LEGAL NOTES VOL 1/2023

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TURN AROUND INVESTMENTS 7 (PTY) LTD AND OTHERS v MARCUS SMIT ARCHITECTS CC AND ANOTHER 2023 (1) SA 300 (WCC)

Architect — Duties — Supervision — Ambit.

In this matter, first and second plaintiffs contracted in writing with second defendant, a building contractor, to construct, among other things, a wine cellar. Separately, under an oral agreement, plaintiffs employed first defendant, an architectural firm, to render the services of an architect and principal agent (see [4], [7]). In particular, first defendant agreed to regularly inspect the works to satisfy itself that the work was being carried out in accordance with the plans, and further to exercise reasonable professional skill and diligence in performing its mandate (see [5] – [6]).

The works were, however, not carried out in a proper manner and the structures concerned were replete with material defects (see [9] and [29]). Consequently, plaintiffs sued first and second defendants for breach of agreement and their resultant damages, and the issue in respect of first defendant resolved to whether it had breached its obligations as architect and principal agent (see [1] and [26]).

[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!**

Held, that it was an accepted principle that there was a common-law duty on an architect, as principal agent, to supervise the works to ensure they were carried out in accordance with the governing agreement (see [48]). Supervision in this context did not entail monitoring and directing the works on a day-to-day basis, but rather that the principal agent should inspect the works with sufficient frequency and care to ascertain that they were being carried out in accordance with the requirements and specifications of the agreement, and then give the contractor such instructions as were necessary to ensure the works were properly carried out or rectified (see [49]).

Held, further, that first defendant's contractual obligation to regularly inspect the works to satisfy itself that the work was being done in accordance with the plans, and to exercise reasonable professional skill and diligence in so doing, accorded with the common-law obligation of supervision described above (see [54]). Had first defendant properly supervised the works and exercised reasonable care and diligence, first defendant would have observed that the works were not being carried out in a proper manner and would have taken steps to have the poor workmanship rectified. First defendant had, however, failed to do so and accordingly had breached its obligations as principal agent (see [69]).

Plaintiffs' claim accordingly upheld, and first defendant found liable in damages for the costs required to remedy such defects as arose by its breach of its obligations (see [104] and [125]).

TISO BLACKSTAR GROUP (PTY) LTD AND OTHERS v STEINHOFF INTERNATIONAL HOLDINGS NV 2023 (1) SA 283 (WCC)

Access to information — Access to information held by private body — Request — Refusal — Grounds — Litigation privilege — When access to record must be refused on grounds of litigation privilege — Document must have been obtained or brought into existence for purpose of litigant's submission to legal advisor for legal advice — Litigation must have been pending or contemplated as likely at time — Promotion of Access to Information Act 2 of 2000, s 67.

Access to information — Access to information held by private body — Request — Requirements — Record to be required for exercise or protection of rights — Right to freedom of expression — Press and other media — Confirmation that media seeking access to record of private body entitled to rely on right to freedom of expression —

Court setting aside company's decisions to refuse request by media for access to report compiled by accounting firm after investigation into accounting irregularities at company — Promotion of Access to Information Act 2 of 2000, s 53(2).

This was an application in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA), heard before the Western Cape High Court, for access to a report held by the respondent, Steinhoff International Holdings NV (Steinhoff). The report, authored by PricewaterhouseCoopers Advisory Services (Pty) Ltd (PwC), was the outcome of an independent investigation PwC had been commissioned by Steinhoff's attorneys, Werksmans, to conduct into alleged accounting irregularities that had been discovered during the auditing (by Deloitte) of Steinhoff's financial statements for the year ending 30 September 2017. PwC handed the report to Steinhoff and Werksmans during March 2019, after which Steinhoff published the 'Overview of the Forensic Investigation'. Consequently, the first applicant — Tiso Blackstar Group (Pty) Ltd (Tiso Blackstar), the owner of various media assets — and the third applicant — the amaBhungane Centre for Investigative Journalism NPC (amaBhungane), a non-profit company — separately requested access to the report in terms of s 53(1) of PAIA. Steinhoff refused the requests, prompting the present application. The applicants sought, in terms of s 82 of PAIA, orders setting aside Steinhoff's decisions refusing the PAIA requests; and directing Steinhoff, within 10 days of the order, to supply Tiso Blackstar and amaBhungane with a copy of the PwC report.

It was common cause that the PwC report was a 'record' to which the Act applied, and that Steinhoff was a private body as defined in s 1 of PAIA (see [30]). That being the case, Tiso Blackstar and amaBhungane were obliged by s 53(2) of PAIA to identify the right they sought to exercise or protect and provide an explanation of why the requested record was required for the exercise of such right (see [30]). They both identified the right they sought to exercise or protect in seeking the PwC report as the right to freedom of expression enshrined in s 16 of the Constitution, which right included the freedom of the press and other media, as well as the freedom to receive or impart information or ideas (see [31]). Relying on *Brummer*, they argued that access to the information was crucial to freedom of expression, so as to ensure accurate reporting and thus imparting accurate information to the public. (See [32], [39].) Steinhoff's response was that no reliance could be placed on the right to freedom of

expression when seeking access to information *from private bodies*; all the case law in which reliance was placed on this right concerned information held by public bodies (see [33]).

Steinhoff argued that it was obliged to refuse the requests for access to the report, as it was subject to legal privilege as contemplated in s 67 of PAIA, its having been prepared for the express purpose of obtaining legal advice and in respect of contemplated litigation. (See [18], [43], [45].) The applicants, in turn, argued that Steinhoff was mandated by the public- interest-override provisions as contained in s 70*(b)* to accede to the information requests, the public interest in the disclosure of the record clearly outweighing any potential harm contemplated in s 67. (See [16], [26].)

Held, that there was no doubt that the right to freedom of expression was among the rights which would entitle a requester to access a record held by a private body (see [35], [36]).

Held, further, that Steinhoff's refusal to provide Tiso Blackstar and amaBhungane access to the report limited the latter's freedom of expression: Access to information was crucial to accurate reporting and thus to imparting accurate information to the public; and accurate reporting and imparting accurate information to the public were at the core of the right to freedom. (See [37] – [39].) The question then was whether this limitation was justified in terms of s 67 of PAIA (see [39]).

Held, that, in order to successfully rely on litigation privilege as a justification for refusing access to the report, Steinhoff was required to establish, by placing sufficient evidence before the court, that the PwC report was obtained or brought into existence for the purpose of submitting it to Werksmans for legal advice, *in respect of litigation which was* either pending or, as was asserted by Steinhoff, *was contemplated as likely at that time*. (See [44], [45], [66], [71].)

Held, that Steinhoff had failed to prove its claim that at the time the report was obtained, litigation was contemplated as likely (see [71), having failed to place before the court sufficient objective facts in support thereof (see [70], [71]). * No indication was provided of the precise nature of the litigation which was in contemplation, the person or persons against whom such litigation was contemplated, and the facts on which was formed the opinion that the prospect of litigation was likely. (See [66].) While Steinhoff might well have become nervous on learning of the alleged accounting

irregularities, and on such ground decided to appoint Werksmans for the purposes of advising them in respect of any fallout from the PwC report, this would not be sufficient to justify the claim that the PwC report was privileged. There had to be some fact that litigation was likely (see [70].)

Held, accordingly, that Steinhoff's decisions refusing access to the PwC report had to be set aside. And Steinhoff was directed to supply Tiso Blackstar and amaBhungane each with a copy of the PwC report within 10 days. (See [71], [77].)

SURROGACY ADVISORY GROUP v MINISTER OF HEALTH 2023 (1) SA 241 (GP)

Constitutional law — Legislation — Validity — Regulations Relating to Artificial Fertilisation of Persons, regs 7*(j)*(ii), 13 and 19, promulgated in terms of National Health Act 61 of 2003 — Regulations respectively requiring psychological evaluation where donor and recipient known to each other, prohibiting pre-implantation sex selection, and prohibiting disclosure of certain information regarding artificial fertilisation — Regulations found to be unconstitutional.

Constitutional law — Legislation — Validity — Regulations Relating to the Use of Human Biological Material, reg 6, promulgated in terms of National Health Act 61 of 2003 — Regulation prohibiting pre-implantation sex selection — Regulation found to be unconstitutional.

Children — Conception and birth — Artificial fertilisation — Sex selection — Pre-implantation sex selection — Prohibition against — Declared unconstitutional — Declaration suspended for 12 months — Regulations Relating to Artificial Fertilisation of Persons, reg 13, promulgated in terms of National Health Act 61 of 2003; Regulations Relating to the Use of Human Biological Material, reg 6, promulgated in terms of National Health Act 61 of 2003.

Children — Conception and birth — Artificial fertilisation — Prerequisites for removal or withdrawal of gametes — Requirement for psychological evaluation where donor and recipient known to each other — Declared unconstitutional — Declaration suspended for 24 months, during which period of suspension reading-in applied to provision, such that exception applying to donor and recipient who married to each other or in permanent domestic life partnership — Regulations Relating to Artificial

Fertilisation of Persons, reg 7*(j)*(ii), promulgated in terms of National Health Act 61 of 2003.

Children — Conception and birth — Artificial fertilisation — Disclosure of information — Prohibition against disclosure of certain information regarding artificial fertilisation — Found to be unconstitutional — Regulation to be read down, such that persons who underwent, donated towards or resulted from artificial insemination themselves would not be subject to prohibition — Regulations Relating to Artificial Fertilisation of Persons, reg 19, promulgated in terms of National Health Act 61 of 2003.

In the present application, heard before the Pretoria High Court, the applicant — the Surrogacy Advisory Group, a voluntary association of medico-legal lawyers and individuals with experience in infertility and surrogacy — sought orders against the respondent, the Minister of Health, declaring to be unconstitutional certain provisions of the Regulations Relating to Artificial Fertilisation of Persons, and the Regulations Relating to the Use of Human Biological Material, promulgated in terms of the National Health Act 61 of 2003.

Regulation 7*(j)*(ii) of the Regulations Relating to Artificial Fertilisation of Persons provided that artificial insemination in respect of which *the proposed donor and recipient were known to each other* may not be proceeded with until both such parties had been psychologically evaluated. The applicant argued that this regulation breached the right to equality protected in s 9 of the Constitution: It differentiated, without a legitimate government purpose, between, on the one hand, women and their husbands or partners who planned to have children through artificial fertilisation using their own gametes, *who had to undergo psychological evaluation*, and, on the other hand, other groups who did not, such as women and their husbands/partners who planned to have children through sexual intercourse, and women and their husbands/partners, if any, who planned to have children through artificial fertilisation using the gametes of unknown donors. The applicant added that the differentiation amounted to unfair discrimination based on the grounds of disability. The applicant further argued that the regulation, in requiring donors and recipients who fell within its scope to disclose personal issues relating to decisions to build a family using artificial fertilisation, infringed the right to privacy as protected in s 14 of the Constitution. Finally, the applicant argued that the regulation, by imposing a psychological

evaluation requirement which created a financial and emotional obstacle to the person's access to artificial fertilisation healthcare services, also contravened the right to access to healthcare services as protected in s 27(1)*(a)* of the Constitution.

Regulation 13 of the Artificial Fertilisation Regulations, and its duplicate in the Regulations Relating to the Use of Human Biological Material, reg 6, prohibited, except in limited circumstances, pre-implantation testing for the purpose of selecting the sex of a child. The applicant argued that the regulations violated the right to bodily and psychological integrity, as protected in s 12 of the Constitution, in particular ss (2) thereof, which secured everyone the right to make decisions regarding reproduction, and to have security in and control over one's body. The applicant argued further that it breached the right to privacy and to equality.

Regulation 19 of the Artificial Fertilisation Regulations provided that '(n)o person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders'. The applicant argued that the regulation, in preventing 'recipients' and 'donors' from communicating with their personal circle of family and friends about their own involvement with artificial fertilisation, violated the right to privacy, as well as freedom of expression as protected in s 16 of the Constitution.

The respondent opposed the relief sought. It raised two preliminary grounds: Firstly, it argued that the applicant ought to have brought the application by way of a review under the Promotion of Administrative Justice Act 3 of 2000: the making of regulations amounted to administrative action; it followed that the validity of the impugned regulations had to be determined with reference to the grounds of review listed in s 6(2) of PAJA, in particular s 6(2)*(i)*, which allows a court to review action that was 'otherwise unconstitutional or unlawful'. By virtue of the principle of subsidiarity, the applicant did not have an election to instead proceed directly under the Constitution. Secondly, the respondent argued that the application was premature; this was because the Minister had embarked on amending the regulations in question. The amendment process had to first be allowed to unfold before the court could pronounce on their constitutionality. Regarding the merits of the arguments raised by the applicant, the respondent asserted as follows:

In respect of the 'psychological evaluation requirement' and the 'prohibition of disclosure of certain facts', the respondent argued, inter alia, that the draft regulations addressed the issues raised by the applicant; and their determination at this stage would accordingly be an academic exercise. As to the sex selection prohibition, the respondent argued that there were indeed policy reasons for not allowing pre-implantation sex selection, ie it was wrong for the state to endorse sex selection because it was intrinsically unethical; the practice was unethical, as it reinforced sexual discrimination, and this caused harm; and it may disrupt the ratio between the sexes due to discrimination.

Points in limine: Justiciability of issue — The court accepted for purposes of adjudicating this preliminary issue that the making of regulations constituted administrative action (see [27]). However, the court held that the principle of subsidiarity would oblige the litigant impugning regulations to do so under s 6(2)*(i)* of PAJA only when the issue that gave rise thereto pertained to the right to administrative justice; not when, as here, the contention was that the regulations breached some other constitutional right, such as the right to equality, privacy or bodily integrity. Accordingly, the applicant was not compelled to rely on PAJA. (See [35] – [40].)

Points in limine: Issues academic — The court held that the applicant was within its rights to challenge the regulations as they stood at present, and the court accordingly could consider the application. In justification of its decision, the court referred to the unpredictability of the legislative process; there was no guarantee as to what the final regulations would look like. (See [42] – [44].)

'Psychological evaluation requirement' — The court held that the regulation infringed the right to equality (see [81]): The differentiation to which the regulation gave rise, while serving a legitimate, rational government purpose, that is, to ensure that parents who conceived children through artificial insemination were psychologically prepared (see [78] – [79]), amounted to discrimination on a listed ground of disability (see [80]). And the presumption of unfairness that this created, the court held, the respondent had not rebutted (see [80). The court further held that the regulation infringed the right to privacy, in imposing a legal requirement that people in a relationship must disclose information regarding their decision to conceive a child through artificial insemination, a decision falling squarely in the truly personal realm. The court added that the

respondent had failed to offer any justification for the limitation of the right. (See [86] – [87].) The court finally held that the regulation infringed the right to healthcare for the reasons offered by the applicant. No justification, the court held, was offered by the respondent. (See [88] – [89].) Regulation 7*(j)*(ii) was accordingly unconstitutional and invalid (see [90]).

'Sex selection prohibition' — The court held that these regulations infringed the right to bodily integrity and reproductive choices, in prohibiting pre-implantation sex selection in circumstances in which the law permitted prenatal sex selection, ie in circumstances in which women were permitted by the Choice on Termination of Pregnancy Act 92 of 1996 to terminate their pregnancies, up to 12 weeks, without giving any reason. The court held further that the regulation infringed the right to privacy: the right to decide about one's family composition fell within the personal realm; while this could be limited by the state if such limitation was justified in terms of s 36 of the Constitution, no such justification was offered by the respondent to the court. The court, however, rejected that the regulation breached the right to equality. (See [168].)

'Prohibition of disclosure of certain facts' — The court held that the regulation, insofar as it barred parties involved in artificial fertilisation from finding comfort with their family and friends by sharing their experiences, breached the rights to privacy and freedom of expression. The court added that no justification was given for the infringement. (See [178] – [183].)

Remedy — The court accordingly declared reg 7*(j)*(ii) of the Regulations Relating to Artificial Fertilisation of Persons as unconstitutional and invalid, which declaration would be suspended for 24 months, during which period of suspension the following would be read into reg 7*(j)*(i), 'except where such donor and recipient are a couple that is married or in a permanent domestic life-partnership'. Regulation 13 of the Regulations Relating to Artificial Fertilisation of Persons and reg 6 of the Regulations Relating to the Use of Human Biological Material were declared unconstitutional and invalid, which declaration would be suspended for 12 months. The appropriate remedy in respect of reg 19 was that it should be 'read-down', such that 'no persons' did not include the persons who underwent, donated towards or resulted from artificial insemination themselves. (See [201].)

REDEFINE PROPERTIES LTD v GOVERNMENT, REPUBLIC OF SOUTH AFRICA AND OTHERS 2023 (1) SA 226 (GP)

Land — Ownership — Registration of immovable property owned by state — Vesting of in one part of government — Effect — Placing administration of property only in part of government it was vested in — Ownership remaining with state — Vesting process only finalised when endorsed against title deed — Constitution, 1996, sch 6, item 28.

The applicant (Redefine) owned an industrial site (the Property) that was used by a tenant as a production plant for aerosol products. The property was next to undeveloped state-owned land (the Adjacent Property), vacant, save for alleged unlawful occupation since 2018. The Adjacent Property enjoyed no access to running water, sewage disposal or any other amenities. Redefine asserted that the living conditions there was a nuisance and a health and fire hazard (see [8], [24]). It sought an order directing the first respondent (the National Government), as the owner of the Adjacent Property, to evict the unlawful occupiers from it in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act), or alternatively remove the nuisance. The other respondents were the ministers of national departments (Agriculture, Land Reform and Rural Development; and Public Works and Infrastructure).

Redefine contended that the ministers, as custodians of all property owned by the National Government, had an obligation to abate the nuisance, threat and interference posed by the condition of the Adjacent Property. The respondents' case was primarily that, since the Minister of Agriculture had finally and officially vested the Adjacent Property in the Gauteng Provincial Government (under s 239 of the Constitution of the Republic of South Africa, 1993, and item 28(1) of sch 6 to the Constitution, 1996), * the responsibilities or obligations in respect of the Adjacent Property were not theirs, but those of the Gauteng Provincial Government. In this regard they contended that once the Minister of Agriculture had signed the item 28(1) certificate, the Gauteng Government was for all intents and purposes the owner of the Adjacent Property — despite the registrar of deeds (Pretoria) not having endorsed the vesting of the Adjacent Property in the name of the Gauteng Government (See [13], [25].)

Held

Item 28(1) merely facilitated the 'vesting' from the one part of government to another, of an immovable property owned by the state. The 'vesting' placed the administration of the property in the part of government in which it was vested, but the ownership of the property remained with the first government. The process of vesting would only be attained once the registrar of deeds made entries in or endorsements of the relevant documents. The registered owner's rights and obligations in respect of the material property or land remained unaffected by the pending 'vesting'. The ownership and control of the Adjacent Property therefore had not yet 'finally and officially' vested in the Gauteng Provincial Government, but remained with the National Government until the completion of the vesting process, as provided in item 28(1) of sch 6 to the Constitution. (See [27] – [31].)

This meant that the National Government was the relevant party for purposes of the relief sought in this matter. Eviction of the unlawful occupiers did not appear to be a suitable solution in the circumstances of this case; instead the principles of neighbour law would be applied. The applicant established that there was a nuisance of a private nature occurring on the Adjacent Property. The court was allowed a wide discretion to issue an order for the resolution of a dispute between the neighbours in the most reasonable and equitable manner. Accordingly, the National Government would be ordered to halt the nuisance complained of. (See [32], [35] – [36] [38], [40].)

MIYA v MATLEKO-SEIFERT 2023 (1) SA 208 (GJ)

Magistrates' court — Civil proceedings — Jurisdiction in respect of causes of action — Eviction — Monetary value of right of occupation of property exceeding district court's jurisdiction — If PIE Act applicable, and property in its jurisdictional area, magistrates' court having jurisdiction regardless of value of right of occupation — Magistrates' Courts Act 32 of 1944, s 29(1)*(b)*; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(7) and 9.

Appeal — Against magistrates' court eviction order — Wide powers of High Court on appeal — Magistrates' Courts Act 32 of 1944, ss 29(1)*(b)*, 87; Superior Courts Act 10 of 2013, s 19*(b)*.

One of the grounds in this appeal to the High Court against a magistrates' court's eviction order was that the magistrate erred, in that he did not have jurisdiction to grant the order since the monetary value of right of occupation of the property exceeded the district court's jurisdiction as per s 29(1)*(b)** of the Magistrates' Courts Act 32 of 1944.

Held

A magistrates' court had jurisdiction to grant an eviction order, even where it may otherwise be beyond the monetary jurisdiction of the magistrates' court. Section 29(1)*(b)* of the Magistrates' Courts Act expanded the magistrates' court's jurisdiction (where the property was in the area of jurisdiction of that particular magistrates' court) *and eviction fell within the ambit of the PIE* Act. Section 9 of PIE expressly provided that '(n)otwithstanding any provision of any other law', a magistrates' court had jurisdiction to issue any order authorised by the provisions of the PIE Act. Many unlawful occupiers — who would fall within the ambit of the protection afforded by PIE in preventing illegal evictions — would not have access to extensive legal resources; so, it made sense that a magistrates' court would have jurisdiction in respect of any order to be granted under the PIE Act. *A magistrate would therefore have jurisdiction to grant an eviction order in terms of s 4 of PIE*, whatever the value of the right of occupation. (See [64] – [68].)

But, even if the magistrates' court did not have jurisdiction to grant the eviction order, that did not prevent this court on appeal from doing so in circumstances where the unlawful occupier would otherwise be evicted. To require of the respondent to start eviction proceedings afresh in circumstances where an eviction order would otherwise have been granted, but for the jurisdictional difficulty, would not be just and equitable. Section 87 of the Magistrates' Courts Act conferred wide powers on a court of appeal, which included taking 'any course which may lead to the just, speedy and as much as may be inexpensive settlement of the case'. This was reinforced by s 19*(d)* of the Superior Courts Act, 2013. The power of the appeal court was wide enough to enable it, if it set aside the magistrates' order for want of jurisdiction, to then make the order itself. In any event, s 172(1)*(b)* of the Constitution empowered a court to make any order that was just and equitable when deciding a constitutional matter within its power. Accordingly, to the extent that the magistrate's court did not have jurisdiction,

this court of appeal would nonetheless be able to grant an eviction order where the requirements of s 4 of PIE were satisfied. (See [70] – [72], [78].)

LIVING HANDS (PTY) LTD AND OTHERS v OLD MUTUAL TRUST MANAGERS LTD 2023 (1) SA 164 (GJ)

Delict — Specific forms — Pure economic loss — Whether recoverable — Losses incurred when financial institution handed over trust assets to entity that proceeded to dissipate them — Delictual liability of financial institution — Direct duty of care to trust — Collective Investment Schemes Control Act 45 of 2002, s 71; Financial Institutions (Protection of Funds) Act 28 of 2001, s 2*(b)*.

Financial institution — Asset management — Trust assets — Collective investment scheme — Fiduciary duty of managing company to prevent dissipation of funds with vulnerable beneficiaries — New owners of trust, as principal, directing financial institution to liquidate trust's entire investment portfolio — New owners proceeding to loot funds — Delictual liability of financial institution — Ambit of duty of care and statutory obligations — Collective Investment Schemes Control Act 45 of 2002, s 71; Financial Institutions (Protection of Funds) Act 28 of 2001, s 2*(b)*.

This action was an attempt to recover the losses suffered by the first plaintiff, the Living Hands Umbrella Trust (Living Hands), when Mr J Arthur Brown's Fidentia Holdings Group (Fidentia) gained control of and dissipated R861 million of the R1,2 billion portfolio Living Hands' forerunner, the Mantadia Asset Trust Co (Matco), had administered on behalf of 52 000 widows and orphans of deceased mineworkers. The first plaintiff (Matco/Living Hands) was the 'trust administration company', or TAC, a managing entity distinct from the trust itself, which received and controlled, though the trustees, the benefits due to the beneficiaries. The second and third plaintiffs were two of the trust's trustees. Matco had in 2002 outsourced the management of the funds to the defendant, Old Mutual Unit Trust Managers Ltd. In May 2002 Matco and Old Mutual concluded a service level agreement (SLA) setting out Old Mutual's responsibilities.

In what appeared to be a premeditated strategy to gain access to the funds, Fidentia in October 2004 bought Matco for R93 million and replaced its directors with Fidentia directors (Brown and his colleagues). A Fidentia-controlled entity, Fidentia Asset Management (Pty) Ltd (FAM), was then appointed as Matco's 'investment manager',

with full discretionary powers to deal with the Matco portfolio. As a test run for what was to follow, FAM on 15 October 2004 instructed Old Mutual to pay R150 million from the Matco portfolio into FAM's bank account. Old Mutual refused on various grounds. But a few days later Old Mutual received and complied with an instruction by FAM to immediately liquidate Matco's entire portfolio. The upshot was that Old Mutual had by early November 2004 paid the entire R1,2 billion into Matco's bank account. Old Mutual argued throughout that the service level agreement it had concluded with Matco had obliged it to do so.

In 2007 Fidentia was placed under curatorship after an investigation by the Financial Services Board. In terms of the approved distribution plan, the curators paid R273 million to Living Hands (Matco's successor).

The plaintiffs then instituted an action in delict, based on pure economic loss resulting from an omission, to recover the balance of some R861 million plus interest from Old Mutual. The plaintiffs' case was based on the argument that Old Mutual should have prevented the loss by complying with the duty of care it owed to the TAC and the end beneficiaries. It was based on the following allegations: Old Mutual (i) had knowledge of the TAC's business and the vulnerable nature of the beneficiaries; (ii) had breached statutory duties imposed on it by the Collective Investment Schemes Control Act 45 of 2002, the Trust Property Control Act 57 of 1988 and the Financial Institutions (Protection of Funds) Act 28 of 2001; and (iii) had known or reasonably ought to have known that Fidentia had taken control of the TAC and installed persons there who would not act in the beneficiaries' best interests. Had Old Mutual complied with its duties to the end beneficiaries and reported certain events, it would have triggered early detection and a timeous regulatory response. Though the plaintiffs conceded that the loss resulted from Fidentia's wrongdoing, they argued that Old Mutual should have satisfied itself that the TAC would safeguard the fund for the benefit of the end beneficiaries. The plaintiffs' case was thus that it was not the payout per se but Old Mutual's failure to report it to the appropriate entities that was wrongful.

For its part Old Mutual, which did not lead evidence, denied that it had been negligent or that it was liable to the plaintiffs, citing instead the wrongful and criminal conduct of others: the TAC, which had handed the funds over to Fidentia, and the Fidentia wrongdoers, who had dissipated them. Under trust law the TAC's failure to perform its

fiduciary obligations meant that *it* was responsible for the loss. Moreover, the constitutional and statutory duties invoked by the plaintiffs did not extend to the present situation, where trust funds were invested by a financial institution pursuant to a mandate, returned on an instruction from its principal, and then fraudulently dissipated by the principal. Old Mutual had been obliged to exhibit good faith and diligence in respect of the *management and administration* of the portfolio, no more. Since the loss was caused by the TAC's transfer of the funds to Fidentia, not by Old Mutual's conduct, the element of causation was also absent. Finally, the spectre of indeterminate liability loomed if Old Mutual were to be penalised for acting on duly authorised instructions and a failure to go behind them in the apparent interests of third parties.

In deciding the matter in favour of the plaintiffs, Judge Siwendu dealt with the following issues:

Old Mutual's fiduciary obligations to the trust and the beneficiaries

Old Mutual's invocation of trust law had to be considered in the light of the investment milieu in which the trust was formed and operated, the nature of the relationship between the TAC and Old Mutual, the prevailing regulatory framework, and the circumstances under which the portfolio was liquidated (see [98]). The TAC and the trustees were not the owners of the portfolio, but were acting administratively for the trust, and in turn for the trust beneficiaries. The reference to 'trust property' in s 71 of the Collective Investment Schemes Control Act and the terms of the SLA concluded between Matco and Old Mutual made it clear that Old Mutual was required to have knowledge of the trust deed, the trust and who the beneficial owners were. Old Mutual, as 'manager' of the funds, owed the trust a *direct duty of care* that ranked higher than the duties arising from its contractual arrangements. (See [103] – [104].)

In addition, s 2*(b)* of the Financial Institutions (Protection of Funds) Act indicated that where, as in this case, an institution designed and structured unit trusts or where trust instruments were placed at its disposal, it had to deal with them with utmost good faith, due diligence, skill and care. This requirement extended to the whole value chain of institutional conduct up to the disposal of the trust instrument. (See [119], [122].)

Old Mutual's failure to report events leading up to the release of the funds

Old Mutual's about-turn from its clearly prudent stance in refusing to pay the R150 million to its subsequent liquidation of the entire R1,2 billion portfolio was never explained. The reasonableness of the demand to liquidate over R1 billion of an investment portfolio on a day's notice belied the terms of the SLA or any conduct expected of a reasonably prudent investment manager or trustee. The demand was in itself a clear breach of the legislated duty of care and the duty to act with utmost good faith referred to in the Collective Investment Schemes Control Act.

The size of the portfolio, the potential risk to the trust and the beneficiaries, and the clear missteps committed by Fidentia — which in its correspondence with Old Mutual seemed ignorant of the workings of collective investment schemes — should have put Old Mutual on guard. Even if it felt compelled to yield to FAM's demands and to comply with its 'instructions', Old Mutual had had sufficient time — 90 days — to notify the regulatory bodies of the disinvestment. Doing a measure of due diligence on Fidentia and FAM, and notifying the regulatory authorities, was not an unreasonable, burdensome or costly exercise or requirement for an entity of Old Mutual's calibre. There were sufficient facts to support a claim of negligence. (See [138], [146], [153] – [156].)

Causation

The duty to report was not only about the effectiveness or consequences of such reporting, but also about the discharge of Old Mutual's duty of good faith and care to the trust. The failure to report enabled the acquisition of the funds and what followed thereafter. There was a real probability that Fidentia's conduct would have been detected in time were it not for Old Mutual's failure to report it. Given the facts, the sheer size of the portfolio and the material risks, the detrimental consequences were foreseeable and would have been foreseen by a prudent manager. Hence the plaintiffs established factual and legal causation. (See [163], [168].)

Wrongfulness, pure economic loss and indeterminate liability

An omission was considered wrongful if a defendant was under a legal duty to act to prevent the harm or if it evoked moral indignation, or the legal convictions of the community required that the omission be regarded as wrongful (see [174]).

Indeterminate liability did not arise: the trust and its beneficiaries were a clearly determinable class and were known (see [176]). The rationale for housing the trust assets in unit trusts was to afford the trustees peace of mind by placing the assets in the highly regulated collective investment scheme. The portfolio was tailor-made for the needs of the beneficiaries and enabled the protection of the capital against excessive risk. The funds qualified as social security funds and were understood as such by all the parties, including Old Mutual. In view of the above, both public- and legal-policy considerations dictated that liability should be imposed on Old Mutual for the loss of the funds. There was no basis for Old Mutual's claim that doing so would be 'extraordinary', and there was no need to develop the common law, since there was already a sufficient basis for the imposition of liability. (See [177] – [184].)

Therefore, Old Mutual was liable to pay R854 650 643 as capital and R854 650 643 as interest at the in duplum level, plus interest at 15,5% per annum calculated from the date of judgment (see [190]).

GCASAMBA v MERCEDES-BENZ FINANCIAL SERVICES SA (PTY) LTD AND ANOTHER 2023 (1) SA 141 (FB)

Practice — Judgments and orders — Default judgment — Granting of by registrar — Matters falling under NCA — Registrar did not have power to grant default judgment in respect of matters falling under NCA — National Credit Act 34 of 2005, s 130(3).

Credit agreement — Consumer credit agreement — Debt enforcement — Debt proceedings in court — Default judgment — Granting of by registrar — Whether competent — Meaning of 'court' — Registrar did not have power to grant default judgment in respect of matters falling under NCA — National Credit Act 34 of 2005, s 130(3).

Words and phrases — 'Court' — Meaning of in s 130(3) of National Credit Act 34 of 2005 — Judge, sitting in open court.

Under consideration before the Bloemfontein High Court was an application for rescission of a default judgment granted by the Registrar of the High Court cancelling the instalment sale agreement entered into between the applicant, as purchaser, and the first respondent credit provider, as seller, and ordering to be returned the vehicle forming the subject-matter of the agreement. The main issue to be addressed was

whether the applicant was correct in his assertion — upon which he grounded his application — that *the Registrar of the High Court did not have the power to grant default judgments resorting under the auspices of the National Credit Act 34 of 2005, as was the case here*. Of relevance was s 130(3) of the NCA, which provided that that 'in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the *court* may determine the matter only *if the court* is satisfied that [the requirements set out in paras *(a)* – *(c)* had been met]'.

Held

It was not competent for the Registrar to grant default judgments in matters resorting under the NCA, for the following main reasons (see [30] and [35]).

Firstly, the matter had been settled by the Constitutional Court, in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) (2016 (12) BCLR 1535; (2016) 37 *ILJ* 2730; [2016] ZACC 32), which concerned an application for confirmation of a High Court order that ss 65J(2)*(a)* and 65J(2)*(b)*(i) of the Magistrates' Courts Act were 'inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial supervision of the issuing of an emoluments attachment order against a judgment debtor'. The Constitutional Court in that matter found, in dicta forming part of its ratio decidendi — and accordingly binding on the High Court — that, in terms of ss 129 and 130 of the NCA, *it was only courts that could determine matters to which the NCA* applied. (See [35], [38] – [39], [43], [44] and [46].)

Secondly, even were the court not bound by *University of Stellenbosch*, * on a proper interpretation of s 130(3) of the NCA, only a court, as opposed to anyone else, ie the Registrar, could grant judgments and/or orders to which the NCA applied (see [35] and [48]):

- Section 130(3), purposively interpreted in its proper context, required that there had to be judicial intervention by the court before proceedings that had been commenced by a credit provider may be determined. Following that, the proceedings had to be determined by the court. The section therefore required judicial oversight before the proceedings initiated by a credit provider may be determined. The section was expressly formulated in a way that showed that the court may or may not determine the matter, depending on whether the court was satisfied that there had

been due compliance with the matters mentioned in the section. There could not be judicial intervention or judicial oversight if the court was not involved. (See [59].) The section clearly provided a mandatory judicial intervention to ensure that, upon termination of a credit agreement, a consumer was protected . The court's role was clearly and expressly spelt out (see [60]).

- The meaning of 'court' in s 130(3) could not be interpreted to impliedly include anybody else performing the functions therein contained. The 'court' in s 130(3) of the NCA clearly referred to a judge sitting in open court. Had the legislature intended that a function in terms of s 130(3) could or should be performed by anyone else, as opposed to the court, the section would have provided for that in express terms. (See [60] – [61], and [64] – [65].)

Accordingly, the Registrar did not have the authority, and was thus not competent, to grant the default judgment, since the matter was governed by the provisions of the NCA. (See [68].) An order rescinding default judgment against the applicant had to be granted (see [72]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v WIESE AND OTHERS 2023 (1) SA 119 (WCC)

Revenue — Tax administration – – Tax debt — What constitutes for purposes of liability of person assisting in dissipation of taxpayer's assets — Tax Administration Act 28 of 2011, ss 169 and 183.

Revenue — Tax administration — Evidence at tax enquiry — Admissibility of transcript of tax enquiry in proceedings under s 183 of Tax Administration Act — If admissible, for what purpose — Tax Administration Act 28 of 2011, s 183.

This case concerned two separated issues in actions in which the South African Revenue Service (Sars) sought to hold the defendants liable under s 183 of the Tax Administration Act 28 (the TAA), for 'knowingly assist[ing] in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt of the taxpayer'. Such a person, s 183 further provides, would be 'jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt'.

On 16 November 2012 Sars had issued a notice in terms of s 80J(1) of the Income Tax Act 58 of 1962 (the ITA) of its intention to make adjustments to the taxpayer's 2007 assessment, raising a corresponding assessment on 21 August 2013. At the time of the s 80J notice the taxpayer's only asset was a loan claim. Sars claimed that on 19 April 2013 the second defendant, on instructions of the first defendant, assisted the taxpayer in dissipating the loan claim by declaring and transferring it as a dividend in specie to its holding company (the dissipation).

Prior to its January 2014 amendment, s 1 of the TAA defined a 'tax debt' as 'an amount of tax *due* by a person in terms of a tax Act'; after its amendment it is defined as an amount referred to in s 169(1), which in turn defines it (under the heading 'Debt due to SARS') as '(a)n amount of tax *due or payable* in terms of a tax Act'. Sars' case was that the dissipation was effected at a time when, to the knowledge of the defendants, the intended adjusted liability constituted *debts due* to Sars for the purposes and in terms of s 169 of the TAA (see [28] – [29]). The defendants — relying on the impugned distribution having been made on 19 April 2013, ie before the assessment — contended that a 'tax debt' must be interpreted in the context of an assessment that had been raised, so that Sars was required to issue an assessment to the taxpayer before invoking s 183 (see [31] – [35]).This dispute formed the basis of the first separated issue, ie whether a 'tax debt' for purposes of s 183 of the TAA had been established.

The second separated issue was whether Sars, for the purposes of proving its claim under s 183, could rely on transcribed evidence, together with documents to which reference was made during testimony of three of the defendants at an inquiry held in 2015 and 2016 in terms of s 50 the TAA. Section 56(4), under the heading 'Confidentiality of proceedings', provides that '(s)ubject to section 57(2) [which prevents its use in criminal proceedings] Sars may use evidence given by a person under oath or a solemn declaration at an inquiry in a subsequent *proceeding* involving the person or another person'. The contentious issues were whether the word 'proceedings' in s 56(4) was limited to tax court proceedings (as the subsection was anchored in the section titled 'confidentiality of proceedings'); and if admissible, for what purpose.

Held

Chapter 11 of the TAA dealt with the recovery of tax, and part D thereof — wherein s 183 was nestled — dealt with the liability and collection of tax debt from a party other than the taxpayer. In these circumstances, where the purpose and aim of the TAA was to hold a third party liable, the notice as issued by Sars on 16 November 2012 was more than sufficient to fall within the true meaning of a 'tax debt' as contemplated in s 183. To interpret it differently would undermine the purpose and context of s 183 and the TAA as a whole. It would also lead to absurd consequences, for instance where a party who knowingly assisted the taxpayer in dissipating assets where an assessment had been raised and a tax debt established 'due or payable' to Sars would be struck by the section, but the same person who assisted the taxpayer to dispose of assets in order to obstruct the collection thereof a day before the event that rendered the tax debt due or payable, would escape liability. The meaning to be ascribed to the phrase 'tax debt' where it appeared in s 183 must prevail over that as defined in s 1; it must be read as reference to an amount of tax due or payable in terms of the TAA as advanced by Sars. A tax debt either existed or not, depending on various factors, for instance, whether there has been a capital gain or whether a taxpayer has made a taxable profit or not. A tax debt thus existed irrespective of whether the taxpayer or Sars has made an assessment. It followed that the defendants who arranged the declaration of the dividend in specie could be held liable in terms of s 183 of the TAA in the absence of an assessment at the time of the dissipation. (See [46] – [49], [53], [55].)

Attributing a meaning to the word 'proceeding' that excluded judicial proceedings in court, whether civil or criminal, could not be supported. It made no sense at all to read the TAA as on the one hand giving substantial powers of information-gathering, investigation and inquiry, and then regarding that evidence so obtained at an inquiry as inadmissible in subsequent court proceedings. To do so would undermine Sars' ability in carrying out its duty to collect tax. The suggestion that the information so obtained was inadmissible was simply untenable, as it would mean that these inquiries would serve little purpose. Our higher courts have dealt with and confirmed the constitutionality in respect of admissibility of evidence and/or transcripts of inquiries in other legislation. There were striking similarities between those provisions and those of the TAA; logic dictated that the evidence obtained in the investigative inquiry as

contemplated in s 56(4) is admissible and Sars may use such evidence given by the first, second and third defendants in the main proceedings, provided that such evidence was not used in criminal proceedings as contemplated in s 57(2). On a plain reading of s 2 of the Civil Proceedings Evidence Act 25 of 1965, the purpose for which the evidence was admissible was to prove or disprove all relevant fact(s) in issue in the current legal proceedings between the parties. Accordingly, the separated issues would be decided in favour of Sars. (See [75] – [80], [85] – [87], [90].)

AFRICA WIDE MINERAL PROSPECTING & EXPLORATION (PTY) LTD v PLATINUM GROUP METALS (RSA) (PTY) LTD AND OTHERS 2023 (1) SA 98 (GJ)

Company — Shares and shareholders — Shares — Sale — Drag-along — Effect of drag-along clause in memorandum of incorporation — Share transfer cannot be stymied by minority dissent.

Company — Shares and shareholders — Shares — Scheme of arrangement — Approval — Effect — Scheme's legal effectiveness derived from terms of Companies Act — Cannot be altered or affected by rights which party may have had were it not for Act — Any challenge by shareholder entailing, directly or indirectly, attack against resolution under which scheme was approved may, regardless of form of challenge, be brought only under s 115 of Act — Companies Act 71 of 2008, ss 114 and 115.

Plaintiff, Africa Wide Mineral Prospecting & Exploration (Pty) Ltd (Africa Wide), and first defendant, Platinum Group Metals (RSA) (Pty) Ltd (PTM), were, respectively, the minority and majority shareholders of third defendant, Maseve Investments 11 (Pty) Ltd (Maseve), a mining company.

In 2016 Maseve ran into financial difficulties and was bailed out by PTM in return for pledging its assets, including its mine, as security. Keen to sell either the mine or Maseve itself, PTM took steps to amend Maseve's memorandum of incorporation (MOI) — which contained the usual minority protections — by incorporating a 'drag-along' clause that would oblige Africa Wide to go along with any offer to purchase Maseve's full shareholding. The amendment was passed by special resolution in June 2017, the Africa Wide- appointed director dissenting.

By this time the second defendant, Royal Bafokeng Platinum Ltd (RB Platinum), had indicated an interest in acquiring all Maseve's assets. But its offer was rebuffed by

PTM, which did not want to sell them separately from its shareholding. Eventually a two-part transaction was agreed on: the sale of Maseve's ore-processing plant to fourth defendant, RB Resources (a subsidiary of RB Platinum), and the disposal of the entire Maseve shareholding to RB Platinum via a 'scheme of arrangement' under ss 114 and 115 of the Companies Act 71 of 2008 (the scheme). Although the processing-plant transaction * was purportedly self-standing, the evidence showed that the US$ 58 million/US$ 12 million split between shares and plant was fictional and intended to enable PTM to get quick access to the larger sum (the share transfer required government approval that was notoriously slow in coming). The scheme was subsequently sanctioned by court under s 115(2)*(b)*, which made it binding on all shareholders.

Unhappy with what amounted to an expropriation of its shareholding in Maseve, Africa Wide sought to collapse the scheme by attacking the plant transaction. It claimed that the minority protections in the Maseve shareholders' agreement and in its MOI meant that its consent was required for the plant transaction. Africa Wide relied on these rights, which were common-law rights, to escape the stranglehold imposed by the statutory machinery in ss 114 and 115 which, it argued, did not expressly exclude reliance on common-law rights.

For their part the defendants argued that Africa Wide was unable to show that the minority protections it relied on were triggered or, even had they been, that the approval of the scheme did not in any event mean that its claim was barred by s 115. The defendants pointed out that Africa Wide's reliance on common-law rights was contrary to the speed-driven purpose of the statute and, in any event, the court's sanction meant that a scheme's effectiveness was derived from statute and could not be altered or affected by extraneous rights.

Held

The true intention of plant transaction was neither to dispose of the plant in a vacuum nor to change the nature of Maseve's business, but to facilitate the transfer of the shares in accordance with the scheme. Given plant transaction was intended to be an integral and indivisible part of the share transaction, the effect of the drag-along clause in Maseve's MOI was that Africa Wide had to go along with all of it. (See [59] – [71].)

While this finding rendered it unnecessary to deal with the defendants' special plea in terms of s 115, the court would nevertheless do so as it was independently dispositive of the case. The question at issue was whether a scheme of arrangement could be challenged outside of the machinery prescribed by the Act or, put differently, whether Africa Wide's claim, based as it was on the common law, was barred by the Act. (See [79] – [80], [85].)

The general purpose of schemes of arrangement was to overcome minority resistance to fundamental proposals made to save the company. The intention was commercial certainty and the early weeding-out of unjustified opposition. If schemes were rendered susceptible to the vagaries of review litigation, their purpose — to preclude minority interference — would not be achieved. The legislative scheme that emerged from ss 114 and 115 was thus exclusionary of alternative process. (See [82] – [83], [102], [106], [113].)

Africa Wide's attempt to separate the plant sale from the scheme failed to take account of the versatile nature of schemes of arrangement, which could involve a variety of transactions. A scheme might refer to conditions falling outside the scope of the agreement between the company and its shareholders contemplated by the scheme. Africa Wide also failed to take account of the fact that the scheme had been approved by company resolution and was thus enforceable by and against the scheme participants in terms of s 115(9) unless reviewed and set aside. Regardless of how a challenge was cast, if it entailed a direct or indirect attack on the resolution approving the scheme, it could only be brought under s 115. (See [119], [123] – [127].)

Since Africa Wide's attack on the resolution — based as it was on its alleged failure to comply with Maseve's memorandum of incorporation and rules — fell squarely within the type of challenge envisaged by s 115(7)*(b)*, review could only be brought under that provision. Since it was not, the present application was statutorily barred. (See [129] – [131].) Claim dismissed.

VAN WYK VAN HEERDEN ATTORNEYS v GORE AND ANOTHER NNO 2023 (1) SA 80 (SCA)

Insolvency — Unlawful alienations and preferences — Disposition without value — Deposit into attorneys' trust account — Whether attorney benefiting — Onus — Insolvency Act 24 of 1936, s 26(1)*(b).*

In this matter entity U pursued Mr P and corporation B in insolvency. P, negotiating via his attorneys, V (the appellants), arranged for a third party to purchase U's claims. To this end the purchase consideration was deposited into V's trust account, and V transferred it to U. Two other sums were also deposited into V's trust account, and these V appropriated toward the fees P and B owed it. At the time of the making of the deposits, V believed, misled by P, that the depositor was the third party, but it later came to light that it was BR, a company controlled by P.

Six months later BR was wound up, and here BR's liquidators proceeded against V for the setting-aside of the deposits as dispositions without value in the terms of s 26(1)*(b)* of the Insolvency Act 24 of 1936, and for an order that V pay over the moneys to them.

Section 26(1)*(b)* provides that '(e)very 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 claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities'.

The application succeeded and, on the High Court refusing V leave to appeal, it obtained such from the Supreme Court of Appeal. There, the matter centred on the requirement of 'benefit' by the disponee, one of the requisites for obtaining the setting aside of a disposition (see [32] and [35]).

Held in this connection, with regard to the purchase consideration, that the party benefiting was U, with BR receiving no value in return for its disposition, while V was merely a conduit for onward transmission of the funds and did not benefit at all — indeed the disposition was not directed to it (see [34] and [38] – [39]).

However, the situation was different with the other two amounts, which V retained and applied toward the fees that P and B owed them (see [40]). In this instance V did benefit, while BR received no value in return, so causing a full onus to rest on V to show that immediately after the dispositions BR's assets exceeded its liabilities (see [41] – [42]). V was unable to discharge this onus and accordingly these dispositions attracted the setting-aside provided for in s 26(1), with the result that the appeal

against the High Court's finding fell to be dismissed (see [45]). As pointed out above, the same could not be said in respect of the appeal concerning the purchase consideration: it was required to be upheld (see [39] and [48]).

Ordered accordingly (see [48]).

INGQUZA HILL LOCAL MUNICIPALITY AND ANOTHER v MDINGI 2023 (1) SA 70 (SCA)

Local authority — Municipality — Executive committee — Removal of members — Notice of intention to move motion for removal of member — Local Government: Municipal Structures Act 117 of 1998, s 53(1).

Towards the end of a meeting of first appellant municipality, a councillor introduced a motion for the removal of the municipality's mayor, Mr Mdingi (the respondent) (see [18]). The meeting was, however, ultimately closed. The matter was, however, taken up at the next council meeting, where a resolution was taken to remove Mr Mdingi (see [16] and [20]). Mr Mdingi sought and obtained the review of the decision, after which the municipality appealed to the Supreme Court of Appeal (see [23] – [24]).

The issue concerned was notice and specifically s 53(1) of the Local Government: Municipal Structures Act 117 of 1998, which provided:

'A municipal council may, by resolution remove from office one or more or all the members of its executive committee. Prior notice of an intention to move a motion for the removal of members must be given.' (See [5].)

Held, that s 53(1) required notice to be given not only to the member proposed to be removed, but also to all members of the municipal council (see [10]). Here, neither criterion had been fulfilled, and the High Court's review of the removal decision was accordingly sound (see [27] and [29] – [31]).

MF v ROAD ACCIDENT FUND 2023 (1) SA 52 (SCA)

Evidence — Expert evidence — Reliance by expert on scientific literature — Requisites for such reliance.

Appellant, Mr MF, was involved in a motor vehicle accident in which he sustained an injury to the soft tissue of his neck. Then, 10 months later, he developed a disorder called dystonia, which manifests in involuntary muscle contractions. MF sued the Road Accident Fund for the damages flowing from his injury, and in the High Court the issue resolved to whether the soft-tissue injury was the factual cause of the dystonia. From there the issue was further narrowed to whether the dystonia was anatomically related to the site of the injury, a diagnostic criterion for the post-traumatic variant of the disorder.

The High Court's finding in this regard was that such a relationship was not established, and accordingly that factual causation was not proved. It granted leave to appeal to the Supreme Court of Appeal.

The SCA examined the evidence of MF's expert, in particular whether there was a logical basis for his opinion that the anatomical-link criterion had been established (see [32] and [45]). In passing, the SCA affirmed that an expert may (as here) quite acceptably rely on medical literature, provided the expert affirmed the correctness of the statements made in the publication concerned, and provided further that the publication was authored by a person of repute or experience in the field (see [37]).

The SCA ultimately concluded, as the High Court had done, that the anatomical-relationship criterion was not proved, and accordingly that a causal relationship of the injury to the dystonia had not been proven (see [55] and [65] – [66]).

Appeal accordingly dismissed (see [68]).

EKURHULENI METRO MUNICIPALITY v TAKUBIZA TRADING & PROJECTS CC AND OTHERS 2023 (1) SA 44 (SCA)

Government procurement — Procurement process — Irregularities — Validity period — Request by municipality during bid validity period for bidders to agree to extension of period — Affirmative response received after expiry of bid validity period — Effect.

In March 2020 appellant, a municipality, invited offers for electricity meter services, with the closing date for submission of such offers being 8 June 2020, and the validity period of the offers enduring to 9 October 2020. On that date the municipality emailed all the offerors, asking them if they would agree to extend the validity of their offers

until 31 December 2020. The response of the main body of offerors, made on 9 October, was to agree to the extension, with one offeror not agreeing, one not responding at all, and three communicating their agreement to the municipality after 9 October. From there, the municipality evaluated and adjudicated the bids, and on 24 November awarded the contracts concerned to second respondent and third respondent. In January 2021, upon learning it was unsuccessful, first respondent offeror instituted proceedings for review and obtained the setting-aside of the awards. Its position, supported by authority and accepted by the High Court, was that on effluxion of the bid validity period on 9 October, the offers, extant until then, fell away, and the tender process came to an end, albeit without any valid award. (See [2] – [6].)

Here, on appeal to the Supreme Court of Appeal, the municipality sought to distinguish the authority so relied on, asserting that in its case, it had taken steps before the effluxion of the bid validity period to extend the period (by way of its email of the 9th), while in the cases cited such steps had only been taken after the expiry of the offer validity period (see [10]).

Held, that the proposed distinction should be rejected (see [10]). The position here (despatch of the request for extension within the validity period, but receipt of favourable responses outside the period) ought to meet with no different treatment to there (requests made, and responses received outside the validity period): absent a request for extension and favourable response thereto by all of the bidders within the validity period, then the tenders would expire and the tender process would terminate on the conclusion of the validity period (see [11] – [13]).

Appeal accordingly dismissed (see [20]).

DYANTYI v RHODES UNIVERSITY AND OTHERS 2023 (1) SA 32 (SCA)

Administrative law — Procedural fairness — Disciplinary proceedings against student at public higher education institution — Right to particular legal representation under PAJA — Only available in exceptional circumstances, considering factors such as timing, delay, prejudice to any affected party and availability of suitable alternative legal representation — In present case, procedurally unfair to require student to forgo services of counsel steeped in part-heard matter and available within reasonable time — Decisions flowing from disciplinary inquiry reviewed and set aside — Promotion of Administrative Justice Act 3 of 2000, s 3(2)*(b)*(1)(ii).

Education — University — Student — Disciplinary proceedings — Right to particular legal representation under PAJA — Only available in exceptional circumstances, considering factors such as timing, delay, prejudice to any affected party and availability of suitable alternative legal representation — In present case, procedurally unfair to require student to forgo services of counsel steeped in part-heard matter and available within reasonable time — Decisions flowing from disciplinary inquiry reviewed and set aside — Promotion of Administrative Justice Act 3 of 2000, s 3(2)*(b)*(1)(ii).

During 2016 the first-respondent university instituted disciplinary proceedings against Ms Dyantyi and others. The second respondent was the vice-chancellor of the university in his official capacity, and the third respondent (the proctor) chaired the disciplinary inquiry. The disciplinary hearing commenced on 26 June 2017, with Ms Dyantyi, who was entitled to legal representation under the first respondent's disciplinary code, being represented by pro bono counsel. The hearing stretched over several days and was then set down — at the insistence of the proctor — for a continuation on a date on which counsel for Ms Dyantyi were unavailable. In October 2017, shortly before the date that the matter had been set down for, Ms Dyantyi submitted a formal application to the proctor for the postponement of the hearing that had been set down, but this was refused by the proctor without giving any reasons therefor. As a result, Ms Dyantyi took no further part in the proceedings.

The proctor found Ms Dyantyi guilty of the misconduct as charged (see [4]) and ordered her permanent exclusion from the university with effect from 17 November 2017. Ms Dyantyi then launched an unsuccessful High Court application for the review and setting-aside of the proctor's decision and orders. The present case concerned her appeal to the Supreme Court of Appeal, leave to appeal having been granted by the court a quo on the procedural-unfairness review ground.

At issue was, where the affected person was entitled to legal representation as was the case here, whether in the specific circumstances procedural fairness under PAJA required that the affected person obtain or retain the services of a particular legal representative.

Held As a public higher education institution, the first respondent was an organ of state as defined in s 239 of the Constitution and thus in s 1 of PAJA. In subjecting Ms

Dyantyi to a disciplinary inquiry, the university exercised a public power and/or performed a public function in terms of legislation, within the meaning of the definition of 'administrative action' in s 1 of PAJA. The decisions clearly affected Ms Dyantyi's rights adversely by direct external legal effect. It followed that PAJA was applicable and that Ms Dyantyi had the right to procedural fairness encapsulated in s 3 of PAJA. (See [19] – [20].)

At common law the opportunity of an individual to present evidence supporting their case and to controvert evidence against them was 'the essence of a fair hearing and the courts have always insisted upon it'. Today this formed part of the reasonable opportunity to make representations under s 3(2)*(b)*(1)(ii) of PAJA. And, in accordance with the position at common law, there was no general right to legal representation under PAJA. Unless a relevant instrument extended the right to legal representation, it was limited by s 3(3)*(a)* to serious or complex cases. Only in exceptional circumstances — weighing considerations of timing and delay, prejudice to any affected party, availability of suitable alternative legal representation, together with all other relevant factors — would procedural fairness in terms of PAJA require that the affected person obtain or retain the services of a particular legal representative. (See [21] – [23].)

Ms Dyantyi's was such an exceptional case. The legal complexities and potential seriousness of the consequences of an adverse finding entitled Ms Dyantyi to adequate legal representation for the duration of the inquiry. The rulings deprived Ms Dyantyi of the services of two counsel steeped in the matter. Moreover, they did so at a crucial stage of the proceedings, when Ms Dyantyi was about to testify and to otherwise present her case. This amounted to prejudice that could only have been justified by powerful considerations, especially so because all of this could have been avoided by the simple expedient of setting down the matter for a later date. In the particular circumstances of this case, a proper balancing of the relevant considerations would have dictated that the inquiry had to be postponed to the dates on which counsel for Ms Dyantyi were available. The failure to do so violated Ms Dyantyi's right to procedural fairness under PAJA. It followed that the appeal would be upheld. The matter would be remitted to the university for reconsideration in its discretion, on the condition that any continuation of the disciplinary inquiry against Ms Dyantyi should take place before another proctor. (See [24] – [25] and [32] – [33].)

MINISTER OF WATER AND SANITATION v SEMBCORP SIZA WATER (PTY) LTD AND ANOTHER 2023 (1) SA 1 (CC)

Administrative law — Administrative action — Review — Rationality — Procedural rationality — Not about rationality of decision or procedural fairness but existence of rational connection between process followed and purpose sought to be achieved — If connection exists, then rationality challenge must fail, regardless of cogency of reasons furnished for decision — Promotion of Administrative Justice Act 3 of 2000, s 6.

Water — Supply — Tariff — Bulk supplier — Water board deciding to increase cost of water to private entity to greater extent than municipality in situation where private entity by agreement with municipality fulfilling certain of municipality's statutory water-supply obligations — Whether decision meeting or falling short of standard of rationality — Water Services Act 108 of 1997.

The entities involved in this matter were a water board (Umgeni), a municipality (Ilembe), a private provider of water and sanitation (Siza), and the national Minister of Water and Sanitation. Pursuant to an agreement, Siza fulfilled certain of Ilembe's statutory obligations to supply water to consumers in Ilembe's jurisdiction. Under a separate agreement, Umgeni supplied Siza with water. Umgeni also supplied water to other municipalities in the region. Historically, Umgeni charged the municipalities and Siza the same tariff. However, this changed when Umgeni increased Siza's tariff by far more than that of the municipalities, an increase for which the Minister in turn gave approval. Siza then approached the High Court, challenging both Umgeni's decision to increase its tariff and the Minister's decision on it.

The High Court found Umgeni's decisions irrational on the basis that the differentiation in the increases for Siza and Ilembe ignored the fact that Siza was Ilembe's alter ego insofar as it fulfilled Ilembe's statutory and constitutional obligations. The differentiation would, moreover, negatively impact consumers serviced by Siza, while consumers also in Ilembe's municipal jurisdiction, but serviced by Ilembe, would not suffer such negative consequences. The High Court found, however, that the allegation of profit-making by Siza on a uniform tariff was unsupported by evidence. The High Court accordingly set aside Umgeni's decision to increase Siza's tariff, as well as the Minister's approval of it.

Umgeni and the Minister appealed the High Court's judgment to the Supreme Court of Appeal, which held (as had the High Court) that, since Umgeni's decision met the criteria for administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the differentiation had to meet PAJA's rationality standard, which demanded that, to be lawful, a differentiation had to have a rational justification. To test for the rationality, the SCA investigated the cogency of the reasons given for the impugned decisions. It found that rational justification was lacking because: (i) the pricing policy that bound Umgeni did not contemplate tariff differentiation; (ii) Umgeni had, despite its claims to the contrary, failed to demonstrate an actual intention to eliminate cross-subsidisation; (iii) there was no reason to treat Siza differently from other municipalities that operated at a loss in servicing poor customers; (iv) Umgeni had not demonstrated that the differentiation benefited its financial position or that it was statutorily supported; and (v) it was irrational to charge Siza more than Ilembe where Siza performed the same obligations.

Umgeni and the Minister applied to the Constitutional Court for leave to appeal against the SCA's judgment.

The CC granted leave on the grounds that (i) a review of an exercise of a public power was a constitutional matter and therefore with in its jurisdiction; and (ii) a possible error in the SCA's approach suggested a prospect of success on appeal (see [24], [26]).

The CC held that testing the satisfactoriness of the reasons for the decision, as the SCA had done, was not the proper application of the rationality standard (see [55] – [58], [61]). The proper procedure was to test whether the decision was rationally connected to the aim sought to be achieved (see [44]).

The CC pointed out that the method employed (the differentiation decision) was rationally connected to, and indeed achieved, the aims sought (cost savings for Umgeni and elimination of Siza's cross-subsidy) (see [69] – [70]). Umgeni's decision had therefore been wrongly set aside (see [73]). The same could not be said of the Minister's decision to approve the tariff decision, which was ultra vires because she was not vested with a power of approval by any statutory instrument (see [80] – [84]). The CC accordingly upheld Umgeni's appeal but not that of the Minister, which was dismissed. The CC further ordered that the orders of the High Court and SCA, insofar as they referred to Umgeni, should be set aside, and the High Court's order

substituted, insofar as it dealt with Umgeni, with an order dismissing Siza's application to review Umgeni's tariff determination. (See [92].)

In a dissenting judgment Madlanga J (with Theron J) indicated that he would have dismissed both Umgeni and the Minister's applications for leave to appeal (see [111]). In the Minister's case, for the reasons given by the majority, and in the case of Umgeni, because it had made no decision on a tariff increase, but merely a recommendation (see [94] – [95] and [103]). Thus, absent a tariff decision on the part of Umgeni or the Minister (her purported approval being null owing to the lack of power on her part to give an approval), there was no decision Umgeni could defend and consequently no prospect of success on appeal (see [96] and [109]).

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Coral Lagoon Investments 194 (Pty) Ltd and another v Capitec Bank Holdings Limited [2023] 1 All SA 1 (SCA)

Corporate and Commercial – Reliance on pactum de non petendo as defence to claim for damages – Enforcement of contractual undertaking not to institute legal proceedings against contracting party – On application of established rules of interpretation, undertaking not to sue not against public policy and ruled to be enforceable.

In 2006, the appellants and the respondent ("Capitec") concluded a subscription of shares and shareholders agreement (the "subscription agreement") in terms of which Capitec allotted and issued, and Coral subscribed for, ten million ordinary shares in Capitec at R30 per share for a total subscription price of R300 million. An important element of the subscription agreement were certain selling restrictions, which later became a source of discontent by the second appellant ("Ash Brook") and its shareholders. In 2019, when the first appellant ("Coral") sought to sell some of its shares, Capitec refused to grant consent. Appellants instituted action against Capitec, claiming that Capitec's prevention of the sale of the shares by Coral led to a loss of R 1,225 billion. Capitec asserted that the action should be withdrawn because the appellants had agreed in a consent agreement between the parties, not to institute legal proceedings against Capitec. Such a clause is known as a *pactum de non petendo*.

Enforcing the *pactum de non petendo*, the High Court directed the appellants to withdraw their action for damages against Capitec. The two issues raised by the appellants in their appeal were the interpretation of the consent agreement and, whether the *pactum*, which was a permanent one, was contrary to public policy.

Held – In interpreting the relevant clauses in the agreement that interpretation is, generally speaking, an objective process of attributing meaning to the words used in a document, read in the context of the document as a whole and having regard to the apparent purpose of the words. It is a unitary exercise which must be approached

holistically – simultaneously considering the text, context and purpose. In addition, extrinsic evidence may be admitted as relevant to context and purpose.

Explaining the nature and scope of warranties, the Court found that the relevant clause was not a warranty in the traditional sense but a contractual undertaking. The institution of the action by the appellants clearly breached the undertaking not to sue, and Capitec was entitled to specific performance of the agreement.

The appellants also argued that a constitutional right cannot be waived, and that the *pactum* is against public policy. However, it was found that the High Court's finding that waiver did not arise was correct. The *pactum* was also held to be consistent with public policy.

The appeal was dismissed.

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The appeal was dismissed.

National Commissioner of Correctional Services and another v Democratic Alliance and others (South African Institute of Race Relations as *amicus curiae*) [2023] 1 All SA 39 (SCA)

This is the appeal from the Gauteng Division of the High Court, Pretoria, against the finding of Matojane J (sitting as a court of first instance) in the case of *Democratic Alliance v National Commissioner of Correctional Services and others and related matters* [2022] 2 All SA 134 (GP) – Ed.

Constitutional and Administrative Law – Correctional Services – Release on medical parole – Section 75(7) of the Correctional Services Act 111 of 1998 empowers National Commissioner of Correctional Services to release on medical parole, an inmate serving a sentence of incarceration for 24 months or less – Substantive requirements for medical parole in section 79(1) include terminal disease or physical incapacity – Commissioner's discretion to release inmate on medical parole is not triggered unless Medical Parole Advisory Board makes positive recommendation on appropriateness of granting such parole, which is based on a determination in terms of section 79(1)(a) of inmate's terminal illness or physical condition – In absence of positive recommendation by Board, Commissioner's decision unlawful and unconstitutional, and liable to be set aside.

The second appellant ("Mr Zuma"), the former President of South Africa, was sentenced to 15 months' imprisonment by the Constitutional Court for failing to obey that court's order to appear before a Judicial Commission of Inquiry. Two months after Mr Zuma started serving his sentence, the first appellant, the National Commissioner of Correctional Services (the "Commissioner"), released him on medical parole. The respondents each launched separate applications in the High Court, challenging the Commissioner's decision on various grounds in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000. Their applications were consolidated and heard together. The Court reviewed the Commissioner's decision, set it aside, and substituted it with one rejecting Mr Zuma's application for medical parole. It consequently directed that Mr Zuma be returned to the custody of the Department of Correctional Services (the "Department") to serve out the remainder of his sentence of imprisonment. The court also ordered that the time Mr Zuma was out of jail on medical parole should not be considered for the fulfilment of the sentence of 15 months imposed by the Constitutional Court. Finally, a declaratory order was issued, to the effect that in terms of section 79(1)(a) of the Correctional Services Act 111 of 1998 (the "Act"), read with regulations 29A and 29B promulgated in terms thereof, the statutory body to recommend whether medical parole should be granted or not is the Medical Parole Advisory Board (the "Board"). With the leave of the High Court, the Commissioner and Mr Zuma appealed against the whole order.

Held – A person convicted and sentenced for contempt of court ordinarily falls to be dealt with in terms of the laws relating to prisons. That includes the privilege to be released on parole if he so qualifies.

Outlining the medical parole legislative scheme, the Court referred to section 75 of the Act. Section 75(7) empowers the Commissioner to release on medical parole, an inmate serving a sentence of incarceration for 24 months or less. That provision must be read with section 79(1), which sets out three substantive requirements for medical parole, namely terminal disease or physical incapacity; low risk of re-offending; and appropriate arrangements post-release. The second and third requirements involve typical correctional services considerations and, therefore, fall within the Commissioner's remit. The first requirement is a medical one, and the Commissioner must be guided by the Board. The requirements set out in section 79(1) constitute jurisdictional facts that must be met for medical parole to be granted. If any of them is not present, an offender does not qualify for parole. For a sensible result, sections 75(7)(a) and 79 must be read together.

The Commissioner's discretion to release an inmate on medical parole is not triggered unless the Board makes a positive recommendation on the appropriateness of granting such parole, which is based on a determination in terms of section 79(1)(a) of the inmate's terminal illness or physical condition. Thus, it is only once the Board makes a positive recommendation that the Commissioner may enquire whether the inmate meets the requirements of section 79(1)(b) and (c). Once the Board has properly applied its mind and concluded that an inmate does not suffer from a terminal illness or physical incapacity so as to severely limit daily activity or inmate self-care, the Commissioner is not entitled to grant medical parole. In the present case, there was no positive recommendation by the Board. The Commissioner's decision was therefore unlawful and unconstitutional, and was set aside.

Nesongozwi v Commissioner for the South African Revenue Service
[2023] 1 All SA 59 (SCA)

Tax – Income Tax – Tax assessment – Imposition of donations tax and capital gains tax upon finding that shares were disposed by taxpayer at a price below their market value – Objection and appeal – Right of appeal is defined in the Tax Administration Act 28 of 2011 – Where issue of method of valuation of shares had not been raised as an objection to tax assessment or in grounds of appeal, it could not form the subject of further appeal.

The taxpayer was initially the sole director of a company ("Umthombo") that held coal prospecting and mining rights. Umthombo's sole shareholder was NMC. The taxpayer was, until August 2008, also the sole shareholder of NMC. In August 2008, the taxpayer sold 50% of NMC's shares in Umthombo for R150 million. In October 2009, the taxpayer sold his remaining shares in NMC for the sum of R547 275. In October 2014, the respondent ("SARS") issued an assessment which took into account the taxpayer's disposal of his shares in NMC to the trust. SARS determined that the taxpayer had disposed of the NMC shares at a price below their market value and imposed a donations tax and capital gains tax liability on the taxpayer of R48 635 677,49. The taxpayer's objection was disallowed and he appealed to the tax court which dismissed the appeal but made certain amendments to the assessment. The taxpayer appealed to the Full Court against the tax court decision, raising two grounds of appeal. A day before the appeal was argued, he gave notice of his intention to apply for an amendment of the notice of appeal to introduce two further grounds. The Full Court allowed an amendment in respect of only one of the additional grounds, but

ultimately dismissed the appeal. The taxpayer then appealed to the Supreme Court of Appeal.

Held – The points which the taxpayer appeared to want to revisit raised the question of whether those points were properly before the court as grounds of appeal. The reason was that the tax court is a creature of statute with the result that the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions are defined in the Tax Administration Act 28 of 2011.

Explaining the system of assessment, the court outlines the process of objection to an assessment, and appeal. When a taxpayer objects, he must, in terms of section 104(3) of the Act, lodge an objection in the manner, under the terms, and within the period prescribed in the rules made in terms of section 103 by the Minister of Finance. Rule 7 sets out how a taxpayer objects to an assessment. The objection must be made on the prescribed form, and it must specify the grounds of the objection in detail, including the part or amount objected to and the grounds of assessment that are disputed. Similar requirements apply to an appeal against an assessment. In terms of rule 10(3), a taxpayer may not appeal on a ground that constitutes a new objection not raised under rule 7. If they do so, however, SARS may, in terms of rule 10(4), require, production of the substantiating documents necessary to decide on the further progress of the appeal, within 15 days after delivery of the notice of appeal.

Until the filing of the taxpayer's heads of argument in the appeal to the Full Court, there was never any suggestion that he disputed the method of valuation of the shares. It was not a ground of objection and neither was it a ground of appeal before the tax court. The issue could therefore not be introduced on further appeal. Moreover, the reasoning of the tax court and of the Full Court was firmly grounded in the credible evidence of the expert witnesses called by SARS and could not be faulted.

The appeal was thus dismissed.

Eastern Cape Provincial Council of the South African Legal Practice Council v Mfundisi [2023] 1 All SA 90 (ECG)

Legal Practice – Attorney – Misconduct – Application for striking from roll – Whether Legal Practice Council is free to depart from a sanction recommended by the disciplinary committee – While section 40(8) of Legal Practice Act 28 of 2014 provides that the council must give effect to the advice and decision of a disciplinary committee, it is not prevented from seeking relief outside of the sanction deemed appropriate by the disciplinary committee.

The applicant was a provincial Legal Practice Council. As a result of conduct by the respondent, which culminated in criminal proceedings against her, the applicant sought the striking of the respondent's name from the roll of attorneys – alternatively, an order interdicting the respondent from practising as an attorney.

Apart from maintaining her innocence and advancing a version which had already been rejected by the Commercial Crimes Court, the respondent contended that the relief sought by the applicant was incompetent by virtue of section 40(3)(a)(i) of the Legal Practice Act 28 of 2014.

Held – Section 40(3)(a)(i) of the Act caters for situations in which the disciplinary committee finds a legal practitioner to be guilty of misconduct and imposes a sentence

that the legal practitioner is to pay compensation, with or without interest to the complainant. In such circumstances, the order is subject to confirmation by an order of any court having jurisdiction, on application by the applicant. In the present matter, the sanction imposed by the disciplinary committee falls within the ambit of section 40(3)(a)(iv) and was properly before court.

The respondent also argued that the applicant was not free to depart from a sanction recommended by the disciplinary committee. Section 40 of the Act deals with the procedural aspects which follow disciplinary proceedings pertaining to legal practitioners. It includes the duties and powers of the disciplinary committee, including those pertaining to sanction, following a finding of misconduct, and the concomitant rights of the practitioner insofar as mitigation of sentence is concerned. Section 40(8), on which respondent relied, provides that "The Council must give effect to the advice and decision of a disciplinary committee". That did not mean that the section precludes the Council from seeking relief outside of the sanction deemed appropriate by the disciplinary committee. It is the Council that is the statutory, regulatory authority, and which acts as the *custos morum* of the profession and accordingly it is the Council that has the power to institute legal proceedings.

The main enquiry before the court was whether or not the respondent was a fit and proper person to practice as an attorney of the court. The three-stage enquiry in that regard was set out and applied. The evidence established that the conduct complained of had been committed by the respondent, that such conduct displayed a complete lack of integrity and dishonesty and was contemptuous of the applicant. Finding that the respondent was not a fit and proper person to practice as an attorney, the Court struck her name from the roll.

Khoin and others v Jenkins and others and a related matter [2023] 1 All SA 110 (WCC)

Civil Procedure – Rescission of order – Lack of authority of person bringing application for interdict – Where court a quo would not have entertained the application had it been aware of applicant's lack of authority, order stood to be rescinded.

The site of the River Club development in the Western Cape has a rich heritage, having been occupied by indigenous people and having historical significance. The granting of authorisation of the development was made against the backdrop of the site's degradation over the years, and the prospect of significant improvement and rehabilitation. An application by the first respondent ("Mr Jenkins") for an interdict preventing the development from proceeding pending finalisation of review proceedings succeeded. That order was the subject of an appeal and an application for rescission.

The first applicant, a group of individuals from a First Nations tribe, sought rescission of the order on the basis that it was induced by fraud in that the first applicant had not authorised the litigation nor was it opposed to the River Club development. The applicants alleged that Mr Jenkins had committed the fraud in concert with some of its members. The appeal was directed at the granting of the interdict.

Held – The submissions made by the applicants and evidence adduced led the Court to accept that the first applicant's 2018 constitution was its only constitution and that actions contrary to it and not ratified by the relevant structure permitted in terms of that

constitution were invalid and not binding on the first applicant. In his attempt to stop the development at all costs, Mr Jenkins fabricated a constitution to suit his objective and betrayed the trust others had in him. He was not authorised to apply for the interdict as he had, and misrepresented the views of some indigenous leaders without consulting with them. Had the court *a quo* been aware of his lack of authority, it would not have entertained the application. The order was consequently rescinded.

Turning to the appeal by the local authorities against the granting of the interdict, the Court noted that the second respondent in the appeal was a voluntary group of like-minded First Nations persons who acted together in furtherance of their shared cultural objectives. The group could only be represented by a legal practitioner of their choice. Mr Jenkins was not a legal practitioner and was therefore unable to represent any other natural person or group of persons.

Referring to the well-established jurisdictional requirements for interim relief, the Court agreed that such relief was not appropriate in the circumstances of this case, where a right under threat of irreparable harm was not established. The test for interference on appeal was met, and the Court set aside the interim interdict.

Lifa v Minister of Police and others [2023] 1 All SA 132 (GJ)

Personal Injury/Delict – Unlawful arrest and detention – Claim for damages – Lawfulness of arrest without warrant – Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 – For arrest without warrant to be lawful and for jurisdictional prerequisites for subsection 40(1)(b) to be present; arrestor must be aware that he has a discretion to arrest; and discretion must be exercised with reference to the facts – Onus rests upon the arrestor to prove that the arrest was objectively lawful.

The plaintiff ("Mr Lifa") claimed delictual damages from the defendants based on unlawful arrest and detention, and malicious prosecution. As a result of the withdrawal of part of the claim, the only issues remaining for determination were whether or not Mr Lifa's arrest by a member of the South African Police Services and the subsequent detention was unlawful and, if so, the determination of damages as a result thereof. The defendants were the Minister of Police, the Minister of Justice and Correctional Services and the National Prosecuting Authority.

Held – The claim relating to malicious prosecution was withdrawn and the only issues remaining for determination were whether Mr Lifa's arrest by a member of the police services and the subsequent detention was unlawful and, if so, the determination of damages. Only the Minister of Police remained potentially liable for those damages.

Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 deals with arrest without a warrant. A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody. The law pertaining to arrest without warrant has been described as requiring that the jurisdictional prerequisites for subsection 40(1)(b) be present; awareness by the arrestor that he has a discretion to arrest; and exercise of such discretion with reference to the facts. There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court. The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable

suspicion before the peace officer arrests. The discretion to arrest must be properly exercised. In objectively determining when an arrestor has acted arbitrarily the court should consider whether or not he applied his mind to the matter or exercised his discretion at all; and/or disregarded the express provisions of the statute. The onus rests upon the arrestor to prove that the arrest was objectively lawful. That onus was not discharged in this case.

The Court identified the period for which damages should be awarded, and awarded Mr Lifa R600 000 in damages.

Minister of Police v Dunjana and others [2023] 1 All SA 180 (ECG)

Personal Injury/Delict – Unlawful arrest and detention – Assault by police – Arrest without warrant – Claim for damages – Criminal Procedure Act 51 of 1977, section 40(1)(b) providing that a peace officer may arrest any person without a warrant of arrest whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody – Test for whether a suspicion is reasonably entertained within meaning of section 40(1)(b) is objective, with enquiry being whether a reasonable person in the position of arresting officer, and possessed of the same information, would have considered that there were grounds for suspecting that arrestee committed Schedule 1 offence in question.

The Minister of Police appealed against the High Court order in an action arising from what the Court found was the unlawful arrest, detention and assault of the respondents by police officers employed by the South African Police Services. The arrest of the respondents was without a warrant. The court ordered the Minister to pay the sum of R500 000 as compensation to each of the seven respondents.

Held – The arrest of a person without a warrant is authorised by law in section 40 of the Criminal Procedure Act 51 of 1977, which has passed constitutional muster. The respondents' arrest was effected in the circumstances contemplated in section 40(1)(b), in terms of which a peace officer may arrest any person without a warrant of arrest "whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody." The focus of the exercise of the power to arrest is on the discretionary nature of that power. The section provides that a peace officer "may", without a warrant, arrest any person. The arresting officer *in casu* was a peace officer as defined in the Act, who formed a suspicion that the respondents had committed the offence of robbery, which is an offence referred to in Schedule 1 of the Act. The first issue to be decided in the appeal was accordingly confined to the question of whether the suspicion formed by the arresting officer, that the respondents had committed the offence in question, was a reasonable one. The test for whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective. The enquiry is whether a reasonable person in the position of the arresting officer, and possessed of the same information, would have considered that there were grounds for suspecting that the arrestee committed the Schedule 1 offence in question. The arresting officer did not satisfy the test in this case.

The allegations of assault could not be supported in respect of two of the respondents. Accordingly, the finding of the trial court in relation to the second and fourth respondent's claim for compensation for assault founded on the *actio iniuriarum*, was set aside.

Having regard to the facts, the Court found the quantum of compensation awarded by the trial court to be too high. Setting aside the awards, the Court ordered payment of R70 000 to each of the second and fourth respondents and R120 000 to each of the remaining respondents.

Molibeli v Speaker of the Municipal Council: Fezile Dabi District Municipality and others [2023] 1 All SA 199 (FB)

Local Government – Municipal manager – Lawfulness of suspension – All disciplinary steps, including precautionary suspension, instituted by the municipality against the applicant had to comply with Local Government: Disciplinary Regulations for Senior Managers – Failure to include issue of suspension and matters related thereto in agenda for municipal council meeting rendering resolutions taken in that regard at the meeting unlawful – Suspension of municipal manager tainted by irregularity and set aside.

The applicant was the municipal manager of the second respondent municipality. In August 2022, the municipal council resolved that allegations of misconduct against the applicant were serious and merited investigation, and that the applicant was to be placed on precautionary suspension

In an urgent application, she sought a declaration that the municipal council's resolution to suspend her was unlawful and stood to be set aside due to the council's failure to have properly complied with the prescripts of regulations 5 and 6 of the Local Government: Disciplinary Regulations for Senior Managers, 2010, published in *Government Gazette* number 34213 of 21 April 2011, under Government Notice number 344 (the "Disciplinary Regulations").

Held – Rule 6(12)(b) of the Uniform Rules of Court requires an applicant in an urgent application to set forth explicitly the circumstances which render the matter urgent and the reasons why the applicant would not be afforded substantial redress at a hearing in due course. The Court was satisfied that the applicant had made out a proper case for urgency in this matter.

It was common cause that all disciplinary steps, including precautionary suspension, instituted by the municipality against the applicant had to comply with the Disciplinary Regulations. The applicant correctly submitted that consideration and discussion of the disciplinary process against her and consequently the allegations of misconduct and her precautionary suspension were not included in the agenda for the relevant meeting of the municipal council. Consequently, the council was not entitled to have dealt with the new disciplinary process against the applicant during the meeting. The resolutions taken at the meeting were thus unlawful. On that basis alone, the application had to succeed.

Due to the importance of the matter to both parties and the fact that the municipality was a public entity, the court decided to deal with the further issues regarding the merits of the application.

Regulation 5 of the Disciplinary Regulations required the allegations of misconduct to have been tabled by the Executive Mayor before the municipal council not later than

seven days after receipt thereof, failing which the Executive Mayor could request convening of a special council meeting within seven days to consider the relevant report. What was required to serve before the council was more than mere bald allegations like in the present instance. The municipality consequently failed to comply with the provisions of regulations 5(2) and 5(3), and its resolution was thus unlawful. In the absence of a valid decision in terms of regulation 5(3), the municipal council could not have resolved to place the applicant on precautionary suspension and to call upon her to make representations as to why she should not be suspended. The Court also took issue with the municipality's alleged reasons for the resolution to have placed the applicant on precautionary suspension.

The suspension of the applicant was reviewed and set aside

.

Phala v Minister of Safety and Security and another
[2023] 1 All SA 227 (FB)

Civil Procedure – Action against Organ of State – Claim for damages arising from alleged unlawful arrest, detention and malicious prosecution – Special plea of extinctive prescription and non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State 40 of 2002 – Onus of proof of extinctive prescription resting on defendant – Unlawful arrest, detention and prosecution is not to be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution – Situation is different in claim for malicious prosecution, where prescription starts running only when criminal proceedings are finalised in plaintiff's favour.

The plaintiff sued the defendants for damages arising from his alleged unlawful arrest, subsequent imprisonment, and malicious prosecution. The defendants raised three special pleas. The first was that the plaintiff had failed to give proper notice to the first defendant within 6 months from the date on which the debt which the plaintiff sought to recover fell due, as envisaged in terms of section 3(1) read with 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. The second special plea was that plaintiff's claim had been extinguished by prescription in terms of the Prescription Act 68 of 1969. A final special plea related to non-joinder of the National Prosecuting Authority.

Held – The doctrine of precedent requires courts to follow the decisions of coordinate and higher courts, unless they are clearly wrong. The court questioned case authority on which plaintiff relied, which was alleged to establish that in the event of any unlawful arrest and detention, the proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until acquittal. An

analysis of case law confirmed that unlawful arrest, subsequent detention and prosecution is not to be treated as one continuous transaction which is not completed until the outcome of the criminal prosecution. The notion that a claim for detention arises only on release is wrong. The situation is different in a claim for malicious prosecution, where prescription starts running only when the criminal proceedings are finalised in the plaintiff's favour.

The onus of justifying interference with the liberty of the plaintiff in the case of unlawful arrest and detention rests on the defendant. Once the plaintiff establishes that interference has occurred, the deprivation is *prima facie* unlawful. The debts forming the subject matter of the plaintiff's claims constituted "a debt" as envisaged in the Institution of Legal Proceedings against Certain Organs of State Act. The first defendant (the "Minister") focused on whether the plaintiff complied with section 3(2)(a) of the Act by serving the notice of intention to institute proceedings for recovery of the debt within six months from the date on which the debt became due. The court referred to case law establishing that the prescription period for delictual debts against State organs has now been brought in line with the 3-year prescription period that pertains to delictual debts in general. A court is also empowered to condone non-compliance with the notice provision if it is satisfied that good cause exists for the failure to give timeous notice, and the Organ of State was not unreasonably prejudiced.

Section 12 of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as the debt is due. Section 12(3) states that, "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." The commencement of prescription is not dependent on the plaintiff having knowledge of the legal consequences of the facts. The onus to prove extinctive prescription rested on the Minister in this case. The Court was satisfied that the onus had been discharged in respect of the unlawful arrest claim, and part of the unlawful detention claim. The special plea regarding non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State was also upheld in respect of the claims of unlawful arrest and detention.

Public Protector of South Africa v Speaker of the National Assembly and others [2023] 1 All SA 256 (WCC)

Constitutional and Administrative Law – Effect of setting aside of suspension of Public Protector by President – Constitutional Court makes final decision on whether conduct of President is unconstitutional, and no order to that effect by any other court has any force until the Constitutional Court has pronounced on issue – Declaration of constitutional invalidity of the President's suspension of the Public Protector had to be confirmed by the Constitutional Court.

The Public Protector brought an extremely urgent application in terms of section 18(1) and 18(3) of the Superior Courts Act 10 of 2013 to render a court order delivered on 9 September 2022 operational and executable, pending any application for leave to appeal. Having been suspended by the President of the country, she now sought an order in terms of section 172(1) of the Constitution declaring the President's decision irrational, unconstitutional, and invalid. An order was issued declaring the

decision invalid and setting aside the suspension. The applicant was of the view that the judgment uplifted her suspension and reinstated her immediately, allowing her to resume her duties as Public Protector. However, one of the political parties (the "DA") opposing the application was of the view that the judgment was of no force and effect until confirmed by the Constitutional Court. That led to the Public Protector bringing the present application.

Held – The matter involved the head of a Chapter 9 institution, the head of state and the national executive of the government. There was a clear public interest element that demanded the finalisation of the matter without delay. It therefore warranted urgent adjudication.

An application to intervene, brought by the Deputy Public Protector, was dismissed. In such an application, the applicant must demonstrate a direct and substantial interest in the subject matter of the proceedings and must make such allegations that will show that he at least has a *prima facie* case that would entitle him to relief. Those requirements were not met and intervention was refused.

In terms of the hierarchy of courts, the Constitutional Court makes the final decision on whether the conduct of the President is unconstitutional. No order to that effect by any other court has any force until the Constitutional Court has pronounced on the issue. Section 172(2)(c) of the Constitution requires national legislation to provide for the referral of an order of constitutional invalidity to the Constitutional Court. The Superior Courts Act and the Constitutional Court Rules fulfil that requirement. Section 187(5) provides that the Constitutional Court makes the final decision on whether conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court, or a court of similar status,

before that order has any force. Section 172 states that when deciding a constitutional matter within its power, the above-mentioned courts may make an order concerning the constitutional validity of any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

In terms of section 18 of the Superior Courts Act, unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. The Public Protector sought an order declaring the judgment to be operational and executable in terms of section 18(1) and 18(3) of the Act.

The matter required an interpretation of the order declaring the President's suspension of the Public Protector invalid. The question was whether the President's decision to suspend the Public Protector could properly be characterised as "conduct of the President" under sections 172(2)(a) and 167(5) of the Constitution. The Public Protector sought to draw a distinction between the decision and conduct and submitted that it is only conduct and not decisions that fall to be referred to the Constitutional Court for confirmation. That submission lacked any merit. The court further confirmed that the declaration of constitutional invalidity of the President's suspension of the Public Protector had to be confirmed by the Constitutional Court. Section 172(2)(b) of the Constitution, dealing with temporary relief and section 18 of the Superior Courts Act were not applicable to the present case.

The application was dismissed.

The Haze Club (Pty) Ltd and others v Minister of Police and others [2023] 1 All SA 280 (WCC)

Criminal Law and Procedure – Drug offences – Cultivation of cannabis – An adult may lawfully cultivate and possess cannabis for his or her personal consumption in a private space – Lawfulness of model where buyer does not purchase cannabis but the expertise and tools to cultivate cannabis and rents out the space for such cultivation – Right to privacy – Reasonable expectation of privacy test requires that there be a subjective expectation of privacy, and the expectation must be recognised as reasonable by society – Model not lawful where not resulting in members cultivating cannabis for their own consumption in a private place.

The second and third applicants were arrested by the police at the first applicant's premises, with 344 cannabis plants and approximately 2,5 kg of dried cannabis valued at approximately R1 million being seized. The applicants sought a declaratory order confirming the lawfulness of a "grow club" model, a socialised system of cannabis cultivation in terms of which the applicants rented out private space to members for such members to grow their own cannabis for personal consumption, while employing the applicants as professional horticulturalists to attend to the cultivation of such plants. Alternatively, a declaration was sought that sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, and section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 were unconstitutional. The applicants stated that growing cannabis was a specialised process requiring specialised knowledge, research, tools, ingredients and start-up funds. It was also alleged that growing cannabis is a costly enterprise. By joining a grow club, members could enjoy the benefits of cannabis without having the necessary skill, equipment or cash flow required to each one's own cannabis.

Following a Constitutional Court judgment ("*Prince 3*") in 2018, an adult could lawfully cultivate and possess cannabis for his or her personal consumption in a private space. According to the applicants, the grow club model was entirely consistent with the *Prince 3* judgment in that the space sub-leased to members constituted the member's private space and property and there was no communality or use of common space. With a grow club model, the buyer does not purchase cannabis but the expertise and tools to cultivate the cannabis and rents out the space for such cultivation. A distinction was sought to be made between the model and the definition of possession of and dealing in cannabis in the Drugs and Drug Trafficking Act. The respondents on the other hand, argued that the applicants' model did not fall within the permissible use of cannabis in terms of *Prince 3*.

Held – The court in the *Prince 3* case found that the right to privacy in section 14 of the Constitution was infringed by the impugned statutory provisions to the extent that they prohibited the cultivation of cannabis by an adult in a private place for his or her personal consumption in private. As the right to privacy was the basis for the High Court's decision, the Constitutional Court engaged with the scope and content of that right during the confirmation proceedings. It reiterated that the reasonable expectation of privacy test consists of two inquiries. Firstly, there must be a subjective expectation of privacy, and secondly the expectation must be recognised as reasonable by society. When the expectation to privacy relates to the inner sanctum such as that pertaining

to an individual's home environment or family life, society is more likely to accept the reasonableness thereof than when the expectation to privacy relates to a commercial or transactional setting. The Notice of Motion described the grow model as a socialised system of cannabis cultivation. There was an evident difference between the nature and scope of the private space exercised within the grow club model and the nature and scope of the private space referenced in *Prince 3*, with the grow club model moving away from an individual's inner sanctum to a more communal sphere. The Court disagreed that the applicants were no different from a home gardener cultivating cannabis. As the grow club model did not result in members cultivating cannabis for their own consumption in a private place, it was not shown to be consistent with *Prince 3*. Alternative arguments raised by the applicants were also not sustainable, and the application was dismissed.

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