LTD AND OTHERS 2022 (2) SACR 519 (CC)
Arms and ammunition — Licensing — Expiration of licence — Whether owner able to make new application for possession licence — Distinction between ownership and possession — No express or implied provision in Act preventing owner from applying for new licence — Firearms Control Act 60 of 2000, ss 13 – 20, 28 and 149(2)*(b)*; Constitution ss 7(2) and 25.
Arms and ammunition — Firearm — Ownership — Regulation of — Firearms Control Act 60 of 2000 not regulating or removing ownership of firearms — Provisions in s 149(2)*(b)* of Act confirming that expiry of licence not tantamount to forfeiture of firearm for purposes of destruction.

The respondent applied in the High Court for an order directing the third applicant, the Acting National Commissioner of the South African Police Service, to accept late-renewal applications, or alternatively new firearm licence applications, in respect of certain firearms, the licences of which had terminated. Being a security company, the respondent owned approximately 8000 firearms and employed someone to maintain those firearm licences. However, when that employee retired in February 2016, the respondent discovered that 700 firearm licences had not been renewed and those licences were viewed by the designated firearms officer at the local police station to have terminated by operation of law as contemplated by s 28 of the Firearms Control Act 60 of 2000 (the Act), and he accordingly refused to accept the applications for renewal in terms of a directive issued by the third applicant. The High Court dismissed the application. The respondent then appealed to the Supreme Court of Appeal, which held that there was nothing in the Act nor the regulations promulgated under the Act that even remotely suggested that someone whose licence had terminated by the operation of law was precluded from applying for a new licence. It held that an interpretation of the Act, in terms of which firearm owners were prevented from applying for a new licence in such circumstances and were required to buy new firearms for the same application to be considered, was neither sensible nor business-like. The court accordingly upheld the appeal and declared that the respondent was entitled to apply afresh for new licences to possess those firearms whose licences had expired. The applicants then applied for leave to appeal to the

Constitutional Court, contending that the application raised a constitutional issue regarding the interpretation and application of the Act, and had far-reaching implications in relation to the government's constitutional duty in regulating the use and possession of firearms. They also contended that the matter raised an arguable point of law of general public importance which ought to be considered by the court.
Held, that the proper regulation of firearms implicated a variety of rights in the Bill of Rights, including the general constitutional duty resting on the state in terms of s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The interpretation of the Act also concerned the role of the police in administering the Act and enforcing the law on firearm regulation and the rights of gun owners, particularly their property rights, something which implicated s 25 of the Bill of Rights. In any event, the case raised an arguable point of law of general public importance, namely whether a gun owner whose possession licence had expired was entitled to make a new application for a possession licence, a question on which the High Court and the Supreme Court of Appeal had differed. In the circumstances it was in the interests of justice for the court to grant leave to appeal. (See [24] – [26].)
Held, further, that a distinction had to be drawn between the possession of firearms and the ownership thereof. The precedent * relied upon by the applicants dealt with the possession of firearms and not with their ownership, and accordingly had to be distinguished. (See [35].)
Held, that, the Act did not purport to regulate or remove ownership. To the contrary, s 149(2)*(b)* of the Act confirmed ownership of even a forfeited firearm, as it stipulated that 'the firearm remains the property of the owner until destruction'. This supported a reading of the Act that the expiry of a licence was not itself tantamount to forfeiture for the purposes of destruction. (See [41].)
Held, further, that the fact that a gun holder may not, once the licence had expired, apply to renew the licence in terms of s 24 did not in itself mean that the gun holder may not apply for a licence in terms of the applicable provisions in ss 13 – 20. Section 24 did not contain such a prohibition and neither did ss 13 – 20. Applying for a licence and applying to renew an existing licence were entirely different processes, governed by different provisions of the Act. (See [44].)
Held, further, that many regulatory regimes provided that certain objects may not be possessed, or certain activities may not be performed without a licence or permit issued pursuant to an administrative application. Those regimes often made provision for the licence or permit to be renewed upon application. The fact that the holder had allowed the licence or permit to lapse without applying for renewal had never, to the court's knowledge, been held to preclude such person from applying for a new licence or permit: indeed, the contrary position had been taken for granted. The correct position was that s 20, on its plain and ordinary meaning, entitled a person specified in ss (2) to apply for a licence in respect of any 'firearm' that is not a 'prohibited' firearm. Since the respondent met those requirements, it was entitled to make applications in respect of the firearms at issue unless this was expressly or impliedly prohibited. Since there was no such express nor implied prohibition, the respondent was entitled to make application for the renewal of its firearms. (See [53] – [55].) Leave to appeal was accordingly granted and the appeal was dismissed.

S v DAVIDS 2022 (2) SACR 544 (WCC)

Court — High Court — Seat — Determination of — Circuit court set up within precinct of prison — Determination of place of sitting of court within preserve of Judge President — Accused's rights not infringed by court being held in prison precinct where provision made for all necessary facilities of court and public access, albeit via CCTV.

The applicant sought an order that the criminal proceedings against him and his co-accused be heard at the High Court in Cape Town, rather than at the circuit court situated at the Pollsmoor Medium A Correctional Centre where it was scheduled to be heard. The applicant and his six co-accused were facing a number of charges involving murder, offences relating to criminal gang activity as defined in the Prevention of Organised Crime Act 121 of 1998 (POCA), the possession of unlicensed firearms and ammunition, and robbery with aggravating circumstances. After an objection by the applicant to the venue of the trial, the court held an inspection of the prison circuit court. The applicant claimed that, because the court was situated on prison grounds and was part of the prison building, it was not a structure that stood alone or apart from the prison. Even if a separate freestanding court was built within the prison precinct, the applicant would still have a problem in having his matter tried within that precinct, as the correctional centre had a bad reputation and the court had an aura of a prison, which did not bode well for the administration of justice. He said that it did not have the look and the feel of a proper High Court and violated his presumption of innocence. His further concern was that members of the public, including journalists, would sit in another building viewing the trial proceedings via CCTV, as there was insufficient space in the court to serve as an ordinary gallery for his family and friends to attend.
The respondent contended that all of the legal representatives of the parties were in attendance during the pretrial proceedings and had not objected to the transfer of the matter to the Pollsmoor Circuit Court, and that, although the matter was scheduled to be heard in a prison precinct, the accused would not appear in shackles or prison clothes and would appear in their normal civilian clothes. If he objected to sitting in the dock, he could request to be allowed to sit next to his counsel. Counsel for the respondent submitted that the applicant's objection appeared to be more about the convenience of the applicant than about the fairness of the trial, and implored the court to dismiss the application.
Held, that the determination of places for the sitting of a court was the exclusive preserve of the head of court, which in the present case was the Judge President. Neither the state nor the accused had locus standi to determine where the court should sit. The fact that a court was held in a building situated within a prison complex did not compromise the institutional and individual independence of the court and/or the judge. The right to a public trial in open court was not violated merely because the matter was heard in a correctional facility, and the presumption of innocence was not dependent on the building or the premises where the court was sitting. Therefore, the hearing of the matter at the prison circuit court would not extinguish or take away any of the constitutionally entrenched rights of the applicant. (See [46] and [50] – [51].)
Held, further, that there were, however, circumstances in which criminal proceedings could not take place in open court, such as those set out in s 153 of the Criminal Procedure Act 51 of 1977. Therefore, whilst the applicant had a right to a public

hearing, this right was not absolute and, depending on the circumstances of the case, the court could direct that the court be held behind closed doors if the interests of justice demanded that. Notwithstanding, the suggestion by the applicant that the public and the media were not allowed in the prison circuit court was not correct. They had access to the court, should space be available in the public gallery, and, if not, a live feed via CCTV to a designated room would be provided. Furthermore, the applicant would not be tried by prison officials, but by an independent judge in open court with a court staff in attendance. (See [59] – [61].) The application was dismissed.

S v RAMPHELO 2022 (2) SACR 560 (LP)

Corruption — Contravention of s 4(1) of Combating of Corrupt Activities Act 12 of 2004 — Sentence — Imprisonment — Traffic officer accepting gratification of R150 for ignoring commission of traffic offence — Sentence of two years' imprisonment upheld on appeal, despite personal mitigating circumstances of accused.

The appellant and a co-accused, who were both traffic officers, were charged with a contravention of s 4(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA), in that they had corruptly, during a police trap, taken R150 to ignore a traffic offence committed in their presence. The appellant was sentenced to two years' direct imprisonment without the option of a fine, whereas her co-accused was sentenced to four years' imprisonment of which two years were suspended for four years. She appealed against both her conviction and sentence. The court dismissed the appeal against the conviction and considered the sentence.
Held, that, in terms of s 26 of the PCCA, a magistrate's court was empowered to sentence the appellant to a fine or imprisonment not exceeding five years' imprisonment. The court a quo had taken into consideration the appellant's personal circumstances, namely that she was the primary caregiver of her three minor children aged 12, 8 and 6, and that she was a single mother. It had also dealt at length with recommendations of the probation officer and why direct imprisonment was an appropriate sentence. As a law-enforcement officer, she was entrusted to maintain law and order on the road, to reduce the high rate of collisions that occurred daily. If the law-enforcement officers were also involved in corrupt activities the campaign against reducing accidents on the roads, and getting road users to obey the rules of the road, would never be won. The offence of which she had been convicted had elements of dishonesty, whereas a high degree of professionalism, morals and honesty was expected of such law-enforcement officers. The sentence imposed was not disturbingly disproportionate and the appeal against sentence also had to be dismissed. (See [34] – [36].)

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Qurashi and others v S [2022] 4 All SA 295 (SCA)

Criminal Law and Procedure – Evidence – Hearsay evidence – Admissibility of extra-curial statements – Despite inadmissibility of extra-curial statements, sufficiency of safeguards in evidence, viewed holistically, confirming reliability of hearsay evidence tendered by witnesses.

Criminal Law and Procedure – Rights of accused – Rights to privacy and fair trial – Exclusion of unconstitutionally obtained evidence – Section 35(5) of the Constitution does not provide for the automatic exclusion of unconstitutionally obtained evidence – Evidence must be excluded only if it renders the trial unfair; or is otherwise detrimental to the administration of justice.

The appellants were charged with contravention of section 9(1)(a) of the Prevention of Organised Crime Act 121 of 1998; two counts of robbery with aggravating circumstances; five counts of murder; kidnapping; attempted extortion; and contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956, being a conspiracy to commit kidnapping – a charge that was not preferred against the third appellant. The first count related to the alleged participation of the accused in organised criminal gang activity in contravention of section 9 of the Prevention of Organised Crime Act. It was alleged that as part of a pattern of such activity, the accused either individually or collectively committed the various offences set out in the indictment.

The prosecution alleged that in November 2007, the four deceased in four of the murder counts were lured to Clocolan in the Free State, where they were robbed of a motor vehicle, four cellphones and two firearms. They were then murdered and buried in a shallow grave. It was further alleged that in March 2008, the accused allegedly kidnapped another person and robbed him of his vehicle and a cellphone before killing him.

The appellants appealed against their convictions.

Held – The breaking down of a body of evidence into its component parts is a useful aid to a proper understanding and evaluation of such evidence, but in doing so, the court must guard against a tendency to focus too intently upon the separate and individual parts.

The appeal rested upon the following main foundations: first, the admission of evidence, which was said to have been obtained unconstitutionally and which infringed the appellants' right to privacy and to a fair trial; second, the admission of hearsay evidence and the prominent role that such evidence played in the conviction of the appellants; and, third, the credibility findings made by the trial court in favour of the prosecution witnesses and against the appellants.

None of the defences were found to be sustainable. Firstly, section 35(5) of the Constitution does not provide for the automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it renders the trial unfair; or is otherwise detrimental to the administration of justice. No justification existed in this case for the exclusion of the evidence.

In arriving at its conclusion, the Court also explained the principles underlying hearsay evidence. Hearsay is defined, in section 3(4) of the Law of Evidence Amendment Act 45 of 1988, as statements, either oral or written, whose probative value depends upon the credibility of another independent person not testifying before court. Based on the hearsay rule, the Court attached no weight to extra-curial statements made by one of the witnesses. However, a pointing out by that witness, and the discovery of the four bodies pursuant thereto, was taken into account. It was concluded that there was sufficient by way of safeguards in the evidence, viewed

holistically, to satisfy the court as to the reliability of the hearsay evidence tendered by each of the relevant witnesses.

Finding the evidence against the appellants to be damning, the Court dismissed the appeal.

Sigcau and another v President of the Republic of South Africa and others [2022] 4 All SA 315 (SCA)

Constitutional and Administrative Law – Traditional leadership – Succession dispute – Commission on Traditional Leadership Disputes and Claims determination regarding rightful successor to throne of traditional community – Process followed by Commission in discharging its duties under the Traditional Leadership and Governance Framework Act 41 of 2003 fatally flawed insofar as relevant considerations were ignored and genealogy was used as a determinative factor.

In February 2010, the Commission on Traditional Leadership Disputes and Claims determined that the fourth respondent ("Zanozuko") was the rightful successor to the throne of the nation of amaMpondo aseQaukeni. Zanozuko's claim to the throne was based on the ranking of the king's wives, and his assertion that he was a descendant of the Great House. According to him, in terms of the amaMpondo custom the son of the right-hand house, such as his competitor, the father of the first appellant ("Wezizwe"), never succeeded to the throne. The Commission found that, like all other African communities, the customary law of amaMpondo was governed by the principle of male primogeniture in terms of which a female could not succeed as a queen and the status of a wife within the polygamous marriage determined succession to the throne. That decision, together with the recognition of Zanozuko by the President of South Africa, was taken on review by the appellants. The grounds of review were that the Commission had misunderstood the nature of customary law; failed to consider the import of the appointment of Wezizwe's father in 1979; failed to consider the views of the amaMpondo as expressed in 2008; and incorrectly determined that Wezizwe's grandfather was not the legitimate successor in 1938. The present appeal was against the High Court's dismissal of the review application.

Held – The respondents' contention that the appellants' delay in prosecuting the review of the 2010 determination was grossly unreasonable was assessed against the fact that the contentious issue of kingship of amaMpondo had lingered for many years. It was in the interests of amaMpondo that finality be brought to bear.

It was common cause between the parties that amaMpondo customary law on their traditional leadership was not premised on inflexible genealogical rules, but was malleable. The Court agreed that the Commission misunderstood its function in the 2010 process, and only considered the evidence led on behalf of the disputants to the throne. It also ignored relevant evidence on how amaMpondo had chosen their leaders in the past. On the evidence before the Commission, amaMpondo customary law incorporated indigenous political processes where the community participated in choosing between eligible candidates, based on both the strength of their familial claim and their ability to lead. Those considerations were ignored by the Commission.

The Commission was found to have ignored relevant evidence, misconceived applicable principles, and departed from the approach to be adopted by a commission conducting an investigation. The process followed by the Commission in discharging

its duties under the Traditional Leadership and Governance Framework Act 41 of 2003 was fatally flawed.

Upholding the appeal and setting aside the decisions of the Commission and the President, the court declared that the Queen or King of amaMpondo aseQaukeni was to be identified in terms of the process set out in section 8 of the Traditional and Khoi-San Leadership Act 3 of 2019, or, if that provision was not in force when the Queen or King was to be identified, then in accordance with the applicable law in force at the time.

Director of Public Prosecutions, Western Cape v Magistrate, Cape Town, Mhlanga NO and another and a related matter [2022] 4 All SA 332 (WCC)

Criminal Law and Procedure – Extradition proceedings – Limited scope of extradition enquiry imposed by section 10(1) of Extradition Act 67 of 1962 – Referral of case for special review of finding that an accused be extradited – Section 304(4) of Criminal Procedure Act 51 of 1977 not applicable in extradition proceedings – Findings by magistrate regarding lack of particularity in charges underlying extradition request and that charges substantially identical to previous charges on which accused was acquitted, fundamentally flawed.

Three matters before the court concerned Mr Lee Tucker ("Tucker"), who was wanted for trial in the United Kingdom ("UK") on 50 charges pertaining to the alleged rape and sexual assault of children in England and Wales. The first matter concerned a referral to the present court by the magistrate of Wynberg, for review in terms of the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977, of the decision which he previously made in 2017, whereby he held that Tucker was liable to be extradited to the UK. The basis for the referral was that during follow-up proceedings, the magistrate concluded that there had been a failure of justice in the 2017 proceedings and that he had erred in holding that Tucker was liable to be extradited. The Director of Public Prosecutions in turn sought review of the magistrate's decision to refer the matter to the present court. Finally, Tucker sought to be released on bail.

Tucker had jumped bail and absconded from the UK while his criminal proceedings were underway. Fourteen years later, he was found to be living in South Africa. He was arrested and pursuant to a formal application for his extradition, he appeared before the magistrate at the 2017 extradition enquiry.

Held – Contrary to concerns raised, Tucker was not being extradited in respect of offences on which he had previously been acquitted, and that was in any event, an issue which he had to raise in the UK trial court. Regarding Tucker's contentions in relation to allegedly unfair media coverage, the offences for which he was charged had been committed more than 20 years previously, and any press coverage subsequent to his arrest was unlikely to influence a jury.

In referring the case for special review, the magistrate's decision was flawed in several respects. An affidavit provided by the UK prosecution service, and an accompanying memorandum by the State, received no attention in the magistrate's decision. On that ground alone, the decision was irregular and liable to be set aside. However, further problems with the decision were found to exist. The magistrate entertained an affidavit by Tucker, which breached the terms of an order which had remitted the matter to the magistrate, and based on that affidavit, the magistrate concluded that insufficient details of the offences against Tucker had been adduced

at the 2017 hearing. Consequently, he was of the view that he had the authority to reconsider the order in terms of which he had held that Tucker was liable to be extradited. His reliance on section 165 of the Constitution was misplaced as that section does not afford a magistrate the power to reconsider an order which he has previously made. Once the extradition ruling was made, the magistrate was *functus officio* and could not revisit his order.

In terms of section 10(1) of the Extradition Act 67 of 1962, the two aspects to be determined by a magistrate at an extradition enquiry are whether the extraditee is liable to be surrendered, and whether there is sufficient evidence to warrant the prosecution of the extraditee in the requesting State. The magistrate failed to recognise that the presiding officer at an extradition enquiry is not required to determine an accused's criminal culpability. He also offered a lengthy and irrelevant critique of the jury system. A further misdirection was the purported referral of the matter for special review in terms of section 304(4) of the Criminal Procedure Act, which is not applicable in extradition proceedings.

Finally, the Court confirmed that the power to grant bail in extradition matters, following a committal order in terms of section 10(1), should be exercised sparingly. The fact that Tucker had previously absconded was a major factor which militated against the grant of bail.

The magistrate's decision was reviewed and set aside, the referral for special review was dismissed, and the application for release on bail was dismissed.

Dlamini v Road Accident Fund [2022] 4 All SA 360 (GJ)

Personal Injury/Delict – Determination of extent of plaintiff's future loss of earnings and contingencies to apply – Court not enjoying an inherent jurisdiction or wide discretion, and is bound by established precedent – Plaintiff's loss must be determined by evidence including appropriate expert evidence which must be evaluated in accordance with established precedent – Any discretion a court may exercise must be exercised on consideration of facts before it, and on application of applicable legal principles.

A collision between an unknown vehicle and a minibus taxi in which the plaintiff was a passenger, resulted in the plaintiff suffering a traumatic head injury. She consequently claimed compensation from the Road Accident Fund arising from her injuries. The fund conceded liability for any damages that the plaintiff might prove, and subsequently settled the plaintiff's claim for general damages. The only issue in dispute before the court was the plaintiff's past and future loss of income and the contingencies to be applied.

Held – Defendant's case was purely hypothetical, limited to suggesting that the plaintiff's injuries, the detrimental effect on her ability to acquire a tertiary qualification and secure and maintain employment, would improve consequent upon the improved medical care that would result from the fund's undertaking to pay the agreed damages. The fund was unable to challenge the plaintiff's evidence.

Contrary to defendant's argument, the court confirmed that it did not enjoy an "inherent jurisdiction" in determining what the extent of the plaintiff's future loss of earnings would be, and what contingencies to apply. The court's inherent jurisdiction is derived from section 173 of the Constitution, and is a power afforded to the court to

regulate its own process and develop the common law, taking into account the interests of justice. However, there is nothing within that power that permits a court to deviate from established precedent, save in very limited circumstances. That limited power gives effect to the *stare decisis* doctrine which is a cornerstone of our law that serves to avoid uncertainty, confusion, protect vested rights and legitimate expectations.

Addressing the submission that the court enjoys a "wide discretion" in determining a claim for future loss of earnings, the Court found the submission not to answer the question of the extent of the court's powers where the expert evidence has been accepted as accurate and reliable. There is little room, if any, for guesswork on the part of a court in determining the loss of income suffered by a plaintiff. The loss must be determined by the evidence and, more particularly, that of appropriate expert evidence which must be evaluated by the trial court in accordance with established precedent. Any discretion a court may exercise must be exercised on consideration of the facts before the court, and on application of the applicable legal principles.

The plaintiff must prove her damages and the *quantum* thereof on a balance of probabilities. In particular, there must be evidence that the disability giving rise to the damages impacts detrimentally upon the work or occupation that a plaintiff would probably have pursued, had it not been for the accident. Thereafter, an actuarial calculation is made in which the loss (being the difference between the value of income but for the accident, and the value of the income having regard to the accident) is determined and an appropriate contingency applied. Where, as in this case, the plaintiff's experts in relation to the plaintiff's disability are cogent, well-grounded and unchallenged, they must be accepted as proved.

The contingency deduction is dependent upon the facts of the case. Explaining the purpose of the contingency deduction, the court decided that a 5% contingency be applied to plaintiff's damages.

Habitat Council v City of Cape Town and others [2022] 4 All SA 378 (WCC)

Civil Procedure – Mootness – Judicial resources should not be used for advisory opinions or abstract propositions of law, and courts should avoid deciding abstract, academic or hypothetical matters – Mootness not an absolute bar to justiciability of an issue as court may entertain an appeal, even if moot, where interests of justice so require.

Four buildings in Cape Town, three of which enjoy primary heritage status, formed what the court referred to as the Melck precinct. The building which did not have heritage status, colloquially known as the Melck Warehouse, was owned by a trust in which the second to fourth respondents were trustees. The Trust wished to develop the building by improving its facades, upgrading the commercial premises and locating a residential unit on top of the rear part of the building. The project required a series of planning and related approvals from the first respondent (the "City"). The erection of the residential component of the development was opposed by many concerned citizens. The principal complaint was that the modern addition to the historic warehouse was out of character with the other historic buildings in the Melck precinct.

The trust's plans to develop the building led to the applicant's application to review the City's approval of the development.

Held – The first issue related to the respondents' averment that the application for review was moot. Mootness is when a matter no longer presents an existing or live controversy. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are abstract, academic or hypothetical. Mootness is not an absolute bar to the justiciability of an issue as the court may entertain an appeal, even if moot, where the interests of justice so require.

As the construction on the building had proceeded to an advanced stage, there was no longer a live dispute between the parties and the matter was indeed moot. The conduct of the City to which the applicant objected was correctly categorised as lacking in constitutional citizenship. The City's deviation from the norms and standards expected of it under the Constitution could be adequately addressed in an order for costs. The matter did not warrant the granting of an order against the City which would have no practical effect.

The Court concluded that as the application for review was moot in that it raised no live issue between the applicant and the City, the application fell to be dismissed, with an adverse costs order made against the City.

Miya v Matlhko-Seifert [2022] 4 All SA 401 (GJ)

Property – Eviction order – Appeal – Ownership of property – Where registration of transfer of immovable property not effected in deeds office, there cannot be transfer of ownership of such property – Eviction order warranted where section 4 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 was complied with.

The appellant appealed against an eviction order evicting her and all other occupants from a residential property. Despite the respondent asserting ownership of the property, the appellant's case was that she had purchased the property first, and so could not be evicted. The grounds of appeal were that the magistrate did not have jurisdiction to grant the eviction order as the right of occupation of the property exceeded the jurisdiction of the district court as stipulated in section 29(1)(b) of the Magistrates' Court Act 32 of 1944; that there was a dispute of fact relating to the ownership of the property, which could not have been decided on motion by the magistrate, and which stood to be decided by the High Court in a pending action in which the appellant was a party; and that the magistrate erred in finding that it was just and equitable to grant the eviction order.

Held – Against the respondent's considerable body of evidence establishing her ownership of the property, was the appellant's assertion in her answering affidavit in the eviction proceedings that she purchased the property in 2007. She attached to her answering affidavit what she described as the deed of sale between her and the seller. The alleged sale agreement consisted of a single page manuscript document, which purported to bear appellant's signature and that of the alleged seller. It was common cause that registration of transfer to the appellant was not effected in the deeds office. There cannot be a transfer of ownership in immovable property unless there is registration of transfer in the deeds office.

The Court confirmed the basic principle in our law that a real right generally prevails over a personal right even if the personal right is prior in time. The latter principle is

subject to the doctrine of notice. In the absence of any right to occupy property, the appellant's occupation was unlawful. For an eviction order to be granted, there had to be compliance with section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The requirements of section 4 were found to have been complied with.

The remaining challenge by the appellant was that the magistrate did not have jurisdiction to grant the eviction order as the right of occupation of the property exceeded the jurisdiction of the district court as stipulated in section 29(1)(b) of the Magistrates' Court Act 32 of 1944. The Court entertained the challenge despite it not being raised in the notice of appeal. It found however, that a magistrate's court would have jurisdiction in respect of any order to be granted under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, regardless of the Court's monetary jurisdiction.

The appeal was thus dismissed.

Public Protector of South Africa v Speaker of the National Assembly and others [2022] 4 All SA 417 (WCC)

Constitutional and Administrative Law – Public Protector – Challenge to proceedings for removal from office – Whether decisions of Speaker of the National Assembly, Chairperson of committee established by National Assembly in terms of section 194 of the Constitution, and President of South Africa were irrational, unconstitutional and invalid – Suspension.

The Public Protector, as applicant, sought orders declaring certain decisions of the Speaker of the National Assembly, the Chairperson of a committee established by the National Assembly in terms of section 194 of the Constitution, and the President of South Africa irrational, unconstitutional and invalid. The impugned decisions related to the consideration of a motion for the removal of the applicant from office. Essentially, the Speaker wrote to the President, informing him of the decision of the section 194 committee to proceed with consideration of a motion for the applicant's removal from office. The President then invited the applicant to provide him with reasons why he should not suspend her pending the finalisation of the work of the section 194 committee.

In the present application, the applicant sought urgent interdictory relief prohibiting the section 194 committee from continuing with its work, directing the Speaker to withdraw her letter to the President, and preventing the President from taking any steps aimed at suspending her pending the determination of the relief sought in Part B. Regarding the Speaker, the applicant submitted that the writing of the letter by the Speaker constituted illegal conduct, based on an incorrect interpretation of section 194(3)(a) of the Constitution. The alleged illegality was said to be that the Speaker's action was not authorised by any empowering legislation. It was suggested that the Speaker was not acting in good faith but was driven by the *mala fide* intention of wanting to unlawfully trigger the process for applicant's suspension. As against the section 194 committee, the applicant's challenge required the court to consider whether the enquiry being conducted by the Committee infringed the *sub judice* rule and/or rule 89 of the Rules of the National Assembly (the "Rules"), it being contended that the committee would be considering a pending rescission application by the applicant.

Held – The Speaker, as a representative and leader of the National Assembly, is obliged to inform the President of the decision of the section 194 committee to resume its proceedings. What the Speaker said was nothing more than to articulate the correct factual position. She would have risked failing to fulfil a constitutional obligation had she not written the letter.

Rule 89 of the Rules regulates debates in the National Assembly and prevents members from reflecting upon the merits of any matter on which a judicial decision is pending. No factual basis was laid to show that the enquiry by the section 194 committee would result in it reflecting on the merits of the applicant's rescission application. The other grounds in respect of which the applicant attempted to challenge the committee's conduct were also unsustainable.

Turning to the challenge to the President's conduct, there was no merit in applicant's contention that the President's decision to suspend her was premature as the proceedings envisaged in section 194(3)(a) had not yet started. The section 194 committee had clearly begun its investigations. A further contention by the applicant was that the President was in contempt of court, not because of an existing order but on the basis that he was not entitled to suspend her pending the outcome of her application for an interim interdict preventing her suspension. That species of contempt is concerned with the interference with the administration of justice by taking a decision which is bound to prevent the court granting a remedy. The applicant could not satisfy the court that the President knew that the interim interdict was certainly going to be granted and hurried the decision to suspend the applicant with the intention of frustrating the enforcement of the anticipated court order and thereby defeat the course of justice. Similarly, it was not established that he breached section 165 of the Constitution, concerning judicial authority. However, the President's suspension of the Public Protector could be seen as retaliatory in light of investigations into him by the applicant. He could not bring an unbiased mind to bear as he was conflicted when he suspended the applicant. The applicant's allegation of conflict of interests and bias were upheld. The decision of the President to suspend the applicant was declared invalid and the suspension set aside.

Ray v Ray and others [2022] 4 All SA 457 (WCC)

Civil Procedure – Pleadings – Exceptions – To succeed, an excipient must persuade the court that on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed – Court must look at pleading excepted to as it stands and cannot go beyond the pleadings.

Contract – Claim for specific performance – Doctrine of election – Upon breach by defendant, plaintiff could elect to either enforce or cancel the contract, and could not approbate and reprobate.

Plaintiff and first defendant were married in England in 2006. Based on first defendant's representations that he was expecting an influx of money, plaintiff agreed to his proposal that they jointly establish a foundation (the "Cavingut Foundation") into which they would each pay an equivalent amount. Although plaintiff paid her contribution of EUR6 million, the first defendant did not pay his share. A second foundation (the "Blue Elephant Foundation") was established in 2009 in terms of the laws of Panama. That foundation established a company ("Sideline Holdings") in the Seychelles, which then acquired a South African company ("Musiamo"). The plaintiff

was a director of Musiamo, and she and the first defendant were the "beneficial owners" of the assets in Musiamo. The Cavingut Foundation transferred EUR 3 million to Sideline Holdings which in turn provided funds to Musiamo to acquire two properties in 2009 and 2017. The transfer of funds to Musiamo was done by way of a purported loan agreement. Plaintiff alleged that the loan agreement was a simulated transaction, and was null and void for lack of authority and alternatively, if not found to be a simulated transaction, it was an implied term of the loan agreement that the loan would not be called up. She also averred that a resolution by the third defendant to appoint first and seventh defendants as directors of Musiamo was unlawful, and sought to have the business rescue plans regarding Musiamo set aside as the first and second defendants were not duly appointed as directors. Plaintiff further sought certain ancillary relief.

The first defendant raised 25 grounds of exception to the particulars of claim.

Held – Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies for his/her claim with sufficient particularity to enable the opposite party to plead thereto. An exception provides a useful mechanism for weeding out cases without legal merit. An exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. To succeed, an excipient must persuade the court that on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed. Where an exception is taken, the court must look at the pleading excepted to as it stands. The court must accept the factual averments in the particulars of claim as truthful, unless manifestly false and cannot go beyond the pleadings.

Plaintiff claimed specific performance of the agreement between her and first defendant. In terms of the doctrine of election, upon breach by first defendant, plaintiff could elect to enforce or cancel the contract. The choice of one necessarily involves the abandonment of the other, as one cannot approbate and reprobate. Based thereon, the court upheld the third exception. Three further grounds of exception were upheld as the plaintiff sought declaratory relief in circumstances where no dispute had arisen. Also upheld was an exception that the plaintiff did not plead a basis to sustain the allegation that the resolution taken to appoint the first and seventh defendants as directors was unlawful. Finally, the plaintiff had not set out the basis for the relief regarding the setting aside of the business rescue plans.

The plaintiff was afforded a period of 20 days from the date of the order to amend her particulars of claim.

South African Human Rights Commission and others v City of Cape Town and others (Abahlali Basemjondolo Movement South Africa as *amicus curiae*) [2022] 4 All SA 475 (WCC)

Constitutional and Administrative Law – Demolition by city officials of occupied informal structure – Common law defence of counter-spoliation – Constitutionality of remedy – Because counter-spoliation is not a stand-alone remedy and seeks to counter an act of spoliation, the act of counter-spoliation must take place immediately in response to the act of spoliation – On a narrow interpretation of instanter and the

requirement of peaceful and undisturbed possession, counter-spoliation is not unconstitutional and remains a valid common law remedy, but its application to demolish a completed, occupied structure was unlawful and unconstitutional.

In July 2020, officials of the City of Cape Town forcibly dragged the third applicant (Mr Qolani) out of his home and demolished the informal structure, having unilaterally determined that the structure was unoccupied. The applicants essentially sought a declaration that the City's actions, in the absence of a court order, were impermissible. A crucial question was whether the City's officials acted lawfully, in terms of the common law defence of counter-spoliation, or whether possession was lost and counter-spoliation was no longer available to them with the result that their actions required judicial supervision.

Held – The central issue, apart from the legality of the City's demolition of erected structures, was the meaning of, the requirements for, and application of the common law defence of counter-spoliation; whether such defence or its exercise in relation to the invasion of vacant land is constitutional; and the correctness of the particular understanding and application of the defence relied upon by the City. The *mandament van spolie* is a common law possessory remedy used to restore possession that was unlawfully lost. It is rooted in the rule of law and is intended to prevent persons from taking the law into their own hands. However, in limited circumstances, a party may take the law into his own hands by using the defence of counter-spoliation against the wrongful disturbance of his peaceful and undisturbed possession. In such circumstances, counter-spoliation would be a continuation or part of the *res gestae* and is *instanter* to the despoiler's unlawful appropriation of possession. Counter-spoliation is not a stand-alone remedy or defence and does not exist independently of the *mandament van spolie*. It is used as a defence to counter an act of spoliation. The applicants' challenge to counter-spoliation was limited to its application to demolish and/or evict persons from informal structures that appeared to officials of the City as unoccupied or not constituting a home. Because counter-spoliation is not a stand-alone remedy and seeks to counter an act of spoliation, it has to be used at the *instanter* stage – where it can be considered as being part of the act of spoliation.

What would amount to *instanter* is dependent upon the facts of each case and is flexible, but the act of counter-spoliation must take place immediately in response to the act of spoliation. Regarding the factual circumstances in which the parties alleged counter-spoliation may be invoked, the parties differed on the approach to the application of the defence. Having regard to the authorities, a narrow approach as advocated by the applicants was preferred. Once the act of spoliation is completed and spoliator has perfected possession, the window within which to invoke counter spoliation is closed. A broadening of the interpretation and application of the *instanter* requirement and of counter-spoliation itself would result in an increased sphere within which persons may breach the rule of law by taking the law into their own hands. On a narrow interpretation of *instanter* and the requirement of peaceful and undisturbed possession, counter-spoliation is not unconstitutional and remains a valid common law remedy. Peaceful and undisturbed possession was physically manifested by the occupiers commencing construction of informal structures on the land. The structures need not be completed nor occupied for the possessory element of spoliation to be perfected. Counter-spoliation is an interim restoration of the status quo, pending judicial determination.

A consideration of the lawfulness of the establishment of the Anti-Land Invasion Unit and its actions led to the conclusion that the unit had acted unlawfully in demolishing a completed structure being occupied by Mr Qolani even while he was inside it.

An application for recusal was dismissed, with the presumption of judicial impartiality and the onus of rebutting that presumption explained.

Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and others [2022] 4 All SA 533 (ECG)[2]

Civil Procedure – Leave to intervene – Applicant for leave to intervene must show that it has a direct and substantial interest in subject matter of litigation, in the form of a legal interest that may be prejudicially affected by court's judgment.

Constitutional and Administrative Law – Administrative decision – Judicial review – Delay rule – Section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 requiring application for judicial review to be instituted without unreasonable delay and no later than 180 days after date on which applicant was informed of administrative action, became aware of action and reasons for it, or might reasonably have been expected to have become aware thereof.

Environment – Coastal environment – Granting of exploration right to conduct seismic survey – Whether decision to grant exploration right was lawful – Where decision was not preceded by fair procedure and decision-maker failed to take relevant considerations into account and to comply with relevant legal prescripts, decision set aside on review.

In 2014, the fourth respondent ("Impact") obtained an exploration right to, *inter alia*, use a seismic survey to seek out oil and gas reserves off the Eastern Cape coast. In October 2021, notice was given of the intention of the third respondent ("Shell") to commence with a 3D seismic survey along the Wild Coast, pursuant to the exploration right and environmental management programme which had been approved by the Deputy Director-General of the Department of Mineral Resources and Energy. Impact and Shell had not secured any environmental authorisation of the survey and exploration. The first to seventh applicants were environmental entities, individuals and representatives of local communities and stakeholders in the affected area. They applied to interdict the relevant respondents from undertaking the survey and for review of the decision granting the exploration right. They contended that environmental authorisation in terms of the National Environmental Management Act 107 of 1998 was necessary for exploration activities regulated by the Mineral and Petroleum Resources Development Act 28 of 2002 and that the seismic survey was a listed activity under the former Act which may not commence without such authorisation having been secured. It was also contended that the process of consulting with potential interested and affected parties was materially flawed and inadequate, that the impugned decisions were taken without paying heed to fundamental considerations, and that the mitigation measures were insufficient to address the threat of harm arising from the proposed seismic survey.

[2] The relief sought in this case is from the Eastern Cape Division, Grahamstown, based on the order of GH BLOEM J (sitting as a court of first instance) in the case of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG)

The first and second respondents were the Minister of Mineral Resources and Energy and the Minister of Environment, Forestry and Fisheries. They were responsible for the administration of the relevant legislation which recognised everyone's constitutional right to have the environment protected for the benefit of present and future generations.

Held – Applications for leave to intervene by two environmental organisations were granted. An applicant for leave to intervene must show that it has a direct and substantial interest in the subject matter of the litigation, in the form of a legal interest that may be prejudicially affected by the court's judgment.

In terms of section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000, an application for judicial review must be instituted without unreasonable delay and no later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware thereof. As the 180-day period did not start running before November 2021, there was no delay in bringing the application. Furthermore, the applicants were found to have made out a proper case for being exempted from the obligation to exhaust internal remedies.

The review application was granted on the grounds that the decision was not preceded by fair procedure in that impact did not give the applicant communities proper notice of the nature and purpose of the proposed seismic survey, the information required to make meaningful representation, or the opportunity to make representations. That, together with the decision-maker's failure to take relevant considerations into account and to comply with relevant legal prescripts led to the application succeeding.

Tunica Trading 59 (Pty) Ltd v Commissioner for SARS [2022] 4 All SA 571 (WCC)

Trade (Customs and Excise) – Refusal of application by fuel distributor for excise duty and fuel levy refund on the ground that it had been purchased from an intermediary and not a licensee of a customs and excise manufacturing warehouse – Section 64F of Customs and Excise Act 91 of 1964 – Proper interpretation of section 64F held to require that fuel only had to be "obtained" as opposed to "purchased" from the licensee of a customs and excise manufacturing warehouse.

The appellant ("Tunica"), a licensed small-scale distributor of fuel, had claimed a refund of the excise duty and fuel levy it had paid in respect of a consignment of fuel purportedly exported by it. The fuel obtained from a warehouse of BP Southern Africa ("BPSA"), which was a licensee of a customs and excise manufacturing warehouse within the meaning of section 64F of the Customs and Excise Act 91 of 1964. It was supplied to Tunica by a company ("Masana") which was entitled to sell fuel obtained from BPSA to small-scale distributors like Tunica.

The respondent ("SARS") refused the refund on the ground that it had been purchased from an intermediary and not a licensee of a customs and excise manufacturing warehouse. It disallowed an internal appeal (the "September 2015 decision") on the basis that Tunica purchased the fuel from Masana, and therefore it could not be said that Tunica had obtained the fuel from the stocks of BPSA. Tunica then delivered a notice of legal proceedings to SARS in terms of section 96(1)(a) of the Act. In February 2017, SARS advised that Tunica still did not qualify for a refund.

It later took the view that the September 2015 decision constituted a tariff determination within the meaning of section 47(9)(a) of the Customs Act. In terms of section 47(9)(e) and (f), an appeal against such a tariff determination lies to the High Court, and must be prosecuted within one year from the date of the determination.

Tunica applied for review of the decisions. The court *a quo* agreed with SARS, leading to Tunica's appeal. It argued that the court erred in finding that the September 2015 decision was a tariff determination and in proceeding to assume that the right of an appeal in terms of section 47(9)(e) had ousted Tunica's right to take the decision on review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Court was also said to have incorrectly characterised the February 2017 decision as being a "section 96 decision" which is not reviewable either in terms of PAJA or on the principle of legality, and to have failed to consider Tunica's application for review and setting aside of the impugned decisions.

Held – The February 2017 decision was the operative decision which constituted administrative action as defined in PAJA and was therefore reviewable. Tunica's application was brought within the 180-day period prescribed in section 7(1) of PAJA. The court *a quo* therefore mistakenly characterised the February 2017 decision as being a "section 96 decision" which was not reviewable in terms of PAJA or on the principle of legality. Tunica's application for the review and setting aside of the September 2015 and February 2017 thus had to be considered afresh.

On the substantive issue in dispute, SARS contended that the fuel in question had to be "purchased" directly from the licensee of a customs and excise manufacturing warehouse. Tunica argued that the fuel only had to be "obtained" as opposed to "purchased" from the licensee of a customs and excise manufacturing warehouse. On a proper interpretation of the wording in section 64F of the Customs Act, the interpretation advanced by Tunica was the correct one. Furthermore, the court *a quo*'s finding that the September 2015 decision was a tariff determination was incorrect.

The appeal was upheld with costs.

Venator Africa (Pty) Ltd v Bekker and another [2022] 4 All SA 600 (KZP)

Corporate and Commercial – Company law – Claim for damages against directors of company for loss caused by company – Exception to particulars of claim – Failure to disclose cause of action – Whether a director of a company can be held liable under section 218(2) of Companies Act 71 of 2008 if the company breaches section 22(1) of the Act – A company is considered to be a legal persona, distinct from its members, with its own separate legal existence – In terms of section 19(2) of the Companies Act, a person is not solely by reason of being inter alia a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise.

The defendants were directors in a company ("Siyazi") with whom the plaintiff ("Venator") had contracted in 2006. Venator alleged that Siyazi had caused it loss in the amount of R41 407 220 by short-paying SARS amounts which plaintiff had paid Siyazi to that end. That resulted in SARS raising assessments against Venator for VAT and penalties. With reference to section 22(1) of the Companies Act 71 of 2008, which prohibits reckless trading by a company, Venator pleaded that Siyazi was reckless or grossly negligent, or that the business was conducted with the intention to

defraud Venator. It was contended that the defendants, as directors of Siyazi, were reckless or grossly negligent in controlling the activities of Siyazi.

The second defendant filed two exceptions to the claim. The first exception averred that the particulars of claim failed to disclose a cause of action. It was argued that section 22(1) regulates companies, which are distinct juristic persons, and therefore does not regulate what directors may do, nor does it impose duties on directors. It was averred that there was no allegation in the particulars of claim that section 22 regulated directors' conduct. A further contention was that allegations in the particulars of claim, regarding fraud, recklessness and gross misconduct, mirrored the jurisdictional requirements of section 22(1) but that section 22(1) did not impose obligations on, and could not apply to the defendants as directors. The second defendant maintained that the particulars of claim did not aver any breach by the defendants of an obligation imposed on them by the Companies Act, in order to bring them and the alleged loss said to have been caused by them within the purview of section 218(2), which deals with civil actions for contraventions of the Act, and accordingly did not sustain a cause of action. The exception distinguished between Siyazi as the company and the defendants as directors and entities separate from the company.

Held – The approach taken by courts when considering exceptions requires an excipient who alleges that a summons does not disclose a cause of action to establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

The main thrust of the second defendant's argument centred around whether a director of a company can be held liable under section 218(2) if the company breaches section 22(1) of the Companies Act. A cornerstone of company law is that a company is considered to be a legal persona, distinct from its members, with its own separate legal existence. Section 19 of the Companies Act deals with the legal status of companies. In terms of section 19(2), a person is not solely by reason of being *inter alia* a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise. Section 22 contains no express provision that a director will be held liable for acting in the manner prohibited by the section. The remedy in section 77(3)(b) against directors where recklessness is found, is only available to the company itself and not to creditors.

Upholding the exception, the court described the so-called lacuna created by the Legislature in not providing expressly for the liability of directors to other persons, such as creditors, for loss or damage suffered, as a clear indication that it was not its intention to do so, thereby continuing to recognise a foundational principle of company law.

The first exception was upheld, rendering it unnecessary to consider the second exception raised. Venator was granted leave to file amended particulars of claim.

End for now