LEGAL NOTES VOL 12/2022

Compiled by: Matthew Klein

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S.A. LAW REPORTS DECEMBER 2022

KOCH NO AND ANOTHER v AD HOC CENTRAL AUTHORITY, SOUTH AFRICA AND ANOTHER 2022 (6) SA 323 (SCA)

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Children — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Harm or intolerability — Mitigation — Fact that psychological harm inevitable whether or not return ordered and remedial measures implemented only after harm incurred, not necessarily meaning that measures inadequate and return should not be ordered.
The facts in this appeal, against an order for the return of a 4½-year-old girl, AB, to the United Kingdom under the Hague Convention, * were the following: AB was born in the UK to unmarried parents in July 2017. In April 2019 the mother, a South African national who also held UK citizenship, was diagnosed with cancer. AB's parents, who had by this time split up, nonetheless decided to come to SA together with AB so the mother could seek medical treatment here. In October 2019 the father returned to the UK on the understanding that the mother and AB would remain in SA while there was a prospect of successful treatment, failing which she would return to the UK with AB. In November 2019 the mother, who had always been AB's primary caregiver, informed the father that she wanted AB to remain in SA and, in the event of her death, live here with her aunt (the present appellant) and maternal grandmother. AB was 26 months old when she left the UK and 3½ years old at the time of her mother's death.

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

The father would not agree to AB remaining permanently in SA under any circumstances and, assisted by the Ad Hoc Central Authority (the present respondent), made an application under the Convention for her return to the UK, citing the mother and the aunt as respondents. The mother opposed return on the grounds that (i) the father had consented to AB remaining with her in SA for as long as she was undergoing treatment; and (ii) there was a grave risk, given the new attachments AB had formed in SA and her father's inability to care for her due to his depression and alcohol abuse, that returning her to the UK would expose her to physical and psychological harm or place her in an intolerable situation. The defences were advanced under arts 13*(a)* (consent/acquiescence) and 13*(b)* (harm/intolerability).

The mother died on 8 December 2020. Three days later the court charged with the matter, the Western Cape High Court, rejected her defences and made an order for AB's return to the UK. In respect of the art 13*(b)* defence, the court ruled that the mother had failed to establish that the UK would not be able to mitigate the risks she had raised. The court granted the appellant leave to appeal to the Supreme Court of Appeal.

In the appeal the SCA first dealt with an application by the appellant to lead further evidence by an educational psychologist, Ms P, on the negative impact a removal order would have on AB. The father opposed this application on the ground that the evidence related to new facts that arose after the trial and that the SCA was obliged to decide the matter on the facts before the High Court. He also argued that the evidence was prejudicial and irrelevant, and that its admission would undermine the principle that Convention matters be dealt with expeditiously.

The appellant contested the High Court's finding that there were sufficient mechanisms in place in the UK to mitigate the impact of AB's return, arguing that AB would suffer harm whether or not the proposed measures were implemented. Mere remedial measures implemented after the fact were insufficient and a return should in the circumstances not be ordered. The father submitted that the social services available in the UK were adequate to respond to the needs of AB and that she would be able to re-establish her bond with her father once there.

Held

While appeal courts had the power to hear further evidence, it had to be exercised sparingly and only in exceptional circumstances. Here, exceptional circumstances justifying the admission of Ms P's evidence were indeed present. She had assessed AB after her mother's death and commented on her current functioning and the impact an order for her return to the UK would have on her given her recent bereavement. This assessment could not have been conducted while the mother was still alive. Moreover, the basis of the appellant's art 13*(b)* defence did not change. What had changed was AB's factual situation, the appellant now being her remaining caregiver. In the light of this, the appellant would be allowed to introduce Ms P's report. (See [24] – [27].)

The Convention was founded on the belief that it was in the interest of abducted children to be returned to the state where they habitually resided and that the courts of that state were best suited to determine disputes regarding AB's residence and welfare. Since less than one year had passed since AB's removal from the UK, the High Court had been obliged, under art 12 of the Convention, to order her return unless the mother had a defence under art 13. (See [29] – [31].)

Proof of consent had to be *clear* and *cogent*. In the present case the father's consent had been *provisional*: AB could remain in SA while the mother was undergoing treatment or until her death. In addition, the mother had unequivocally stated that she

no longer wished to be bound by the conditions under which AB was to remain in SA and had then abandoned the consent justification altogether, raising instead the father's alleged inability to provide for AB. The mother's consent defence, being unclear and inconsistent, was correctly rejected by the High Court. (See [33] – [44].)
As to the High Court's finding on the art 13*(b)* defence and the ability of UK authorities to protect AB from the harm she might face on her return, the correct interpretation of the phrase 'intolerable situation' was a situation which the particular child in the particular situation should not be expected to tolerate. And it was the return to the requesting state, not the removal from the requested state, that had to have this effect. (See [67].)
Although there were grounds for the view that psychological harm to a child was inevitable whether or not a return was ordered, the fact the remedial measures could only be implemented after the harm had already taken place did not mean that the measures were inadequate, and a return should not be ordered. (See [64] – [65].)
The facts in the present case were complex and exceptional in that her mother, AB's primary caregiver and attachment figure, was dead, and her father, due to personal challenges, unable to provide for her. Ms P's evidence showed that the appellant had taken the mother's place as primary caregiver and that removing AB to the UK would result in an insurmountable second maternal 'death' for her. It was thus clear that the removal of AB from her primary attachment figure in the form of the appellant would expose her to psychological harm or otherwise place her in an intolerable situation. There was, moreover, compelling evidence that the mechanisms in place in the UK were insufficient to ameliorate the psychological and emotional harm she would be exposed to. Returning her to the UK would compound the loss of her mother and break her new bond she had formed with the appellant, and the High Court had erred in ordering it. (See [65], [69] – [77].)
The SCA accordingly upheld the appeal and replaced the High Court's order with one dismissing the application for the return of AB (see [78]).

MUNICIPAL EMPLOYEES PENSION FUND AND ANOTHER v MUDAU AND ANOTHER 2022 (6) SA 343 (SCA)

Pension — Pension fund — Rules — Amendment of rule governing withdrawal benefits so as to reduce such benefits — Amended rule given retroactive effect — Validity of rule — Pension Funds Act 24 of 1956.

Mr Mudau, the first respondent, was employed by Vhembe District Municipality, the second respondent, and as a concomitant became a member of the first appellant pension fund (see [3]). Then, in May of a certain year, Mudau resigned from his employment. The fund's rules provided that on date of resignation, the member concerned would become entitled to his withdrawal benefit, calculated according to the formula pertaining at the time (see [3] – [4]).
Subsequently, in June of that same year, the fund resolved to amend the rule which had applied at the time of Mudau's resignation. Under the amended rule, which was applicable from April, members' withdrawal benefits were reduced (see [4]). Thereafter, in October, the fund paid Mudau under the amended rule the lesser benefit than he would have been entitled to under the old one (see [6]).
Following this, the Registrar of Pension Funds registered the amended rule with its effective date of April described above (see [6]). Aggrieved, Mr Mudau approached the Pension Funds Adjudicator, asserting that only on registration could the amended

rule have become effective, with the result that the old rule would have applied to him (see [7]). The Adjudicator agreed, adding that the amended rule could only be of prospective application (see [8]).
The fund then approached the High Court, asserting that the Adjudicator's ruling was outside her powers and also wrong in its conclusion that the amended rule could not apply to benefits that had accrued before the rule's registration (see [9]).
The High Court, approaching the matter as a review rather than as a new hearing as provided for by s 30P of the Pension Funds Act 24 of 1956, found no irregularity in the Adjudicator's determination and dismissed the fund's application (see [10] – [11]).
The fund then appealed the ruling to the full court, but without success, after which it appealed to the Supreme Court of Appeal (see [1] and [12]).
The SCA *held*, firstly, that it had been within the Adjudicator's powers to make the determination: what was implicated was not, as the fund asserted, the validity of the amended rule (determinations of validity being outside her powers), but its interpretation and application, which it was within her power to rule on (see [14] – [15]).
The SCA *held*, secondly, that the rule was of retroactive application: the fund's rules permitted it to amend its rules, subject to compliance with s 12 of the Act, where here there was such compliance; and the presumption against retroactivity was rebutted by the fund's clear intention (conveyed by its unambiguous use of language) for the amended rule to apply retroactively (see [17] – [19] and [21] – [22]).
Ordered, accordingly, that the appeal be upheld; the full court's order set aside and replaced with an order that the appeal against the High Court's judgment be upheld; the Adjudicator's determination set aside and replaced with a determination dismissing Mudau's complaint (see [23]).

RENNIES TRAVEL (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES 2022 (6) SA 349 (SCA)

Revenue — Value-added tax — Zero-rated supplies — Supplementary commission received by travel agency after achieving agreed sales targets of international airline tickets — Constituting consideration for arranging transport of international passengers — Such receipts having to be zero-rated — Value-Added Tax Act 89 of 1991, subsections under s 11(2)*(a)* and *(d)*.
Practice — Appeal — Time for lodgement of notice of appeal — Conflict between provisions of Tax Administration Act and rules of Supreme Court of Appeal — Latter subordinate legislation — Provisions of Tax Administration Act as national legislation, prevailing — Tax Administration Act 28 of 2011, s 138(3); Rules of Supreme Court of Appeal, rule 7(1)*(b)*.

The appellant, Rennies Travel (Pty) Ltd, conducted a travel agency enterprise. A part of its income was derived from 'supplementary commission' it earned reaching international airline ticket sales targets agreed with the airline concerned (see [1], [10]).
The respondent, the Commissioner for the South African Revenue Services, determined that the appellant was liable for the payment of value-added tax (VAT) on the supplementary commission that it had earned during the period from February 2012 to December 2016, and accordingly issued additional VAT assessments. Rennies maintained that the supplementary commission had been earned in respect of a supply of services that attracted VAT at 0% (zero-rated) under the Value-Added Tax Act 89 of 1991.

In the tax court the Commissioner's case was that the supplementary commission was an incentive for promoting the sale of international airline tickets above agreed targets, the payment of which was conditional upon the appellant achieving the predetermined sales targets. The tax court, however, determined the matter on a basis that the respondent had not relied upon, that the supplementary commission had been paid for the supply of the services of marketing and promotion of the sales of airline tickets for international travel, the supplementary commission being payable because of successful marketing and promotion campaigns.
In this case, Rennies' appeal to the Supreme of Appeal (with the tax court's leave), a preliminary issue was condonation since the appeal had been lodged out of time under rule 7(1)*(b)* of the Supreme Court Rules, but in time under s 138(3) of the Tax Administration Act 28 of 2011 (see [3] – [5]).
Held
The SCA rules were made by the rules board in terms of s 6 of the Rules Board for Courts of Law Act 107 of 1985, and as such they constituted subordinate legislation. It was trite that in the event of conflict, national legislation prevailed over subordinate legislation. Thus, the appellant's notice of appeal was lodged timeously and condonation was not required. (See [5].)
The approach of the tax court was wrong: in terms of the VAT Act provisions the supply of the services of arranging of the transport of passengers for international travel was zero-rated. The agreements with two of the airlines contained separate provisions in respect of marketing and promotional services, and another agreement made no such provision. The appellant accordingly charged separate fees, as well as VAT at the standard rate, for its services in respect of marketing campaigns. (See [13] – [14].)
VAT could only be payable on a supply of services as defined in the VAT Act. The Commissioner's contentions did not identify a supply of services for which the incentive was paid. The meeting of a revenue target was not a supply of services. The supply of services for which the supplementary commission was paid was earned for exactly the same supply of services as the standard commission services of arranging of the transport of international passengers — through the sales of airline tickets. It followed that the supplementary commission fell to be zero-rated under s 11(2) of the VAT Act and that the appeal has to succeed. (See [15] – [17].)

AFRIFORUM v ECONOMIC FREEDOM FIGHTERS AND OTHERS 2022 (6) SA 357 (GJ)

Equality legislation — Hate speech — What constitutes — One song containing lyrics 'Kill the boer/Kill the farmer', alternatively 'Kiss the boer/Kiss the farmer', and another containing lyrics 'Call the Fire Brigade, Burn these Boers, EFF enters in space/place' — Songs not to be understood literally, but interpreted in context of political struggle for land justice, and as means to agitate and mobilise in support of such struggle — Need for broad delineation of bounds of constitutional guarantee of freedom of expression — Songs not constituting hate speech — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10.

The present matter concerned the lawfulness of two songs or chants that had been sung at gatherings of the political party the Economic Freedom Fighters (the EFF). One contained the lyrics 'Kill the boer/Kill the farmer', alternatively 'Kiss the boer/Kiss the farmer'. The other, titled '*Biza a ma'firebrigate*' (translated into English 'Call the fire brigade'), contained the translated lyrics 'Call the Fire Brigade, Burn these Boers, EFF

enters in space/place'. In this matter, AfriForum NPC, the applicant, approached the Equality Court, Johannesburg, complaining that the songs 'advocated hatred on the grounds of race and ethnicity, and constitute an incitement to cause harm', and unfairly discriminated on 'the grounds of race by disseminating racist propaganda and inciting racial violence'. It accordingly sought an order declaring the two songs to constitute hate speech and unfair discrimination, as prohibited by ss 10 and 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The first respondent was the EFF. The second and third respondents were, respectively, the president of the EFF, Julius Malema, and the party member, Dr Ndlozi. They had on occasion during the period 2016 – 2020 led the singing of the songs; Mr Malema, Kill the Boer, and Dr Ndlozi, '*Biza a ma'firebrigate*'. The respondents opposed the relief sought.
The court, after having heard the evidence, held that the applicant had failed to show that the lyrics of the impugned songs amounted to unfair discrimination as prohibited by the Equality Act. Nor had it established that the lyrics amounted to hate speech, having failed to prove that they could reasonably be construed to demonstrate a clear intention to harm or incite to harm and propagate hatred.
The court, in explaining its findings with regard to the song Kill the Boer, accepted the argument of Mr Malema, as well as the respondents' expert, Prof Gunner, that the song should be interpreted in the context of a long-standing struggle for land justice, from apartheid and to the present day, and understood, not literally, but as a means to agitate and mobilise the youth in support of this struggle in which the EFF was engaged. A generous delineation of the bounds of the constitutional guarantee of freedom of expression, against which the prohibition against hate speech under the Equality Act had always to be balanced, was called for here. Thus, declaring the impugned song to be hate speech would significantly alter or curtail freedom of expression. (See [104] – [106] and [111].) As matters stood, the court held, the singing of the impugned song and its lyrics should be left to the political contestations and engagement on its message by the political role players. Accordingly, a reasonable listener would conclude that the song did not constitute hate speech but rather that it deserved to be protected under the rubric of freedom of speech. (See [112].)

HABITAT COUNCIL v CAPE TOWN CITY AND OTHERS 2022 (6) SA 383 (WCC)
Consititutional law — Organ of state — Duty to act as consitutional citizen — Local authority's conduct in opposing review of its decision inconsistent with such duty — Approprate costs order.
Costs — Special order — Punitive costs order — When to be awarded — Local authority's conduct in opposing review of its decision inconsistent with duty to act as consitutional citizen — Fairness requiring that local authority should bear part of unsuccessful applicant's costs.

The mayoral committee (MAYCO) of the City of Cape Town (the City) decided in November 2015 to approve building plans relating to a property known as 'the Melck Warehouse' which formed part of the late 18th century Melck precinct in the City's central business district. The Habitat Council, who had opposed the development of the property on heritage grounds, was advised by the City that it was entitled to appeal the MAYCO's decision to the City's planning and general appeals committee (PLANAP).
Its appeal to PLANAP unsuccessful, Habitat Council then launched a High Court application to review the PLANAP decision. The City eventually conceded the review,

acknowledging that PLANAP was not authorised to have heard the MAYCO appeal after all. The PLANAP decision was accordingly set aside in March 2018.
In the meantime, the developer, the owner of the property, proceeded with obtaining city approval of its building plans and in February 2020 commenced construction work on the building, which continued throughout. There was no attempt by the Habitat Council to impugn the decision to approve building plans or to interdict the developer and the building work which had subsequently taken place. (See [72].)
In the present application, launched in September 2018, the Habitat Council sought to review the MAYCO decision (its approach apparently having been to get the PLANAP decision out of the way first). In September 2019 settlement negotiations yielded a proposal from the City to agree to the setting aside of the MAYCO decision and the referral of the matter back to MAYCO. However, shortly afterwards, the City rejected this proposal, citing that the building was complete — which was not the case (see [55] – [57]).
At the time of finalising the PLANAP review, the heritage status of the Melck Wherehouse property was under consideration by the heritage appeal tribunal as to whether it should be graded as a provincial heritage site — with restrictive implications for the proposed development — or at a lower level. Three other parts of the Melck complex enjoyed national heritage status (see [1] – [6]). In November 2019 the heritage appeal tribunal ruled that a lower grade applied. This was unbeknownst to Habitat (who claimed only to have found this out in May 2021) but not to the City (as was apparent from its opposing papers). This effectively put paid to Habitat's heritage grounds in the review (see [28]).

Held

Setting aside the decision would have no practical effect other than to castigate the City for its constitutional delinquency. The application had become moot; it raised no live issue between the applicant and the City. The review accordingly fell to be dismissed (See [76] and [79].)
As to costs, the City's conduct in the litigation was lacking in constitutional citizenship. In opposing the application, the City —

- expended ratepayers' money in defending a decision which held no benefit for those ratepayers or the public at large; it was only for the benefit of the developer, who was afforded a free ride on the back of the ratepayer (see [81], [82]);
- did not put up any evidence by way of affidavits from its officials who had knowledge of the matter but rather relied on an answering affidavit by its attorney, which was largely based on hearsay evidence (see [83]);
- relied on grounds that were manifestly false when it told the applicant's attorneys that there was no sense in reviewing the MAYCO decision as the building work was finished, when it was easy for it to ascertain its true extent (see [84], [86]);
- did not point out to the applicant, as would be expected of a good constitutional citizen, that the plans had been approved nearly two years before the review application was made (see [87] – [88]);
- having conceded the PLANAP review, should have, as a good constitutional citizen, initiated the MAYCO review itself (see [89] – [90]);
- with its knowledge of the heritage approvals without informing the applicant thereof, also reflected adversely on the City's duty as a good constitutional citizen (see [91]).

These deviations from the norms and standards expected of it under the Constitution would be addressed by way of an order for costs. Fairness required that the City should bear part of the applicant's costs on account of the manner in which it

conducted itself overall, and the resultant costs which the applicant was obliged to incur. In the peculiar circumstances of the matter, it would be fair, just and equitable to order the City to bear the applicant's party and party costs up to 30 June 2021, and that thereafter each party is to bear its own costs of suit. (See [80] and [95].)

MAQUBELA AND ANOTHER v THE MASTER AND OTHERS 2022 (6) SA 408 (GJ)

Marriage — Proprietary rights — Community of property — Whether, on spouse's death, proceeds of spouse's life policy falling within spouse's individual estate or joint estate.
Evidence — Admissibility — Evidence of conviction in criminal proceeding — Non-admissibility in subsequent civil proceeding — Criticism of Hollington rule.

Third respondent, Mrs Maqubela, and Mr Maqubela were married in community of property. Mr Maqubela took out a policy on his life, in terms of which he nominated his separate estate as the beneficiary (see [19] – [20]). Later on, Mr Maqubela died intestate, and the estate's executor, the second respondent, drew the estate account such that the policy benefits fell, as stipulated in the policy, in Mr Maqubela's estate rather than the joint estate (see [21] and [36]).
Mrs Maqubela later lodged an objection to the account with the Master, and obtained the Master's direction that the account be amended so as to entitle Mrs Maqubela to half of the proceeds of the policy, on the premise that the policy benefit fell within the joint estate (see [22] – [23]).
First and second applicants, children of Mr and Mrs Maqubela, later objected to the amended account, but the Master overruled their objection, and here, by virtue of s 35(10) of the Administration of Estates Act 66 of 1965, they applied for the setting-aside of the Master's decision (see [24] – [25]).
The first issue was whether the life-policy proceeds were part of the joint estate (see [26]).
Held, on established authority, that they were not, and formed part rather of Mr Maqubela's individual estate (see [29]). (This on the basis that on Mr Maqubela's death, the joint estate terminated, and simultaneously the right to the policy benefits arose, the right accordingly not having been part of the joint estate before Mr Maqubela's death (see [28]).)
The second issue related to applicants' prayer that Mrs Maqubela be declared unworthy of inheriting, on the ground that she had forged a will of Mr Maqubela (see [37], [39] and [41]).
In this regard, the evidence applicants relied on was a judge's finding, in an earlier criminal trial of Mrs Maqubela, that Mrs Maqubela had perpetrated forgery, and his conviction of her of forgery and fraud (see [45]).
However, Mrs Maqubela in her answering papers denied the commission of any such offences (see [44]).
The issue resolved then to whether the criminal court's conviction could be admitted as evidence of the commission of the offences (see [45]).
Held, following the *Hollington* rule, albeit with reservations, that the court could take no cognisance of the convictions as evidence, and consequently that an evidentiary basis for applicants' prayer was absent (see [47], [50] – [51] and [53]).
Ordered, accordingly, that the Master's refusal to sustain applicants' objection be set aside; that the life-policy proceeds did not form part of the joint estate; and that the

proceeds be distributed in terms of the Intestate Succession Act 81 of 1987. However, the application for a declarator of unworthiness to inherit fell to be dismissed (see [1]).

MAVUDZI AND ANOTHER v MAJOLA AND OTHERS 2022 (6) SA 420 (GJ)

Legal practitioner — Misconduct — Removal from roll — Application for — Application to court at instance of laypersons or entities — Circumstances in which laypersons or entities could apply to courts for striking-off of name of legal practitioner from relevant professional roll — Legal Practice Act 28 of 2014, s 44(2).

This was an application to the Johannesburg High Court for the striking-off of the name of the first respondent, Adv Majola, from the roll of advocates on the grounds of gross unprofessional conduct. The application was brought by two laypersons, Mr Mavudzi and Mr Dube, who were the accused in a pending criminal trial in which Adv Majola was lead prosecutor. Pertinently for present purposes, while a complaint had been lodged against the advocate with the Legal Practice Council (the LPC) — that was done by Mr Mavudzi shortly before the institution of these High Court proceedings — the disciplinary process was still pending. Before the High Court the applicants based their claims on adverse findings of dishonesty against Mr Majola made in a judgment by Gilbert AJ. That judgment concerned an application brought by Mr Mavudzi to challenge the lawfulness of the warrant for his arrest. Gilbert AJ dismissed that application because the issue of the unlawfulness of the warrant of arrest was res judicata, having been disposed of in an earlier application before Du Plessis AJ brought by Mr Mavudzi. However, in obiter comments, Gilbert AJ made remarks to the effect that *Adv Majola had misled Du Plessis AJ* in those earlier proceedings. And it was on these findings or remarks that the applicants here relied.
Key issues to be considered in the present matter were, inter alia, the following:
(a) One, was the factual foundation relied on for the striking-off application sound?
(b) Two, did the applicants have standing to bring a striking-off application to court, either at all, or in the circumstances of this case? The underlying question here was whether laypersons or entities could apply to the courts for the striking-off of a name of a legal practitioner from the relevant professional roll, particularly in circumstances in which a professional body had not yet investigated and concluded whether or not such a step was necessary. The applicants relied on the provisions of s 44(2) of the Legal Practice Act 28 of 2014 (the LPA) in order to ground standing. It provided that '(n)othing contained in this Act preclude[d] *a complainant* or a legal practitioner . . . from applying to the High Court for *appropriate relief* in connection with any complaint or charge of misconduct against a legal practitioner . . . or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge'. (See [3], [38] and [41].)

As to *(a)*, *held*, that the judgment of Gilbert AJ could not be relied upon to found an application to strike off Adv Majola's name from the roll of advocates (see [27]): When Gilbert AJ expressed himself in the passages upon which the applicants relied, the remarks were made *contingently* in relation to the crux of the matter before him: he had to decide if res judicata was a sound defence, not whether Adv Majola was guilty of dishonesty. Properly understood, the judgment posited, *for the sake of the argument* on the res judicata point, that even on the premise that Adv Majola misled Du Plessis AJ, as alleged and unrebutted on the papers, those 'acts' did not knock out the res judicata defence. (See [26].) Given that the premise of the relief sought were

these remarks, the application had to fail for want of a proper foundation (see [27]). This conclusion, standing alone, disposed of the matter. (See [28].)
As to *(b)*, *held*, that, having regard to s 44(2) of the LPA, understood in the context of the architecture of the LPA — in particular the apparatus for the discipline of legal practitioners — and the history of the regulation of the legal professions, the following was apparent:
(i) It was inappropriate for any layperson or entity to apply ab initio to the courts for a striking-off of the name of a legal practitioner from the roll, save for the reason mentioned in (iii) below.
(ii) A complaint of misconduct against a legal practitioner had to be lodged with the LPC or any one of the voluntary regulatory bodies of legal practitioners and the court had to insist on a report from one or more of them in any striking-off application that came before it to facilitate the court reaching a conclusion on 'appropriate relief'.
(iii) Only where a regulatory body was itself delinquent in performing its functions in addressing a complaint would it be appropriate for a layperson to approach the court for 'appropriate relief'.
(iv) Any person aggrieved at the decision of a regulatory body may seek to review its decision. (See [3] and [31] – [39].)
Held, accordingly, that the application had to fail (see [40] – [42]).

NEDBANK LTD v MHLARI NO AND OTHERS 2022 (6) SA 438 (GJ)

Estoppel — By conduct — Trustees contracting without authority and other party to contract led by trust resolution into believing that trust's internal formalities were complied with when they were not — Whether such party could raise ostensible authority and estoppel to meet defence that contract invalid for lack of authority.
Trust — Trustee — Authority to bind trust — Trust deed requiring three trustees to be appointed whereas trust operating with only two trustees — Other party to contract led by trust resolution into believing that trust's internal formalities were complied with when they were not — Whether such party could raise ostensible authority and estoppel to meet defence that contract invalid for lack of authority.

Nedbank instituted an action against the defendants arising from the breach of a written loan agreement secured by a mortgage bond, concluded between it and the Patrick Malabela Family Trust (the Trust), claiming judgment for the principal sum outstanding and an order that the immovable property be declared executable.
The first and second defendants were trustees of the Trust. The other defendants were sureties for the Trust's indebtedness under the loan agreement, and also a third trustee appointed after the loan agreement was entered into. The thrust of their defence was that the loan agreement was invalid (and so also the suretyships) because the first and second defendant lacked authority to bind the Trust. And this was so because, contrary to the trust deed's requirement that no less than three persons may be appointed as trustees to the Trust, at the time of concluding the loan agreement only two trustees had been appointed.
In replication, the plaintiff pleaded that the conduct of the first and second defendants was such that the Trust was estopped from raising the lack of authority of the two trustees by virtue of the doctrine of ostensible authority. In this regard Nedbank relied, inter alia, on the trustees having provided it with a resolution, purportedly adopted at a meeting of trustees, to the effect that the first and second defendants were

authorised to complete and sign all documents incidental to the conclusion of the loan agreement on behalf of the Trust. (See [12] and [18].)
At issue was whether the Trust could be legally bound by the loan agreement despite that, when it was concluded, only two trustees were appointed instead of three. The defendants relied on *Land and Agricultural Bank of South Africa v Parker and Others* (infra [17]), where the Supreme Court of Appeal concluded that a trust could not be bound where there were fewer than the required number of trustees in terms of the deed of trust, except where the statute provided otherwise.
Held
The *Parker* decision left open the question of ostensible authority and estoppel. There was no legitimate basis upon which it could be asserted that ostensible authority and estoppel could not be invoked in the case of an action of the Trust, where the other party was lured into believing that internal formalities were complied with when in fact that was not so. On the undisputed facts, the Trust should be estopped from relying on lack of authority to contract. The loan agreement was binding on the Trust, and the third, fourth, fifth, sixth and seventh defendants were equally bound as sureties for the debts owed by the Trust to the plaintiff. Judgment would accordingly be granted against them in favour of plaintiff. (See [22] – [23].)

IN RE PROTECTION OF CERTAIN PERSONAL INJURY AWARDS (PRETORIA SOCIETY OF ADVOCATES AND OTHERS, AMICI CURIAE) 2022 (6) SA 446 (GP)

Damages — Bodily injuries — Award — Protection — Protection, in Gauteng High Courts, of awards made to minors and mentally incapacitated persons in Road Accident Fund and medical negligence claims — Appointment of curator or creation of trust — Court and Master's roles — Guidelines for proposed consolidated practice directive for Gauteng Courts.

The courts have no control over lump-sum awards made in claims for damages arising out of motor vehicle accidents and medical negligence, except where they are made to minors or mentally incapacitated persons. In Gauteng two separate mechanisms are used for legal oversight in such cases: (i) the appointment of a curator bonis under rule 57 of the Uniform Rules of Court; and (ii) the creation of a trust by order of court. The curator and the trustee both have fiduciary duties and are subject to supervision by the Master, although the Master's powers over the curator (under the Administration of Estates Act 66 of 1965 — the Estates Act) are greater than those over the trustee (under the Trust Property Control Act 57 of 1988 — the Trust Act).
The Master approached the court for general guidance on her supervisory obligations over these types of awards. The Master also asked the court for specific guidance in five such cases. The Master had two main concerns: ambiguous court orders that confused the Master's powers under the Estates Act with those under the Trust Act (as demonstrated by the orders in the five specific cases), and legal practitioners' perceived attempts to circumvent the controls in the Estate Act by establishing trusts rather than going the curator bonis route. The Master felt that due to her comparative lack of control, trusts might not be in the best interests of vulnerable plaintiffs.
Held
The two protective mechanisms described above — curators bonis and trusts — were equally tenable in law and there was no basis to conclude that a trust should be permitted only in exceptional circumstances. The choice was up to the court and an

amendment to the current practice directives of the Gauteng Division was required to assist it in choosing the best alternative for each plaintiff. (See [46] – [47] and [136].)
The provisions of the Estates Act were not applicable if a trust was established. Although the Master had fewer powers under the Trust Act than under the Estates Act, trustees were nevertheless under a common-law fiduciary obligation to act with due care, diligence and skill. In addition, ss 72(1)*(d)*, 77 and 78 of the Estates Act and ss 6, 9 and 15 of the Trust Act enabled the Master to exercise sufficient oversight over, respectively, curators bonis and trustees. However, the Master's powers could not be extended over trustees as if they were curators bonis. (See [27], [31], [66], [71], [110] – [111], [137].)
If a plaintiff was declared of unsound mind or incapable of managing his or her own affairs due to a disability, the first step had to be an application for the appointment of a *curator ad litem* to protect the plaintiff's proprietary interests. The assumption that the trust route excluded the appointment of a *curator ad litem* was incorrect, as was the view that the consent of the plaintiff was necessary for the creation of a trust. A *curator ad litem* should in all cases be appointed to represent minor plaintiffs and advise the court as to which form of protection was in their best interests. (See [19] – [20], [37], [45], [147].)
The remuneration of trustees should be comprehensively dealt with in the court order and trust instrument. Remuneration should be commensurate with the complexity, time and effort required to discharge their duties and reference should not be made to the scale of fees for curators to calculate trustees' remuneration. The court must be satisfied, on the information provided by the parties, that the proposed remuneration structure was appropriate. (See [78] – [80], [88] – [90], [140].)
Whether guardians or family members should be appointed as co-trustees depended on the facts of the case. If a guardian or family member was appointed, the court should determine whether he or she should have decision-making capacity or needed to provide security. The trust instrument should also provide a mechanism for dealing with any deadlocks in decision-making between the co-trustees. (See [115] – [117], [143].)
Since rule 57 did not allow the appointment of a curator bonis where the plaintiff was not incapacitated, the obvious mechanism for the protection of funds in 'partial incapacity' cases was the trust. This would allow the court to tailor the trustee's powers to prevent undue infringement of the plaintiff's rights. However, sufficient medical evidence had to be placed before the court to support an order for the establishment of a trust. (See [119] – [120], [149].)
Smaller awards to minors could go into the Guardian's Fund. However, depending on the amount of the award, this might not always be the most cost-effective solution. This issue needed to be properly dealt with in the reports of the *curator ad litem* and the Master. Alternative forms of protection for awards made to minors were payment to the child's parents or guardians to manage the funds on their behalf until majority, the appointment of a curator bonis, or the establishment of a trust. (See [131], [145] – [146].)
The proposed practice directive alluded to above should, inter alia —

- recognise that both the appointment of a curator bonis and the establishment of a trust were both valid mechanisms for the protection of damages awarded to plaintiffs in RAF and medical negligence matters;
- enable each case to be decided on its own facts, with the court ultimately being required to determine whether the proposed mechanism was appropriate;
- ensure that applications be supported by evidence from medical experts on —

— whether the plaintiff was of unsound mind or suffered from a form of disability rendering them incapable of managing their affairs; and

— if not incapable, whether there was nonetheless a need to protect the award;

- provide that a *curator ad litem* be appointed if the medical expert's view was that the plaintiff was incapable of managing his or her own affairs;
- allow the court to direct the parties to apply for the appointment of a *curator ad litem* if the medical expert's view was that the award required protection, even though the plaintiff was able to manage his or her own affairs;
- in applications for the appointment of a *curator ad litem*, ensure that the draft order sets out the specific powers to be conferred on him or her;
- ensure that the *curator ad litem* reported to the court on whether a curator bonis or a trust was best for the protection of the award;
- where a *curator ad litem* was not appointed but the protection of the award was still advisable, ensure that the plaintiff's attorney placed the required information about the plaintiff's circumstances before the court;
- whether a curator bonis was appointed or a trust created, ensure that the court be given sufficient information to determine appropriate remuneration for the curator bonis or trustee;
- ensure that the appointment of a curator bonis did not include a provision that the exercise of all the curator's powers were subject to the prior approval of the Master;
- discourage the use of generic trust instruments;
- where the injured party was a child, provide for the appointment of a *curator ad litem* to represent the child's interests and to make a recommendation to the court as to the form of protection that will best serve the child's interests; and
- ensure, where a trust was established to manage a minor's affairs, that the court order and trust instrument stated the objective of the trust.

SORRENTO SECTIONAL TITLE SCHEME BODY CORPORATE v KOORDOM AND ANOTHER 2022 (6) SA 499 (WCC)

Costs — Special order — Punitive costs order — Incorrect forum — Community Schemes Ombud appropriate forum but matter brought in High Court — Successful applicant awarded costs on tariff applicable in proceedings under ambit of ombud — Community Schemes Ombud Service Act 9 of 2011.
Housing — Consumer protection — Community Schemes Ombud — Ombud appropriate forum but matter nevertheless brought in High Court — Successful applicant awarded costs on tariff applicable in proceedings under ambit of ombud — Community Schemes Ombud Service Act 9 of 2011.

The applicant filed a notice of motion in the High Court, on an urgent basis, to compel the respondents to grant access to a unit owned by second respondent in the Sorrento Sectional Title Scheme, for the purposes of conducting a further leak detection test and inspection.
This was after second respondent thwarted various requests to gain access, through managing agents, loss adjusters, leak-detective agents and the applicant's attorneys. After the matter was struck off the urgent roll, second respondent changed his stance and granted the demanded access. The only remaining issue was costs.
Held
Neither party appeared to have considered approaching and engaging with the Community Schemes Ombud under the Community Schemes Ombud Service Act 9

of 2011. The Act provided for the Ombud to enjoy jurisdiction, by way of prayers for relief which were relevant to this matter. As stated by this court before, 'judges and magistrates . . . should . . . use their judicial discretion in respect of costs to discourage inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the Community Schemes Ombud Service'.
This matter should never have been brought before this court as first instance; the issues fell squarely within the ambit of the Ombud and would have been expeditiously dealt with at no cost, as the employ of legal representatives was not permitted. Litigants and their respective legal advisors must take heed of the availability of the Ombud in matters that were uncomplicated, required a more conciliatory approach and at vastly less costs, with a considerably more expedient manner of processing.
The applicant would therefore be granted costs on the tariff applicable in respect of proceedings under the ambit of the Ombud. (See [15], [18] – [19], [22].)

SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS v CAPE TOWN CITY AND OTHERS 2022 (6) SA 508 (WCC)

Spoliation — Counter-spoliation — Requirements — Constitutionality — Discussion.

In the present application, heard before the full bench of the Western Cape High Court, the applicants sought an order declaring to be unlawful and unconstitutional actions taken, without a court order, by officials of the City of Cape Town, and of the latter's Anti-Land Invasion Unit (ALIU), to demolish, and evict persons from, informal structures unlawfully erected on various pieces of land, namely Erf 18332, Khayelitsha (Empolweni/Ethembeni), owned by the City; Erf 5144, Ocean View, owned by the Hout Bay Development Trust; and Erf 544, Portion 1, Mfuleni (Delft), owned by Cape Nature. The applicants included amongst their number Mr Qolani (as third applicant). During the course of the City's operations conducted in Ethembeni referred to above, he had been forcefully dragged, while naked, out of his structure, which was then subsequently demolished. The scene was captured on video, and publicised on social media, to widespread condemnation.
The City and the Province argued that their actions were lawful; they were entitled, they argued, to rely on the common-law principle of counter-spoliation to seize and demolish unlawful informal structures without a court order at any stage before such structures were fully constructed and occupied as 'homes', that is, at any stage before the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 applied. The structures they demolished, the City contended, did not qualify as 'occupied' for the purposes of the PIE Act. The applicants, for their part, disputed the City's right to demolish the structures based on counter-spoliation, and in fact argued that the remedy was unconstitutional to the extent that it allowed the City to demolish 'occupied' (according to their understanding of the term) informal dwellings, thereby circumventing the requirements of the PIE Act.
The applicants further sought orders, inter alia, declaring the decisions and/or conduct of the City in establishing and operating the ALIU, and in mandating it to summarily seize and demolish structures determined by it to be 'unoccupied', to be unlawful and unconstitutional.
Held
The court considered the concept and requirements of the common-law principle of counter-spoliation. In this regard, it noted that counter-spoliation existed as a defence

to an act of spoliation, by means of which the victim of the spoliation (the despoiled) may resort to self-help to regain possession of their property appropriated (by the despoiler). It noted that it was clear that the act of counter-spoliation would only be permissible in law if resorted to '*instanter*' the despoiler's act of dispossession, such that it formed part of, or was a continuation of, the res gestae of the despoiler's act of dispossession. Should the dispossessed victim resort to self-help after the original breach was completed and '*possession*' perfected by the despoiler, the '*instanter*' requirement would be absent; the self-help would amount to a separate act of spoliation not condoned by law. (See [25], [26], [29], [44] and [83].)

A critical question to be determined in this case was, what would qualify as 'possession' by the despoiler, which once established would render any self-help by the despoiled victim unprotected by law? (See [20] and [41].) Properly interpreted, the court held, it was simply 'peaceful and undisturbed' physical control exercised with the intention of securing some benefit therefrom (see [29], [43], [51], [56] – [58], [65] – [67], [83]). In so holding, the court expressed its favour for a narrow interpretation of counter-spoliation, as opposed to a broader interpretation in terms of which 'possession' was equated with possession in the full juridical sense. (See [45], [54], [62], [65], [67].)

The court rejected as misguided the view of the City that, at any stage prior to an unlawful occupier being subject to the provisions of the PIE Act, it may utilise counter-spoliation to demolish structures and to remove unlawful occupiers from land. The court held that the availability of counter-spoliation was not dependent upon the unavailability of PIE. The requirement, the court emphasised, was that the City, when seeking to rely on counter-spoliation when demolishing informal structures, had to act *instanter* to the act of spoliation. (See [83].) Whether actions of self-help were taken '*instanter*', or whether the despoiler had perfected their possession, would depend on the facts of each case (see [43], [44], [49], [66] and [85]). Contrary to the views of the City, the court held, an unlawful occupier might very well have established the necessary level of control and suitable intent by erecting incomplete structures (see [83]). Applying the law to the facts, in the court's view, the occupants whose structures the City had demolished had met the requirement of peaceful and undisturbed possession by having 'commenced construction' of their informal structures (see [83]).

As to the City's conduct in Khayelitsha, the court held, and declared, that the City had acted unlawfully and unconstitutionally, in attempting to demolish the structure clearly occupied at the time by Mr Qolani, and effectively evicting the latter; and in demolishing other structures in the area based on an incorrect interpretation and understanding of the common-law defence of counter-spoliation. (See [116] – [123] and [159.1].)

As to the City's conduct in Hout Bay, the court held, and declared, that the City had acted unlawfully and unconstitutionally, in demolishing structures on land belonging to the Hout Bay Development Trust, prior to its having obtained permission from the Trust to lawfully conduct counter-spoliation operations on such land. (See [124] – [126] and [159.1].)

As to the City's conduct in Mfuleni, the court held, and declared, that the City had acted unlawfully and unconstitutionally in demolishing structures prior to having obtained permission from Cape Nature to assist it with conducting lawful counter-spoliation operations. (See [127] – [129] and [159.1].)

The court further found that counter-spoliation, when properly interpreted, was not unconstitutional. It accordingly declined to grant the applicants relief in this regard. (See [89] – [99].)

As to the applicants' relief relating to the ALIU, the court held, and declared, that the body in question was not per se unlawful, provided that, in discharging its mandate to guard the City's land against unlawful invasions, it acted lawfully. However, to the extent that the ALIU operated and carried out its functions based on an incorrect interpretation of the common-law defence of counter-spoliation, its conduct was unlawful. (See [113] – [115].)

STANDARD BANK OF SOUTH AFRICA LTD v TCHIBAMBA AND ANOTHER 2022 (6) SA 571 (WCC)

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Nature of process — Not adversarial, conventional application procedure not engaged — Properly construed as extension of application to declare immovable property executable as provided for in rule 46(3) — Uniform Rules of Court, rules 46A(3), 46A(9)*(c)*, *(d)* and *(e)*.

Rule 46A(8)*(e)* provides that a court granting an order declaring immovable property that was a primary residence executable, may exercise a discretion to determine a reserve price for the sale in execution; rule 46A(9)*(d)* provides for the court's reconsideration of a reserve price so fixed if it were not achieved at auction. In such cases, in terms of the latter rule, the sheriff must report to the court within five days of the date of the auction on a number of listed factors; and under rule 46A(9)*(c)* 'the court must, on a reconsideration of the factors in paragraph *(b)* and its powers under this rule, order how execution is to proceed'.
In the current matter, the sheriff duly compiled a report in compliance with rule 46A(9)*(d).* Once the sheriff had made his report, confusion reigned as to how to bring about the reconsideration required by para *(c)* in court, causing much delay in doing so. The reconsideration eventually arrived before court on the opposed motion roll on 1 August 2022, almost nine months after the sale in execution. Appreciating that the situation was entirely unsatisfactory and at odds with the indications in the subrule and the considerations of practicality that enjoined that these matters be disposed of expeditiously, the court decided mero motu to retain the matter and hear it on the earliest feasible subsequent date (see [30]).
Having heard the matter, the court *criticised* the finding in *Changing Tides* (see n5), that an application by the judgment creditor was necessary to obtain the reconsideration by the court required by rule 46A(9)*(c)*. It *held* that such a conclusion was not supported by the wording of the subrule, which, in the given circumstances, directed the sheriff to submit a report to the court and required the court receiving such report ipso facto to undertake the necessary reconsideration — irrespective of whether anyone applied for it or not. It further *held* in this regard that the notion, that an application process in the conventional sense was engaged, was misconceived. The judicial reconsideration posited in rule 46A(9)*(c)* was plainly inquisitorial in character and, unlike in ordinary adversarial proceedings, the court must be able to call upon the sheriff or the protagonists in the principal rule 46A application to supply it with any information it needed to do the task. It was the rules of inquiry that were missing. (See [32, [35].)
As to how the rule was properly construed, it *held* the rule contemplated the reconsideration exercise to be an extension of the application provided for in rule 46A(3). The scheme of the subrule was that the original application continued on the basis of supplemented papers, commencing with the sheriff's report. There was no

new application to be instituted. If there were, one would expect the rule to provide for it. It was not surprising that it did not; the exercise that was involved was, after all, nothing more than a consideration by the court of whether to amend the order that it had already given in the application in terms of rule 46A(3), so that it could be effectively executed. The reconsideration did not occur in a new matter. Rule 46A(9) plainly implied that a court that fixed a reserve price in its order was not *functus officio* until the contemplated sale had been concluded at or above the determined reserve price. (See [38].)

As to the practice directive of the division on rule 46A reconsiderations, insofar as para 1 of the directive referred to 'applications' it was *held* that this must be interpreted to mean the reconsiderations prescribed in rule 46A(9)*(c)*, and thus *not* to imply fresh proceedings on notice of motion. The court also expressed the opinion that the prescribed reconsideration must take place in open court, rather than only 'ideally' so, this because it was as an extension of the ordinary motion proceedings commenced in terms of rule 46A(3) and which were subject to the general requirements of s 32 of the Superior Courts Act 10 of 2013. (See [27], [42] – [43].)

And further, as to the proper approach to reconsiderations, it was *held* that the unfortunate lacunae in subrule (9) required the court itself to deal with the consequences pending the remedial intervention plainly called for by the Rules Board. * The express provisions of the subrule necessarily implied that the registrar should place the sheriff's report before a judge and make the necessary arrangements to render the prescribed reconsideration ripe for hearing in open court after a reasonable opportunity had been afforded to the interested parties. (See [39].)

SUSTAINING THE WILD COAST NPC AND OTHERS v MINISTER OF MINERAL RESOURCES AND ENERGY AND OTHERS 2022 (6) SA 589 (ECMk)

Administrative law — Administrative action — Review — Exploration right to explore for offshore oil and gas — Application to review granting of exploration right and to interdict prohibiting seismic survey — Applicants' right of meaningful consultation infringed — Exploration right set aside — Promotion of Administrative Justice Act 3 of 2000, s 6(2)*(c)* and 6(2)*(e)*(iii).

Minerals and petroleum — Mining and prospecting right — Exploration right to explore for offshore oil and gas — Application to review granting of exploration right and to interdict prohibiting seismic survey — Applicants' right of meaningful consultation infringed — Exploration right set aside — Promotion of Administrative Justice Act 3 of 2000, s 6(2)*(c)* and 6(2)*(e)*(iii).

In February 2013 Impact Africa Ltd (Impact), a subsidiary of Shell Exploration and Production South Africa BV (Shell), applied in terms of s 79 of the MPRDA * for an exploration right to, inter alia, use seismic surveying to seek out oil and gas reserves off the Eastern Cape coast. The application was accepted on 1 March 2013, and Impact was required to submit an environmental management programme (the EMPr) on the proposed activities to the Petroleum Agency of South Africa (PASA) for consideration and approval by the minister responsible for mineral resources.

Pursuant to PASA's acceptance of the application, a consultation process was initiated by an independent environmental assessment practitioner at the instance of Impact (see [19]). The Deputy Director-General gave approval on 17 April 2014. No meaningful seismic and exploration activities were immediately conducted, and the exploration right was renewed twice. On 29 October 2021 SLR Consulting (South

Africa) Ltd, at the instance of Shell as operator of the exploration right, gave notice of Shell's intention to commence with a 3D seismic survey along the Wild Coast under the exploration right and the EMPr approved in 2014.
On 28 December 2021 a number of people and organisations — having first heard of the proposed seismic testing through SLR's notice — approached the High Court on an urgent basis and obtained an interim interdict against Shell, prohibiting them from proceeding with seismic surveying pending determination of an application for a final interdict. This, to prohibit them from proceeding with seismic surveying unless and until an environmental authorisation had been granted under the National Environmental Management Act 107 of 1998 (NEMA).
The present case concerned their application for that final interdict. However, by the time it was heard it had evolved into a review of three administrative decisions: the granting of the exploration right and the two renewals thereof. These were assailed in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as procedurally unfair for failing to adequately consult (or consult at all) with interested and affected communities, including the applicants; for failing to take into account relevant considerations; and for not complying with applicable legal prescripts.
Held
The consultants identified the interested and affected parties, not through a public process, but through an analysis of potential stakeholders engaged in previous similar studies in the area. The EMPr did not explain what 'stakeholder analysis' denoted. There was a dearth of information as to what 'previous studies in the area' meant; there was no evidence that the applicant communities were involved in such studies. Despite Impact having been aware of numerous communities in the area concerned, there was nothing from a reading of the papers pointing to Shell, Impact or the consultants having conducted investigations to identify the communities. Consequently, the communities did not form part of the stakeholder database. This disadvantaged the communities as they ended up not receiving the relevant background information, and eventually not being consulted. It would seem Impact and Shell were content to consult with only the monarchs of the communities, adopting the stance that such consultations sufficed. That view was clearly incorrect; a 'community' as defined in the MPRDA was a separate entity from a chief. (See [19] and [90] – [95].)
In these circumstances, the objects of reg 3 of the MPRDA (see [88]), insofar as it provided that the notice must let the affected and interested parties know, and that the notice must be accessible to all affected communities, were thwarted. In sum, therefore, the consultation carried out by Impact was procedurally unfair. The decision to grant the exploration right fell to be reviewed on this ground alone, in terms of s 6(2)*(c)* of PAJA. The renewals, being dependent upon the grant of the exploration right — whose process has been proven to have been fatally defective — also fell to be reviewed. (See [100] – [103].)
The failure on the part of the minister to take into account relevant considerations (see [106] – [129]) was also fatal to the decision to grant the exploration right and the renewals thereof, rendering these reviewable in terms of s 6(2)*(e)*(iii) of PAJA, as was the minister's failure to comply with the applicable legal prescripts of the MPRDA. Accordingly, the decision granting the exploration right fell to be reviewed under s 6(2) of PAJA and the principle of legality. (See [134] – [136], [139].)

WILLIAMS AND ANOTHER v STANDARD BANK OF SOUTH AFRICA (PTY) LTD AND ANOTHER 2022 (6) SA 629 (WCC)

Mortgage — Foreclosure — Residential property — Compliance with rule 46A of Uniform Rules of Court — Not required where execution order made before rule 46A came into effect (22 December 2017).

Rule 46A of the Uniform Rules of Court — which introduced new requirements regulating execution against the primary residence of a mortgage debtor — does not apply to execution proceedings where the execution order was made before rule 46A came into effect on 22 December 2017. (See [12] – [19] for the ambit of rule 46A; [20] – [26] for the presumption against legislative retrospectivity; and [27] – [37] for the application of those principles to the facts of the case.)

ZWENI v ROAD ACCIDENT FUND AND OTHERS 2022 (6) SA 639 (WCC)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Road Accident Appeal Tribunal — Decision that injury not 'serious injury' relayed without giving any reasons — Decision reviewable — Cannot be validated by ex post facto reasons — Matter remitted — Road Accident Fund Act 56 of 1996, s 17(1A), reg 3(1)*(b)*(iii)*(bb)*.
Administrative law — Administrative action — Review — Grounds — Failure to furnish adequate reasons for action — Cannot be validated by ex post facto reasons — Quaere: Whether there might be exceptions — Promotion of Administrative Justice Act 3 of 2000, s 5(3).

This case concerned a person's right to adequate reasons for administrative action that materially or adversely affected him or her, as embodied in s 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 5(3) provided that if the decisionmaker failed to furnish 'adequate reasons' for the decision, it had to be presumed, in the absence of proof to the contrary, that the action was taken without good reason.
The applicant was injured in a taxi accident and lodged a claim for compensation with the Road Accident Fund. Dr Cronwright, a plastic and reconstructive surgeon, found that the applicant had suffered permanent disfigurement and that her injuries were therefore 'serious' as intended in s 17(1A) of the Act read with reg 3(1)*(b)*(iii)*(bb)* of the Road Accident Fund Regulations. The applicant submitted her RAF4 report to the Road Accident Fund in support of her claim for general damages. The RAF rejected the serious-injury assessment and hence the applicant's claim for general damages.
The applicant then lodged a notification of dispute with the second respondent, the Health Professionals Council of South Africa (HPCSA) and requested it to be referred to the Road Accident Fund Appeal Tribunal (the third to sixth respondents). The tribunal resolved that the applicant's injuries were indeed not serious and communicated its decision to the applicant's attorneys in an email dated 5 July 2016. The email contained a brief description of the injuries and the proposed treatment and concluded as follows: 'Tribunal findings: Not serious.'
The applicant then requested written reasons for the tribunal's decision under s 5(1) of PAJA. The tribunal responded that it was satisfied with the reasons supplied in its email of 5 July 2016 and that the applicant was at liberty to apply to the High Court for the review of the tribunal's decision, which the applicant proceeded to do.
The grounds for review were that the tribunal's email of July 2016 merely reflected the tribunal's findings and did not contain any reasons at all, but rather mere statements

or conclusions; that in terms of s 5(3) of PAJA the tribunal was obliged to furnish adequate reasons within 90 days after receiving the request for reasons, in the absence of which it had to be presumed that the decision was made without good reasons; and that the tribunal failed to consider the findings of Dr Cronwright. The tribunal, while conceding during oral argument that the reasons provided were not adequate, argued that the HPCSA detailed its reasons in its answering affidavit.

Held

The furnishing of adequate reasons for an administrative decision, the cornerstone of the constitutional right to fair administrative action, was given statutory form in s 5 of PAJA. The reasons had to be intelligible and informative to the reasonable reader with knowledge of the context of the action. Here, the tribunal's cryptic response in its email of 5 July 2016 was not reasons at all, but rather mere statements. It was deficient, in that the tribunal failed to explain why the claim for general damages was rejected or why it thought that the applicant did not suffer serious injuries. More importantly, there was no indication that it considered or applied the narrative test envisaged in reg 3(1)*(b)*(iii). In addition, the tribunal failed to explain why it had disregarded Dr Cronwright's findings. (See [13] – [17].)

Since the tribunal's response to the applicant's request for written reasons was that it stood by the reasons given in the email of 5 July 2016, it could not remedy its conduct or decision by formulating reasons after the fact. In particular, the HPCSA should not be allowed to rationalise its decision in the answering affidavit after it expressly limited its reasons to those furnished in the email. The tribunal's flagrant failure to give adequate reasons for its decision rendered it void. (See [21] – [25], [28].)

While the furnishing of reasons *ex post facto* would in some cases save its decision, this would not be the case where they were an afterthought aimed at remedying an otherwise fatal error. In the former instances the administrator would be saddled with the onus of displacing the presumption that the impugned decision was taken without good reasons. (See [26] – [27].)

S.A. CRIMINAL LAW REPORTS DECEMBER 2022

JACOBS v MINISTER OF JUSTICE 2022 (2) SACR 569 (SCA)

Correctional services — Parole — Action for damages arising from attack by parolee — Prisoner released and not returned to prison, despite violating parole conditions — Error by court in granting absolution from instance in circumstances where significant risk to community and no explanation from prison authorities.

The appellant instituted an action for damages in the High Court against the respondent for the pain and suffering she sustained in an attack at the hands of a man who had been released from prison on parole. She alleged that he had attempted to assault, rape and rob her. He had previous convictions for offences including indecent assault and rape, and had been sentenced to periods of imprisonment. He was placed on parole on 1 November 2010 and between 24 February 2011 and 28 August 2011 he violated the conditions of his parole on several occasions, for which he was given verbal warnings. At the trial the appellant gave evidence after which she closed her case. The court then granted absolution from the instance. In an appeal against this decision the appellant contended that the court had erred in doing so and that the respondent had failed to discharge his duty to protect her. Given the man's criminal record and the information that served before the parole board, he should not have been released on parole. Even after violating his parole conditions, he had not been returned to prison. By permitting him

to be released on parole, the Department of Correctional Services should have foreseen that the public may have been endangered.
Held, that the High Court's conclusion — that the parole board enjoyed a discretion and, unless there was evidence that could show that the exercise of that discretion was flawed, the appellant could not prevail — failed to recognise the complexity of the issues that arose from the appellant'spleaded case, which relied upon the constitutional duty of the Minister to protect the public and to protect women from violent crimes.
Held, further, that the issue of law as to whether a cause of action was cognisable, based on a duty by the parole board to protect the appellant, should have provided the High Court with a compelling basis to decline the application for absolution. Where a substantial issue of law arose as in the present case, the interests of justice ought to incline a trial court to refuse absolution. Whether the appellant enjoyed a cause of action and, if she did, its basis, were matters of some difficulty and best dealt with once all the evidence had been heard. (See [13] – [14].)
Held, further, that until such time as those who made the parole decision came to give evidence and explain what they did, there was sufficient evidence that could permit of a finding that the parole board acted wrongfully and negligently. The convictions for three sexual offences, the superficial commentary offered in the social worker's report, the vagueness of what was said by the case-management committee, and the lack of a psychologist's report, made out a case on the basis of which it could be said that the parole board decided to release the man on parole when there was significant risk attached to that decision. The High Court was accordingly in error in granting absolution from the instance. (See [29] and [32].)

OUTDOOR INVESTMENT HOLDINGS (PTY) LTD AND ANOTHER v MINISTER OF POLICE AND ANOTHER 2022 (2) SACR 578 (GP)

Arms and ammunition — Storage of — By dealer — Application by large retailer to store firearms at premises of wholly owned subsidiary — Impermissible in terms of licence conditions and mandatory requirements of regs 67 and 86(4) of Firearms Control Regulations of 2004, promulgated under Firearms Control Act 60 of 2000.

The first applicant is the largest hunting and nature-related retailer in South Africa, trading nationwide and supplying ammunition, reloading equipment, rifles and handguns to the public. It has five branches situated in Gauteng and the Western Cape and dealer's licences issued to it in terms of the Firearms Control Act 60 of 2000. The second applicant is a wholly owned subsidiary of the first applicant and is based in Pretoria, Gauteng. It is a wholesale business and conducts no business directly with members of the public. A significant portion of its business is to provide storage facilities which occurs when it sells stock to other retailers and the retailers are not able to take delivery immediately. Because of delays between customers buying firearms from the first applicant and their eventual obtaining of licences to possess the firearms, the first applicant would use the storage facilities provided by the second applicant. After having been told by senior officers of the South African Police Service that that was in contravention of their licence, they sought declaratory orders entitling them to store firearms legally in its possession in terms of reg 67 of the Firearms Control Regulations of 2004 (the regulations) at the premises of the second applicant, provided that the removal of the firearms be recorded in the first applicant's firearm stock register and then be recorded in the firearm safe- custody

register of the second applicant. The respondents opposed the application. The crisp question before the court was whether, on a proper interpretation of reg 67 of the regulations, the first applicant was entitled to store firearms it lawfully possessed at the premises of the second applicant.
Held, that the provisions of subreg 86(4) permitted a person who held a firearm licence to store a firearm in respect of which he or she did not hold a licence if they were in possession of written permission from the holder of the licence, and that permission was endorsed by the relevant designated firearms officer. This provision was clearly mandatory, and it was inconceivable that a dealer in firearms could simply decide to store its firearms at the premises of another dealer without following its prescripts. (See [28] – [29].)
Held, further, that, in a dealer's licences granted in respect of one of the first applicant's branches, there were details of the name and identity number of the responsible person, which raised the question as to how this person could be expected to comply with the obligations imposed if the firearms in question were not under their control. Or better yet, how the prescripts of the Act in respect of inspections were to be effected if the firearms in question were not stored in the strongroom or safe described in the specific licence. That would create a practical nightmare for the second respondent in carrying out its obligations and effectively render the provisions discretionary. (See [31].) The application was accordingly dismissed.

S v MAKUTOANE AND OTHERS 2022 (2) SACR 589 (FB)

Review — Powers of court — Confirmation of proceedings — Incompetent sentence — Court can confirm incompetent sentence where in interests of justice to do so.

The four accused pleaded guilty in a magistrates' court to contraventions of s 4(3) of the Precious Metals Act 37 of 2005 in respect of the possession of unwrought gold, and to contravening s 49(1)*(a)* of the Immigration Act 13 of 2002 for having entered or remained in South Africa without a valid permit, passport or travel document. The state accepted the pleas, and the accused were convicted. They were each sentenced on the first count to a fine of R3000 or 60 days' imprisonment, and on the second account to a fine of R1000 or 30 days' imprisonment. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA), the sentences were ordered to be served concurrently. The matter was sent on special review by the senior magistrate for consideration of whether it was competent for the court to order that a sentence consisting of a fine with alternative imprisonment should run concurrently with another sentence, particularly when the offences were of a completely different nature. He also queried whether the relevant gold-bearing material should not have been seized in terms of the CPA and an order made in respect thereof in terms of s 21(1)*(b)* of the Precious Metals Act.
Held, that the sentences imposed by the magistrate were not competent and fell foul of the provisions of s 280(2) of the CPA. (See [10].)
Held, further, that the accused were all Lesotho citizens and would have been deported after completing their sentences. Considerable time, effort, inconvenience and expenditure would have to be incurred to bring them before court again and this could result in the matter not being brought to finality, which neither the accused nor the state desired, and would not serve the interests of either party. Whilst it might be appropriate in another matter, it would not be in the interests of justice to bring them

back in these circumstances. (See [16] – [18].) The convictions and sentences were confirmed; however, the gold-bearing material was declared forfeit to the state.

S v BOUMPOUTOU 2022 (2) SACR 594 (WCC)

Plea — Plea bargain — Plea-and-sentence agreement — Accused convicted on basis of incompetent sentence contained in agreement — Sentence not correctable, as no mistake in imposition thereof — Criminal Procedure Act 51 of 1977, s 208.
Plea — Plea bargain — Plea-and-sentence agreement — Irregular sentence imposed — Remedy — Plea-and-sentence agreement constituting composite agreement with one part inseparable from other — Prosecutor not authorised to enter unlawful agreement — Plea and sentence void and had to be set aside.

The accused, a foreign national, represented by his attorney, entered into a plea-and-sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of a charge of contravening s 49(15)*(b)*(iv) of the Immigration Act 13 of 2002, in that he had obtained a fraudulent South African work visa. The agreement in question made provision for a sentence of R4000 or eight months' imprisonment. The magistrate duly sentenced the accused in accordance with this agreement and ordered that the fine be paid in two instalments of R2000 each, which the accused paid. After conviction, the magistrate explained in a request for special review that it had come to his attention that the Immigration Act did not provide for the option of a fine, but only for imprisonment for the offence in question, and that he had therefore imposed a sentence which was not in accordance with the law.
Held, that s 298 of the CPA provided that a sentence could be corrected, but did not apply in the present matter, in that a 'mistake' in the context of the section meant a misunderstanding or an inadvertency resulting in an order not intended. It was apparent from the record that the magistrate had intended to impose the sentence of a fine as agreed by the parties in their agreement. That intention nullified any suggestion of a mistake. (See [17].)
Held, further, that, where the sentence in a plea-and-sentence agreement was irregular, the nature of the remedy had to be determined in the light of the principles underpinning plea-bargaining and the resultant agreement concluded by the parties. A plea-and-sentence agreement was a composite one where the plea of guilty was inseparable and indivisible from the sentence agreed upon by the parties. (See [25].)
Held, further, that the entire agreement was therefore 'poisoned' by the material error. If the court were to confirm the conviction, but set aside the sentence and remit the matter to the magistrate to reconsider a just sentence, it would mean that only the sentence part of the agreement would be expunged from the record. The accused would be bound by a conviction, whether he agreed with what the magistrate considered to be a just sentence, which in the circumstances of the present case, of necessity, had to be a custodial one. This clearly would be unfair to the accused who presumably had entered into the agreement as a package deal which precluded a custodial sentence. (See [31].)
Held, further, that, when the prosecutor performed a public function in line with the broad mandate conferred upon him or her in terms of s 179(2) of the Constitution, they performed an administrative function. The prosecutor had to be authorised to enter into a plea-and-sentence agreement, which could only mean that the

prosecutor was authorised to enter into a lawful agreement. The fact that the prosecutor had agreed to a sentence not in compliance with the Immigration Act meant that he exceeded the scope of his authority, and his actions were accordingly not authorised for the purposes of s 105A of the CPA. The agreement was therefore void and fell to be set aside in its entirety, and the matter to be tried de novo at the discretion of the Director of Public Prosecutions.

S v YOSE AND ANOTHER 2022 (2) SACR 603 (WCC)
Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — What constitutes — Time spent in custody prior to commencement of sentence — Appellants incarcerated for nine years in trial taking 13 years to finalise — Inducing sense of shock and justifying deviation from prescribed minimum sentence.
Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Globular sentence — When appropriate — Although undesirable, where offences committed on single occasion and closely connected in time, location and common facts, such sentence appropriate.

The two appellants were convicted in a regional court of 7 counts, namely robbery with aggravating circumstances which involved the wielding of a firearm or a threat to inflict grievous bodily harm; 3 counts of kidnapping; and 6 counts of rape as contemplated in s 51(1) of the Criminal Law Amendment Act 105 of 1997. They were sentenced on the count of robbery to 15 years' direct imprisonment; on the counts of kidnapping to 3 years' direct imprisonment; and on the counts of rape, to life imprisonment. It appeared that the court ordered the 15-year sentence imposed in relation to the first count to run concurrently with the life sentences imposed on the rape counts. No such order was made in relation to the sentence on the kidnapping counts. On appeal against the sentences of life imprisonment, the question arose whether the court had misdirected itself in failing to so order, and whether the effect of such failure was that the sentences in respect of the kidnapping counts would have to be served after the sentence of life imprisonment. A further question was whether the court a quo had misdirected itself in not sufficiently considering the time spent in custody prior to the finalisation of the trial. The proceedings against the appellants had commenced in 2007, judgment only being delivered on 22 November 2019, and the appellants sentenced on 24 June 2020. Therefore, a period of 13 years had elapsed between the inception of the proceedings and sentence.
Held, that the appellants had been incarcerated for a total period of about nine years prior to the commencement of their sentences, which was a very long time indeed. From the record it appeared that the appellants themselves did not cause the delay in the trial, which was caused by changes in legal representation over the years; by the unavailability of legal representatives on numerous occasions; and by the absconding of a co-accused. Although the period in detention was but one of the factors that had to be considered in determining whether the effective period of imprisonment to be imposed was justified, the problem in the present matter was that the period of nine years induced a sense of shock and ought to have been considered by the lower court in deciding whether compelling and substantial circumstances existed that would justify deviation from the prescribed sentence of life imprisonment. In the circumstances, a sentence of 25 years' direct imprisonment would have been appropriate. (See [40] – [44].)

Held, further, although it was undesirable to take charges together for sentencing where an accused faced prescribed sentences in terms of the provisions of Act 105 of 1997, in the present matter the fact that the magistrate had taken the rape counts together for the purposes of sentencing was not undesirable or a misdirection. The offences were committed on a single occasion and were closely connected in time, location and common facts. The matter was one of those exceptional cases which warranted the imposition of a globular sentence in relation to the rape counts. (See [48] – [50].) The court amended the sentences accordingly and ordered that the sentences imposed on the kidnapping counts were to run concurrently with the sentences imposed on the rape counts.

S v AUSTIN 2022 (2) SACR 615 (WCC)

Rape — Sentence — Life imprisonment — Appellant having raped 11-year-old complainant three times — Complainant only discovering that she was pregnant after seven months and son taken at birth into foster care — Although appellant 30-year-old first offender, no other significant mitigating factors present — Appellant showing no remorse — Sentence confirmed on appeal.
Sentence — Factors to be taken into account — Gender-based violence — Multiple rape of 11-year-old girl — Gender-based crimes particularly prevalent and serious and to be combated using all suitable means, even more so when victim young child.

The appellant was convicted of the rape of an 11-year-old complainant, who had been put in his care by her father, who shared a house with him. The appellant raped her more than once and she fell pregnant, but it was only discovered that she was pregnant after seven months and the child could not be aborted. She experienced a severe and painful birth and had to stay in hospital for seven or eight days. She only held her son briefly before he was taken into foster care and, thereafter, she only saw him once. She herself was taken away from her father and placed in foster care as well. The appellant was sentenced to life imprisonment and appealed against his conviction and sentence. The court dismissed the appeal against conviction on the evidence in the record and proceeded to consider the appeal against sentence.
Held, that, except for the fact that the appellant had no previous convictions, there were no other significant mitigating circumstances in his favour. He was a 30-year-old unmarried male with no children, who had been employed but lost his employment due to his arrest. He had lost his parents when he was young and was raised by his aunt. He expressed no remorse for his actions. (See [119] – [120].)
Held, further, that gender-based crimes were particularly prevalent and serious and had to be combated on all fronts by making use of every suitable means, even more so when the victim was a young child. The rape in question fell within the most serious categories of rape. She was raped three times, the indications being that they were not done on the spur of the moment. The appellant had exploited the fact that the complainant was residing with him in the shack. He had called her to his room before raping her for the first time, and went into her room on two subsequent occasions to rape her. He had abused the trust of the complainant and his friend, her father, whilst she was entrusted to him, to live with him in his shack. The complainant was specifically traumatised by the fact that her father had his meals with her in the company of the appellant, yet she could not inform him of the incidents due to the

death threats made by the appellant. (See [121] – [124] and [127].) The appeal against conviction and sentence was dismissed.

CENTRE FOR CHILD LAW v DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG AND OTHERS 2022 (2) SACR 629 (CC)

Child — Drug offences — Use or possession of dagga — Constitutionality — Considered by recourse to best interests of child rather than right to equality — Less restrictive means available for protection of child outside of criminal justice system — Declaration that s 4*(b)* of Drugs and Drug Trafficking Act 140 of 1992 inconsistent with Constitution and invalid to extent that it criminalised use or possession of dagga by child, confirmed — Constitution, ss 28 and 9.

This central concern of the court in this case was not the legalisation and condonation of the use or possession of cannabis by a child, but rather the repercussions of such use or possession. In other words, was the criminal justice system the appropriate mechanism to respond to the use or possession of cannabis by child, or were social systems designed to protect and promote the rights of the child more suitable.
The matter arose from the incarceration of some children who had tested positive at school for having used cannabis and were put on a special diversion programme managed by the senior prosecutor of the district. The children, however, did not fully comply with the programme and were referred to the Department of Social Development. There they were assessed by probation officers who recommended that they be subjected a compulsory residential diversion programme at a youth care centre, which recommendations were implemented through an order of the magistrates' court. That order was then referred to the High Court on urgent review where it was held that s 41 of the Child Justice Act 75 of 2008 (the CJA) did not permit compulsory residence for a sch 1 offence and that the magistrates' court had not complied with s 58(2) of the Act. The order was set aside, and the children released. The acting senior magistrate was concerned that there were other children who were detained under similar circumstances, but was unable to identify those children and requested the High Court to issue an order that would have the effect of assisting them. The High Court then issued a rule nisi calling upon all affected parties to show cause why the order directing the correctional facilities to conduct an audit of all children kept at those facilities in terms of s 41 of the Act should not be made final. The rule nisi was later extended and the Director of Public Prosecutions made submissions contending that s 54(3) of the Act should be interpreted to include compulsory residence and asked the High Court to reconsider its order of 5 February 2019. The court then approached the applicant and requested it to participate in the proceedings as amicus curiae. The applicant raised the question of the constitutionality of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) insofar as the children were concerned. The court then invited the Minister of Justice and Correctional Services to be joined as a respondent and he in turn requested the joinder of the Ministers of Social Development,Health, Basic Education, and the Police, and they were then also joined as respondents. All the respondents supported the view that the section was unconstitutional insofar as it applied to a child and supported the argument that the Prevention of and Treatment for Substance Abuse Act 70 of 2008 (the PTSAA) and the Children's Act 38 of 2005 were more appropriate mechanisms. The High Court held that, because the

authoritative precedent on the legislation criminalising the use or possession of cannabis in private by an adult did not apply to a child, the child was left in the position where she was treated as a criminal and prosecuted for behaviour for which adults were not criminally liable. The criminality of the act was based rather on age and timing which was constitutionally indefensible and had become known as a 'status offence'. It considered international law and regional instruments which recommended that state parties abolish status offences, as those violated the rights of the child. The court conducted its analysis under the rubric of the best interests of the child as entrenched in s 28(2) of the Constitution. It held that criminalisation did not fulfil this requirement and considered that the arrest of the children would deprive them of their freedom in arbitrary and capririous circumstances. It concluded that there were less restrictive means available to achieve the aims of the legislation which were available to children both within and outside of the child justice system. It therefore declared s 4*(b)* of the Drugs Act to be inconsistent with the Constitution to the extent that it criminalised the use or possession of cannabis by a child and issued a moratorium, pending law reform, that no child may be arrested, prosecuted or diverted for contravening the impugned provision.
In the subsequent confirmation proceedings there were three issues before the court: *(a)* whether the court should follow the same approach as in *Prince*[*] in considering the constitutional validity of the section to the extent that it criminalised the use or possession of cannabis by child; (b) the impact of the criminalisation on a child; and (c) whether this placed limitations on a child's rights and if so whether the limitation was justified in terms of s 36 of the Constitution.
Held, that the proper approach to considering the constitutionality of the impugned section was by recourse to the best-interests-of-the-child principle, rather than through the right to equality. (See [32].)
Held, further, that channelling a child through the criminal justice system as opposed to social systems — designed to protect children — could lead to exacerbated harm and risk. Cannabis use was a social problem, and an appropriate response, which recognised a child's rights in s 28 of the Constitution, should be located in social systems as opposed to the criminal justice system. It followed that there was a need, and an obligation, for decriminalisation and for the respondents to rather implement a non-punitive, rehabilitative alternative to prevent children from using cannabis. (See [40], [49] and [54].)
Held, further, that, in the light of the general and specific guidance offered by international law, it was perturbing that within the current status quo, the alternatives to imprisonment were not being used. This manifestly meant that the deprivation of liberty of the child was currently the first course of action where a child was found using or in possession of cannabis. This approach was not in line with the approach adopted in the Constitution and under international law. (See [58].)
Held, further, that, by the time the High Court set aside the orders subjecting the children to a compulsory residential programme, they had already served approximately three months, which was a disproportionate response. The High Court had confirmed that a compulsory residential diversion programme was not one of the options available to a prosecutor in terms of s 53(3) of the CJA, but this was not sufficient on its own to justify the criminalisation. Other than the available options for diversion as contained in said provision, a child could still be subjected to the following: arrest; detention in an appropriate child and youth care centre, or, if there was no space available in such centre, a police cell or lockup, before a child's first appearance; and a sentence of imprisonment. If convicted of the use or possession

of cannabis, a sch 1 offence, that child would have a criminal record and the same applied if the child were channelled through diversion programmes in terms of the Act. The extent of the limitation on children's rights was far-reaching and the finding of the High Court that criminalisation had a disproportionate effect on children was correct. (See [72] – [73].)
Held, further, that it was not necessary for the court to consider the efficacy of criminalisation as a deterrent because there was no evidence of such before the court. The Minister of Basic Education had even gone so far as to argue that the criminal justice system could lead to more exposure to drugs for children as opposed to deterring the use of cannabis. The criminalisation of the use or possession of cannabis by a child therefore did not serve the intended purpose of protecting the child. (See [77] – [78].)
Held, further, that the Children's Act gave extensive powers to children's courts to make orders in the best interests of the child and the PTSAA specifically applied to children affected by substance abuse, making provision for admission to a treatment centre to obtain the necessary assistance in rehabilitation and reintegration. As there were less restrictive means available to protect a child from cannabis use and/or exposure, it could not be said that the limitation on a child's s 28 and s 10 rights was reasonable and justifiable. In the result, the impugned provision did not pass constitutional muster and the declaration of invalidity had to be confirmed. (See [84] – [91].) The court ordered accordingly and made provision for the suspension of its order to enable Parliament to finalise its legislative reform process. It also made provision for a moratorium on arrest and prosecution, and diversion, in respect of contraventions of s 4*(b)* of the Drugs Act by a child, and the expungement of criminal records of children who may have been convicted of such an offence.

S v GHUMMAN 2022 (2) SACR 664 (WCC)

Evidence — Admissibility — Hearsay evidence — Admissibility in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Hearsay statements provisionally admitted but not subsequently confirmed by witness — Defence relying thereon in cross-examination — Magistrate having no regard to safeguards and requirements contained in s 3(1)*(c)*(i) – (v) before accepting evidence — Appellant's fair-trial rights affected, and convictions based on hearsay evidence set aside.
Trial — Prosecution — Conduct of — Hearsay evidence provisionally admitted into evidence while prosecutor having no reason to believe that such would be confirmed by witness — Defence relying thereon in cross-examination and appellant's fair-trial rights affected — Conduct of prosecutor deprecated.

The appellant was convicted in a regional court of fraud (count 1), a contravention of s 18(2)*(b)* of the Riotous Assemblies Act 17 of 1956 (count 2), attempted murder (count 3), and malicious injury to property (count 4). The court took all the counts together for the purpose of sentence and sentenced the appellant to nine years' imprisonment. His application for leave to appeal against the conviction and the sentence was refused by the magistrate, but was granted on petition.
The state alleged that the appellant had developed a grudge against the complainant in London, and was convicted of having harassed him after the complainant's daughter had broken off her relationship with the appellant. The complainant also had a house in Cape Town and was living there in January 2012. The appellant also

arrived in Cape Town and, posing as a photojournalist who was interested in contacting gang members for a journalism project, met a gang member by the name of Yalezo whom he tried to procure for the purposes of murdering the complainant. The appellant asked Yalezo to kill the complainant for a reward of R10 000, but he refused. The appellant then launched an attack on the complainant's home with petrol bombs which caused severe damage, but no harm to any of the inhabitants. The state called the complainant who testified that Yalezo had warned him that the appellant wanted to kill him. A constable, who overheard Yalezo making his witness statement, testified that Yalezo stated that he was hired 'to sort out someone in Camps Bay'. On further enquiries he had added that he was hired to kill this person, and the person who hired him had pretended to be a journalist. Yalezo had also shown the constable taking down the statement a photograph said to depict the place where the hit was to be carried out. Yalezo testified, but did not confirm the hearsay statements and recanted parts of his written witness statement. The magistrate ruled that his evidence was discredited. The state nevertheless applied for the evidence of three witnesses to be admitted as hearsay evidence in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Act). Before admitting the evidence, the magistrate made no mention that he had regard to the safeguards and requirements contained in s 3(1)*(c)*(i) – (vi). In his main judgment, read with his judgment on the application for leave to appeal, the magistrate changed his original ruling and allowed only the hearsay evidence of one witness.
On appeal,
Held, that the record of what had transpired during the trial led to the irresistible inference that the prosecutor had no reason to think that Yalezo would confirm the hearsay statements. It was in the circumstances wrong of him to inform the court that Yalezo would testify and by implication confirm the hearsay statements. Because of the assurance that he gave to the court, the defence, as it was entitled to do, curtailed the cross-examination of witnesses giving the hearsay evidence, and reserved a thorough cross-examination for Yalezo. This had impacted on the appellant's fair-trial rights. The magistrate had failed to give due consideration to each of the important provisions of the section before admitting the evidence. (See [30].)
Held, further, that without the evidence of what had transpired between the appellant and Yalezo, the appellant's convictions on the first two counts could not stand. (See [36].)
Held, further, that the magistrate's finding that the appellant had the direct intention to kill the complainant had been based on the facts surrounding the appellant's conduct before leaving the UK for Cape Town, and his conduct subsequent to his arrival in Cape Town. Although the evidence tended to indicate that the appellant intended to attack the complainant, it did not, without the hearsay evidence, justify the inference that he intended to kill him. The attack with petrol bombs was nonetheless fraught with danger and pregnant with the possibility of the loss of life. The only reasonable inference was that he foresaw the possibility that his actions could cause the loss of life and, in the circumstances, it had been proved that he acted with mens rea in the form of dolus eventualis and not dolus directus, and it followed that his conviction on the charge of attempted murder had to stand. (See [37] – [38].)
Held, further, that the sentence needed to be adjusted, given the findings of the court on appeal. The sentence imposed on the third and fourth counts taken together justified a sentence of four years' imprisonment. (See [41].)

MV 'TARIK III' Credit Europe Bank NV v The Fund Comprising the Proceeds of the Sale of the MV Tarik III and others [2022] 4 All SA 621 (SCA)

Shipping – Admiralty fund constituted from judicial sale of vessel – Claims against fund – Deeming provision in section 1(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, providing that for purposes of an action in rem, a charterer by demise shall be deemed to be the owner of the ship for the period of the charter – Whether charter agreement had been terminated and was no longer extant – Onus of proof on party asserting termination – Right to claim not dependent upon claimant having effected arrest of vessel prior to its sale.

The 17th respondent became the owner of the motor vessel Tariq III in 2008. It entered into a bareboat charter agreement for the vessel with a third party. Shortly thereafter, the appellant arrested the vessel by way of an *in rem* arrest. The charterer brought an application to set aside that arrest. In effecting the arrest of the vessel, the appellant relied on section 1(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, which provided that "for the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise". When the vessel berthed in Durban, appellant commenced an application before the High Court for the sale of the vessel.

The first respondent was a fund comprising of the proceeds of the judicial sale of the vessel pursuant to the arrest by the appellant. The appellant and second to eighteenth respondents lodged claims against the fund, all purporting to rely on the deeming provision in section 1(3) of the Act. The referee appointed to adjudicate the claims recommended payment of the second to sixteenth respondents' claims. All the recommended claims ranked above the appellant's claim, and if paid, would exhaust the fund. The appellant contended that the referee erred in concluding that the charter agreement had not terminated and that it was still extant at the time of the vessel's sale, and that the referee should have disallowed respondents' claims. It brought an application for the partial confirmation of the referee's report in respect of some of the claims, including its own. The High Court granted an order in relation to only some of the relief sought, including the recognition of appellant's claims. On appeal, the appellant contended that each claimant against the fund bore the onus of proving that its claim was valid and enforceable against the fund, which in the present context included proving the existence of the bareboat charter at the material times; and that it was necessary for a claimant in the position of the opposing suppliers to have arrested the vessel *in rem* in order to lodge a claim against the fund arising from its reliance upon the deeming provision. It contended that the referee had erred in concluding that the agreement had not terminated and was still extant at the time of the sale and that the second to twelfth respondents could rely on the deeming provision in lodging their claims against the fund.

Held – The continued existence of the charterparty agreement was confirmed in the evidence adduced, with the result that all the claims against the fund were competent. No genuine dispute of fact on that issue existed and the various considerations relied upon by the appellant in support of its foundational hypothesis that the agreement had terminated could not trump the direct evidence to the contrary. An attempt by the appellant to invoke Turkish law to show that the charter agreement had terminated

failed as those new contentions were not foreshadowed in the founding affidavit. In that regard, the court set out the basic rules regarding the onus of proof. The appellant could provide neither a single date on which the charter agreement had terminated, or a single alleged cause or mechanism by which the charterparty allegedly terminated. It was for the appellant to establish the termination and not for the opposing suppliers to prove that the agreement had not terminated.

Regarding whether a claimant is entitled to lodge a claim against an admiralty fund based on the deeming provision, without having arrested the vessel *in rem* whilst the charter remained extant, the Court held that it would be a purposeless technicality to insist that the vessel be arrested after its sale had already been ordered.

The appeal was dismissed.

In a minority judgment, it was opined that the opposing suppliers did not discharge the onus of proving that, at the time they lodged their claims, the charterparty remained extant.

Van Wyk Van Heerden Attorneys v Gore NO and another [2022] 4 All SA 649 (SCA)

Insolvency – Dispositions without value – Insolvency Act 24 of 1936, section 26(1)(b) – Every disposition of property not made for value may be set aside if made by an insolvent within two years of sequestration of estate, and the person benefited by the disposition is unable to prove that, immediately after disposition was made, assets of the insolvent exceeded liabilities – Liability attaching only to party benefiting by disposition.

Three deposits were made into the trust account of the appellant, a firm of attorneys, from the account of a company ("Brandstock"). Upon the provisional winding up of Brandstock, the respondents, as liquidators, applied to have the deposits set aside under section 26(1)(b) of the Insolvency Act 24 of 1936. The appellant appealed against the High Court's granting of the order sought by the liquidators.

Held – Section 26(1)(b) provides that every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent within two years of the sequestration of his estate, and the person benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities. As the deposits took place less than two years prior to the winding up of Brandstock, they fell within the ambit of section 26(1)(b). The elements required to set aside a disposition under section 26(1)(b) were set out in the judgment.

The Court referred to the legal principles concerning the position of bank accounts in general and trust bank accounts of attorneys in particular. General banking principles are clear that the bank owns the money deposited into accounts held with it. The bank owns the money but is obliged to comply with instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf. Money deposited into attorneys' trust accounts gives rise to the same relationship with the bank as with any account holder. The bank is indebted to the attorney and no other party. No one else is entitled to instruct the bank on how to deal with it. At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular

clients. Attorneys operate on their trust accounts as principals and not as agents. That is because only they can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. Relevant for purposes of the present case, was that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney.

The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document. The point of departure is the language of the provision.

At the heart of section 26(1)(b) was the requirement that the party to whom the disposition was made is put to the proof that immediately after the disposition was made, the assets of the insolvent exceeded his liabilities. Only the person who benefited from the disposition bears that onus. The construction of the section does not allow for liability to attach to one who did not benefit by it. The first of the three deposits in this case did not benefit the appellant, as the firm simply acted on the instructions of its client and acted as a conduit in the onward transmission to the entity which did benefit. The appeal was upheld in respect of that deposit.

The remaining two deposits however, insofar as they were used to settle amounts owed to the appellant, meant that the appellant attracted the onus of proving that Brandstock's assets exceeded its liabilities at the time of deposits were made. As that had not been proved, the appeal in respect of those two deposits was dismissed.

Afriforum NPC v Ngwathe Local Municipality (Parys) and others [2022] 4 All SA 666 (FB)

Civil Procedure – Costs – Litigation between government and private party seeking to assert a constitutional right – General rule is that each party should bear its own costs if government is successful – Qualification to rule is that if an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect the worthiness of its cause to immunise it against an adverse costs award.

Civil Procedure – Urgency – Allegations of basic human rights being violated – Where alleged reasons for urgency clearly no longer existed at time of institution of application, urgency not established.

The applicant ("Afriforum") brought an application on an urgent basis for an order compelling the first to fourth respondents to take immediate action to get pumps for water supply and processing of sewage waste in running order by way of alternative energy sources, and to resolve a financial dispute with the fifth respondent ("Eskom") which was causing a delay in the repair of the electricity supply to the first respondent municipality. Afriforum stated that since lack of water is primarily an infringement of basic constitutional rights, the application was being brought in the public interest and in the interest of justice and to enforce the rights of the residents of Parys. After the exchange of affidavits, Afriforum indicated that it no longer sought relief regarding electricity supply to Parys as the electricity supply had been restored. It maintained however, that the issue of water supply remained urgent.

The respondents contended that that the entire application was pinned on the allegation that there was a complete lack of electricity supply and consequently a

complete lack of water supply and sanitation processes. That was the case which the first to fourth respondents had to meet on an urgent basis with only 48 hours' notice of the application. It was submitted that the deponent to the founding affidavit must have known that the electricity supply to Parys had been restored, having been advised as such by Eskom. Afriforum nevertheless continued with the drafting and issuing of the urgent application in which the alleged reasons for urgency clearly no longer existed.

Held – On the applicant's own version, the information provided by Eskom came to Afriforum's knowledge before the application was launched. The allegations that the basic human rights of residents were being negatively impacted would have rendered the application urgent and would have necessitated urgent intervention by the court had the allegations relied on in the founding affidavit for purposes of urgency and in support of the relief claimed, been true and correct. But they were not. It being clear that electricity supply had been restored, the alleged reasons for urgency did not exist.

Despite the lack of urgency, the merits were considered, and found to be lacking.

Afriforum sought to avoid being mulcted with costs should it fail in its application. It contended that it had acted in the public interest and that the purpose of the application was to protect and promote the constitutional rights of the residents of Parys. Reliance was place on the judgment in *Biowatch Trust v Registrar Genetic Resources and others* 2009 (10) BCLR 1014 (CC) in which the general principle relating to costs in litigation between the government and a private party seeking to assert a constitutional right was established to be that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs. A qualification to that principle is that if an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect the worthiness of its cause to immunise it against an adverse costs award. That qualification was relevant in this matter, in light of Afriforum's proceeding with the application in the circumstances referred to above.

The application was dismissed with costs.

Benjamin and another v FNB Trust Services (Pty) Ltd NO and others [2022] 4 All SA 687 (WCC)

Family Law and Persons – Islamic marriage – Requirements for divorce – Declaration that plaintiff was wife of deceased at time of his death, and accordingly a surviving spouse in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 – Doctrine of entanglement, in absence of grounds for interference by court, requiring recognition of religious edict confirming subsistence of marriage.

The central issue in this matter fell within the realm of the Islamic personal law of marriage and divorce/*talaq*. The first defendant was the executor of a deceased estate. The plaintiff, Ms Benjamin, sought a declaration that she was the wife of the deceased at the time of his death, and was accordingly a surviving spouse in terms of section 1 of the Maintenance of Surviving Spouses Act 27 of 1990. The executrix of the estate had informed Ms Benjamin that her claim would not be entertained, based on a Marriage Annulment Certificate issued by the Paarl Muslim Jama'ah, which stated that the deceased had issued Ms Benjamin with a final *talaq*/divorce on 7 August 2000. Although the requisite proof according to Islamic Sharia law was absent, second defendant, Ms Jacobs, argued that secular civil laws of evidence rather than Islamic

Sharia evidentiary requirements applied, and that the court was not precluded, by the doctrine of entanglement, from pronouncing on the status of an Islamic Sharia marriage.

A separation of issues was ordered and at the present stage, the Court was required to determine only whether Ms Benjamin was the wife of the deceased at the time of his death.

Held – As the judgment concerned an Islamic marriage/*talaq*, it traversed the interplay between Islamic Sharia law and our civil law.

The doctrine of entanglement entails a reluctance of the courts to become involved in doctrinal disputes of a religious character, based on a proper respect for freedom of religion. Courts should refrain from pronouncing on matters of religious doctrine which fall within the exclusive realm of the religious institution concerned. The internal rules adopted by a religious institution should, as far as possible, be left to the institution to determine domestically, and a court should only become involved in a dispute concerning such internal rules when it is strictly necessary for it to do so. The dispute in this case encompassed applicable principles of Islamic Shariah law pertaining to the issuing of a *talaq*, the presumption concerning the continuing of a marriage, and the principles of *shahadah* (testimony) applicable, namely that of two male witnesses. It was also a dispute which had been determined according to the internal rules of the Muslim Judicial Council ("MJC"). In determining whether Ms Benjamin and the deceased were married in terms of Islamic Sharia law at the time of the latter's death, the Court had to consider and interpret the nature, content and principles of Islamic Sharia law, about which the MJC, applying its internal rules and jurisprudence, had issued a *fatwa* (religious edict). Those circumstances rendered the doctrine of entanglement applicable. Nothing about the *fatwa* to the effect that Ms Benjamin was still married at the time that the deceased died warranted the court's interference in this case.

Contrary to the respondents' submissions, the requirements of Sharia law of evidence were pleaded in the particulars of claim and referred to in the expert notices. The conclusion that the Islamic Sharia law of evidence was applicable meant that the evidence of two male witnesses was required to overcome the presumption that the marriage continued. The available evidence fell short of that requirement and the default position was therefore that the marriage subsisted.

A declaratory order was granted confirming that Ms Benjamin was the wife of the deceased at the time of his death and was a surviving spouse in terms of section 1 of the Maintenance of Surviving Spouses Act.

Business Doctor Consortium Limited and another v Old Mutual Finance (RF) (Pty) Limited and others [2022] 4 All SA 719 (WCC)

Corporate and Commercial – Company law – Alleged oppressive conduct – Rights of minority shareholders – Companies Act 71 of 2008, section 163 – Despite wide discretion courts have to grant just and equitable relief from oppressive or unfairly prejudicial conduct, jurisdictional requirements must be established before a court's power to grant relief is triggered – Minority shareholder bears onus of proof and must show that impugned conduct is prejudicial or disregards its interests and, also that the prejudice has occurred unfairly.

The applicants were minority shareholders in the first respondent ("Old Mutual Finance"), holding a 25% shareholding. The remaining 75% was held by the second respondent ("Old Mutual Capital Holdings"), which in turn was owned and controlled by the fourth and fifth respondents. The third respondent ("Old Mutual Life Assurance") was the major trading entity in the corporate respondents' group. Old Mutual Finance was a service provider to Old Mutual Life Assurance. The applicants alleged that there had been a material under-recovery of costs from Old Mutual Life Assurance for nearly a decade, and that they would be directly and severely prejudiced if Old Mutual Finance under-charged Old Mutual Life Assurance for its services. Taking issue with an alleged material under-recovery of costs by Old Mutual Finance from Old Mutual Life Assurance, the applicants stated that the corporate respondents who were alerted to the under-recoveries refused or neglected to take steps to rectify the irregularities. It was contended that such conduct amounted to minority oppression because the corporate respondents acted in a manner that was unfairly prejudicial to applicants' interests.

Held – Section 163 of the Companies Act 71 of 2008 provides that a shareholder of a company may apply to a court for relief if any act or omission of the company has a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. In addressing any allegation of oppressive conduct, the starting point is the principle that by becoming a shareholder, a person undertakes to be bound by the decisions of the majority, even where those decisions may adversely affect his rights or interests. Courts will be slow to interfere in the management of companies and will be cautious in the exercise of their wide discretion. Despite the very wide discretion courts have to grant just and equitable relief from oppressive or unfairly prejudicial conduct, there are certain jurisdictional requirements that fall to be established before a court's power to grant relief is triggered. The particular act or omission must have been committed, or the affairs of the company must be conducted as alleged; such act, omission or conduct of the company's affairs must be unfairly prejudicial, unjust or inequitable to the shareholder or some part of the members of the company; the nature of the relief that must be granted should bring an end to the matters complained of; and it must be just and equitable for such relief to be granted. The onus falls squarely on the minority shareholder seeking to rely on the remedy. A high degree of specificity is therefore required. It is not enough for a minority shareholder to show that the conduct is prejudicial or disregards its interests but, also that the prejudice has occurred unfairly. The test for unfair prejudice is objective. The enquiry is whether a reasonable bystander observing the consequences of the conduct would regard it as having a prejudicial effect.

The applicants sought to impermissibly attribute the alleged conduct of certain entities within the group to all other entities therein. That approach was not supported by the facts because the entities within the group were separate and independent. Each company within a group has its own separate and distinct legal personality. It was also not shown that the fourth to sixth respondents acted in concert with any of the other respondents in a manner that was oppressive or unfairly prejudicial to the interests of the applicants. The applicants failed to adduce the necessary primary facts to establish the required jurisdictional requirements against Old Mutual Life Assurance.

The relief sought in the form of an order authorising and directing Old Mutual Finance to institute proceedings to recover payment of the disputed amounts was not competent relief under section 163(2) of the of the Companies Act, and the applicants should have brought an application in terms of section 165 instead.

In the premises, the application was dismissed.

Commissioner for the South African Revenue Service v Wiese and others [2022] 4 All SA 748 (WCC)

Tax – Income tax – Obstruction of tax collection – Action against third party for assisting in dissipation of asset of taxpayer to obstruct collection of a tax debt – Tax Administration Act 28 of 2011, section 183 – Whether the term "tax debt" as contemplated in section 183 requires Revenue Services to issue an assessment before invoking the section – Section 183 must be interpreted so as to give proper effect to legislative intention to hold third parties liable if they knowingly assisted in dissipating a taxpayer's assets in order to obstruct collection of a tax debt – As a tax debt exists irrespective of whether an assessment has been made, parties who arranged transfer of assets may be held liable in terms of section 183 in the absence of an assessment at the time of the dissipation.

Alleging that the defendants knowingly caused a company (the "taxpayer") to dissipate a loan claim in its favour by transferring it as a dividend *in specie* to its holding company, in order to obstruct the collection of certain tax debts, the plaintiff ("SARS") sought an order declaring the defendants liable to pay it an amount of R216,6 million in terms of sections 183 and 184 of the Tax Administration Act 28 of 2011 (the "Act"). Section 183 deals with liability of a person assisting in dissipation of assets. SARS also sought to rely on evidence tendered by the first to third defendants at an inquiry held in 2015 and 2016 in terms of Part C of Chapter 5 of the Act for the purposes of proving its claim.

The relevant backgrounds facts were as follows. In November 2012, SARS issued a notice declaring its intention to make adjustments to the taxpayer's 2007 assessment pursuant to an audit into the tax affairs of the taxpayer. According to SARS the taxpayer was liable for capital gains tax ("CGT") and secondary tax on companies ("STC") on the basis that the transfer of the loan claim amounted to an impermissible tax avoidance arrangement. SARS alleged that the dissipation of the loan claim of R216,6 million, which was the taxpayer's only asset, was a simulated transaction. The taxpayer disputed its alleged tax liability. On 19 April 2013, before SARS made its assessment, the taxpayer disposed of its loan claim. That gave rise to SARS' action in terms of section 183.

Held – The issues for determination were whether the evidence in the transcript of the inquiry was admissible in these proceedings; and whether the STC and CGT as referred to in the particulars of claim were each a "tax debt" for purposes of section 183 of the Act.

The latter question was addressed first. The defendants' argued that a "tax debt" properly construed requires SARS to issue an assessment to the taxpayer before it can invoke the provisions of section 183. The raising of the STC and CGT assessments only occurred on 21 August 2013 – after 19 April 2013 when the distribution was made. Referring to the correct approach to interpretation of statutes,

the Court stated that in considering whether the term "tax debt" as contemplated in section 183 requires SARS to issue an assessment before invoking the section, or whether SARS is allowed to issue a notice in anticipation of an adjusted assessment and thereafter determine tax liability, the point of departure must be the language of the provision read as a whole, its context and purpose. Section 183 had to be interpreted in a manner that would give proper effect to the legislative intention to hold third parties liable if they knowingly assisted in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt. A tax debt was held to exist irrespective of whether an assessment has been made. Consequently, the defendants, who arranged the declaration of the dividend *in specie*, could be held liable in terms of section 183 in the absence of an assessment at the time of the dissipation.

The question of the admissibility of the transcript of the earlier inquiry was also decided in favour of SARS.

The application accordingly succeeded.

Golden Fried Chicken (Pty) Ltd v Soul Kitchen Restaurant [2022] 4 All SA 768 (WCC)

Intellectual Property – Trademarks – Alleged infringement – Entitlement to interdict under section 34(1)(a) in relation to the use of a mark was whether the entity complained of was presently using an identical mark to trademark owner – Interdicts are not granted to address past wrongs, and where business complained of had changed name to a sufficiently dissimilar one so as not to cause confusion with applicant's trademark, no infringement established.

Trading under the name "Chicken Licken", the applicant owned all intellectual property rights created and used in respect of the Chicken Licken business and had registered various marks under the Trade Marks Act 194 of 1993. The respondent was a small bistro-type restaurant in Plettenberg Bay trading as "East Coast Soul Kitchen". That name attracted the attention of the applicant, which considered the use of the words "Soul Kitchen" as an infringement of its registered trademarks, leading to it seeking interdictory relief.

Held – This matter did not involve a claim of passing off or unlawful competition. The applicant sought relief based solely on trademark infringement under section 34 of the Act. It argued that the original description of the restaurant as "East Coast Soul Kitchen" was a copy of an identical mark in the same class (ie class 43 for the provision of food services) and the fact that the type face and colour of the words was dissimilar and that it was qualified by the words "East Coast", was irrelevant in the circumstances. The Court held that the point of departure in relation to the applicant's persistence in moving for an interdict under section 34(1)(a) in relation to the use of its mark "SOUL KITCHEN" was whether the restaurant was presently using an identical mark. It was manifestly not doing so – having changed its name to "Sol Kitchen" – and it had adduced more than sufficient evidence to demonstrate that. The new name was sufficiently dissimilar not to cause confusion with the applicant's trademark. Interdicts are not granted to address past wrongs. In the circumstances, an interdict under section 34(3)(a) of the Act served no purpose and was not warranted.

The Court took note of an isolated reference to the respondent's old name on its website, and accepted that as a mere oversight. The respondent was given an

opportunity to correct that. The Court ordered the respondent to remove any remaining references to “East Coast Soul Kitchen” from its webpage and/or Facebook page. The application was otherwise dismissed.

Kena Media (Pty) Ltd v Mangaung Metropolitan Municipality [2022] 4 All SA 791 (FB)

Local Government – Regulation of outdoor advertising – Erection of billboards – Powers of municipality – By-laws entitling municipality to remove billboard without prior notice and without a court order if it constitutes a danger to life or property, or causes an obstruction of visibility to traffic or to a road traffic sign.

Property – Spoliation – Essential allegations which must be made to obtain a spoliation order – It must be alleged and proved that the applicant was in possession of the property; and that the respondent deprived him of the possession forcibly or wrongfully against his consent.

In September 2021, the respondent municipality brought an application against the applicant (“Kena Media”) seeking an order directing Kena Media to remove an electric billboard which had been erected on a street corner in Bloemfontein. That application was opposed by Kena Media, which filed an answering affidavit and counter-application. At the time of the hearing of the present application, no further exchange of application papers had occurred in the first application.

The present proceedings were on the return date of a rule *nisi*, directing that the matter be enrolled as an urgent application and calling on the municipality to show cause why a final order should not be made directing it to restore possession of and replace Kena Media’s electronic billboard to its location.

Held – The matter was essentially a spoliation application. Before addressing the merits several preliminary points had to be dealt with. The first related to the alleged lack of urgency as contended by the municipality. That issue had already been dispensed with and could not be revisited or reconsidered at this stage of the proceedings.

The municipality also contended that the founding affidavit was fatally defective in that the attestation thereof by the Commissioner of Oaths wrongly reflected that the deponent was female. The Court referred to relevant case law in which an overly technical approach was eschewed. Finding substantive compliance with the Regulations Governing the Administration of Oath or Affirmation, issued in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, the court dismissed the point *in limine*.

An attempt by the municipality to challenge the authority of the deponent to the founding affidavit in instituting the application on behalf of Kena Media was also dismissed, as no challenge was brought in terms of Rule 7 which provides a procedure to be followed by a respondent who wishes to challenge such authority.

Turning to the substantive requirement of whether Kena Media was in peaceful and undisturbed possession of the billboard, the court referred to the essential allegations which must be made to obtain a spoliation order. It must be alleged and proved that the applicant was in possession of the property; and that the respondent deprived him of such possession forcibly or wrongfully against his consent.

The court was satisfied that Kena Media had proved on a balance of probabilities that it was the entity which was in peaceful and undisturbed possession of the billboard at the time when it was removed by the municipality. It consequently also had the necessary *locus standi* to have launched the application.

It remained to consider whether Kena Media had been wrongfully deprived of its possession. The municipality alleged that in terms of section 25(5) of the Outdoor Advertising By-laws, it was entitled to have removed the billboard. Section 25(5) states that "The municipality may, without prior notice and without a Court order, remove, confiscate, and destroy any sign if the sign constitutes a danger to life or property, or causes an obstruction of visibility to traffic or to a road traffic sign on or adjacent to any public road". Pointing to the danger the location of the billboard caused to motorists and pedestrians who utilised the intersection, the municipality defended its actions. Kena Media did not challenge the municipality's assertion regarding such danger. In view of the explicit and clear wording of section 25(5), the municipality was entitled to have removed the billboard in the circumstances. Kena Media therefore failed to prove on a balance of probabilities that it was wrongfully deprived of its peaceful and undisturbed possession of the billboard, and the rule *nisi* was consequently discharged.

Korabie v Judicial Commission of Inquiry into Allegations of State Capture, Corruption, Fraud in the Public Sector, including Organs of State and others [2022] 4 All SA 811 (WCC)

Civil Procedure – Doctrine of ripeness – In terms of doctrine, a complainant should not go to court before offending action or decision is final or ripe for adjudication – Ripeness of matter is to be measured by whether prejudice has already resulted or is inevitable, irrespective of whether action is complete or not.

Civil Procedure – Non-joinder – Courts will not deal with matters where a third party who may have a direct and substantial interest in litigation is not joined, or where no adequate steps could be taken to ensure that judgment will not prejudicially affect that party's interests.

Constitutional and Administrative Law – Judicial review – Whether recommendation by Commission of Inquiry that person be investigated constituting administrative action – Requirement of direct legal effect requires finality in administration of rights, which would exclude preliminary steps in multi-staged decisions.

The applicant sought the urgent review and setting aside of the findings made against him by the first respondent (the State Capture Commission) relating to the affairs of the State-owned diamond company, Alexkor SOC, and its activities, *vis-à-vis*, the Richtersveld Community. The applicant was involved as the community's legal advisor and a board member of one of its companies. Alexkor, had formed a joint venture with the Richtersveld community to explore the mineral riches in the area. The joint venture was to award a tender to an independent contractor to mine and market the joint venture's diamonds through a tender process which was supposed to be fair, equitable, transparent, competitive and cost-effective, as required by section 217 of the Constitution. The applicant was implicated as he was part of the tender committee. The tender committee awarded the tender to a company which was a shell company until just before its bid was submitted, and which did not meet the prerequisites for the

tender. The Commission subsequently addressed several notices in terms of regulation 3.3 promulgated under the Commissions Act 8 of 1947 to the applicant, requesting information which he had in his possession or under his control. Applicant was later alerted to findings of the Commission which included a directive that further investigation be launched against him and two others on the tender committee in relation to the tender that was awarded. That led to the launching of the urgent application for review.

Held – The failure to join two other members of the tender committee to whom the Commission's recommendations also applied constituted a material non-joinder. It was indisputable that the said members had a direct and substantial interest in the relief sought by the applicant and that they might be prejudicially affected by the court's decision pertaining to the relief sought. Our courts will not deal with matters where a third party who may have a direct and substantial interest in the litigation was not joined, or where no adequate steps could be taken to ensure that its judgement would not prejudicially affect that party's interests.

As the application was brought on an urgent basis, it had to be established whether a case had been made out for urgency in terms of rule 6(12). Having regard to the nature of the relief sought and the reasons furnished for urgency, together with the provisions of rule 6(12), the court was not convinced that the applicant had established urgency.

Turning to the question of whether the impugned recommendations constituted administrative action, the court examined the definition of administrative action in the Promotion of Administrative Justice Act 3 of 2000. Relevant case law considered established that a decision must have a direct legal effect to constitute administrative action. The requirement of direct legal effect requires finality in the administration of rights, which would exclude preliminary steps in multi-staged decisions. The findings of the Commission did not evince the characteristics of an administrative act as defined in the Promotion of Administrative Justice Act and subsequent judicial interpretation.

The final issue was whether the application was ripe for hearing. In terms of the doctrine of ripeness, a complainant should not go to court before the offending action or decision is final or ripe for adjudication. Ripeness of a matter is to be measured by whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. Those requirements were not met *in casu*, with the result that the application was not ripe for hearing.

The application was dismissed.

Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and others [2022] 4 All SA 827 (GJ)

Civil Procedure – Summary judgment application – Requirements to successfully oppose summary judgment – Rule 32(3) of the Uniform Rules of Court – Defendant's resisting affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon, which must be delivered after the delivery of a plea – Plea, as read with resisting affidavit, with due regard being had to any divergence between them, would have to be considered in assessing whether it is sufficient to stave off summary judgment.

The plaintiff ("Nedbank") had granted the first defendant ("Uphuhliso") an overdraft facility as well as a medium-term loan facility in the amount of R1,6 million repayable over 60 months. Uphuhliso was said to have breached the agreement by exceeding the limit of the overdraft facility, alternatively by failing to meet its obligations in terms of the agreement. Nedbank directed a letter of demand calling upon Uphuhliso to make payment of the excess on the overdraft facility within 10 business days, failing which the agreement would be cancelled and the full outstanding amount would become immediately due and payable. It averred that it did then cancel the agreement. In the present application, it sought summary judgment against Uphuhliso as principal debtor and against the second to fourth defendants as sureties.

Apart from alleging that the agreement contained an implied or tacit term that the defendants would only need to repay the money to Nedbank if the business remained sufficiently profitable to enable them to do so, and that they were prevented from being profitable by the impact of the Covid-19 pandemic. For the rest, blanket denials containing no detail were advanced. There was also a marked divergence between the defences raised by the defendants in their affidavit resisting summary judgment and what was contained in their plea.

Legal principles applicable to determining summary judgment proceedings, particularly where there is a divergence between the plea and the affidavit resisting summary judgment in the defences raised.

Held – Rule 32(3) of the Uniform Rules of Court, as it read before its amendment, required that the affidavit by the defendant or of any other person who could swear positively to the fact that the defendant had a *bona fide* defence to the action, disclose fully the nature and grounds of the defence and the material facts relied upon therefor. Notwithstanding the amendments to Rule 32 with effect from 1 July 2019, what is required of an affidavit in Rule 32(3)(b) remains the same. However, it could not be less than was required of the defendant previously as the defendant under the new rule must first have delivered a plea. The amendment does not now require of a defendant to necessarily plead in its plea more than it previously would have had to. But given the requirement of a resisting affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor, which is now to be delivered after the delivery of a plea, a court will more closely scrutinise a denial in a plea, as read with what is set out in a resisting affidavit to substantiate or flesh out that denial, to ascertain whether there is a triable issue that would justify leave to defend being granted. The plea, as read with the resisting affidavit, and due regard being had to any divergence between them, would have to be considered in assessing whether it constitutes bald averments and sketchy propositions insufficient to stave off summary judgment.

The defendants did not amend their plea to ensure they met with the abovementioned requirements. They could not, at summary judgment stage, advance defences that were not raised in their plea. Their failure to raise a genuine triable issue led to summary judgment being granted.

Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and others [2022] 4 All SA 827 (GJ)

Civil Procedure – Summary judgment application – Requirements to successfully oppose summary judgment – Rule 32(3) of the Uniform Rules of Court – Defendant's resisting affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon, which must be delivered after the delivery of a plea – Plea, as read with resisting affidavit, with due regard being had to any divergence between them, would have to be considered in assessing whether it is sufficient to stave off summary judgment.

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Apart from alleging that the agreement contained an implied or tacit term that the defendants would only need to repay the money to Nedbank if the business remained sufficiently profitable to enable them to do so, and that they were prevented from being profitable by the impact of the Covid-19 pandemic. For the rest, blanket denials containing no detail were advanced. There was also a marked divergence between the defences raised by the defendants in their affidavit resisting summary judgment and what was contained in their plea.

Legal principles applicable to determining summary judgment proceedings, particularly where there is a divergence between the plea and the affidavit resisting summary judgment in the defences raised.

Held – Rule 32(3) of the Uniform Rules of Court, as it read before its amendment, required that the affidavit by the defendant or of any other person who could swear positively to the fact that the defendant had a *bona fide* defence to the action, disclose fully the nature and grounds of the defence and the material facts relied upon therefor. Notwithstanding the amendments to Rule 32 with effect from 1 July 2019, what is required of an affidavit in Rule 32(3)(b) remains the same. However, it could not be less than was required of the defendant previously as the defendant under the new rule must first have delivered a plea. The amendment does not now require of a defendant to necessarily plead in its plea more than it previously would have had to. But given the requirement of a resisting affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor, which is now to be delivered after the delivery of a plea, a court will more closely scrutinise a denial in a plea, as read with what is set out in a resisting affidavit to substantiate or flesh out that denial, to ascertain whether there is a triable issue that would justify leave to defend being granted. The plea, as read with the resisting affidavit, and due regard being had to any divergence between them, would have to be considered in assessing whether it constitutes bald averments and sketchy propositions insufficient to stave off summary judgment.

The defendants did not amend their plea to ensure they met with the abovementioned requirements. They could not, at summary judgment stage, advance

defences that were not raised in their plea. Their failure to raise a genuine triable issue led to summary judgment being granted.

South African Municipal Workers Union National Medical Scheme (SAMWUMed) v City of Ekurhuleni and others [2022] 4 All SA 878 (GJ)

Labour and Employment – Collective agreement – Scope of agreement – Locus standi of entity alleging infringement, where such party was accredited to provide services to parties to collective agreement – Onus of proof – Where entity was not party to the collective agreement and as such, had no direct or substantial interest in the matter, no locus standi existing.

In 2011, the applicant ("SAMWUMed") and second respondent ("Moso") entered into a broker agreement. In September 2015, a collective agreement was concluded in the Bargaining Council between fifth respondent ("SALGA"), seventh respondent ("IMATU") and sixth respondent ("SAMWU"). Prior to 2020, SAMWUMed was accredited by the bargaining council as one of the five accredited medical schemes as stipulated in the collective agreement and as such, hundreds of employees of the first respondent, the City of Ekurhuleni ("COE"), became members of SAMWUMed. In January 2020, the COE and Moso concluded a service level agreement (the "SLA"), wherein Moso was appointed as the service provider for the provision of medical aid broker services to the City of Ekurhuleni. The COE then addressed a letter to SAMWUMed advising that it had appointed two medical aid brokerage service consultants (Moso and another) to exclusively render services to all the COE's employees, including SAMWUMed's own existing members and prospective members. It turned out that the other broker fell out of the picture and Moso remained as exclusive broker. Notwithstanding, SAMWUMed's dissatisfaction with Moso being appointed as broker, it successfully applied for accreditation as medical scheme in terms of the collective agreement for the 2021 period. The accreditation afforded it the right to market its scheme and its benefit options to COE's employees from 1 October 2020 to 30 November 2020, for the year 2021. It also granted SAMWUMed the opportunity to render ongoing services to its members thereafter. When SAMWUMed was no longer able to do that, it applied for an order declaring that the COE was in breach of the collective agreement.

Held – The first issue for determination was whether SAMWUMed lacked *locus standi* in that it had derived nothing more than a "privilege" from the collective agreement. In furtherance of that contention, the COE contended that SAMWUMed was not party to the collective agreement and it was not a signatory to it. It also argued that the collective agreement did not give SAMWUMed a right to enforce its terms against any member of the employer organisation; and the COE did not have any obligations and duties contained in the collective agreement dischargeable in favour of SAMWUMed. Courts will not be unduly technical with regard to *locus standi* as each case should be considered on its own merits. The question of *locus standi* is generally procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in litigation in order for that person to be accepted as a litigating party. The party instituting proceedings bears the onus to allege and prove its *locus standi*. It is thus necessary for a party in all cases to allege in its pleadings facts sufficient to show that it has *locus standi* to bring an action. Having regard to the purpose of collective bargaining and the doctrine of privity of contract, the court agreed that SAMWUMed was not a party to the collective agreement and as such, had no direct or substantial interest in the matter and therefore had no *locus standi*. On that basis, the application stood to be dismissed.

Weissensee v Stone-Bird Investments (Pty) Ltd and others [2022] 4 All SA 905 (GJ)

Financial Services Regulation – Financial Advisory and Intermediary Services Act 37 of 2002, section 7(1) requires person acting as financial services provider to be licenced – Effect of non-compliance on asset management agreement – As asset management company not permitted to act as a financial services provider if not registered, asset management agreement a nullity and void ab initio for impossibility of performance and for illegality – Other party to agreement entitled to restitution and in terms of the condictio ob turpem vel iniustam causam to reclaim performance under void contract.

In 2017, the applicant ("Weissensee") and first respondent ("Stone-Bird") entered into an asset management agreement. The second and third respondents were directors of Stone-Bird. Pursuant to the agreement, Weissensee paid €600 000 into an account nominated by Stone-Bird. Weissensee sought an order that the agreement be declared void *ab initio* due to non-compliance by Stone-Bird with section 7(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, that the €600 000 be repaid with interest, and that the second and/or third respondent be declared to be personally liable to Weissensee under section 218(2) and related sections of the Companies Act 71 of 2008, together with Stone-Bird, for the repayment. Section 7 requires a person who acts as a financial services provider to be licenced, and Stone-Bird did not meet the licence requirements.

Held – Stone-Bird attempted to avoid liability by contending that Weissensee was always aware that Stone-Bird was an agent of an overseas company and had no standing of its own to be sued. That contention was without merit. On a proper interpretation of the asset management agreement, Weissensee had contracted with Stone-Bird and no joinder of the foreign entity referred to was necessary. Stone-Bird's contention regarding non-joinder or misjoinder was dismissed on the facts. A counter-application was brought by Stone-Bird for rectification of the agreement to reflect that it was acting as agent. Pointing out that the agreement as rectified would still not comply with section 7 of the Financial Advisory and Intermediary Services Act and would still be a nullity, the court dismissed the counter-application.

A further defence raised the question of whether the court had jurisdiction to entertain the matter in light of an arbitration clause in the agreement. It was held that the court's jurisdiction is not excluded by an arbitration clause in an agreement. The law recognises the principle of party autonomy but the jurisdiction of the court to rule on referral to arbitration is retained. When there is an arbitration clause in a contract, the parties are bound by their contract and the court will usually give effect to the arbitration clause in the exercise of its jurisdiction. However, that is not so when the contract itself is void, as there is nothing to refer to arbitration. In addition, the specific dispute in this matter did not concern the interpretation of the clauses of the agreement and was therefore not covered by the arbitration clause.

In response to Weissensee's contention that the asset management agreement was void because Stone-Bird was not licensed to provide financial services, the respondents argued that the fact that Stone-Bird was a product supplier in addition to being an asset manager saved it from illegality. However, nothing in the agreement pointed to Stone-Bird acting as a product supplier. It was not permitted to act as a

financial services provider, and could not perform under the agreement. The agreement was a nullity and was void *ab initio* for impossibility of performance and for illegality.

The respondents' submission was that the choice of law applicable was English law. That was not supported by the evidence, leading to the conclusion that the agreement was always subject to South African law.

Weissensee had a right to restitution, and was thus entitled in terms of the *condictio ob turpem vel iniustam causam* to reclaim her performance under the void contract.

Stone-Bird carried on business recklessly, and the second and third respondents as the company's directors, also carried on the company's business recklessly, failed to act in good faith and for a proper purpose, and failed to honour their fiduciary duty to the company. They were thus liable to Weissensee in terms of section 218 of the Companies Act for her loss.

The application accordingly succeeded.

END-FOR NOW