CIVL LAW UPDATES NOVEMBER 2022[1]

INDEX

CASE NAMES

Acrow Limited v South Mead t/a Meister Cold Store [2022] ZAGPPHC 802
ALBERTS AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2022 (6) SA 59 (SCA)

BAYETHE PROJECTS CC v NELSON MANDELA BAY MUNICIPALITY AND ANOTHER 2022 (6) SA 196 (ECMk)

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

Carlisle v Wiese [2022] ZAGPJHC 791
Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another (A660/2022) [2022] ZAWCHC 223 (3 November 2022)

CSARS v Moloto [2022] ZAGPPHC 832
Darryl Ackerman Attorneys v Bhawan and Another (2021/53620) [2022] ZAGPJHC 930 (23 November 2022)

De Beer v Geldenhuys [2022] ZAGPPHC 905

De Wet v Scheepers [2022] ZAGPPHC 793

Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 (3 November 2022)

Du Toit v Jacobs [2022] ZAWCHC 243

EL IDZ Fibre Maintenance Venture v East London Industrial Development Zone Soc Ltd (EL395/2021) [2022] ZAECELLC 31 (22 November 2022)

Geeco Investments (PTY) LTD v Gourmet Cape Distributors (PTY) LTD (11008/2019) [2022] ZAWCHC 240 (25 November 2022)

Goringhaicona Khoi Khoin v Jenkins [2022] 12339-2022 (WCC) at [18]-[30]

Greater Tzaneen Municipality v Bravospan 252 CC (Case no. 428/2021) [2022] ZASCA 155 (7 November 2022)

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

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

In re : Human Rights Watch and Others; Various Parties on behalf of Minors v Anglo American South Africa Limited and Others (2020/32777) [2022] ZAGPJHC 935 (25 November 2022)

Inathi-Mbako v Manguang Metro Municipality (4253/2022) [2022] ZAFSHC 305 (7 November 2022)

Industrial Development Corporation v Sibiya [2022] ZAGPJHC 933

Lebea v Menye and Another (CCT 182/20) [2022] ZACC 40 (29 November 2022)

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

Maistry v CN [2022] 2020-36040 (GJ)

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

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

Mineral Sands Resources v Reddell [2022] ZACC 37
Miya v Matlhko-Seifert [2022] 4 All SA 401 (GJ)

Norris v Nedbank Ltd (22916/09) [2022] ZAGPJHC 908 (6 September 2022)

R v R (45854/2020) [2022] ZAGPPHC 886 (17 November 2022)

RAFONEKE AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2022 (6) SA 27 (CC)
Ramolotja v Motaung and Others (89/22) [2022] ZALMPPHC 62 (25 November 2022)

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

Reddell v Mineral Sands Resources [2022] ZACC 38
Samancor Chrome v Bila Civil Contractors [2022] ZASCA 154
Sheriff of the High Court for District of Bellville v Walker [2022] ZAWCHC 214
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)

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

The Member Of The Executive Council: Responsible For Health In The Eastern Cape v Caka In re: Caka v The Member Of The Executive Council: Responsible For Health In The Eastern Cape (4947/2017) [2022] ZAECMHC 44 (22 November 2022)

Underberg Dairy (Pty) Ltd v The Dairy Boys (Pty) Ltd and Others (A193/2021) [2022] ZAGPPHC 894 (17 November 2022)

V v V and Another (A58/2022) [2022] ZAFSHC 324 (17 November 2022)

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

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

SUBJECT INDEX

Abuse of process -Defamation – SLAPP suit defence – Ulterior purpose – Abuse of process – Common law doctrine of abuse of process can accommodate SLAPP suit defence – RequirementsMineral Sands Resources v Reddell [2022] ZACC 37 Amicus curiae – Applications for admission of amici curiae in application for certification of class action In re : Human Rights Watch and Others; Various Parties on behalf of Minors v Anglo American South Africa Limited and Others (2020/32777) [2022] ZAGPJHC 935 (25 November 2022)

Anti-dissipation Mareva injunction – Interdict sui generis in South Africa – SARS wishing to preserve assets for claim on customs liabilities – Movement of funds and assets to defeat claim – Provisional anti-dissipation order confirmed. CSARS v Moloto [2022] ZAGPPHC 832

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). BAYETHE PROJECTS CC v NELSON MANDELA BAY MUNICIPALITY AND ANOTHER 2022 (6) SA 196 (ECMk)

Appeal-Appeal in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 against the decision of the court a quo directing that its decision not be suspended pending the decision of any appeal from it. Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another (A660/2022) [2022] ZAWCHC 223 (3 November 2022)

Attorneys fees – Payment for services rendered – Liability in terms of agreement Darryl Ackerman Attorneys v Bhawan and Another (2021/53620) [2022] ZAGPJHC 930 (23 November 2022)

Attorneys-auction and defamation of attorneys De Wet v Scheepers [2022] ZAGPPHC 793

Company – Directors – Contempt of court – Joinder of directors and contempt relief sought in the same application – Directors aware of the relief sought against them – Contempt of court established beyond a reasonable doubt. Samancor Chrome v Bila Civil Contractors [2022] ZASCA 154

Condonation – Condonation for late delivery of notice in terms of Rule 30(2)(b) and late delivery of application in terms of Rule 30(1) The Member Of The Executive Council: Responsible For Health In The Eastern Cape v Caka In re: Caka v The Member Of The Executive Council: Responsible For Health In The Eastern Cape (4947/2017) [2022] ZAECMHC 44 (22 November 2022)

Contempt of court-imprisonment order but suspended Carlisle v Wiese [2022] ZAGPJHC 791

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

Discovery – Failure to comply with Rule 35(3) notice – Insufficient discovery R v R (45854/2020) [2022] ZAGPPHC 886 (17 November 2022)

Evidence-Leading evidence and closing the case – Standard of proof Underberg Dairy (Pty) Ltd v The Dairy Boys (Pty) Ltd and Others (A193/2021) [2022] ZAGPPHC 894 (17 November 2022)

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

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

Execution – Attachment – Interpleader – Claimant the husband married out of community of property – Couple operating close corporation and claimant benefiting through intermingling process – Not proving ownership of most of the items – Uniform Rule 58. Sheriff of the High Court for District of Bellville v Walker [2022] ZAWCHC 214

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

Execution — Stay — When granted — Principles discussed. MEC, DEPARTMENT OF PUBLIC WORKS AND OTHERS v IKAMVA ARCHITECTS AND OTHERS 2022 (6) SA 275 (ECB)

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

Intervention- Leave to intervene – By attorney who was witness in proceedings – Adverse credibility findings – Direct and substantial interest pertains to the order – Not sufficient if interest is in the findings or reasons for order – Magistrates' Court Rule 28(1). Lebea v Menye and Another (CCT 182/20) [2022] ZACC 40 (29 November 2022)

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

Jurisdiction – Challenging the Maintenance Court decision where parties agreed to arbitrateV v V and Another (A58/2022) [2022] ZAFSHC 324 (17 November 2022)

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

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

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

Motion applications – Leave to supplement founding affidavit and amend notice of motion in the main proceedings to introduce additional relief Geeco Investments (PTY) LTD v Gourmet Cape Distributors (PTY) LTD (11008/2019) [2022] ZAWCHC 240 (25 November 2022)

Order-consent order - unequivocally in its terms an admission of liability for what occurred De Beer v Geldenhuys [2022] ZAGPPHC 905

Plea- defamation of a company-Defamation – Trading corporation as plaintiff – Reputation rights – Freedom of speech – Constitutionality of awarding general damages to trading corporations – Trading corporations can claim general damages for defamation – Not where the speech forms part of public discourse on issues of

public interest – Court's discretion. Reddell v Mineral Sands Resources [2022] ZACC 38

Prescription – Commences from demand claim notice-Contract – Loan Agreements – Guarantee agreement – Independent agreement – Precludes defence on underlying agreement Industrial Development Corporation v Sibiya [2022] ZAGPJHC 933

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

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

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

Prescription-Constitutional law – enrichment claim not 'debt' as defined in Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 – no notice in terms thereof required – no general enrichment action recognised in our law – appropriate remedy available to the respondent – court's discretionary power in terms of s 172(1)*(b)* of the Constitution to grant a just and equitable remedy. Greater Tzaneen Municipality v Bravospan 252 CC (Case no. 428/2021) [2022] ZASCA 155 (7 November 2022)

Prescription-Insurance — Indemnity — Right of insured to claim indemnity from insurer — When prescription on claim begins to run. MAGIC EYE TRADING 77 CC t/a TITANIC TRUCKING AND ANOTHER v SANTAM LTD AND ANOTHER 2022 (6) SA 120 (SCA)

Protection order – Harassment – Against neighbour – Manure business causing noise, smells, flies and other complaints – Not what Act targets – Conduct of a business is far removed from abusive behaviour that induces fear or harm or behaviour intentionally directed at another to cause detriment to that other – Protection from Harassment Act 17 of 2011. Du Toit v Jacobs [2022] ZAWCHC 243

Provisional sentence-Application for provisional sentence brought in terms of Rule 8 of the Uniform Rules of Court concerning an award of a tender by the defendant to

the plaintiff. Inathi-Mbako v Manguang Metro Municipality (4253/2022) [2022] ZAFSHC 305 (7 November 2022)

Res judicata – Issue estoppel – Action for damages on alleged unlawful termination of membership – Prior application for reinstatement dismissed – Dismissal not amounting to determination of issue at stake in later damages action – Issue estoppel not applying. Democratic Alliance v Brummer [2022] ZASCA 151

Res judicata-plea- by reason of issue estoppel in action for damages arising from alleged unlawful termination of membership – prior judgment of court dismissing application for order reinstating membership – whether same issue (*eadem quaestio*) decided in prior judgment requiring close examination of the basis upon which application dismissed – such relief not sought and court finding that the issue not fully ventilated – dismissal of application not amounting to determination of the issue at stake in later damages action – no scope for issue estoppel to apply. Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 (3 November 2022)

Rescission – On grounds of fraud – Group of First Nations people – Not opposed to development on land – Person misrepresented the group's constitution and did not have authorisation to launch the proceedings that culminated in the judgment – Rescission granted. Goringhaicona Khoi Khoin v Jenkins [2022] 12339-2022 (WCC) Review– Special Review – Motion proceedings irregular, magistrate made the mistake Ramolotja v Motaung and Others (89/22) [2022] ZALMPPHC 62 (25 November 2022)

Rule 28(4) – Application for leave to amend –The applicant seeks to amend its notice of motion; respondent objected to the intended amendments; grounds of the objection, the applicant was directed to respond to the respondent's further affidavits, rather than to file a notice of intention to amend. EL IDZ Fibre Maintenance Venture v East London Industrial Development Zone Soc Ltd (EL395/2021) [2022] ZAECELLC 31 (22 November 2022)

Rule 66 – Purpose to streamline and simplify the process of issuing a writ Norris v Nedbank Ltd (22916/09) [2022] ZAGPJHC 908 (6 September 2022)

Service of court process by email – Proof of sending – Deeming provisions in ECTA not triggered by mere allegations of having sent an email – Production of evidence of emailing required – Electronic Communications and Transmissions Act 25 of 2002, s 23. Acrow Limited v South Mead t/a Meister Cold Store [2022] ZAGPPHC 802

Spoliation – Mandament van spolie – Joinder of non-spoliating and non-possessing owner not required — Delay in bringing application. Maistry v CN [2022] 2020-36040 (GJ)

Spoliation- counter-spoliation -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. 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)

CASES

Sheriff of the High Court for District of Bellville v Walker [2022] ZAWCHC 214
Execution – Attachment – Interpleader – Claimant the husband married out of community of property – Couple operating close corporation and claimant benefiting through intermingling process – Not proving ownership of most of the items – Uniform Rule 58.
Facts: The sheriff attached the itemised movable goods at a residence shared by Mr Walker and Ms Crouse pursuant to a writ of execution granted against Ms Crouse in favour of A Batchelor & Associates Inc.
Claim: Mr Walker filed interpleader proceedings claiming that certain movable assets that were attached and removed by the Sheriff were his sole and exclusive property. This assertion was based on the fact that he and Ms Crouse are married to each other out of community of property. A copy of the ante-nuptial contract was provided.
Discussion: How Ms Crouse owed the attorney firm for legal fees for a matter in which they had to withdraw because they contend that the she gave them false instructions regarding a claim against the Road Accident Fund; the bill of costs for R538,477.55; that Mr Walker no longer has receipts or invoices as proof of his acquisition of the listed items; the contentions that the couple did not disclose the earnings of a close corporation; and that Mr Walker conceded that the items for which he claims exclusive ownership, which forms the basis of the interpleader claim, were ultimately bought with monies derived from the business operations conducted by him on behalf of his wife.
Findings: Mr Walker throughout the existence of the marriage benefited immensely from the close corporation through an intermingling process from his wife. The claimant only managed to prove that only two items 4 do not belong to Ms Crouse. Concerning the other items, there was no conclusive proof that they do not belong to Ms Crouse.
Order: The claimant's interpleader is upheld in respect to Items 1 and 4 and dismissed for all the other items.

De Wet v Scheepers [2022] ZAGPPHC 793

Attorneys-auction and defamation of attorneys

Mr De Wet and Mr Nel practise as attorneys in a partnership under the name and style of Nel & De Wet Attorneys and specialise in deceased estates. The defendant, Mr Scheepers is a lay person and was the primary heir to his late mother's estate on her passing. The attorneys were appointed to administer the deceased estate. Mr Scheepers was unhappy with the outcome of the auction of the property and made accusations in complaints to Sanlam Trust, the Master of the High Court, the Legal Practice Council, and to various other individuals.

Discussion: The claim by the attorneys for damages for what they contend were defamatory statements and published widely; that the allegations included accusations of forgery and fraud, that the sale of the property was illegal, and that the attorneys rig property sales at auctions; that Mr Scheepers said that he was angry at the manner in which the property was sold and not obtaining as a high purchase price as he had hoped; and that the attorneys submitted that, according to comparable cases, R300,000 each would be fair and reasonable.

Findings and order: The attorneys would have been satisfied with an apology, so the solatium to be awarded may not justify an unreasonable high amount in these particular circumstances. Mr Scheepers is ordered to pay the attorneys R50,000 each.

Democratic Alliance v Brummer [2022] ZASCA 151
Res judicata – Issue estoppel – Action for damages on alleged unlawful termination of membership – Prior application for reinstatement dismissed – Dismissal not amounting to determination of issue at stake in later damages action – Issue estoppel not applying.
Facts: Mr Brummer was a member of the DA since 2000. He was elected as a municipal councillor in the Bitou Municipality and was re-elected in successive local government elections. In 2012 his membership of the DA was terminated because of his alleged failure to pay certain mandatory financial contributions. An application for reinstatement was unsuccessful and he followed this up with an action for damages based on unlawful termination. The DA filed a special plea of res judicata in the form of issue estoppel, which was dismissed by the High Court.
Appeal: Against the full court's dismissal of the appeal against the High Court's dismissal of the special plea.
Discussion: That the special plea was premised upon the fact that the judgment dismissing the reinstatement application involved a judicial determination that the termination of Brummer's membership was lawful; the argument that only interim relief was sought for reinstatement so the Judge was not required to finally decide the issues; that the form of the application and the nature of the relief sought, ie that it was interim, was not relevant; and the question was always, what issue of fact or law was decided by the court in the proceedings, and was it finally decided.
Findings: That the same issue of unlawfulness of the termination was raised in the reinstatement application and in the damages action, however, it had to be established that it was finally determined. The judgment on reinstatement did not indicate that the Judge decided that Brummer's membership termination was lawful, rather that she dismissed the application because a case was not made out for granting the relief. The dismissal of the application amounted to no more than an order of absolution. Accordingly, a plea of res judicata was not available and the appeal must fail.
Order: The appeal is dismissed with costs.

Acrow Limited v South Mead t/a Meister Cold Store [2022] ZAGPPHC 802
Service of court process by email – Proof of sending – Deeming provisions in ECTA not triggered by mere allegations of having sent an email – Production of evidence of emailing required – Electronic Communications and Transmissions Act 25 of 2002, s 23.

Facts: The taxation of respondent's bill of costs by the Taxing Master proceeded in the absence of the applicant. Respondent insisted that its attorneys' costs consultants had sent an email to the applicant's attorneys to which the notice of set down was allegedly attached. The applicant denies that it received the email and notice of set down.
Application: Seeking a rescission or setting aside of the taxation of the respondent's bill of costs.
Discussion: That the respondent invokes the deeming provisions of section 23(2) of the Electronic Communications and Transmissions Act 25 of 2002 (ECTA) to avert the onus or duty to provide the requested proof of emailing of the notice of set down; whether the email attaching the notice of set down of the taxation of the bill of costs was sent by the costs consultants and received by the applicant's attorneys; service of court process by email and Uniform Rule 4A; entry of a data message into the information system of the addressee; the onus on the addressee and the sender; and the provision of a "sent report".
Findings: It was incompetent for the respondent to merely seek refuge in the deeming provisions of section 23(b) without first demonstrating the completion of the requirements of section 23(a) regarding the sending of the message. The application of the deeming provisions of section 23(b) is not triggered by mere allegations of having sent an email, but by the production of the evidence of emailing: automatically generated "sent report" following a successful transmission of emailed information. The required proof of the sending of the email is accessible only to the respondent and costs consultants from the system that was used to send the email. A failure to provide proof of emailing is a disproval of the respondent's allegation that the notice of set down was emailed to the applicant's attorneys.
Order: The application succeeds on the ground of the irregularity in respect of service of the notice of set down of the taxation of the bill of costs.
Samancor Chrome v Bila Civil Contractors [2022] ZASCA 154

Company – Directors – Contempt of court – Joinder of directors and contempt relief sought in the same application – Directors aware of the relief sought against them – Contempt of court established beyond a reasonable doubt.

Facts: Samancor has mining rights over certain portions of lands in the North West Province. It obtained an interdict to prevent Bila from conducting mining operations on the land. Bila had said that it was only prospecting. Samancor later approached the court with an urgent application against Bila and its directors, who had not been parties before the interdict application, and sought an order joining the directors and declaring that they were in contempt of that order.
Appeal: Against the High Court's dismissal of the contempt application (it granted an order joining the directors).
Discussion: Whether the High Court was correct in holding that the contempt order could not be granted simultaneously with the joinder of the directors; joinder and summary process; that the directors were cited as respondents in the joinder and contempt application, received the notice of motion and had time to seek legal counsel and to consider the application and their position; and the evidence of Bila's operations on the land.
Findings: No purpose would have been served in bringing a separate contempt application from the joinder. Samancor has established non-compliance with the order interdicting mining activities. The directors deliberately and intentionally caused

Bila to continue acting against the order, whilst contending that it was not mining but prospecting. Their defence of legal advice was contrived and did not give rise to a reasonable doubt so as to rebut the inference of wilfulness and mala fides.
Order: The appeal succeeds with costs. The High Court order is amended such that the respondents are declared to be in contempt of the order interdicting the operations. The company is fined R100,000 and the directors R50,000 each.

Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another (A660/2022) [2022] ZAWCHC 223 (3 November 2022)

Appeal-Appeal in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 against the decision of the court a quo directing that its decision not be suspended pending the decision of any appeal from it.

Discussed: Even if all the requirements of s 18(1) and (3) are satisfied, and the absolute threshold established thereby consequently met, the decision whether to grant an exceptional order in terms of section 18 remains within the discretion of the court; the court will have regard to the applicant's prospects of success in the pending or prospective appeal because those bear on the issue of exceptionality; Goldrush did not satisfy the requirement of proving that it would suffer irreparable harm if the court a quo's order were not made of immediate effect notwithstanding the pending appeals; the appeal in terms of s 18(4) succeeds.

Order: The order of the court a quo is set aside and replaced; the application in terms of s 18(3) of the Superior Courts Act is dismissed with costs.

Goringhaicona Khoi Khoin v Jenkins [2022] 12339-2022 (WCC)

Rescission – On grounds of fraud – Group of First Nations people – Not opposed to development on land – Person misrepresented the group's constitution and did not have authorisation to launch the proceedings that culminated in the judgment – Rescission granted.
Facts: The site of the River Club development has a rich heritage and has been occupied by indigenous people and used for sacred functions. Authorisation for the development of the area was granted by the authorities after extensive public engagement. The applicant is a group of individuals from a First Nations tribe. Mr Jenkins professed to have instituted, on behalf of the applicant, an application for an interdict to prevent the River Club development from proceeding pending the finalisation of review proceedings in which it challenged the environmental authorisation, among others. The interdict application was successful.
Application: For the rescission of a judgment of Goliath DJP (and an appeal) interdicting the further construction and earthworks.
Discussion: The applicant's contention that the order was induced by fraud in that it had not authorised the litigation nor was it opposed to the development and that the first respondent (Mr Jenkins) had committed the fraud in concert with some of its members; whether Mr Jenkins had the authorisation to launch the interdict on behalf of the applicant; the applicant's Constitution; that it seemed that Mr Jenkins was determined to stop the development at all costs and therefore fabricated a constitution to suit his objective and betrayed the trust others had in him.

Findings: The judgment was induced by fraud. Mr Jenkins misrepresented the applicant's constitution and did not have authorisation to launch the proceedings that culminated in the judgment. He further misrepresented the views of some indigenous leaders without consulting with them.
Order: It is declared that the 2018 constitution document, not the document of 2021, is the valid constitution of the applicant. The Goringhaicona did not authorise the litigation and the first and second respondents are not their duly authorised representatives. The order and judgment by Goliath DJP are rescinded.

Carlisle v Wiese [2022] ZAGPJHC 791
Contempt of court-imprisonment order but suspended
Mr Carlise and Mr Wiese had shares in Honey Fashions and worked together. Mr Wiese later left and started Miko and Anna in direct competition which led to a restraint order. This was followed by an order pursuant to him having failed to comply with the restraint order. Once again the matter is before court, this time with the applicants contending that Mr Wiese has placed orders and received stock from one of their suppliers which stock is earmarked for sale to their customers. Applicants seek his imprisonment.
Discussion: Mr Wiese has demonstrated that he has no respect for court orders and he is a serial transgressor of orders; whether his non-compliance was wilful and mala fide; and that in this instance the onus lies with him to prove that the non-compliance was not wilful and mala fide; and that Mr Wiese does not dispute that he penned disparaging words about the applicants' employees, as set out in emails.
Findings and order: The matter arises out of a fierce and tense commercial dispute involving two individuals. As a result, the court decides against direct imprisonment. Mr Weise is committed to imprisonment for 90 days, suspended for one year on condition that he complies with the earlier court order and pays a fine of R50,000 to the Registrar.

CSARS v Moloto [2022] ZAGPPHC 832
Anti-dissipation Mareva injunction – Interdict sui generis in South Africa – SARS wishing to preserve assets for claim on customs liabilities – Movement of funds and assets to defeat claim – Provisional anti-dissipation order confirmed.

Facts: Bustque 542 (Pty) Ltd and Mr Moloto are liable to pay SARS R64 million and R112 million, respectively, in respect of customs dues. According to SARS they are busy dissipating assets by transferring them to the other respondents and these are the assets which ought to satisfy a judgment to be obtained for the custom liability. SARS seeks to preserve those assets.

Application: SARS obtained a provisional order ex parte. The present application is for the final confirmation or discharge of the order.

Discussion: The Mareva injunction remedy and its origins; the English law position pre-Mareva; the South African law position; the requirements, such as assets that may be removed and the difficulty of recovery; that an applicant must show an intention, as opposed to forming a reason to believe; that the applicant must show that the respondent acts with a mala fide intent; whether SARS showed an intention

to defeat the claim; and that our law recognises an interdict sui generis for matters of this nature.

Findings: From the conduct of Moloto and Bustque, the most plausible inference to be drawn was that the movement of funds and assets happened with one sole intention and that was to defeat the claim of SARS. SARS met the requirements of the interdict sui generis.

Order: The provisional anti-dissipation order is confirmed with terms as set out in the order, including the appointment of a curator bonis.

Mineral Sands Resources v Reddell [2022] ZACC 37
Abuse of process -Defamation – SLAPP suit defence – Ulterior purpose – Abuse of process – Common law doctrine of abuse of process can accommodate SLAPP suit defence – Requirements
Facts: The Australian mining companies are engaged in extensive operations in the exploration and development of major mineral sands projects in South Africa. There is fierce community opposition to these mining activities and environmentalists are alleged to have made statements which are defamatory of the companies and some of their executives. Defamation suits were pursued in the High Court with claims of over R14 million against the environmentalists.
Appeal: Against the High Court's dismissal of the mining companies' exception to the special plea raised by the environmentalists, the SLAPP special plea (Strategic Litigation Against Public Participation).
Discussion: Whether our law currently permits that ulterior motive alone, to the exclusion of the merits of a claim, may be determinative of abuse of process, so that the claim can be dismissed solely on that basis; the contentions by the environmentalists that mining companies do not honestly believe that they have any prospect of recovering the damages and that the purpose is to intimidate and silence them; whether the common ought to be developed; the origin, nature, and development of the SLAPP suit; and abuse of process in our law.
Findings: Abusive litigation would fall within the common-law doctrine of abuse of process and can It conceivably accommodate the SLAPP type of defence pleaded by the environmentalists. (See the requirements at para [96].) The environmentalists supported their special plea on the basis that improper motive alone suffices to warrant dismissal of the actions. That was not so, and the merits also bear consideration. It followed that the special plea lacked averments necessary to satisfy the requirements of the SLAPP suit defence. To this extent, the exception taken by the companies holds good and must be upheld.
Order: The appeal is upheld and the order of the High Court replaced with one upholding the exception to the special plea. The mining companies are ordered to pay 60% of the environmentalists' costs.
[100] SLAPP suits appear to be on the increase here, as is the case globally. The finding here that the common law doctrine of abuse of process can accommodate the SLAPP suit defence ensures that courts can protect their own integrity by guarding over the use of their processes. And, ultimately, it ensures that the law serves its primary purpose, to see that justice is done, and not to be abused for odious, ulterior purposes.
Reddell v Mineral Sands Resources [2022] ZACC 38
Plea- defamation of a company-Defamation – Trading corporation as plaintiff – Reputation rights – Freedom of speech – Constitutionality of awarding general

damages to trading corporations – Trading corporations can claim general damages for defamation – Not where the speech forms part of public discourse on issues of public interest – Court's discretion.

Facts and issue: Mining companies and some of their executives launched three defamation actions against environmentalists who raised two special pleas. The first special plea (the SLAPP suit defence) is dealt with in **[2022] ZACC 37.** The second was the "corporate defamation defence special plea". The High Court upheld the mining companies' exception to the corporate defamation special plea on the basis that the court was bound by the precedent of the Supreme Court of Appeal in *SA Taxi*, where it was decided that a trading corporation can sue for general damages for defamation.
Appeal: By the environmentalists directly to the Constitutional Court based on the fact that only this court can overrule the decision in *SA Taxi*.
Discussion: The contention by the environmentalists that the common law in terms of *SA Taxi* equates the position of trading corporations with that of natural persons in claims for defamation and that trading corporations cannot be the bearers of the right to human dignity; that the environmentalists only persisted with their alternative claim on the constitutionality of awarding general damages to trading corporations in defamation cases; our common law of defamation, the *SA Taxi* case and the minority judgment of Nugent JA; the source of a trading corporation's reputation rights; and the right to freedom of expression.
Findings: An unqualified award of general damages to a trading corporation in respect of harm to its reputation limits the right to freedom of speech. A trading corporation has no hurt "human" feelings and no right to dignity. Instead, it has a common-law right to its good name and reputation, protected by the Constitution's equality provisions.
Order: The appeal is upheld to the extent that it is declared that, save for where the speech forms part of public discourse on issues of public interest, and at the discretion of the court, trading corporations can claim general damages for defamation.
Inathi-Mbako v Manguang Metro Municipality (4253/2022) [2022] ZAFSHC 305 (7 November 2022)

Provisional sentence-Application for provisional sentence brought in terms of Rule 8 of the Uniform Rules of Court concerning an award of a tender by the defendant to the plaintiff.

Discussed: The onus is on the defendant to show that the liquid document is tainted with illegality; the mere allegation of illegality is not sufficient to discharge the onus; see Joseph v Hein 1975 (3) SA 175; once the plaintiff has proved on a balance of probabilities the signature of the defendant or its agent, and the fulfilment of any simple condition giving rise to the obligation, the Court will grant provisional sentence unless the defendant produces counterproof which satisfies the Court that the probability of success is against the plaintiff; the defendant has managed to discharge an onus by disclosing a defence that goes behind the liquid document presented by the plaintiff.

Order: Provisional sentence is refused.

Norris v Nedbank Ltd (22916/09) [2022] ZAGPJHC 908 (6 September 2022)

Rule 66 – Purpose to streamline and simplify the process of issuing a writ

Relying on the facts of the case the applicant seeks the writ of execution be set aside for failing to comply with Rule 66 of the Uniform Rules of Court; the proceeds removed from his cheque account be returned together with interest.

Discussed: In essence, Rule 66 declared that a judgment not executed upon within three years of it being issued becomes superannuated; the amended Rule 66 now simply provides that a writ of execution 'once issued remains in force and may at any time be executed without being renewed'; the amended Rule 66 materially changed the law on the issuance of writs; applicant's case is that the provisions of Rule 66 pre the amendment of 28 March 2014 is applicable, and therefore the judgment had been superannuated as from 23 November 2012; since the writ was only issued on 13 March 2018 it could only be issued if he, as judgment debtor, had consented to its issuance, or if this court had revived the order; since neither condition was met, the writ was irregularly issued; respondent contends that the amended Rule 66 is applicable; Rule 66 deals with procedure; the new Rule 66 attends to the issue of a writ in general terms; there is nothing in its provisions to indicate that the elimination of the requirements was not retrospective; neither the old nor the new Rule 66 interfere with any parties' rights or obligations created by the judgment.

Order: The application is dismissed with costs.

V v V and Another (A58/2022) [2022] ZAFSHC 324 (17 November 2022)

Jurisdiction – Challenging the Maintenance Court decision where parties agreed to arbitrate

The issue to be decided is whether the Maintenance Court misdirected itself when it took a decision that the dispute between the parties falls within the purview of section 2 of the Arbitration Act 42 of 1965; the Court must decide if the Maintenance Court was correct in dismissing appellant's point of law in this respect.

Discussed: Grounds of appeal; the court a quo erred in dismissing the appellant's special plea or point of law; finding that the dispute between the appellant and respondent fell within the purview of a "matrimonial cause or a dispute incidental thereto" as contemplated in section 2 of the Arbitration Act 42 of 1965; and failing to apply the legal principle kompetenz- kompetenz to the adjudication of the special plea or point of law raised by the appellant; section 34 of the Constitution; appellant contended first that when the parties got divorced, a "matrimonial cause" between the parties ceased to exist and the matrimonial cause is now res judicata; the arbitrator must decide its own issues of jurisdiction; the decision of the Maintenance Court to pronounce on the forum upon which the dispute between the parties may be heard amounted to misdirection as the parties had agreed to refer their disputes to arbitration.

Order: The appeal is upheld with costs; the Maintenance Court's decision is set aside and replaced with an order in terms whereof the appellant's point of law relating to arbitration is upheld.

R v R (45854/2020) [2022] ZAGPPHC 886 (17 November 2022)

Discovery – Failure to comply with Rule 35(3) notice – Insufficient discovery

Defendant launched an application to compel the plaintiff to comply with her notice; defendant contends that insufficient discovery was made by the plaintiff regarding the full nature and extent of his assets prior to her entering into the settlement agreement with him.

Discussed: The object of discovery was stated in Durbach v Fariway Hotel Ltd 1949 (3) SA 1081; Uniform Rule 35 requires a party to make a discovery of all documents relating to any matter in question in such action; it is not for the party compelled to make discovery to determine whether or not the documents in his/her possession need not be discovered, and the decision does not depend on the subjective views of the legal representative of the party compelled to make discovery; whether the agreement is a full and final settlement of all issues in the divorce action between them; the plaintiff failed to discover any document(s) other than the pleadings, notices and annexures thereto and some correspondence between the parties' respective attorneys and the parties; not one single document relating to the plaintiff's financial position was discovered; Court finds that the documents and information requested in the defendant's notice in terms of Rule 35(3) are relevant to the issues in question, that the discovery made by the plaintiff was inadequate and that better and further/full discovery should be made by the Plaintiff of all source information and documentation.

Order: The respondent/plaintiff is compelled to comply with the applicant's/defendant's Rule 35(3) notice to provide better and full discovery, dated 15 March 2021, within ten (10) days of this order; the respondent/plaintiff is ordered to pay the applicant's/defendant's costs of the interlocutory application.

Darryl Ackerman Attorneys v Bhawan and Another (2021/53620) [2022] ZAGPJHC 930 (23 November 2022)

Attorneys fees – Payment for services rendered – Liability in terms of agreement

Second respondent, acting on behalf of Eldo, instructed applicant to represent Eldo in a number of disputes; applicant has rendered extensive services on behalf of Eldo, and it is indebted to applicant in the sum of R 982 254.66.

Discussed: The only question in this application is whether the parties reached agreement that respondents would be personally liable for Eldo's debt; applicant's case is based on a series of emails which the parties exchanged, and which, applicant says, resulted in an agreement that respondents are personally liable to applicant; although attempts were made to effect payment, it is common cause that the R 200 000 was never paid; respondents contend that the agreement required two steps by which respondents had to indicate their acceptance of the counter-proposal, firstly by written acceptance of the terms of the counter proposal, and secondly, by payment of R 200 000; in both of Hugo's emails of 16 and 23 March 2021 he refers to an agreement that had been concluded; neither of these emails received any response and so, applicant says, Court must draw the inference that respondents also held the view that the parties had concluded an agreement; in the Courts view applicant clearly established the manner in which acceptance was to be conveyed, firstly by acceptance of the terms of the agreement in writing, and secondly by payment of the R 200 000. In the absence of payment, no agreement was concluded.

Order: The application is dismissed with costs.

Industrial Development Corporation v Sibiya [2022] ZAGPJHC 933

Prescription – Commences from demand claim notice-Contract – Loan Agreements – Guarantee agreement – Independent agreement – Precludes defence on underlying agreement

Facts: Various agreements were concluded between the IDC and Keka Moedi Investments, including: a loan agreement, amended by a letter of amendment; a subordinated loan agreement; and a short form loan revolving credit facility agreement, also amended by a letter of amendment. The IDC launched sequestration proceedings against Keka and a final winding up order ensued. The sequestration application against Mr Sibiya's estate was dismissed when the defence of prescription was upheld.

Claim: The IDC claims payment of over R84 million and seeks a monetary judgment Mr Sibiya based on a guarantee agreement in favour of the IDC for the debts of Keka.

Discussion: Prescription and the IDC's case that demand was a condition precedent to Mr Sibiya's indebtedness, which would only be deemed to be due and payable once a certificate of indebtedness had been delivered to him and that the IDC had an election as to the time of the demand; Mr Sibiya's argument that the claims had prescribed because he became obliged to make payment when the amounts became due for payment by Keka to the IDC in terms of the short form agreement, the revolving credit agreement and the subordinated agreement; and whether or not the guarantee agreement was subject to the suspensive condition that the IDC would have to deliver a guarantee claims notice.

Findings: On a contextual reading of the guarantee agreement it was clear that the obligation undertaken by Mr Sibiya was a primary rather than an accessory obligation and that it was a performance guarantee. The primary obligation makes it wholly independent of the liability of Keka and whatever disputes may arise from the underlying transactions are irrelevant to the liability of Mr Sibiya under the guarantee. The furnishing of a guarantee claims notice was a condition precedent. Prescription will commence from the date of delivery of the demand.

Order: Two of the claims were included in the sequestration application (where the court found that they had prescribed) and are not allowed, however, the other claims succeed.

Maistry v CN [2022] 2020-36040 (GJ)

Spoliation – Mandament van spolie – Joinder of non-spoliating and non-possessing owner not required — Delay in bringing application.

Facts: Mr Maistry and Ms VN were married according to Hindu rites and Ms VN purchased the house where they lived. Ms VN became ill and her adult daughter from a previous marriage, Ms M, and Ms VN's sister, Ms CN, stayed in the house. When Ms VN passed away, the occupants left the house and went to Durban for her funeral. Mr Maistry occupied the house with his son and placed locks and chains on the doors and gates of the property. Ms M and Ms CN succeeded in breaking the

locks and chains and Mr Maistry contends that he was prevented from accessing the house.

Application: Almost 22 months later Mr Maistry seeks restoration of possession of the house and orders relating to the rights of the daughter and sister (respondents) to reside on the property.

Discussion: Whether Mr Maistry's failure to join the executor and heirs of Ms VN's estate (which has not yet been finally wound up) constitutes a fatal non-joinder; whether the ancillary orders amounted to a final interdict declaring the parties' respective rights; and whether the relief should be refused due to the delay in launching the application.

Findings: The spoliatory relief does not determine any of the parties' rights of possession or occupation and the executor cannot be said to have a legal interest in the subject-matter of the litigation, so did not have to be joined. The house was in the joint peaceful and undisturbed possession of the Mr Maistry and the respondents for the purposes of residence. The court finds that his exclusion from the house was involuntary and wrongful. The further relief required goes further than restoring the status quo ante but Mr Maistry has not made out a case for an interdict. Considering the steps Mr Maistry took and the circumstances prior to launching the application, the court is unable to find that Mr Maistry acquiesced in the respondents' conduct of excluding him. However, the court finds that the application has not been brought within a reasonable time. The restoration of joint possession of the house in this matter would also not constitute an expeditious remedy that would serve the purpose of preserving the status quo ante in advance of the determination of the rights of the parties pursuant to an opportunity being given to each of them to state their case.

Order: The application is dismissed.

EL IDZ Fibre Maintenance Venture v East London Industrial Development Zone Soc Ltd (EL395/2021) [2022] ZAECELLC 31 (22 November 2022)

Rule 28(4) – Application for leave to amend –The applicant seeks to amend its notice of motion; respondent objected to the intended amendments; grounds of the objection, the applicant was directed to respond to the respondent's further affidavits, rather than to file a notice of intention to amend.

Discussed: The primary issue for decision is simply whether to grant leave to the applicant to amend its notice of motion as intended; legal framework; the main purpose of allowing an amendment is to ensure the proper ventilation of the dispute between the parties, to determine the real issues between the parties, so that justice can be done; applicable principles were summarised in Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73; application of the law to the facts; the applicant's intended amendment in the present matter would not appear to affect the actual dispute between the parties; if the main issue between the parties remains the same, argues the applicant, then a court will generally allow an amendment; in the present matter, the applicant makes no allegation that the conduct of the respondent's officials was dishonest or fraudulent; regarding the claim for just and equitable compensation, the applicant has not demonstrated why this is an exceptional case, such that an order directing the respondent to pay compensation would be warranted; the Court is not satisfied that the intended amendment will give rise to anything deserving of consideration or a triable issue.

Order: The application for leave to amend is dismissed.

The Member Of The Executive Council: Responsible For Health In The Eastern Cape v Caka In re: Caka v The Member Of The Executive Council: Responsible For Health In The Eastern Cape (4947/2017) [2022] ZAECMHC 44 (22 November 2022)

Condonation – Condonation for late delivery of notice in terms of Rule 30(2)(b) and late delivery of application in terms of Rule 30(1)

Applicable legal principles in condonation application; factors weighed by the Court in considering condonation applications are prospects of success, the respondent's interest in the finality of his judgement, the convenience of Court and the avoidance of unnecessary delay in the administration of justice.

Discussed: The approach which the courts have always taken in determining whether good cause has been shown is enunciated in Melane v Santam Insurance Co-Ltd 1962 (4) SA 531; condonation is not there for the mere asking; a party is required to make out a case entitling it to the court's indulgence; it must give a full, detailed, and accurate account of the causes of the delay covering the entire period of the delay; condonation application must be filed without unreasonable delay; length of the delay; the question is, was the applicant's notice in terms of rule 30 (2)(b) regular and prepared strictly in accordance provisions of rule 30?; there has clearly been prejudice to the respondent in this case in that a defective notice in terms of rule 30 (2)(b) which does not strictly comply with the provisions of rule 30 has been allowed to hamstring and detain what is primarily a minor child's claim from advancing.

Order: The application for condonation is dismissed with costs.

Geeco Investments (PTY) LTD v Gourmet Cape Distributors (PTY) LTD (11008/2019) [2022] ZAWCHC 240 (25 November 2022)

Motion applications – Leave to supplement founding affidavit and amend notice of motion in the main proceedings to introduce additional relief

The purpose of the supplementary founding affidavit is to support that additional relief; whether the applicant has followed the correct procedure; it is first necessary to consider whether it is still open to the applicant to amend its notice of motion, given the parties' agreement in paragraph 2 of the referral order.

Discussed: Neither party specifically considered whether it is competent for this Court to grant an amendment to a simple summons; in Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd 2011 (5) SA 130 the Court considered whether it is competent to note an exception to a simple summons; Rule 28 of the uniform rules of court prescribes the procedure to be followed for amendments to 'pleadings and documents'; respondent's other primary contention is that this application is in any event premature, since the applicant has not applied for leave to reopen its case; the respondent is correct on both primary procedural contentions; there should be no prejudice to the applicant if it follows the correct procedure by applying to reopen its case and thereafter seeking to amend its declaration; given the applicant's stance that the present application is interlocutory in nature, it would

be inappropriate for this Court to deal with the merits at this stage, since it would amount to prejudging matters that may well serve in due course before a different court.

Order: The application is dismissed with costs.

Ramolotja v Motaung and Others (89/22) [2022] ZALMPPHC 62 (25 November 2022)

Review– Special Review – Motion proceedings irregular, magistrate made the mistake

In the middle of delivering his judgment, the presiding magistrate realised that he had not given the parties an opportunity to address him on the merits of the matter; after the parties have addressed him, the presiding magistrate sent this matter on special review for guidance and directions of how to handle the matter further.

Discussed: Section 22(1) of the Superior Courts Act provides that the grounds upon which the proceedings of any magistrates' court may be brought under review before a court of a Division; in view of this Court, this section confers the High Court with inherent jurisdiction to review proceedings of whatever nature from the lower Courts; this was a motion proceeding, and the parties were supposed to have first addressed the court before a judgment was delivered; in this case, the presiding magistrate came with a written judgment which was prepared before the parties could address him on the merits of the application; see De Lange v Smuts NO and Others [1998] ZACC 6; presiding magistrate had finalised his written judgment without having been informed about the points of view of both parties; presiding magistrate only gave the parties an opportunity to address him during the middle of delivering of his judgment after he had realised the irregularity he had committed; the irregularity committed is so gross to the extent that the opportunity that was granted to the parties to address him at that late stage of the proceedings will not rectify that irregularity; by the time the presiding magistrate gave the parties an opportunity to address him on the merits of the application, he had already made up his mind about the case, and this Court is in doubt as to whether any argument presented by the parties will be able to persuade him to rule otherwise, than what is contained in his written judgment.

Order: The proceedings before Additional Magistrate Montane M in abovementioned are hereby reviewed and set aside in its entirety; the matter is referred back to the magistrate court for a hearing de novo before another magistrate.

In re : Human Rights Watch and Others; Various Parties on behalf of Minors v Anglo American South Africa Limited and Others (2020/32777) [2022] ZAGPJHC 935 (25 November 2022)

Amicus curiae – Applications for admission of amici curiae in application for certification of class action

The purpose of the class action is to claim damages from Anglo on behalf of two proposed classes who reside in the Kabwe district, Zambia, and who have suffered injury because of exposure to lead; the applicants' cause of action is grounded in the Zambian law of tort.

Discussed: Legal principles governing the admission of an applicant as amicus curiae, applicant must, in terms of Rule 16 A of the Uniform Rules, satisfy the Court

that its submissions are (i) new, i.e., different from the existing submissions before the Court; (ii) that they are relevant; and (iii) that they will be helpful to the Court; see In Re Certain Amicus Curiae Applications: Minister of Helath and others v Treatment Action Campaign and others 2002 (5) SA 713; whether it is in the interests of justice for the class action to be certified; if admitted as amici curiae, the UN bodies will argue that the conflicted position in which Anglo has put itself in, should weigh in the Court's analysis of where the interests of justice lie; no proper foundation was laid in the answering affidavit for maligning the integrity of five UN bodies; it was a gratuitous averment, which was irrelevant to whether or not the requirements for certification were met by the UN bodies in their application.

Order: The third to seventh applicants for admission as amici curiae are admitted as the third to seventh amici curiae.

Du Toit v Jacobs [2022] ZAWCHC 243

Protection order – Harassment – Against neighbour – Manure business causing noise, smells, flies and other complaints – Not what Act targets – Conduct of a business is far removed from abusive behaviour that induces fear or harm or behaviour intentionally directed at another to cause detriment to that other – Protection from Harassment Act 17 of 2011.

Facts: Respondent had lived at his property in Wellington for over 28 years. The appellants moved in next door with a business in cattle manure. The trucks were cleaned and effluent flowed past other properties into the river. Flies, noise and bad smell became an issue for the respondent's family, as well as the unauthorised use of water by the appellants.

Appeal: Against the granting by the magistrate of an order in terms of the Protection from Harassment Act 17 of 2011 prohibiting the appellants from harassing the applicant and his family and from conducting any business activity on the property that caused the offending conduct.

Discussion: The history of the interactions between the neighbours and the threats made; the taking of videos by the respondent; the Preamble and terms of the Act; the terms of the order by the magistrate; and that the Act is intended to afford protection to the person of the complainant against the behaviour of another.

Findings: The appellants conducting their business at their property was not intentionally directed to cause fly infestation, rat infestation, bad smell or noise, amongst other offending conduct, directed at the respondent and was not intended to cause the respondent detriment. The conduct of a business is far removed from abusive behaviour that induces fear or harm, or behaviour intentionally directed at another to cause detriment to that other.

Order: The order granted by the magistrate is set aside and replaced with one dismissing the application.

Underberg Dairy (Pty) Ltd v The Dairy Boys (Pty) Ltd and Others (A193/2021) [2022] ZAGPPHC 894 (17 November 2022)

Evidence-Leading evidence and closing the case – Standard of proof

The fons et origo of the issue is that by agreement between the parties the defendant bore the duty to begin; the second and third respondents carried the

burden to refute or disprove their consent to be bound by the terms of the agreements; consequently, they assumed the duty to begin and prove their defence.

Discussed: This appeal is about two issues, whether the Court a quo arrived at the correct decision in concluding that “the plaintiff also closed its case without leading any evidence in rebuttal”; and whether the Court a quo arrived at a correct decision in concluding that the respondents had “refuted on a balance of probabilities that any amounts can still be owing to the plaintiff”; a fortiori the appellant was not entitled to a judgment in its favour; appellant vehemently denied that it closed its case; the burden of proof in its primary sense was referred to in Pillay v Krishna and Another 1946 AD 946; a proper analysis of the opening address leads to an ineluctable conclusion that the onus to prove the indebtedness remained with the appellant (plaintiff), save where the certificate of balance was accepted as a prima facie proof; based on the submissions it could not have been the intention of the appellant to close its case; the issue was never canvassed nor dealt with.

Order: The appeal is upheld; the matter is remitted to the Court a quo for further evidence.

De Beer v Geldenhuys [2022] ZAGPPHC 905

ROAD RAGE, A CONSENT ORDER AND A DAMASCUS MOMENT

Order-consent order - unequivocally in its terms an admission of liability for what occurred

Respondent had instituted an action against the applicant for injuries sustained in a road rage incident. They entered an agreement to settle liability and a court order was made by consent. Applicant was represented by senior counsel and an attorney and he said that the advice was that it would not prejudice his defence in the action for damages because there was no admission as to causation between the incident and the damages. The attorney in his later criminal case advised him that he should not have consented to the order. When certain aspects of the respondent’s evidence were regarded as unsatisfactory during the criminal trial, the applicant decided to bring the present application for rescission of the order by consent.

Findings: The consent order is clearly and unequivocally in its terms an admission of liability for what occurred. It cannot be ignored that the applicant was represented and advised by senior counsel at the time that he decided to consent to the order. On the probabilities the applicant consented to the order in the civil matter to avoid having to testify. Having achieved this, he then, once the respondent had testified and been cross examined in the criminal trial, sought to resile from the agreement, having already received the benefit that he had sought in consenting. There was in the circumstance’s no “Damascus moment”. The application was not made bona fide and that there was no iustus error. The costs of the application are be paid by the applicant on the punitive scale as between attorney and client.

Lebea v Menye and Another (CCT 182/20) [2022] ZACC 40 (29 November 2022)

Intervention- Leave to intervene – By attorney who was witness in proceedings – Adverse credibility findings – Direct and substantial interest pertains to the order – Not sufficient if interest is in the findings or reasons for order – Magistrates’ Court Rule 28(1).

On Tuesday, 29 November 2022, the Constitutional Court handed down a judgment of an application brought by Mr Justice Nhlanhla Lebea (applicant) against Mr Sango Menye (Mr Menye) and the MEC for Public Works and Infrastructure, Free State (MEC).

The application relates to a dispute between the applicant and Mr Menye about whether or not the applicant should be granted leave to intervene in proceedings between Mr Menye and the MEC in order to appeal against a certain adverse credibility finding that was made by the Magistrates' Court, Bloemfontein in a judgment in those proceedings.

Mr Menye worked for the Free State Department of Public Works and Infrastructure (DPWI) as the Director: Supply Chain Management. He was charged with misconduct and faced a disciplinary hearing. The applicant is an attorney. He was hired by the DPWI to lead evidence on behalf of the DPWI in the disciplinary enquiry. At some stage of the disciplinary proceedings, according to Mr Menye and his lawyers, the applicant told Mr Menye's lawyers that the Head of Department of the DPWI had undertaken to pay Mr Menye's legal costs arising from a certain postponement of the disciplinary proceedings. Later the DPWI refused to pay such costs and said that it had not made any undertaking. Mr Menye then sued the DPWI for such costs on the basis of the representation allegedly made by the applicant. In the subsequent trial relating to the legal costs, the applicant gave evidence and denied that he had made the alleged representation. Mr Menye's attorney and advocate testified and said the applicant had made the representation. The Magistrates' Court found that the applicant had lied to Mr Menye's lawyers by saying that the Head of Department of DPWI had undertaken to pay Mr Menye's legal costs for the postponement. The Magistrates' Court, nevertheless, concluded that the MEC was bound to pay Mr Menye's legal costs. It ordered the MEC to pay.

The applicant later brought an application in the Magistrates' Court in terms of Rule 28 for leave to intervene in the proceedings so that he could challenge the adverse finding on appeal. The court dismissed his application on the basis that, as he was only a witness in the matter and the order of the court did not adversely affect him, he had no direct and substantial interest in the matter and that, for that reason, it would not grant him leave to intervene. His appeal to the High Court, Bloemfontein, failed for the same reason. He then applied to this Court for leave to appeal. Mr Menye opposed the applications and appeals in all the courts.

The Constitutional Court has refused the applicant's application for leave to appeal for the same reason given by the High Court and the Magistrates' Court. That is that he does not have a direct and substantial interest in the matter between Mr Menye and the MEC for DPWI, Free State as the order does not affect him. The order that was made in the matter between Mr Menye and the MEC was that the MEC should pay Mr Menye's legal costs for the postponement. It said the applicant had made the representation but he should not have made it. It said that the Head of Department was bound by the representation because the applicant was his agent.

The Constitutional Court acknowledged that an adverse credibility finding against a witness affects the witness' right to human dignity and ordinarily any person whose constitutional right is adversely affected by anyone's statement should have recourse

to the courts. That notwithstanding, the Constitutional Court concluded that there would simply be too many challenges that would arise in our legal system if it allowed a witness to intervene in other parties' proceedings in order to challenge adverse credibility findings made against them. One of the challenges is that to allow a witness to do so may unduly prolong litigation with the attendant costs. The court said that this is a problem that should receive the attention of Parliament in order to see what legislative intervention it can make to come to the assistance of people in the applicant's position.

The Constitutional Court refused leave to appeal with costs.

Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 (3 November 2022)

Res judicata-plea- by reason of issue estoppel in action for damages arising from alleged unlawful termination of membership – prior judgment of court dismissing application for order reinstating membership – whether same issue (*eadem quaestio*) decided in prior judgment requiring close examination of the basis upon which application dismissed – such relief not sought and court finding that the issue not fully ventilated – dismissal of application not amounting to determination of the issue at stake in later damages action – no scope for issue estoppel to apply.

Greater Tzaneen Municipality v Bravospan 252 CC (Case no. 428/2021) [2022] ZASCA 155 (7 November 2022)

Prescription-Constitutional law – enrichment claim not 'debt' as defined in Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 – no notice in terms thereof required – no general enrichment action recognised in our law – appropriate remedy available to the respondent – court's discretionary power in terms of s 172(1)*(b)* of the Constitution to grant a just and equitable remedy.

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].)

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]).

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].)

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].)

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]).

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.

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

[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)

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.

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.

END – FOR - NOW