LEGAL NOTES VOL 2/2023

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SOUTH AFRICAN LAW REPORTS FEBRUARY 2023

GROBLER v PHILLIPS AND OTHERS 2023 (1) SA 321 (CC)

Land — Unlawful occupation — Eviction — Whether just and equitable to order — Factors permitted to inform decision — Preference of unlawful occupier to remain in specific dwelling — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(7) and 6(2).

Applicant bought a property on which lived first respondent, an 84-year-old woman, and second respondent, her disabled son. The applicant thereafter met with first respondent and asked her to vacate the property. He offered to pay her relocation costs and provide her with alternative accommodation (an offer that was repeated many times during the legal proceedings that were to follow). When first respondent refused to vacate despite the offer, applicant approached a magistrates' court seeking an eviction order. The magistrates' court ruled that first respondent was an unlawful occupier and ordered her to leave the property.

First respondent then approached the full court of the Western Cape Division, which held that first respondent was *not* an unlawful occupier and that it would not be just and equitable to evict her. Applicant appealed to the Supreme Court of Appeal (SCA), which concluded, contra the full court, that first respondent *was* an unlawful occupier

[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!**

but that the full court was correct in its assessment that it would not be just and equitable to evict her. Applicant then applied to the Constitutional Court for leave to appeal against the Supreme Court of Appeal's order.

The Constitutional Court granted leave, upheld the appeal, and ordered that first respondent vacate the property as directed in its order (see [49]). In arriving at its finding, the Constitutional Court considered the following:

- Among the factors that the SCA had considered in deciding that it would not be just and equitable to evict first respondent was her wish or personal preference to remain in the house she occupied (see [23] and [34]).

However, the wish or personal preference of an unlawful occupier to remain in the dwelling concerned was not a relevant factor in the just and equitable enquiry: the Constitution gave the occupier a right of access to adequate housing, but not a right to choose exactly where he or she wanted to live (see [36]).

- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) could not be used to indirectly expropriate land. Nor was a private landowner under an obligation to provide free housing. Furthermore, an offer of free accommodation could not be a precondition for a grant of an eviction order, it being but one factor in the just and equitable calculus. (See [37] – [38].)

- There had to be some give by both parties . That is, compromises had to be made by both parties toward reaching a just and equitable outcome. A disturbing feature of the matter was that very little effort was made by first respondent to seriously consider the several offers of alternative accommodation made by applicant. Moreover, first respondent did not make any counter-offer in response to the generous offers of alternative accommodation made by applicant. (See [40].)

- Section 6(2) of PIE required the striking of a balance between the rights of the occupier and those of the landowner — it did not entail that only the rights of the unlawful occupier be considered (see [39] and [44]).

- While authority was to the effect that a purchaser of land might have to endure an unlawful occupation for some time , first respondent's unlawful occupation of 14 years exceeded such a period (see [45]).

• The eviction would not render first respondent homeless: she would only be required to relocate from one home to another in the same immediate community (see [46]).

• The house applicant was offering was similar to the one first respondent was currently occupying. Applicant had also offered a reasonable time (six months) for first respondent to vacate and relocate (see [47]).

Ordered, accordingly, that leave to appeal be granted, the appeal upheld, and the order of the SCA set aside and substituted with an order directing applicant to purchase a dwelling; to register against the title deed a right on first respondent's part to reside in the property for the rest of her life; and for applicant to pay the relocation costs of first respondent and second respondent (see [49]).

NUMSA OBO DHLUDHLU AND OTHERS v MARLEY PIPE SYSTEMS (SA) (PTY) LTD 2023 (1) SA 338 (CC)

Labour law — Dismissal — Dismissal for assault on employer's manager during unprotected strike on basis of common purpose — Doctrine of common purpose not placing duty on bystanders to intervene or dissasociate — Individual complicity in commission of acts of violence must be proven on balance of probabilities.

During the course of an unprotected strike at Marley Pipe Systems (SA) (Pty) Ltd's (Marley's) premises, striking employees took part in a serious assault on one of its managers (see [3] – [4], [29]). A disciplinary process followed in which 12 employees were convicted for the actual physical assault, and 136 of assault on the basis of the doctrine of common purpose. Marley, on recommendation of the independent chairperson of the disciplinary committee, dismissed all 148 employees.

Of the group of 136, only 95 employees were placed on the scene by the one or other form of evidence; 40 were never identified as having been at the scene of the assault; and another arrived on the scene after the assault (see [9]). Aggrieved by their dismissals, the employees, represented by the National Union of Metalworkers of South Africa (NUMSA), referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. After conciliation failed, a claim of unfair dismissal was referred to the Labour Court, but it upheld the dismissals and awarded damages in a counterclaim by Marley.

Numsa appealed to the Labour Appeal Court (the LAC) in respect of only the 41 employees who were not identified by means of the evidence. The LAC found that all the appellant employees participated in the strike and were probably at the scene (see [10], [24]). And, dismissing the appeal, it held that common purpose had been established (see [11] – [12]); and that in order not to be adjudged guilty under the doctrine of common purpose, a bystander must take positive steps to distance themselves from the act of the actual perpetrator, requiring of a bystander to intervene and protect another from physical harm (see [14]).

In the present case, Numsa's application for leave to appeal to the Constitutional Court, it persisted with its unfair-dismissal claim, taking issue with the LAC's approach to the doctrine of common purpose. The CC granted leave to appeal on the basis, inter alia, that the LAC had created new rules on proof of common purpose which implicated the substantive fairness of a dismissal, and thus raised constitutional issues under s 23 of the Constitution (see [14].)

Held

Implicit in the LAC's finding was that, to escape liability for the assault, the employees should have intervened to stop the assault and should have dissociated themselves in some way from the assault before, during or after it. There was no basis whatsoever for the imposition of such an obligation. It was not beyond the realm of possibility for employees to be mere spectators when other employees are committing acts of violence. It would be a travesty to charge, find guilty of acts of violence and dismiss an employee who — although part of a group of striking workers — never took part in or associated with such acts. (See [20], [24].)

While the LAC's finding that all the employees were at the scene when the manager was assaulted, would be accepted, mere presence and watching did not satisfy the established requirements for common purpose. There must be evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended; and the person concerned must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Merely being there cannot constitute association. For liability to attach, there must be proof (on a balance of probabilities) of an employee's complicity in the acts of violence, including having 'the necessary intention' in relation to the complicity. (See [24] – [25], [36].)

Here, there was no evidence that — as a group — the striking employees ever associated with the assault. The principles applicable to common purpose had not been satisfied. Thus, there was simply no basis for holding the 41 employees guilty of the assault, and the dismissals on the basis of this finding of guilt were substantively unfair. The matter would be remitted to the Labour Court for a consideration of an appropriate sanction, without the aggravating fact of a severe assault. (See [30], [37], [38].)

UNITED DEMOCRATIC MOVEMENT AND ANOTHER v LEBASHE INVESTMENT GROUP (PTY) LTD AND OTHERS 2023 (1) SA 353 (CC)

Appeal — Appealability — Interim interdict — Test — Common-law test in Zweni no longer decisive — Interests of justice determinative — Superior Courts Act 10 of 2013, s 16(1)*(a)*.

Appeal — To Supreme Court of Appeal — Leave to appeal — Whether SCA could refuse to hear matter where High Court granted leave to appeal — SCA was not only entitled, but also obliged, to determine whether matter that came before it was indeed appeal against 'decision' — High Court's granting of leave to appeal did not bind Supreme Court of Appeal — Superior Courts Act 10 of 2013, s 16(1)*(a)*.

Defamation — Defences — Truth and public interest — Restatement of applicable principles.

This was an application to the Constitutional Court for leave to appeal against an order of the Supreme Court of Appeal striking out an appeal the applicants had brought against an interim interdict granted against them in the Pretoria High Court. That interdict, awarded in favour of the respondents, restrained the applicants from making defamatory allegations regarding the respondents pending the institution of an action for damages for defamation and injuria. The SCA ruled the High Court order to be unappealable, given its interim nature; this despite the fact that the High Court itself had granted leave to the applicants to appeal. A brief background to this matter: On 26 June 2018 the second applicant — Bantubonke Holomisa, who was the president of the first applicant, the political party the United Democratic Movement — addressed a letter to the President of South Africa, Cyril Ramaphosa, titled 'Unmasking Harith

and Lebashe's Alleged Fleecing of the Public Investment Corporation [PIC]'. The letter spoke of 'dodgy deals' between the PIC, the state-owned investment vehicle and asset-management company established in terms of s 3 of the Public Investment Corporation Act 23 of 2004, and the two investment companies referred to, ie the first respondent, Lebashe Investment Group (Pty) Ltd, and the second respondent, Harith General Partners (Pty) Ltd. Mr Holomisa subsequently caused a copy of the letter to be published on the UDM's official website and his Twitter account, this time in the sensational terms, 'BREAKING: State capture of a different kind as the ultra rich elite allegedly plunder [the Public Investment Corporation] through companies Lebashe & Harith. Read more on this nauseating tale on udm.org.za.' The respondents * were of the view that the contents of the letter were untrue and defamatory of them. They consequently approached the High Court, where they argued that the applicants, in addressing the letter to the President, and in publishing it on social media, had committed defamation against them. To prevent irreparable harm to their dignity and reputation, they sought, and obtained, an interdict restraining the applicants from making or repeating defamatory allegations against them (as well as an order for the removal of the offending statements from the UDM website and Mr Holomisa's Twitter account), pending the bringing of a defamation action. The applicants were granted leave to appeal to the SCA, but the SCA struck out the appeal; hence, the present application.

Before the Constitutional Court, the applicants argued that the SCA majority should have found as the SCA minority had, ie that, while interim orders were not ordinarily appealable, *in this instance* the *interests of justice* rendered the interim interdict appealable. They argued further that it was not open to the SCA majority to second-guess the decision of the High Court in granting the applicants leave to appeal simply because it held a different view on the matter. They argued that the Constitutional Court had jurisdiction to hear the matter, raising as it did arguable points of law relating to interim interdicts pending defamation actions and the appealability of interim orders generally, and further that it was in the interests of justice for the Constitutional Court to hear the matter. As to the merits, the applicants argued that the publication of the letter was lawful: In publishing the statement, they were acting in terms of their right in terms of s 16 of the Constitution to receive and impart information, and in the exercise of their political rights, as contained in s 19 of the Constitution, and within the ambit of

their political activities. Furthermore, having become aware of allegations of corruption and conflicts of interests against state entities and officials, they were obliged to act in accordance with their constitutional duty to ensure that corruption in public institutions and the executive was exposed; hence they solicited the President to investigate and verify the allegations. They argued further that it was in the public interest that the public should be informed of the allegations.

The Constitutional Court ruled that it had jurisdiction to hear the matter, its raising issues of a constitutional nature and arguable points of law of general public importance. It ruled further that the interests of justice required it to entertain the matter. (See [37].) The court went on to set out the issues to be determined; these were: *(a)* whether the SCA had the power to interfere with the decision of the High Court to grant leave to appeal; *(b)* whether the interim order was appealable; and *(c)* whether the High Court should have granted the impugned interim order.

As to *(a)*: The court held that the SCA was not only entitled, but also obliged, to determine whether the matter that came before it was indeed an appeal against a 'decision' as contemplated in s 16(1)*(a)* of the Superior Courts Act 10 of 2013, and thus an appeal within its jurisdiction. The High Court's granting of leave to appeal did not bind the Supreme Court of Appeal on that issue. (See [40].)

As to *(b)*: The court noted that under the common law the test for appealability of an interim order was that it (i) be final in effect and not susceptible to alteration by the court of first instance; (ii) be definitive of the rights of the

parties, in other words, it must grant definite and distinct relief; and (iii) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (see [41]). The test of appealability now, however, the court held, was the interests of justice (see [43]). That is, an interim order not fully meeting the requirements under the common-law test may be appealed against if the interests of justice so dictated. (See [45] and [46].) The court held that it *was* in the interests of justice that the impugned interim interdict was appealable, *on the applicants' allegation that the interdictory relief in question resulted in the infringement of the right to freedom of expression*. (See [46].) The court added that an interdict restricting free speech constituted a grave intrusion on a constitutional right. Since there was a likelihood that the life of the impugned interim interdict, granted pending the outcome of the

defamation trial, might be extended even longer than it had already existed, it was sufficiently invasive and far-reaching that it was in the interests of justice for the grant of the impugned interim order to be treated as a 'decision'. (See [46].) The court accordingly in its order upheld the appeal against the order of the SCA striking the appeal from the roll (see [75].)

As to *(c)*: The court held that in the present case the ordinary meaning of the statement Mr Holomisa made was that the respondents were thieves, fraudsters, corrupt and dishonest. It went without saying that such statement was defamatory of the respondents. (See [53].)

The court noted that, in order to rebut the presumption of the unlawfulness of the publication of the statement, the applicants had relied on the defence of truth and in the public interest. However, they failed to prove it (see [53]): There had to be evidence and truth to a defamatory statement one made about another, the court held. But, the applicants did not provide any shred of evidence of actual misconduct, corruption and self-dealing. They themselves admitted that they did not know the truth of the allegations in question which had not yet been investigated and confirmed; they were merely relaying allegations of corruption and conflicts of interest. (See [59] and [62].) The applicants were not entitled to wantonly defame the respondents under the pretext that they were executing a constitutional duty. In the same breath, it was not for the public benefit to publish the unverified defamatory information. (See [62].) When a public figure plainly defamed members of the public while admitting that he or she did not know the truth of what he or she said, his or her right to freedom of expression may justifiably be limited. In the premises, the applicants failed to discharge the onus which rested on them to lay a basis for the defence that the allegations were true and in the public interest. (See [62].) The applicants' conveying of the information about the alleged corruption and conflict of interests to the President for investigation was appropriate and lawful. However, their publication of the defamatory statement elsewhere before the verification and confirmation of the alleged corruption and conflict of interests rendered the applicants' conduct wrongful. (See [63].)

The court concluded that the High Court was correct in granting the respondents an interim interdict against the applicants. (See [64] – [73].) It substituted the order of the

SCA with one dismissing the appeal against the order of the Pretoria High Court. (See [75].)

CB v DB 2023 (1) SA 381 (SCA)

Marriage — Divorce — Proprietary rights — Marriage out of community of property with exclusion of accrual — Whether agreement governing maintenance enforceable.

Appellant and respondent in anticipation of their marriage concluded an antenuptial agreement, declaring that their marriage would be out of community of property and exclusory of accrual. They then registered an antenuptial contract in the Deeds Registry and then concluded a further agreement (the agreement), which they requested 'be read together with the Prenuptial Agreement'. The agreement provided that on the dissolution of their marriage by respondent's death or by divorce, respondent would donate certain specified property to appellant.

Appellant and respondent then got married, but a few years later respondent brought an action for divorce in the regional court, which appellant defended, and appellant also counterclaimed for an order of specific performance of the agreement. Respondent's defence was that the agreement was unenforceable, because it conflicted with the antenuptial contract and impermissibly purported to vary it, an argument which the regional court rejected. The court then declared the agreement enforceable, and to be read with the antenuptial contract.

Respondent then appealed to the High Court, making the aforesaid argument. Respondent also argued that the agreement was not enforceable under s 7(1) of the Divorce Act 70 of 1979 ('A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to . . . payment of maintenance by the one party to the other'); and for depriving the divorce court of the discretion it possessed in terms of s 7(2) of the Divorce Act ('In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance . . . the Court may . . . make an order which the Court finds just in respect of the payment of maintenance by the one party to the other') (see [5]).

The High Court agreed with these arguments and upheld respondent's appeal, set aside the regional court's order, and ordered that the agreement was unenforceable. Appellant then, with the Supreme Court of Appeal's special leave, appealed to it.

The SCA upheld the appeal, reasoning as follows.

- The antenuptial contract governed the matrimonial regime, while the agreement did not bear on this at all. Accordingly there was no contravention of s 21 of the Matrimonial Property Act 88 of 1984 (see [9]).

- Analysing the text and the context in which the appellant and respondent made the agreement, as well as its purpose, it revealed no intention that it should amend the antenuptial contract (see [10]).

- Section 7(1) of the Divorce Act was of no application: appellant s claim being in contract, for specific performance of the agreement, and not for the agreement to be made an order of court (see [11]).

- The agreement did not oust a court's discretion under s 7(2): a court did not have a power mero motu to exercise the discretion given by the section (see [12]). It could only do so if a party brought its claim under it (see [15]).

Appeal accordingly upheld, the High Court's order set aside and replaced with an order dismissing respondent's appeal against the regional court's decision, which found the agreement enforceable (see [16]).

KEYHEALTH MEDICAL SCHEME v GLOPIN (PTY) LTD 2023 (1) SA 388 (SCA)

Agency and representation — Mandate — Distinction between mandate and power to perform juristic acts.

Respondent (Glopin) and appellant (KeyHealth) were parties to a brokerage agreement in terms of which Glopin contracted to introduce new members to KeyHealth, a medical scheme. KeyHealth, citing material breaches of the agreement, sent Glopin a letter terminating the agreement. Glopin viewed this as KeyHealth repudiating the contract, a repudiation which Glopin refused to accept, and Glopin obtained an order debarring KeyHealth acting on its repudiation pending further proceedings Glopin intended to institute. KeyHealth then took a new tack, informing Glopin it was abandoning its notice of termination but advising that it was revoking Glopin's authority provided for in the agreement to provide brokerage services.

The dispute then came before the High Court, where Glopin sought a declarator that the revocation was invalid and that the agreement remained extant, while KeyHealth asserted that its revocation of Glopin's authority terminated the agreement. The High Court's approach was to interpret the contract, which it characterised as a contract of mandate and thus subject to the general rule that revocation of a mandate contained in an agreement terminated the agreement. The High Court concluded, however, that the revocation was invalid because the justification it rested on — a purported repudiation of the agreement on Glopin's part — was without merit. (See [10] – [11].)

KeyHealth then appealed to the full court, which agreed that the contract remained extant, but on the basis that it could only be terminated on one of the grounds it listed — grounds which did not include revocation of Glopin's authority — and that none of these grounds were present (see [13]).

Here, with the Supreme Court of Appeal's special leave, KeyHealth appealed to it (see [14]).

The SCA emphasised that there was a difference between a revocation off a mandatary's authority (a power to perform juristic acts on the mandator's behalf) and a termination of an agreement of mandate (see [9] and

[18] – [19]). Thus, while the agreement might only be terminable on the occurrence of an instance it provided for, an authority derived from the agreement could be unilaterally terminated by the mandator, albeit that the mandator might then become liable to the mandatary for damages for breach of agreement (see [18] and [26]).

Here KeyHealth had not established that the authority provided for in the agreement was indeed an authority in the sense described above, and so revocable at KeyHealth's instance. Nor had any occurrence provided for in the agreement allowing for the termination of the agreement taken place — the conclusion reached by the full court. (See [13].)

Accordingly, the appeal was dismissed (see [29]).

MAZARS RECOVERY & RESTRUCTURING (PTY) LTD AND OTHERS v MONTIC DAIRY (PTY) LTD (IN LIQUIDATION) AND OTHERS 2023 (1) SA 398 (SCA)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Payment made to business rescue practitioners after commencement of winding-up — Companies Act 61 of 1973, s 341(2).

A company (Montic) was placed in business rescue and second, third and fourth appellants, who were employees of first appellant (Mazars), were appointed as Montic's business rescue practitioners. They concluded that there was no prospect of Montic being rescued and applied to the High Court to convert the business rescue

proceedings into a liquidation. Thereafter the practitioners caused Montic to make payments to Mazars for their fees.

Subsequently, the practitioners' application for Montic's winding-up was granted, and second, third and fourth respondents appointed as Montic's liquidators. They then applied for and obtained an order from the High Court that the payments to the practitioners were void, by virtue of them being caught by the provisions of ss 341(2) and 348 of the Companies Act 61 of 1973. Those sections provide that '(e)very disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders', and that '(a) winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up'.

Mazars and the practitioners then applied for and the High Court granted leave to appeal to the Supreme Court of Appeal (see [21]).

Their contention there was that ss 143(1), 143(5) and 135(3) of the Companies Act 71 of 2008 removed the payment from the reach of s 341(2) of the 1973 Act (see [24]).

Held, that the argument that the above provisions continued to apply after business rescue was terminated was inconsistent with precedent and wrong. None of them conferred a right to post-liquidation fees. (See [25].)

Held, further, that a business rescue practitioner was not remediless in respect of a payment that was caught by s 341(2): a practitioner could under its proviso apply to the High Court for the disposition to be validated; and the practitioner was also a preferred creditor in the winding-up (see [28]).

Appeal dismissed (see [31]).

An appeal against a decision of the Western Cape Division in Montic Dairy (Pty) Ltd (in Liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others 2021 (3) SA 527 (WCC).

MERIFON (PTY) LTD v GREATER LETABA MUNICIPALITY AND ANOTHER 2023 (1) SA 408 (SCA)

Specific performance — When granted — Municipality failing to fulfil Act's statutory requisites for purchasing asset but nonetheless concluding agreement to do so — Other contractant suing for specific performance — Whether specific performance competent order — Local Government: Municipal Finance Management Act 56 of 2003, s 19(1)*(a)*.

Estoppel — Ambit — Cannot validate ultra vires transaction — Court cannot give imprimatur to illegality.

Local authority — Capital projects — Funding — Acquisition of land — Local authority to comply with prescripts of s 19(1)*(a)* of Local Government: Municipal Finance Management Act 56 of 2003.

First-respondent municipality made an arrangement with the provincial department of housing that the department would buy land on its behalf. To this end the department applied to the provincial treasury for permission to disburse the purchase price. Thereafter the department formally undertook to pay said sum, whereupon the seller and the municipality concluded the purchase agreement.

Later, however, the treasury refused the department permission to disburse the amount, thereby stymying the municipality and the seller's transaction and causing the seller to sue the municipality for specific performance, a claim contingent on the municipality being estopped from denying that the legal requirements requisite for it to conclude the transaction had been fulfilled (see [8] and [9]).The seller was unsuccessful, with the High Court dismissing the action (see [13]). The High Court found that, given that the municipal council had not approved the sale, the municipality's representative had lacked authority to conclude it; that the sale agreement was unenforceable because the municipality had failed to comply with s 19(1)*(a)* of the Local Government: Municipal Finance Management Act 56 of 2003 by not having 'appropriated in the capital budget' the 'money for the [capital] project'; and that estoppel could not vivify an ultra vires transaction such as this one (see [13]).

Thereafter, the High Court granted leave to appeal to the Supreme Court of Appeal, which confirmed the High Court's conclusions, holding that estoppel could not be employed to validate and so ground specific performance of an agreement which was ultra vires for the reasons described above (see [13], [27] and [29]). Appeal accordingly dismissed (see [30]).

MOBILE TELEPHONE NETWORKS (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2023 (1) SA 420 (SCA)

Revenue — Tax administration — Declaratory order — Narrow basis for declaration of rights in tax matters — Fact-specific test — Clear, uncontested facts necessary — Declaratory order as to which of s 10(18) or 10(19) of VAT Act applied to pre-paid vouchers supplied by taxpayer – – No basis for declaration of rights — Value-added Tax Act 89 of 1991, ss 10(18) and 10(19).

Section 10 of the Value-Added Tax Act 89 of 1991 (the VAT Act) deals with 'the value of supply of goods or services'; ss 10(18) and 10(19) specifically with the supply of goods and services by way of vouchers. Section 10(18) applies where there is no specification of goods or services, either by indication on the voucher, or by usage or arrangement; and s 10(19) where the goods or services to which the holder of the voucher is entitled are specified on the voucher or, where not specified, where usage or arrangement entitles the holder to such specified goods or services. The import of the distinction is that a supply under s 10(18) attracted VAT only at the time a voucher is used to procure goods or services rather than at the time the voucher is supplied, whereas if s 10(19) applies, VAT is levied on the sale of a voucher, but no further VAT is levied when the voucher is 'surrendered'. (See [3].)

As part of a range of services it offered, the taxpayer (MTN) sold 'pre-paid multi-purpose vouchers' to its customers (the pre-paid vouchers). Historically, MTN dealt with the pre-paid vouchers as a supply falling under s 10(19) of the VAT Act. On 15 November 2017 MTN sought a private binding ruling from Sars under s 41B of the Tax Administration Act 71 of 2008 (the TAA) that in future it could deal with the sale of the pre-paid vouchers as falling under s 10(18) of the VAT Act. MTN contended that these vouchers, typically referred to as 'airtime vouchers', had a rand value and were not limited to specific services, such as data, but could be used to access a wide range of services offered by MTN, and accordingly fell under s 10(18).

On 4 April 2019 Sars issued a private binding ruling to the effect that s 10(19), not s 10(18), of the VAT Act applied. Aggrieved by the ruling, MTN approached the High Court for an order declaring, inter alia, that the ruling was incorrect and/or setting it

aside, and that s 10(18) of the VAT Act applied. The High Court entertained the application, but dismissed it.

This case, MTN's appeal against the High Court's decision, related to two main issues: first, whether seeking a declaratory order was appropriate in the circumstances; and, second, if so, whether the ruling of Sars was incorrect. As to the first issue, Sars submitted that the procedure utilised by MTN was impermissible because it amounted either to a review, an appeal or an objection to the ruling, none of which were competent (see [8] – [12]).

Held

Declaratory relief in tax matters was entertained only in limited circumstances, where there were clear and uncontested facts. That was the bare minimum requirement for a court to entertain declaratory relief. Even then, a court may nevertheless decline to exercise its discretion to grant a declaratory order, the primary concern being opening the floodgates for applications where certainty was being sought from the court before the taxpayer applied a new strategy. (See [17] – [18].)

The first question was, accordingly, whether there was a clear, uncontested, sufficient set of facts. The distinction between s 10(18) and s 10(19) of the VAT Act was clear. Whether the pre-paid vouchers fell into one category or the other was a factual enquiry. Here, that enquiry did not render a clear answer — there was no clear explanation of what was meant by 'airtime' or how it functioned. This was not therefore a matter where there was a set of clear, sufficient, uncontested facts. The grant of declaratory relief would therefore not be warranted. (See [19], [24], [27].)

However, even if the facts were clear and uncontested, it was doubtful whether this matter warranted the exercise of the discretion of the High Court to entertain the grant of declaratory relief. It was a classic case of MTN wishing to obtain clarity from the High Court on whether it could depart from its prior practice of treating the pre-paid vouchers as falling under s 10(19) and apply a new approach of treating them as falling under s 10(18). The nature of the dispute lent itself more properly to resolution by use of the special machinery of the TAA set up for that purpose. To hold otherwise might well result in a deluge of similar applications. (See [28].)

The application for declaratory relief was therefore not appropriate in this matter. It followed that, while the High Court incorrectly entertained declaratory relief, it was correct in dismissing the application. The appeal would therefore fail. (See [29].)

TEMBANI AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER 2023 (1) SA 432 (SCA)

Practice — Pleadings — Exception — To particulars of claim on ground that not disclosing cause of action — Novel claims involving development of common law — Whether existence of such claim ought to be adjudicated on exception.

The context of this matter was the President's participation, as representative of South Africa, in the disabling of the Southern African Development Community Tribunal, to which appellants, as individuals dispossessed of their land in Zimbabwe by that country's government, would have had resort to bring claims for compensation against Zimbabwe.

Here appellants, as individuals prevented from bringing claims before the Tribunal because of the President's involvement in the disabling of the Tribunal, brought a claim for damages against him. In response, the respondents raised multiple exceptions to appellants' particulars of claim, some of which were upheld by the High Court. Appellants then asked the High Court for its leave to appeal its decision to the Supreme Court of Appeal (SCA), which was granted. In the SCA the issue was whether the High Court correctly upheld respondents' exceptions to appellants' particulars of claim, that the facts appellants pleaded failed to disclose that the President was the factual or legal cause of their loss (see [11] and [26]).

In upholding appellants' appeal against the High Court's maintaining of the exceptions, the SCA considered the following in relation to the adjudication of exceptions, and specifically those raised in respect of novel claims:

- While there is no general rule that issues concerning development of the common law cannot be decided on exception, it was usually better not to do so where the facts are complex and the legal position uncertain (see [15]); and

- The above approach would be supportive of the constitutional duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights, in

that it allowed a court to make its decision in light of all the pertinent circumstances; and concomitantly the norms of the Constitution and Bill of Rights need factor in the assessment as to whether to recognise the novel claim or not (see [16]). Ultimately, the court must be satisfied that the claim is 'inconceivable' under the law as potentially developed in terms of s 39(2) of the Constitution before it can uphold an exception premised on the pleadings disclosing no cause of action (see [20]).

The second issue was respondents' cross-appeal against the High Court's dismissal of their exception that appellants' particulars of claim disclosed no legal duty on the President's part (see [12]). The SCA ruled on established authority that dismissal of an exception was not appealable (see [27]).

The third issue related to the High Court's failure to uphold respondents' attack on appellants' conditional condonation application, which the appellants had made in anticipation of a possible finding that they had delivered their notice of intention to proceed out of time. (This in terms of s 3(1)*(a)* of the

Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.) Respondents' attack here was that the claim had prescribed, but the High Court had ultimately made no order on the issue. Respondents, however, cross-appealed the High Court's failure to grant an order dismissing the condonation application.

In dismissing the cross-appeal, the SCA held, firstly, that no appeal could lie where no order was made (see [29] and [33]). Secondly, the appeal was, on examination, against the High Court's *reasoning*, whereas an appeal could only be brought against an *order* (see [30]). Thirdly, the special defence of prescription ought to have been raised by special plea, not in the manner it was done here (see [31]). Fourth, the condonation application, conditional as it was on prior determination, ought not to have been adjudicated upfront and, moreover, the associated issue, prescription, was ill-fitted to be determined on the papers as they had stood (see [32]).

The SCA ordered, accordingly, that the appeal be upheld, the cross-appeal struck from the roll, and the High Court's order set aside and replaced with an order that defendants' exceptions to plaintiffs' particulars of claim would be dismissed (see [34]).

ZURICH INSURANCE CO SOUTH AFRICA LTD v GAUTENG PROVINCIAL GOVERNMENT 2023 (1) SA 447 (SCA)

Insurance — Contract — Interpretation — Insured property — Damage to rock mass surrounding insured tunnel works — Whether rock mass part of insured property.

In this matter respondent (the province) contracted with a company (Bombela) for the latter to construct a rail network which would run partly through underground tunnels. The province and Bombela also contracted with Zurich to insure the project and, in particular, to indemnify the province and Bombela for the cost of repairing any damage occurring in the course of the network's construction, which involved blasting underground rock to create the tunnels. The project was completed in 2009. Excessive water ingress to the tunnels was noted at an early stage but its cause was unknown, and no damage was observed. But in 2014 an investigation revealed that Bombela's failure to pre-grout the tunnels had resulted in damage to the surrounding rock mass. In February 2015 the province claimed the costs of making good the damage from Zurich. When Zurich repudiated the claim, the province instituted proceedings in which it claimed a declarator that Zurich was obliged to pay the amount the province could prove to be the cost of such making-good. As to prescription, Zurich argued that since no damage could have been caused by the contractors after the completion of the tunnels, prescription had begun to run in 2009.

The High Court granted the declaratory relief sought and thereafter, on Zurich's application, it granted Zurich leave to appeal its order on three grounds: whether the province's claim against Zurich had prescribed; whether the rock mass surrounding the tunnel's void was part of the property insured; and whether the High Court's order was enforceable.

The issue of prescription hinged on when the province obtained knowledge of the damage to the tunnels. Knowledge in this sense was belief, but not belief alone, rather, belief which had justification or warrant (see [18] – [19]). Zurich argued that the province must have had knowledge of the damage at least by the time the tunnels' construction ended in 2009 because the province had in place a monitoring team which must by then have observed it.

The Supreme Court of Appeal found that while the province may have had a suspicion that the tunnels had been damaged, even while they were still being constructed, it was only in 2014 that the damage — deformation of rock in the rock mass surrounding

the tunnels' void — was identified and confirmed (see [28] and [36]). Since the province instituted its claim in 2015, it had not prescribed, and Zurich's plea of prescription would consequently fail (see [38]).

The second issue was whether the rock mass surrounding the tunnels was a part of the insured property (see [39]). This where the insured property was defined to include 'tunnel works', and where 'tunnel works' were in turn defined to include tunnels (see [52]). The province's claim in this regard was that the damage was to the tunnels, the insured property, and specifically their surrounding rock mass (see [39]); while Zurich denied that the rock mass was part of the tunnels (see [42]). The issue thus narrowed to what was meant in the policy by the word 'tunnel', where the policy did not itself define the term (see [42] and [53]).

What was significant here was what the parties had contemplated when they concluded the insurance policy: a major civil engineering project involving excavation of tunnels through rock (see [59]). Thus, when the parties used the word 'tunnel', they must have used it in the sense understood in civil engineering, where in that discipline a tunnel is 'a void surrounded by its own load-bearing cylinder of rock of about one tunnel diameter in thickness' (see [54] and [59]). Accordingly, it could be concluded that the rock mass surrounding the void was part of the tunnel, the property insured, and that the damage to it was indemnifiable under the policy (see [60]).

The final issue was whether the High Court's order was enforceable, where Zurich's assertion was that it was unenforceable for vagueness and ambiguity (see [67]). The Supreme Court of Appeal found, per contra, that, properly construed, the order unambiguously effected the High Court's finding that the damage to the tunnels fell within the terms of the policy and that Zurich was consequently obliged to indemnify the province (see [68] and [70]).

Appeal dismissed (see [72]).

BESTER NO AND ANOTHER v PIETERS 2023 (1) SA 466 (WCC)

Estoppel — Res judicata — Issue estoppel — Requirements — Same party — Intervening party — Party that intervenes in existing proceedings, causing them to be

stymied or postponed, cannot escape application of issue estoppel merely because it chose not to file any papers.

The applicants, the insolvency trustees of a trust, had previously sought the repayment of invested money which they claimed were trust assets. Two former actual trustees, Mr P and Ms P, the respondent presently, indicated that they wished to intervene to oppose repayment. They were recorded as intervening parties and the matter was postponed to give them time to deliver a formal application for leave to intervene and an answering affidavit. But they decided against intervention. On 26 October 2020 the court seized with the matter directed the respondent in that matter, one H (who had received the invested money as stakeholder on behalf of the trust), to repay the capital plus interest. But when it turned out that the Trust had *after its sequestration* paid Ms P interest accrued on the invested funds, the applicants sought to recover it from her in the present proceedings, its being an asset of the Trust. Ms P, in opposition, argued that she had become owner of the invested funds because of a clear and express intention of the trustees that she would be entitled to them as owner. The applicants in response argued that the issue of entitlement to the investment funds and the interest on it had been finally decided in the judgment of 26 October 2020 and was thus issue-estopped and res judicata. Ms P claimed that res judicata did not apply to her because, having failed to file any papers, she had not been a party to those proceedings (ie the requirement of *idem actor* was absent).

Held

In the order of 26 October 2020 there had been a complete identity of interests, ie the claim to the invested funds and ownership thereof, and a similar identity of parties: the insolvent trustees of the Trust, stakeholder H and intervening party Ms P. A party like Ms P, who intervened in existing proceedings, thereby causing them to be postponed or stymied, could not in subsequent proceedings argue that the defence of issue estoppel was not applicable merely because she chose not to file papers. It was common cause that Ms P applied to intervene in the matter of 26 October 2020, that she and her husband were the intervening parties, that they chose not to file their papers and they were accordingly penalised with a costs order, which was the end of the matter. (See [31] – [32].)

BNS NOMINEES (RF) (PTY) LTD AND ANOTHER v ARROWHEAD PROPERTIES LTD AND ANOTHER 2023 (1) SA 478 (GJ)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Court application for determination of 'fair value' for shares — 'Fair value' — Tentative definition offered — Value share would realise in undistorted market, in medium term, with free interaction between buyers and sellers with proper information, and without any exceptions being made for minority holdings or effect of corporate action which has led to dissent — Companies Act 71 of 2008, s 164(14), read with s 164(15)*(c).*

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Court application for determination of 'fair value' for shares — 'Fair value' — Onus — Discussion — Companies Act 71 of 2008, s 164(14), read with s 164(15)*(c).*

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Court application for determination of 'fair value' for shares — Determination of fair value by court — Discretion of court to appoint one or more appraisers to assist in determining of fair value — Discussion — Companies Act 71 of 2008, s 164(15)*(c)*.

Words and phrases — 'Fair value' — Meaning of in Companies Act 71 of 2008, s 164 — Tentative definition offered — Value share would realise in undistorted market, in medium term, with free interaction between buyers and sellers with proper information, and without any exceptions being made for minority holdings or effect of corporate action which has led to dissent.

The first applicant in the present matter was BNS Nominees (RF) (Pty) Ltd. It was a registered shareholder in the first respondent, Arrowhead Properties Ltd (Arrowhead). The second applicant was Breede Coalitions (Pty) Ltd. It was the beneficial owner of the shares held by BNS. In a meeting of Arrowhead's shareholders, a resolution was passed approving a scheme of arrangement in terms of which Arrowhead would acquire the company Gemgrow by means of a reverse takeover, involving a share swap with 0,8237 Gemgrow shares being exchanged for every Arrowhead share. However, BNS voted against such scheme. As it was entitled to do as a dissenting

shareholder under s 164 of the Companies Act 71 of 2008, it subsequently gave notice to Arrowhead that it pay it a 'fair value' for its shares. Arrowhead made an offer of R3,75 per share in response. The applicants rejected this as not representing 'fair value'. Consequently, the applicants, exercising their rights of appraisal under s 164(14), applied to the High Court for it to determine a 'fair value' in respect of the shares, and for BNS to pay it such amount determined. The court, in terms of s 164(15)*(c)*(ii) was obliged to determine a fair value in respect of the shares of dissenting shareholders. However, in terms of s 164(15)*(c)*(iii), it could, 'in its discretion', 'appoint one or more appraisers to assist it' in determining the fair value in respect of the shares.

The applicants in their papers argued that the fair value of the shares in question equated to their 'net asset value' (NAV), that is, R6,90 per share, and that the court should accordingly determine the fair value as such. Arrowhead for its part argued that the amount it had offered, being R3,75 per share, represented fair value, because it exceeded the market value of the shares on the day the corporate action was approved (R3,09), and was based on the higher of two independent analysts' reports. The applicants in their heads of argument appeared to raise an alternative argument, that the court should leave the question of valuation to appraisers, given its complexity and its being highly contested by the parties.

The court, in considering the dispute, had regard to the meaning of 'fair value'. It noted that no definition was provided in the Act (see [13]). It acknowledged the 'elusive' quality of the concept (see [19]). It acknowledged too the views expressed by economists and in foreign case law, to the effect that the concept could not be reduced to 'a set of rules for selecting a method of valuation', or a single 'formula or equation which will produce an answer with the illusion of mathematical certainty' (see [14] and [15]). Despite this elusiveness, the court noted that, given the legislature's use of the term, it was obliged to make some practical sense of the term (see [19]). It accordingly offered a definition, which it described as 'tentative' (see [23]), and by no means 'definitive' (see [13]):

'Fair value is the value a share would realise in an undistorted market, in the medium term, with free interaction between buyers and sellers with proper information, and

without any exceptions being made for minority holdings or the effect of the corporate action which has led to the dissent.' (See [23].)

To the above, the court added that there was not any single price that reflected fair value to the exclusion of others; fair value may exist on a continuum of values, some higher, some lower, but none of them unfair, unless it could be shown that the departure from the continuum was non-trivial and hence unfair. (See [24].) Further, a number of methodologies could be used to determine value; no one method should be considered superior to the others (see [25]).

The court considered whether it should appoint appraisers, and had regard to the applicants' argument as raised in their heads. It held that it would indeed be tempting for courts to exercise the discretion (in terms of s 164(15)*(c)*) when faced with appraisal disputes. But to resort to this 'outsourcing' of a judicial obligation would not only amount to an improper use of a discretion, but would also amount to the abdication of a judicial function to an expert. In this particular matter, the court held, where the primary dispute concerned the use of NAV as the proper basis for finding fair value, there was enough in the record without making use of appraisers to assist the court. Each case turned on its own record and hence its own facts. The court stressed that it did not amount to a general principle to resort to expert appraisers simply because there was a dispute over fair value between the dissenters and the company. If it were otherwise the court would be mandated in the Act to refer the matter to appraisers, instead of, as ss 164(15)*(c)*(iii) made clear, having a discretion to do so. (See [59].)

As to the question of fair value applied to the present facts, the court addressed first the question of onus. The parties in this regard were agreed that s 164 did not impose an onus on either the company or the dissenting shareholder. The court stressed, however, that this did not mean that, when the one party had put up evidence to support its claim for fair value and argued why the other party's claim for same was not established, the court should not find that there was at least an evidential burden to discharge the prima facie case made out by the one contending for fair value. (See [60].) In this regard, the court noted that Arrowhead had put up evidence to support its offer that relied on the valuations of expert parties with no interest in the matter. Moreover, it had put up reasoning from an expert as to why NAV was not an appropriate measure of fair value on the facts of this case. (See [60].) It noted that the

applicants had presented no expert evidence in support of its claim that the NAV represented fair value (see [48]). The court held that the applicants had not made out a case that the offer of R 3,75 per share did not represent fair value (see [61]). It concluded that, on the evidence before it, the main application should be dismissed, and the counter-application, for an order determining that the fair value of the shares held by all dissenting shareholders was R3,75, upheld (see [61]).

CENTAUR MINING SOUTH AFRICA (PTY) LTD v CLOETE MURRAY NO AND OTHERS 2023 (1) SA 499 (GJ)

Company — Legal personality — Separate identity — Statutory basis for disregarding corporate personality — Powers of court — Granting of declaration that company to be deemed not to be juristic person — Making of any further order considered appropriate to give effect to declaration — Whether court empowered to grant order collapsing companies into company which in winding-up — Court entitled to do so, under wide powers granted to it to grant further consequential relief — Companies Act 71 of 2008, s 20(9)*(b)*.

On 20 October 2020, in the Johannesburg High Court, Keightley J issued an order under s 20(9)*(a)* of the Companies Act 71 of 2008, *declaring* that various corporations (the subject companies), including Trillian Shared Services (Pty) Ltd (TSS) and Trillian Financial Advisory (Pty) Ltd (TFA), would be deemed not to be separate juristic persons in respect of any right, obligation or liability of those companies, or of a shareholder of the subject companies. The court further ordered, under s 20(9)*(b)* of the Act, *which allows a court to make any further order it considers appropriate to give effect to a declaration under s 20(9)(a)*, that the subject companies would be 'collapsed' and integrated into the liquidated company, Trillian Management Consulting (Pty) Ltd (TMC), and the subject companies and TMC would henceforth exist as a single entity by ignoring their separate legal existence; and that the effective date of the commencement of the subject companies' liquidation would be the date upon which TMC was placed in liquidation. Whether the further relief granted under s 20(9)*(b)* was competent was the key issue that had to be considered in the present application, heard in the Johannesburg High Court, before Wepener J. The applicant was the company Centaur Mining South Africa (Pty) Ltd (CMSA). It had previously lent money to TSS and TFA. After the obtaining of the s 20(9) order, the liquidators of TMC had sued CMSA, alleging that payments made by TSS and TFA as well as TMC to

CMSA, in partial repayment of the loan, constituted voidable dispositions that should be set aside in terms of the Insolvency Act. After CMSA became aware of the action against it, it launched the present proceedings in which it sought to rescind the order of Keightley J.

CMSA sought rescission on the ground that the court had no jurisdiction to grant an order under s 20(9)*(b)* collapsing TFA and TSS into TMC, particularly given that both TFA and TSS were not in winding-up, while TMC was. The applicant also sought rescission under rule 42(1)*(a)* of the Uniform Rules or the common law, based on good cause.

The court held that the applicant could not succeed in its claim based on the common law: this was because no case was made out based on 'good cause' (see [1] and [8]). Neither could the applicant succeed in its claim based on Uniform Rule 42(1)*(a)*: the case did not fall within the category of cases that qualified for rescission based on an erroneous order (see [9]). That left the applicant's application for rescission based on lack of jurisdiction (see [9]). The court held that two questions required answering in considering CMSA's argument: (1) Did the respondents' case controvert the applicant's standing or locus standi regarding the loan repayment? (2) Did the court lack jurisdiction to issue the s 20(9) order? (See [12].)

Held, as to (1), that the liquidators' version — that the purported loans CMSA made to TFA and TSS were in fact not what they appeared on the face of it to be, but formed part of a fraudulent scheme the true purpose of which was to funnel funds from Centaur Ventures Ltd to CMSA and ultimately TMC — was not seriously contested by CMSA on the papers and had to be accepted (see [13] – [17]). CMSA was thus not a true creditor of TFA and TSS (the collapsed companies) and could not have been lawfully affected by the s 20(9) order (see [18]). In these circumstances CMSA had failed to establish locus standi to launch the present application, as its fraudulent conduct could give it no legitimate interest in the s 20(9) order, based on any purported loans (see [19]).

Held, as to (2), that Keightley J was empowered by s 20(9) to grant the relief of collapsing TFA and TSS into TMC in winding-up: Under s 20(9), once the facts justified the piercing of the corporate veil and making a declaration under s 20(9)*(a)*, a court was empowered *to make any further consequential relief the court considered*

appropriate. (See [24], [31] and [34].) Paragraph *(b)* of s 20(9) afforded a court the *very widest of powers* to grant consequential relief, and this would include the collapsing of companies that were not in winding-up, into a company that was in winding-up, as happened here (see [24], [25], [28] and [34]). Further, on the facts of the case, the order granted was appropriate (see [28]).

Held, that, in all the circumstances, the application fell to be dismissed with costs (see [37].

CL v CJL 2023 (1) SA 513 (WCC)

Marriage — Divorce — Rule 43 proceedings — Maintenance pendente lite of dependent major child — Child retaining own locus standi and falling to be joined (or at least file confirmatory affidavit) in proceedings.

An adult-dependent major child retains its locus standi in rule 43 maintenance claims on their behalf and must be joined (or must at the very least file a confirmatory affidavit) in the proceedings. This would ensure that the child's financial needs are squarely before the court and protect them from having to bring discrete maintenance claims against their parents. Failure to join the child could negatively affect the applicant's claim in respect of the child. (See [40] – [44].)

COOPER AND OTHERS v MIFTAH UL JUNAINAH CC 2023 (1) SA 523 (WCC)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company being wound up and unable to pay its debts — Order for return of disposed property — High Court having exclusive jurisdiction irrespective of whether disposition made before or after granting of provisional winding-up order — Companies Act 61 of 1973, s 341(2).

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company after granting of provisional winding-up order — Order for return of disposed property — Court must first make finding that disposition was indeed contrary to s 341(2) — Companies Act 61 of 1973, s 341(2).

Company — Winding-up — Jurisdiction — Semble: High Court having exclusive jurisdiction not only to wind up but also in all matters relating to, or emanating from,

such winding-up, save where specifically provided that magistrates' courts having jurisdiction.

Jurisdiction — Order for return of void disposition by company being wound up and unable to pay debts — High Court having exclusive jurisdiction whether disposition made before or after provisional winding-up — Semble: High Court having exclusive jurisdiction not only to wind up but also in all matters relating to, or emanating from, such winding-up, save where specifically provided that magistrates' courts having jurisdiction — Companies Act 61 of 1973, s 341(2).

A company paid R184 000 to the respondent after it had been provisionally wound up. The applicants (the liquidators and the company itself) argued that the payments were void dispositions and sought repayment under s 341(2) of the Companies Act 61 of 1973 (the Act). It provides that '(e)very disposition of its property . . . by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void *unless the Court otherwise orders*' (meaning that an application for repayment could be met with a counter-application for the validation of the disposition). The respondent, while initially resistant to the claim for repayment, later decided to settle, offering the return of the R184 000 plus interest and costs on the magistrates' courts scale, on the basis that the amount claimed was less than R200 000 and thus fell within their monetary jurisdiction. The applicants declined the costs offer on the basis that the Act's definition of 'court' in ss 1 and 12 (see [15] – [16]) meant that only the High Court had jurisdiction over s 341(1) claims and that its cost scale therefore applied.

It is settled law that dispositions contrary to s 341(2) are automatically void and do not have to be set aside by court. But recently, in *Pride Milling Co (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA), the Supreme Court of Appeal held that the High Court could not under the proviso to s 341(2) validate dispositions made after a company was provisionally wound up because it would have the effect of preferring certain creditors over others post litis contestatio. Counsel for the respondent argued that, since the payments in casu were automatically void and a counter-application for validation was off the table, the magistrates' court had jurisdiction over what was in effect a simple application for the repayment of less than R200 000.

Held

It was clear from the definition of 'court' in ss 1 and 12 of the Act that the High Court had exclusive jurisdiction in matters brought under the Companies Act in respect of a company or body corporate (see [30]). The fact that the court was not required to make an order declaring a disposition contrary to s 341(2) void, did not detract from the fact that it had to make a finding that the disposition was indeed contrary to 341(2) before it could make an order for repayment (see [39]).

Taking into consideration the relevant provisions of the Companies Act and the Insolvency Act, it appeared that the intention was that the High Court would have exclusive jurisdiction not only to sequestrate and wind up, but also in matters relating to, or emanating from, such sequestration or winding-up, unless it is specifically provided that the magistrates' court had jurisdiction (see [40]).

The SCA's decision in *Pride Milling* did not alter the existing position regarding jurisdiction in proceedings emanating from s 341(2) for the repayment of void dispositions made after a provisional winding-up order had been granted. Therefore, magistrates' courts did not have jurisdiction to order the return under s 341(2) of property disposed of by a company being wound up and unable to pay its debts, *irrespective of whether the disposition was made before or after a provisional winding-up order was granted*. (See [43] – [44].)

Accordingly, the respondent's offer of costs on the magistrates' court scale was not adequate — the applicants were entitled to their costs on the High Court scale (see [45] – [46]).

DA RIBEIRA NO AND OTHERS v WOUDBERG AND OTHERS 2023 (1) SA 530 (WCC)

Practice — Pleadings — Exception — Approach of court — General principles restated and applied.

Servitude — Praedial servitude — Principle that holder acquiring ancillary rights required for exercise of servitude — Whether ancillary rights amenable to limitation by agreement.

Water — Right of aqueduct — Ancillary rights — Allegation, in exception to claim for interdict, that holder had ancillary right to pipe stream forming subject of servitude — Whether piping required for efficacy of servitude — Although baseline existing below which servitude would become unfeasible, ancillary rights capable of limitation by agreement.

In a judgment on exception to plaintiffs' particulars the court had decide on the viability of plaintiffs' claim that the first defendant, the holder of a servitude of *aquaeductus*, had the implied ancillary right to pipe the water furrow forming the subject of the servitude. The first defendant excepted to the plaintiffs' claim on the ground that it disclosed no cause of action: the common-law position as articulated by Voet was that anyone with the right of *aquaeductus* could 'either put a pipe in the channel or do anything else as he pleases, whereby he may take the water more freely, provided that he does not worsen the passage of water for the owner or for other users of the channel' (Voet 8.4.16), reflecting the general principle that a servitude holder acquired all ancillary rights required for its exercise, provided they did not unduly burden the servient property. The first defendant argued that these 'peremptory' principles were not amenable to consensual amendment and would outweigh even clearly and precisely formulated contractual provisions to the contrary. The plaintiffs argued that proposed piping would frustrate their right under the servitude to withdraw drinking water from the furrow and also affect the joint maintenance obligations imposed by the servitude.

Held

The process of exception to pleadings was a useful mechanism for the weeding-out of meritless cases. It was designed to obtain a decision on a point of law which would dispose of the case in whole or in part, thus avoiding the leading of unnecessary evidence at the trial. Where an exception was taken, the court had to look at the pleading as it stood: no fact outside those contained in the pleading could be brought into issue (except in the case of inconsistency), and no reference could be made to any other document. The court had to accept the factual averments in the particulars of claim as truthful unless manifestly false and could not go beyond the pleadings. The

court should not, moreover, deal with exceptions in an overly technical manner. (See [15] – [20].)

The issue raised by the exception had to be resolved by interpreting the original servitude agreement according to established principles (see [39]). It appeared from the express wording of the servitude that the parties had not anticipated that the furrow would be piped (see [43]). While there was a certain baseline of implied ancillary rights for the holder, below which the servitude was not feasible and could not be said to exist, ancillary rights were, contrary to the first defendant's argument, amenable to amendment by consensus (see [45]). It would be up to the trial court to decide whether it was necessary for the efficacy of the servitude to pipe the furrow and what impact, if any, it would have on the joint maintenance obligation (see [46]). It would also be for that court to determine whether, on the wording of the servitude agreement, the implied right asserted by the first defendant was established and, if so, whether it was limited by the express wording of the servitude agreement as pleaded by the plaintiffs (see [47]). This ground of exception therefore fell to be dismissed (see [48]).

ELLIS v EDEN 2023 (1) SA 544 (WCC)

Partnership — Name — Whether competent for partnership to trade under name and style of company.

Practice — Judgments and orders — Rescission — Default judgment for 'debt or liquidated amount' granted by court, not by registrar — Whether rule 31(2)*(b)* applicable or rescission must be sought under rule 42(1) or common law — Uniform Rule 31(2)*(b)*.

In the first of two applications heard together, Mr Ellis sought judgment against Mr Eden to enforce payment of an amount reflected as owing by Mr Eden to Mr Ellis under a liquidation and distribution account, prepared by a receiver pursuant to a court order dissolving an alleged partnership between the parties. In the second application, Mr Eden sought the rescission of the dissolution order, which had been obtained by default judgment at the instance of Mr Ellis — granted by the court as opposed to by the registrar — after Mr Eden rejected mediation to resolve the dispute but failed to defend the dissolution action.

In the dissolution action, Mr Ellis had alleged that he and Mr Eden had 'orally concluded a partnership agreement trading under the name and style of Extruct

Exhibitions Proprietary Limited', which was the name of Mr Ellis' company. In the rescission application, Mr Eden proposed as a bona fide defence that it was not competent for a partnership to trade under the name and style of a company (the legal defence).

Mr Eden delayed for almost one year before bringing the rescisson application. One of the issues raised by this delay was whether Uniform Rule 31(2)*(b)* — with its 20-day time limit — applied where default judgment was granted by the court, rather than, as contemplated by rule 31(5), by the registrar (see [25] and [29]).

Held

As to the legal defence

If the only facts were that a company conducted a business for its own benefit, with X and Y being its shareholders, there would be no partnership between X and Y, and this would not be affected by the fact that X and Y mistakenly believed that their relationship was one of partnership. There may, however, be other facts, such as where, for reasons of commercial convenience, it was preferable to present a company as the public-facing entity with which outsiders would deal. The concern was not with the enforceability of an arrangement as between outsiders and the company, but with relations between the alleged partners. The distinction between nominal and beneficial ownership was recognised in our law, as was the concept of an agent for an undisclosed principal. So, as between the partners and a company, the company could be the nominal owner of assets, with the partnership being the beneficial owner; and, in dealings with outsiders, the company could act as an agent for the partnership as its undisclosed principal. In the present case, there would have been little practical difference between a partnership between Extruct and Mr Eden, and a partnership between Mr Ellis and Mr Eden, with the partnership having become possessed, nominally or beneficially, of the business formally belonging to Extruct. The business could have been carried on, for all outward appearances, in the name of Extruct, with Mr Eden as an anonymous partner. Generally, the law should seek to uphold rather than thwart agreements. (See [45] – [52].)

As to whether rescission under rule 31(2)(b) applied

The claim in the dissolution action was for a 'debt or liquidated demand' as contemplated in s 31(2)*(a)*. Where, on such a claim, default judgment was granted by the court instead of the registrar, there was no reason to deprive a defendant of the benefit of rule 31(2)*(b)*; and, conversely, there was no reason why such a defendant should not be bound by the 20-day time limit specified in rule 31(2)*(b)*, as would have been the position in terms of rule 31(5)*(d)*, had the default judgment been granted by the registrar. Reading rule 31 purposively, it was necessarily implied that rule 31(2)*(b)* applied where, for any reason, the court rather than the registrar had granted default judgment on a claim for a debt or liquidated demand. (See [26] – [27].)

KWADUKUZA MUNICIPALITY v TIGER TALES (PTY) LTD AND OTHERS 2023 (1) SA 568 (KZP)

Magistrates' court — Civil proceedings — Practice — Judgments and orders — Default judgment — Rescission — Locus standi — 'Any person affected' — Referring to person with interest in subject-matter of judgment sufficiently direct or substantial to have entitled them to intervene in original application upon which judgment was given or order granted — Court finding that person whose property was attached pursuant to default judgment granted against someone else was not person 'affected' by judgment who could apply for it to be rescinded — Magistrates' Courts Act 32 of 1944, s 36(1)*(a)*.

This was an appeal against the dismissal by a magistrate of an application brought by the KwaDukuza Municipality (the appellant) under s 36(1)*(a)* of the Magistrates' Courts Act 32 of 1944 to rescind a default judgment, and to stay a sale in execution of various movables that had been attached on the strength of a warrant of execution issued subsequent to the granting of the judgment. Pertinently for present purposes, the Municipality was *not a party to the original litigation* that resulted in the default judgment: that concerned an action brought by Tiger Tales (Pty) Ltd against Simsi Construction & Project Management CC, respectively the first and second respondents in this appeal, for payment for security services rendered: Given that, did the Municipality have locus standi to seek rescission under s 36(1)*(a)*, which provided that the court may, upon application '*by any person affected thereby*', rescind or vary

any judgment granted by it in the absence of the person against whom that judgment was granted? The Municipality claimed that it qualified as a 'person affected' by the judgment, *as it was the owner of the property that had been attached* pursuant to the default judgment.

The court considered relevant case law (see [7] – [13]). There was early authority that held, adopting a wide understanding of the concept 'any person affected', that a person whose property was attached pursuant to a default judgment granted against someone else was a person 'affected' by the judgment and could apply for it to be rescinded (see [6] – [8]). The court raised the difficulty that arose from such an approach: How would such a matter proceed after the default judgment had been rescinded in circumstances in which the applicant had no locus standi to defend the claim (see [9])? The court approved later case authority to the effect that the words 'any person affected' were not as wide as previously thought, and in fact referred to a limited class of person, namely those with an interest in the subject-matter of the judgment 'sufficiently direct or substantial to have entitled [them] to intervene in the original application upon which the judgment was given or order granted'. (See [11] – [14].) The court held that the Municipality in the present case had no legal interest in the first respondent's action against the second respondent for payment of services rendered; it therefore had no locus standi to apply for rescission of the default judgment (see [14]). So, the appeal was dismissed (see [15]).

IM v ROAD ACCIDENT FUND 2023 (1) SA 573 (FB)

Motor vehicle accidents — Road Accident Fund — Duties — Conduct of litigation — Plaintiff's expert reports admitted into evidence moments before trial, but aspects thereof then challenged by Fund's counsel — Court's approach to expert evidence restated and applied — Fund's conduct going against its duty as organ of state to be open to settlement.

The week before a trial was to commence against the Road Accident Fund, it maintained that there was not to be any settlement. Moments before the trial was to start, its counsel indicated that she received instructions to admit plaintiff's expert reports by mere submission thereof to the court. She conceded that the only matter that was at issue was the contingencies applied by the actuary and the calculation as to the influence of the cap thereon. The fact that plaintiff was still sympathetically

employed was also a factor that she wanted to be phased into the calculations. According to her plaintiff was permanently employed in a sympathetic capacity, so that the actuarial calculations must be based on his continued employment. She argued that the best predictor of future behaviour/success, was past behaviour/success, and that there was no indication that plaintiff would have progressed with his career as was opined by the experts.

Held

Plaintiff's counsel's argument was solidly based on the facts, opinions, postulations and calculations by the experts. Defendant's counsel's opinion was her own — not that of an expert. Her argument was frustrated by the fact that no expert evidence, or any evidence at all, was submitted on the issues she raised. On her word from the bar, it remained pure and mere speculation. The court would not take cognisance thereof for its mere vagueness, generalness and unsubstantiated nature. The unyielding, unambiguous and factually corroborated evidence of the industrial psychologist remained — that the continued employment of plaintiff in his current environment, faced with the real fear of deterioration of his sequelae, was on unstable foundations. (See [14] – [15].)

The common theme in the approach of courts adopted towards expert evidence, was that courts must jealously protect their role and powers. Cases of this nature must be subjected and open to settlement negotiations and dispute resolution much earlier than at the door of the trial court. Organs of state were not free to litigate as they please. This abhorrent practice has implanted and rooted itself in the justice system at an alarming and disgusting cost to the administration of justice and to the depletion of the coffers of the fiscus. (See [20] – [22].)

OBSERVATORY CIVIC ASSOCIATION AND ANOTHER v TRUSTEES, LIESBEEK LEISURE PROPERTIES TRUST AND OTHERS 2023 (1) SA 583 (WCC)

Heritage — Cultural heritage — Protection — Interdict — Interim interdict to prevent development of cultural/historical site — Protection of cultural heritage of indigenous groups overriding economic and public benefits of development — Interim interdict halting construction pending consultation with affected indigenous groups and determination of final review granted.

Seeking to halt construction of the contentious River Club development in Observatory, Cape Town, the Observatory Civic Association (OCA) and the Goringhaicona Khoi Khoin Indigenous Traditional Council approached the Cape High Court for an interim interdict pending review of the environmental and land-use planning authorisations issued, respectively, by the Western Cape Province (the province) and the City of Cape Town (the city). The applicants cited as respondents the trustees of the Liesbeek Leisure Properties Trust (the developers), the city and two of its officials (the third, sixth and seventh respondents), and two officials of the province (fourth and fifth respondents). The cited officials were the decision-makers who had granted the authorisations. Environmental and land-use planning authorisations were issued in August and September 2020, and construction began in July 2021.

The River Club site formed part of a broader area known as Two Rivers Urban Park (TRUP), a national-heritage site that was the dominion of indigenous (Khoi and San First Nation) peoples in pre-colonial times. It had great historical and cultural significance for them. The applicants emphasised the 'intangible cultural heritage' resources flowing from the historical associations of the site, claiming that this aspect had been neglected by the province and city when they granted the relevant authorisations (see below). The term refers to things like knowledge, practices, expressions, skills and representations that are considered part of a place's cultural heritage.

The province had appointed one Arendse to consult with First Nations groups on their sentiments regarding the development. His report, the November 2019 *River Club First Nations Report*, was pro-development and heavily criticised by opponents. It subsequently transpired that Arendse had also been engaged by the developers and was a member of a First Nations group, the Western Cape First Nations Collective (the eighth respondent), that supported the development.

According to the developers there had been ample consultation and public participation. The community's cultural aspirations for the site had been duly considered and internationally recognised mechanisms put in place to safeguard intangible heritage. The developers claimed to have gone to considerable lengths to

engage with First Nations groups and denied favouring the Western Cape First Nations Collective or that they had secured 'manufactured consent' through it. They stressed that delays in the development would render it unviable and result in job losses. They further submitted that the applicants should have instituted urgent review proceedings rather than to belatedly seek interdictory relief and that they (the developers) would suffer disproportionate and unjustified hardship if interim relief was granted. The developers also denied that the applicants had shown a reasonable apprehension of impending irreparable harm to their intangible heritage, the existence of which they had in any event not established in their founding papers.

The city claimed that an interdict would sabotage the only viable opportunity to protect heritage resources on the site. It argued that the economic benefits of the project were substantial, that the applicants had been given an opportunity to make comprehensive submissions and that they were not entitled to veto the development because they disagreed with it. The city warned that an interdict would inflict unjustifiable and irreparable harm on its economy in a time of crisis and disputed the applicants' claim that heritage resources would be harmed if construction proceeded.

Heritage Western Cape (the second respondent) did not endorse the development proposal, raising concerns about the adequacy of the heritage impact assessments submitted by the developers, in particular their failure to adequately address the intangible historical significance of the site. However, it elected not to participate in the present proceedings.

The Forest Peoples Programme, admitted as amicus, highlighted South Africa's duty under international instruments to protect the cultural heritage of the Khoi-San people, including its intangible aspects.

The parties also addressed at some length (i) whether the abovementioned heritage-impact assessments complied with s 38(3) of the Natural Heritage Resources Act 25 of 1999; and (ii) the proper interpretation of its s 38(8) — the crux of the review challenge — but the present judgment did not turn on this.

Held

To receive the interdict the applicants had to establish the classic requirements of a prima facie right, reasonable apprehension of irreparable harm, a balance of

convenience in their favour and a lack of alternative remedies. Crucially, the principle of separation of powers demanded that an interim interdict against the state could be granted only in the clearest of cases or where the applicant had made out a strong case or could show that exceptional circumstances existed. (See [114], [116].)

Arendse's report was tainted by bias and not all affected First Nations groups were properly consulted. Excluded or inadequately consulted groups could suffer irreparable harm if construction were to continue because the review court might find that their constitutional rights were violated. While the city's planning authorisation required ongoing engagement with indigenous communities, it was unclear how this condition would be complied with given the divisions and mistrust between various First Nations groups. (See [131] – 132].)

The developers were aware that the development was controversial and of the pending review application when they commenced construction. They consciously took the risk to commence construction knowing that they could face prejudicial consequences should an interim interdict be granted or an adverse finding made in the review proceedings. In these circumstances a prohibition on the continuance of construction work could not be construed as prejudicial to the developers. (See [133] – [134].)

The danger was that by proceeding with the construction, the developers render the review application academic by limiting the just and equitable relief the review court could award. In the absence of an interim interdict the advanced stage of the construction might render review proceedings a brutum fulmen, to the detriment of the applicants. (See [135] – [136].)

The fact that the applicants may have unduly delayed instituting urgent review proceedings did not detract from the relevant decision-makers' duty to properly consult with the First Nations peoples, and the duty of the courts to ensure that the rights of vulnerable indigenous groups were protected. This matter was urgent because, if not given an audience in the urgent court, the applicants and affected First Nations groups would be denied substantive redress in due course. There was no reason why an urgent review should not be heard after proper consultation with the affected First Nations peoples. Since the commencement of the construction works was irrelevant

in the determination of the interdictory relief sought by the applicants, construction had to be halted pending a proper consultation process. (See [137].)

The court emphasised that it was mindful of its obligation not to inappropriately traverse the purview of the review court and that it had considered the issues to be determined on review only for the restricted purpose of determining whether the applicants had made out a strong case for an interim interdict. (See [141].)

It its concluding remarks the court emphasised that the present matter ultimately concerned the fundamental rights of indigenous peoples and that economic, infrastructural and public benefits could never override them. In the absence of consultation, these rights were under threat, with the result that the construction of the River Club development had to be immediately ceased pending consultation and final determination of the review. The extended requirements for the granting of an interim interdict having been complied with, it was constitutionally appropriate to grant it. So ordered. (See [143], [145].)

EX PARTE THREE SURROGACY APPLICATIONS 2023 (1) SA 627 (GP)

Children — Parents — Surrogate mother — Surrogate motherhood agreement — Confirmation by court — Whether, as rule, there should be requirement that clinical psychologist assess existing child(ren) of commissioning and surrogate parents to determine whether they prepared for surrogacy and its outcome — Not in best interests of children that there be such general rule — Rather, case-by-case approach was called for, in terms of which court considering surrogacy application had discretion, where circumstances demanded it, to require such clinical assessment of existing children — Children's Act 38 of 2005, s 295.

The Pretoria High Court was faced with three applications under s 295 of the Children's Act 38 of 2005 for the confirmation of surrogate motherhood agreements. It was considered appropriate that, before the hearing of those matters would proceed, a full court should be constituted in order to address the following question:

'Should it, as a rule, be required that a clinical psychologist assess the existing child(ren) of commissioning and surrogate parents to determine whether they are prepared for the surrogacy and its outcome?'

The question was pertinent in the light of a recent decision by a single judge of the same division that answered the above in the affirmative. *

After hearing argument of, and having been presented with evidence from, the applicants, as well as a number of amici, the court held that it was not in the best interests of children that there be a requirement of general application that, in applications for the confirmation of surrogate motherhood agreements, existing children of commissioning parents and surrogate mothers be assessed by a clinical psychologist to determine whether the children were prepared for the surrogacy and its outcome. Rather, the court held, a case-by-case approach was called for, in terms of which a court considering a surrogacy application had a discretion, *where the circumstances demanded* it, to require such a clinical assessment of existing children. Such an approach aligned with the established position in law that a child's best interests should be determined by the facts of individual circumstances rather than through the application of general rules. (See [36] – [38], and [40] – [46].)

In reaching this conclusion, the court approved the arguments raised by the applicants, as well as amici, that the evaluation of the surrogate mother demanded by s 295*(c)*(ii) of the Children's Act — which evaluation case law had determined had to consider the surrogate's emotional availability to her children, including her readiness to discuss the pregnancy with her children — was sufficient for the purpose of enabling a court to decide whether there was need for an evaluation of the existing children. (See [12], [14], [24], [27], [28], [32], [35] and [42].) In this regard, however, the court stressed the need for an adequate psychological report placing before the court sufficient facts to enable it to properly consider whether it was appropriate to order an evaluation of existing children. (See [43] – [44].)

ALL SA LAW REPORTS FEBRUARY 2023

Dart Industries Incorporated and another v Botle Buhle Brands (Pty) Ltd and another [2023] 1 All SA 299 (SCA)

Intellectual Property – Passing off – Passing-off consists in a representation by one person that the goods or services marketed by him are from another or that there is

an association between such goods or services and the business conducted by the other – Requirements for such action are proof of the relevant reputation; a reasonable likelihood that members of the public may be confused into believing that the business of one is, or is connected with, that of another; and damage.

Intellectual Property – Trademarks – Alleged infringement – Appeal against cancellation of registered trademark – Distinctiveness of mark – A mark is one which is not capable of distinguishing within the meaning of section 9 of the Trade Marks Act 193 of 1994 is liable to be removed from the trademarks register.

Appellants, who were part of the American-based Tupperware group of companies, sought to interdict the first respondent ("Buhle Brands") from infringing their registered trade mark for a water bottle. The High Court instead upheld Buhle Brands' counter-application for cancellation of the trademark. That led to an appeal.

The first appellant ("Dart") was the proprietor of the trade mark "ECO BOTTLE" in class 21, registered for household containers; kitchen containers; water bottles sold empty; insulated bags and containers for domestic use; beverage ware; drinking vessels. Appellants ("Tupperware") had been selling a plastic bottle in the shape of the registered mark, marketed as the "Eco bottle", in South Africa. In 2019, Buhle Brands, a South African company started to sell a similar water bottle. Regarding that bottle as infringing its trademark, Tupperware applied to the High Court for a restraining order based on trademark infringement and passing off. In a counter-application, Buhle Brands sought removal of Tupperware's trade mark registration on the grounds of lack of distinctiveness; that the mark was registered without any intention of using it as such in relation to the goods for which it was registered; that the mark was likely to limit the development of any art or industry; and that there was no *bona fide* intention to use the mark in relation to Tupperware's goods.

The High Court decided the matter on the basis of section 10(2)(a). Section 10 provides a list of unregistrable marks. If such a mark is registered, it shall be liable to be removed from the register. One such mark is one which is not capable of distinguishing within the meaning of section 9. That was the issue considered immediately on appeal.

Held – Section 9(2) provides for inherent distinctiveness and acquired distinctiveness. A mark is inherently distinctive if, by its very nature, it identifies goods as originating from a particular undertaking, and thus distinguishes those goods from those of other undertakings. Regarding acquired distinctiveness, a mark that is not inherently distinctive can acquire distinctiveness by reason of prior use. The function of a trade mark is to indicate the origin of the goods or services. Thus, the public perception of a shape mark is crucial. Where the public might rely on the distinctiveness of the shape as an indicator of the source of goods, that will denote the shape as a trade mark. The judgment highlights the difficulties in the path of traders who contend that the shape of their goods itself has trade mark significance. Tupperware's Eco bottle did not represent a significant departure from the norms and customs of the water bottle sector, and there was no evidence that the average consumer appreciated that the bottle conveyed trade mark significance. It therefore had no inherent distinctiveness. No acquired distinctiveness was found either, and the High Court was correct in ordering cancellation of the mark.

On passing-off, the court referred to the three requirements for a successful passing–off action. Passing-off consists in a representation by one person that the

goods or services marketed by him are from another or that there is an association between such goods or services and the business conducted by the other. The requirements for such an action are proof of the relevant reputation; a reasonable likelihood that members of the public may be confused into believing that the business of one is, or is connected with, that of another; and damage. Tupperware established that it had acquired goodwill deriving from the reputation it had built in respect of its Eco bottle since 2011. Buhle Brands' bottle was substantially similar and would likely lead to confusion.

In the premises, Buhle Brands succeeded in its trade mark counter-application, and Tupperware in its passing-off claim.

Lebashe Financial Services (Pty) Ltd v The Prudential Authority and others [2023] 1 All SA 318 (SCA)

Civil Procedure – Appeal – Locus standi – Question of locus standi is a matter of substance, and concerns sufficiency and directness of interest in the litigation in order to be accepted as litigating party – General rule is that a direct and existing interest in relief is required.

Insurance – Section 54(5) of the Insurance Act 18 of 2017 – An insurer may not begin or enter business rescue or be wound-up while under curatorship, unless the curator applies for the business rescue or winding-up – Having regard to powers and duties of curators and liquidators respectively, curatorship and liquidation cannot co-exist, but once curatorships end, liquidation applications may be proceeded with.

The Prudential Authority, a juristic person operating within the administration of the South African Reserve Bank, obtained orders in the High Court placing the second and third respondents (both insurance companies) under provisional curatorship in terms of section 54(1) of the Insurance Act 18 of 2017. The curators' report showed the insurers to be in serious financial difficulty. Consequently, the Prudential Authority applied for the provisional liquidation of the insurers. The appellant ("Lebashe") appealed against the subsequent discharge of the provisional curatorship orders and the making of final liquidation orders in respect of the two companies. Lebashe was a creditor of the holding company of the two insurance companies and had been granted leave to intervene in the liquidation applications. While it did not dispute that the insurers were insolvent, it contended that section 54(5) of the Insurance Act precluded the provisional liquidation orders. It sought to have the liquidation orders overturned and the curatorships reinstated.

Held – The main issues were whether Lebashe had standing to obtain the said relief on appeal and, whether a proper case had been made out for such relief.

Lebashe had been granted leave to intervene in the liquidation applications by agreement, and obtained leave from the High Court to appeal to the present court. That, however, did not relieve Lebashe of the duty to satisfy the present court that it had *locus standi* to obtain the relief that it sought on appeal.

As stated in case authority, the question of *locus standi* is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party. The general rule is that a direct and existing interest in the relief is required. A direct interest is one that

is not too far removed and an existing interest is one that is not abstract, academic or hypothetical.

Lebashe's interest in having the liquidation orders overturned was questionable. It was only a creditor and shareholder of the holding company of the insurers and had no legal relationships with the insurers. It therefore had no rights to a preferred legal process of dealing with the undisputed insolvency of the insurers, even though it might have an indirect financial or commercial interest therein. Its interest was too indirect and insufficient to clothe it with *locus standi* in the appeal. The appeal had to fail for that reason alone.

In the interests of justice, the court nevertheless considered the remaining issues. Section 54(5) of the Insurance Act states that an insurer may not begin or enter business rescue or be wound-up while under curatorship, unless the curator applies for the business rescue or winding-up. The High Court failed to have regard to the full text of the section when it wrongly rejected Lebashe's argument that section 54(5) precluded the provisional liquidation orders. Having regard to the powers and duties of curators and liquidators respectively, curatorship and liquidation cannot co-exist. However, once the curatorships came to an end, the liquidation applications could be proceeded with as did happen in the court *a quo*.

Finally, the court confirmed that the curator had no duty to affect any recapitalisation of the insurers as contended by Lebashe.

The appeal was dismissed.

Mobile Telephone Networks (Pty) Ltd v Commissioner for the South African Revenue Service [2023] 1 All SA 330 (SCA)

Tax – VAT – Dispute about categorisation of vouchers sold by taxpayer – Whether seeking declaratory order was appropriate in the circumstances – Proceedings for declaratory relief in tax matters are entertained only in limited circumstances, with bare minimum requirement being existence of clear and uncontested facts – Without factual enquiry required in case rendering clear answer, grant of declaratory relief not warranted.

The appellant ("MTN") sold certain pre-paid multi-purpose vouchers which it had historically classified as falling under section 10(19) of the Value-Added Tax Act 89 of 1991 (the "Act"). In November 2017, it sought a private binding ruling from the respondent ("SARS") under section 41B of the Act, to the effect that the sale of the pre-paid vouchers could thenceforth be dealt with as falling under section 10(18). SARS issued a private binding ruling to the effect that section 10(19), and not section 10(18), applied. Aggrieved by the ruling, MTN approached the High Court for declaratory relief. The High Court entertained the application for declaratory relief but dismissed the application with costs, leading to the present appeal.

SARS submitted that the procedure utilised by MTN was impermissible. One of the bases for that contention was that there are no provisions in the Act in terms of which to object to such a ruling, which had not yet taken effect. SARS drew attention to the

special machinery created by the Tax Administration Act 28 of 2011 for such disputes between SARS and taxpayers. MTN conceded that the latter procedure was available to it, but submitted that the application was not one which, in effect, objected to the ruling but was a legitimate approach to the High Court for a declaration of rights.

Held – The two main issues were whether seeking a declaratory order was appropriate in the circumstances, and if so, whether the ruling of SARS was incorrect.

Courts do have jurisdiction to grant a declaration of rights in tax matters. The present court undertook a review of relevant case law in which the courts have exercised their jurisdiction to entertain applications for declaratory orders in tax matters. That exercise established that proceedings for declaratory relief in tax matters are entertained only in limited circumstances. The bare minimum requirement is the existence of clear and uncontested facts. Even where that is the case, there are circumstances where a court will nevertheless decline to exercise its discretion to grant a declaratory order.

Consequently, the first question *in casu* was whether there was a clear, uncontested, sufficient, set of facts. The factual enquiry was whether the pre-paid vouchers fell into one category or the other. Without that enquiry rendering a clear answer, the grant of declaratory relief would not be warranted. Pointing to aspects which were disputed and unclear, the court held that the requirement of clear and uncontested facts was not met. Consequently, the application for declaratory relief was not appropriate in this matter.

The appeal was dismissed.

O'Brien NO v Minister of Defence and Military Veterans and others
[2023] 1 All SA 341 (SCA)

Civil Procedure – Standing – Orders affecting persons who were not party to proceedings in which order was made – Such persons correctly granted standing in review application on ground that they would need to know clearly what the orders required them to do.

Constitutional and Administrative Law – Judicial review – Delay rule – Entire period of delay must be explained, but even if not, delay may be condoned where required upon weighing against other factors.

Constitutional and Administrative Law – Judicial review – Existence of irregularity in impugned decision – Decision-makers mero motu raising issues irrelevant to matters before him and pronouncing on them, together with lack of objectivity, rendering decisions reviewable.

The appellant was a former military judge. In 2014, he took to making remarks in matters that came before him about the brief, renewable assignments of military judges (which was usually for a year at a time) and the implications that held for the institutional independence of military courts. Essentially, when the issue of the court's jurisdiction came up in cases before the appellant, he repeatedly raised concerns regarding the constitutionality of his appointment as military judge. Review Counsel took issue with that and drew it to the attention of the Director: Military Judicial

Reviews, contending that the integrity of the military and senior military judges as well as the integrity of the military court system were being brought into question. The Director: Military Judges (the "DMJ") instructed the appellant not to use the military court as a forum for his criticism. He was advised to use the proper channels of command and warned that if he were to persist in his conduct it might impact on his future assignment as a military judge. However, in August 2016, two matters (the "Mokoena and Mabula matters") came before the appellant in which there had been substantial delays which appellant attributed to the failure of the Minister of Defence and Military Veterans to assign military judges. His judgments in the matters reflected that view, which led to a further meeting with the DMJ who expressed his dissatisfaction that the appellant had repeated his concerns in open court and in his rulings. Instead of agreeing not to repeat the conduct, appellant informed the prosecutor and defence in the Mokoena and Mabula matters that he was being subjected to an investigation by a Board of Inquiry (the "BOI") convened in terms of sections 101 and 102 of the Defence Act 42 of 2002 and that he might have to comment on the cases which were still *sub judice*. In terms of a decision then taken by the Adjutant General, the Defence Force, *inter alia*, sought to review and set aside the majority of the orders handed down by the appellant in the Mokoena and Mabula matters. The present appeal was against the upholding of the review applications. The grounds of appeal were that there had been an unreasonable delay on the part of the Defence Force in bringing the review application; the Defence Force lacked standing; and the review lacked merit inasmuch as the Defence Force had failed to show a gross irregularity in the proceedings.

Held – The delay rule is a principle that flows directly from the rule of law and its requirement for certainty. Although the Defence Force failed to provide a full explanation covering the entire period of the delay, a consideration of the importance of the matter, the prospects of success, the administration of justice and the absence of prejudice, led to condonation being granted by the High Court. No basis was found for interference with that decision.

On the issue of standing, while the officers in the Defence Force were not parties to the proceedings in the Mokoena and Mabula matters, they were affected by the appellant's judgments. To comply with the judgments, they would need to know clearly what they were obliged by the order to do. They were therefore correctly granted standing by the High Court.

The appellant's' final ground of review as that the respondents had failed to establish a reviewable irregularity in his impugned judgments. However, it was evident that he had *mero motu* raised issues irrelevant to the cases before him and then to pronounce on them. His preoccupation with issues that had become all-consuming prevented him from objectively deciding the matters. His appeal consequently had to fail.

Zurich Insurance Company South Africa Ltd v Gauteng Provincial Government [2023] 1 All SA 368 (SCA)

Civil Procedure – Claim for payment under insurance contract – Defence of prescription – Section 12(1) of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as the debt is due – 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 – Prescription may be interrupted by service on debtor of any process whereby creditor claims payment of debt – Onus of establishing that the claim had prescribed rests on the defendant.

After the Gauteng Provincial Government discovered what it believed to be damage to parts of the tunnel system in which the Gautrain Rapid Rail System operated, it made a claim under an insurance policy with the appellant ("Zurich"). Zurich repudiated the claim, and the province issued summons in which it claimed declaratory relief to the effect that Zurich was obliged to indemnify it in respect of the repair, replacement or making good of the damage to the tunnels, and that it was required to pay the province the amount that it proved in due course in respect of its loss.

The High Court granted the relief sought. Leave to appeal was granted on three issues *viz* whether the province's claim against Zurich had prescribed; whether the rock mass that surrounds the void of the tunnels is part of the property insured; and the propriety and effectiveness of the High Court's order.

In terms of a concession agreement, the province granted a company ("Bombela") a concession to design, construct, partially finance, operate, maintain and generate income from the Gautrain for the duration of the concession. Parts of the Gautrain rail network were below ground in tunnels, while others were above ground. This matter concerned the construction of tunnels between the stations of Rosebank and Sandton, and Sandton and Marlboro. In terms of the concession agreement, tunnels were to be constructed so that they would comply with specified permissible water-flow limits and were to be sufficiently water-tight to ensure that the long term ambient hydrological conditions around any of the tunnels would not be disturbed. The ingress of water, when tunnels are constructed below the water table, is a serious engineering concern. The purpose of the policy was to indemnify the insured against any damage contemplated by it, and to pay to or indemnify the insured for the full cost of the replacement, repair or making good of damage.

Held – The issues for determination were whether the province's claim against Zurich had prescribed; whether the rock mass that surrounded the void of the tunnels was part of the property insured; and the propriety and effectiveness of the High Court's order.

It was common cause that a specified high-pressure pre-injection (or pre-grouting), aimed at preventing water ingress, was not performed in the construction of tunnels between the stations of Rosebank and Sandton, and Sandton and Marlboro.

In terms of section 11(d) of the Prescription Act 68 of 1969, the prescription period in respect of the debt in this case was three years. Section 12(1) provides that prescription shall commence to run as soon as the debt is due. Section 12(3) states that the 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, and that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. Prescription may be interrupted in various ways including, in terms of section 15(1), by service on the debtor of any process whereby the creditor claims payment of the debt. Zurich bore the onus of establishing that the claim had prescribed. Based on the facts, the province's claim had not prescribed.

Noting that the policy was intended to give extremely wide cover to the insured, the court found that the property insured included the rock mass that surrounded the void created by the process of excavation.

Finally, the order of the High Court was clear, unambiguous and enforceable. Zurich's argument to the contrary was rejected.

The appeal was dismissed.

Electoral Commission of South Africa and another v Speaker of the uMhlathuze Local Council and others [2023] 1 All SA 386 (Elect Ct)

Constitutional and Administrative Law – Judicial review – Delay rule – In review application based on principle of legality, review proceedings must be instituted within a reasonable time, without undue delay – Two-stage enquiry requiring determination of whether there was an unreasonable or undue delay and, if there was, whether court should exercise its discretion to overlook delay and entertain application.

Local Government – Election of councillors to district council in terms of item 20 of Schedule 2 to the Local Government: Municipal Structures Act 117 of 1998 – Interpretation of item 20 of Schedule 2 – Allocation of seats in district council – Surplus seats after allocation after voting for political parties' candidate lists should remain unallocated – Interpretation ensuring that district council's representatives reflect extent of support for parties in local municipality.

The Electoral Commission of South Africa and the Chief Electoral Officer sought the review and setting aside of the election of the eighth to tenth respondents as councillors of the King Cetshwayo District Council on the ground that their election had been conducted in a manner inconsistent with the Local Government: Municipal Structures Act 117 of 1998 (the "Act") and was thus unlawful.

Opposing the relief sought, the respondents contended that the Commission had delayed unreasonably in launching the review application and that it had failed to join relevant authorities and municipalities. On the merits, they contended that the relief sought was incompetent, as it was based on the Commission's flawed construction of the relevant provisions of the Act. In the alternative, the respondents contended that if found that the Commission's interpretation of the Act was correct and that the affected councillors should not have been elected, the court should in the exercise of its discretion grant a just and equitable remedy.

Held – As the Commission's review application was based on the principle of legality, it was required to institute review proceedings within a reasonable time, without undue delay. The application of the undue delay rule requires a two-stage enquiry involving determination of whether there was an unreasonable or undue delay and, if there was, whether the court should exercise its discretion to overlook the delay and entertain the application. The first stage involves a factual enquiry calling for a value judgment, having regard to all the circumstances of the matter, to establish whether the interests of justice require overlooking the unreasonable delay. The second stage is flexible and entails a legal evaluation taking into account factors such

as potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision and whether such may be ameliorated by the court's power to grant a just and equitable remedy. Although the delay in this case was unreasonable, the matter raised an important issue of law, which required that the merits be considered. The delay was thus overlooked.

On the merits, the parties were in dispute regarding the interpretation of item 20 of Schedule 2 to the Act, relating to the allocation of seats in the district council. Candidate lists submitted by a political party would be allocated one seat on the District Council for every seven votes received. Only three parties submitted candidate lists and based on the votes received, 4 of the 10 available seats were allocated after the first round of seat allocation. The Commission argued that at that point, in terms of item 20, the process for the allocation of seats to the District Council should have stopped and the three remaining seats should have been left unallocated. Instead, the Commission's representatives, who were tasked with managing the election and seat allocation procedures, took the independent decision to allocate the three remaining seats by allocating one additional seat to each of the three contesting candidates' list. The crucial provision was item 20(2)(a), and the meaning of the phrase "any seat or seats not allocated under subitem (1) must be awarded in sequence of the highest surplus" had to be determined. The Commission's proposed interpretation of item 20(2)(a) made sense textually and contextually and was in line with the purpose of item 20, which is to ensure that the district council's representatives reflect the extent of support for the parties in the local municipality. The appointment of the three affected councillors was therefore unlawful, unconstitutional and invalid, and had to be set aside. The setting aside should not, however, have retrospective effect.

HSH v MH [2023] 1 All SA 413 (GJ)

Family Law and Persons – Divorce – Rule 43 application – Rights to equality and access to court, and therefore to justice, lie at heart of Rule 43 applications – Claims for interim maintenance and contribution to legal costs – Entitlement to maintenance must be assessed having regard to standard of living enjoyed by parties during marriage, and ascertaining what contribution would be reasonable in the circumstances – In claim for contribution to legal costs, rule 43 must be applied so as to ensure effective and expeditious access to court, and party may be entitled to full costs.

Against the backdrop of acrimonious divorce proceedings involving the parties in this matter, the Court had to decide on a rule 43 application brought by the applicant. In doing so, the interests of the parties' three children and the applicant's need for interim maintenance were considered.

Held – The high level of parental conflict heightened the need to protect the children, particularly as the conflict had resulted in various behavioural problems. Section 6(4) of the Children's Act 38 of 2005 provides that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided. Delay in any action or decision to be taken must be avoided as far as possible. The Court appointed a social worker to

deal with the high level of conflict between the parties, and ordered that the children's primary residence be with the applicant.

In deciding on interim maintenance, the Court took note of the disparate financial means of the parties, with the applicant clearly unable to live or litigate at the same level as the respondent. the applicant's entitlement to maintenance had to be assessed having regard to the standard of living enjoyed by the parties during the marriage, and ascertaining what contribution would be reasonable in the circumstances. The monthly amount of R104 000 which she claimed was reasonable in the circumstances of the case.

The main aspect addressed was the request for a contribution to legal costs. Rule 43 of the Uniform Rules of Court provides an interim remedy to assist an applicant for a limited period of time before a divorce is finalised, in respect of, *inter alia*, a contribution to legal costs. The rationale behind rule 43 is to ensure that neither party is prejudiced during the divorce proceedings by a lack of resources to maintain a reasonable standard of living, or to pursue her case in the main action. The rule must be applied so as to ensure effective and expeditious access to court. Furthermore, it must be interpreted and applied through the prism of the Constitution, with specific regard to the right to equality. In exercising its discretion, a court deciding a rule 43 application should bear in mind the gender dynamic usually present, with many women being financially disadvantaged in such litigation. Courts must make an order that is fair and equitable having regard to the means and needs of the parties. It would not be in accordance with the Constitution to apply rule 43 in a manner that maintains inequality between the parties or prevents one party from access to justice. The rights to equality and access to court, and therefore to justice, lie at the heart of Rule 43 applications.

The quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge. It has been established in case law that there is no reason why an applicant may not be entitled to all of her costs, because what matters most is that the parties are able to place their case before the court on an equal footing. Clearly, in circumstances where one party causes the other to bear unnecessary costs, entitlement to full costs would be negatively impacted.

On application of the above principles, the respondent was ordered to pay an amount of R830 000 as a contribution towards applicant's legal costs within 10 days of the order.

Lehlehla v Minister of Police [2023] 1 All SA 438 (WCC)

Civil Procedure – Pleadings – Departure in testimony from basis on which case had been pleaded – Failure to amend particulars of claim to reflect true basis of case, resulting in defendant being provided with no factual basis alerting him of case he would later be required to meet.

Personal Injury/Delict – Claim for damages arising from alleged shooting by police – Where police found to have acted out of necessity when discharging firearms containing rubber bullets, and plaintiff also voluntarily assuming risk of injury, claim for damages not sustainable.

Alleging that she had been unlawfully shot in the right eye by members of the police ("SAPS"), acting in the course and scope of their employment with the defendant, the plaintiff sued for damages. The incident occurred during a riot in August 2011, in which police in Grabouw were called upon to control and disperse an armed gathering of over 1000 people. According to the plaintiff, her injury was caused by the police, acting in the course and scope of their employment with the defendant. The police were accused of having breached the duty of care they owed to the plaintiff by failing to handle their firearms with proper consideration for safety of members of the public; and failing to avoid the shooting of the plaintiff when by the exercise of reasonable care they should have done so.

In the plea to the claim the defendant denied that the plaintiff had sustained the injury in question as a consequence of any conduct by SAPS members. Alternatively, it was pleaded that the SAPS members in question had acted out of necessity; that the plaintiff had voluntarily assumed the risk; and that her own negligence had contributed to the injury she sustained. It was argued that the plaintiff had knowledge of the risk in approaching the gathering and therefore consented to the possibility of injury or failed to exercise reasonable care (the further alternative defence of contributory negligence).

Held – Given the medical evidence, it would be assumed in plaintiff's favour that she was, in all probability, struck by a ricocheted rubber bullet. The evidence suggested that she had passed at least alongside the protesters at a time when they had already begun an assault on the SAPS members. The plaintiff must have heard shots being fired even before she left her home but proceeded towards the scene of the protests.

The manner in which the plaintiff had pleaded her case was critical. She had specifically pleaded dereliction of duty by SAPS but relied in her testimony on the actions of a community patrol unit (the "POP unit"). The particulars of claim were not amended to reflect the true basis of the case, with the result that the defendant was provided with no factual basis alerting him of the case he would later be required to meet.

Finally, the police were found to have acted out of necessity when discharging their firearms containing rubber bullets. As shown above, the plaintiff also voluntarily assumed the risk of injury, whether at the hands of one or more of the protesters or the SAPS members acting out of necessity. In the premises, her claim was dismissed.

Mdhlovu v National Director of Public Prosecutions [2023] 1 All SA 458 (MM)

Personal Injury/Delict – Claim for damages – Malicious prosecution – Requirements – Plaintiff must prove that defendant instituted or instigated proceedings, acting intentionally or with animus iniuriandi and without reasonable and probable cause; was actuated by improper motive or malice; that prosecution failed or was terminated in plaintiff's favour; and that plaintiff suffered damages.

Personal Injury/Delict – actio iniuriarum – Nature of – Cause of action whereby a plaintiff can claim for injuries to his person, dignity or reputation, where the injury is committed wrongfully and with animus iniuriandi (intentionally).

The plaintiff, a regional court prosecutor, having formed the view that a case handed to him suffered insurmountable contradictions in the facts, exercised his discretion to

withdraw the charges in the matter. He was subsequently criminally charged for his action, but was found not guilty at his trial and was discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977. He sued the National Director of Public Prosecutions ("NDPP") based on his alleged malicious prosecution by the NDPP, acting through its employees who had acted within the course and scope of their employment.

Held – In order to succeed on the merits with a claim for malicious prosecution, a plaintiff must prove that the defendant set the law in motion, ie instigated or instituted the proceedings; that the defendant acted without reasonable and probable cause; that the defendant acted with "malice" or *animus iniuriandi*; and that the prosecution had failed.

In considering whether the NDPP had acted with reasonable and probable cause and with malice, the court noted the acknowledgment by the prosecutor acting on behalf of the State that the plaintiff should have been called to a disciplinary enquiry instead of being criminally charged.

The *actio iniuriarum* is a cause of action whereby a plaintiff can claim for injuries to his person, dignity or reputation, where the injury is committed wrongfully and with *animus iniuriandi* (intentionally). It is not sufficient for a defendant to merely deny *animus iniuriandi*. He must allege and prove the factual basis for the absence thereof.

Malicious prosecution is an abuse of the process of court by intentionally and wrongfully setting the law in motion on a criminal charge. In order to succeed in an action for malicious prosecution, a plaintiff must prove that the defendant instituted or instigated the proceedings; that the defendant acted intentionally or with *animus iniuriandi*; that the defendant acted without reasonable and probable cause; that the defendant was actuated by an improper motive or malice; that the prosecution has failed or has been terminated in the plaintiff's favour; and that the plaintiff suffered damages.

Both the requisite objective and subjective elements in respect of the NDPP's *animus iniuriandi* were present in this matter. The Court found that the plaintiff had proved on a balance of probabilities that the NDPP's deputy acted with *animus iniuriandi*, and that no defence was established.

The NDPP was held liable to the plaintiff, under the *actio iniuriarum*, for the damages caused to the plaintiff's personality and *dignitas* through his malicious prosecution.

ML v Member of the Executive Council for Health, Eastern Cape [2023] 1 All SA 475 (ECB)

Civil Procedure – Evidence – Expert opinion – Resolution of conflict in testimony of the expert witnesses involving evaluation of expert evidence against requirements for such evidence – Where conflict in expert opinion cannot be resolved, position of overall burden of proof will determine which party must fail.

Personal Injury, Delict – Medical negligence – Claim for damages – Requirements – Plaintiff having to establish that wrongful and negligent conduct of hospital staff, acting within the course and scope of their employment, caused her harm – Onus of proof

resting on plaintiff, and defendant having evidential burden to show what steps were taken to comply with expected standards.

The plaintiff claimed damages flowing from her child's cerebral palsy sustained in consequence of a hypoxic-ischaemic event during the birth process. The claim was based on allegations of medical negligence by the medical and/or nursing staff of a hospital for which the defendant (the "MEC") was responsible.

The MEC filed a general plea denying negligence and causality. The parties then narrowed down the trial issues to the question of causality, with the main dispute being whether plaintiff's child had a pre-existing medical condition that had caused the cerebral palsy or whether the cerebral palsy was caused as a result of the negligence by the medical staff.

Held – To succeed in her action for delictual damages, the plaintiff had to prove, on a balance of probabilities, that the acts or omissions of the hospital staff was wrongful and negligent, and caused loss. She had to establish that the wrongful and negligent conduct of the province's nursing and medical staff, acting within the course and scope of their employment, caused her harm. The onus of proof is on the plaintiff, and the defendant has an evidential burden to show what steps were taken to comply with the standards to be expected.

In casu, as a result of the expert reports and testimonies, the issues were narrowed down to the question of what the factual cause of the child's condition was. The starting point was to evaluate and resolve the conflict in the testimony of the experts for the respective parties. The cogency of the expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached. The opinion must be logical in its own context, that is, it must accord with, and be consistent with all the established facts, and must not postulate facts which have not been proved. The inferences drawn from the facts must be sound. The logic of the opinion must be consistent, and the reasoning adopted in arriving at the conclusion in question must accord with what the accepted standards of methodology are in the relevant discipline. While there are circumstances in which the reasoning will be illogical or irrational and consequently unreliable, if the evidence is based on sound grounds and is supported by the facts, there is no reason not to accept it. If it is not possible to resolve a conflict in the expert opinion so presented, as in when the two opposing opinions are both found to be sound and reasonable, the position of the overall burden of proof will inevitably determine which party must fail.

The evidence supported the expert opinion that the brain injury sustained by plaintiff's child and the consequent disabilities, were the result of prolonged partial hypoxic ischaemia during labour. The injury was consistent with the conduct of the defendant's medical staff allowing a severely prolonged labour of the plaintiff to continue with no monitoring, exposing the foetus to a risk of hypoxic type brain injury. The defendant was thus liable to compensate the plaintiff.

Van Zyl NO obo AM v MEC for Health, Western Cape Provincial Department of Health [2023] 1 All SA 501 (WCC)

Civil Procedure – Absolution from the instance – Low threshold of proof merely requiring that prima facie case be established by plaintiff

Civil Procedure – Evidence – Expert opinion – Court must be satisfied that opinion has logical basis.

Civil Procedure – Joint minute – Status of joint minute – Unlike agreements on questions of fact, court is not bound by such agreements on opinions, and must still assess whether they are based on facts and are underpinned by proper reasoning.

Action was instituted by a curator *ad litem* on behalf of a patient seeking to recover damages from the defendant, who bore responsibility for any acts or omissions by staff at the hospital treating the patient, resulting in injury and damages to its patients. The patient had suffered brain damage when he was being revived from an anaesthetic at the hospital.

The patient appealed against the trial court's granting of absolution from the instance.

Held – Absolution was granted solely on the basis that the plaintiff had failed to adduce sufficient evidence to make out a case for negligence on the part of the defendant. The Court discussed the principles regarding absolution from the instance and the approach on appeal against an order for absolution. The authorities confirm the low threshold of proof in applications for absolution, with the enquiry being merely whether a *prima facie* case has been set up by the plaintiff.

In assessing the evidence, the Court addressed the function of an expert witness in a matter such as this. Such functions are threefold. First, where the experts have themselves observed relevant facts, that evidence will be evidence of fact and admissible as such. Second, expert witnesses provide the court with abstract or general knowledge concerning their discipline, that is necessary to enable the court to understand the issues arising in the litigation. Thirdly, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions. The court must be satisfied that such opinion has a logical basis - in other words that the expert has considered comparative risks and benefits and has reached "a defensible conclusion". Expert opinion evidence should only be excluded when it impacts adversely on the right to a fair trial.

The court also explained the status of a joint minute. Agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts, are not to be lightly departed from. The opinions of expert witnesses stand on a completely different footing. Unlike agreements on questions of fact, the court is not bound by such agreements on opinions. It is still required to assess whether they are based on facts and are underpinned by proper reasoning. The existence of joint minutes may not be used to prevent witnesses from explaining the reasons for the conclusions expressed in the minute. Furthermore, the joint minute does not render the whole of the expert's report admissible in evidence. Unless the expert gives evidence, or it is agreed that the report will be admissible, it remains inadmissible. Deficiencies in a joint minute cannot be resolved by reference to the report of the expert.

In this case, the evidence established that the doctor treating the patient did not act appropriately and timeously. The court *a quo* ought to have found that the plaintiff had made out a *prima facie* case of negligence.

The appeal was thus upheld.

Weinert and another v Municipality of the City of Cape Town and others [2023] 1 All SA 536 (WCC)

Civil Procedure – Interim interdict – Requirements – Applicant must establish a prima facie right, well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, balance of convenience favouring the grant of interim relief, and absence of any other satisfactory remedy.

Constitutional and Administrative Law – Constitutional right to fair and just administrative action – Allegation of bias by decision-maker in rezoning application – Principle of subsidiarity preventing direct reliance on section 33 of Constitution – Doctrine of ripeness precluding determination of fairness of impugned administrative action where rezoning application was still pending and had not yet been decided.

As homeowners in Tamboerskloof, Cape Town, the applicants alleged that their constitutional rights to property, to privacy, and to an environment that is not harmful to their health and wellbeing were violated by the second and third respondents' restaurant being operated nearby, in what was a general residential use zone. The applicants sought to interdict the first respondent (the "City") against considering a rezoning application submitted by the second and third respondents (The "Blue Café"), for the rezoning of their immovable property from a residential zoning to a General Business 1 zoning in terms of the City's Municipal Planning By-law, 2015 (the "MPBL") and the regularisation of a so-called non-conforming use ("NCU") right. The rezoning was required to allow the second and third respondents to operate a restaurant business from their property. Applicants also sought the discovery and production of documents relating to the issues in their application in terms of the provisions of rule 35(11) and (13), read with section 7 of the Promotion of Access to Information Act 2 of 2000.

Held – The requirements for the grant of an interim interdict begin with a *prima facie* right. That need not be shown on a balance of probabilities, but is sufficiently proved if *prima facie* established though open to some doubt. The stronger the right is, the less need there is for the balance of convenience to be considered. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted must also be established. That is harm that a reasonable person might entertain on being faced with certain facts, and entails an objective test. The third requirement is the balance of convenience favouring the grant of the interim relief. The court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. Finally, there must be an absence of any other satisfactory remedy in the circumstances. The proper approach in determining whether to grant an interim interdict is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial (or, in the present matter, on the return date of the rule *nisi*).

In requesting the court to stop the consideration of the rezoning application, the applicants relied on their right to administrative action that is lawful, reasonable and procedurally fair, as provided for in section 33 of the Constitution. Direct reliance was placed on sections 33 and 195 of the Constitution, with applicants alleging that the City was biased on favour of the relevant respondents, thereby violating applicant's right to fair administrative action. However, applicants ignored the fact that the Promotion of Administrative Justice Act 3 of 2000 is the legislation enacted under section 33(3) of the Constitution to give effect to the rights embodied in section 33. Based on the principle of subsidiarity, the applicants were not entitled to by-pass the Promotion of Administrative Justice Act and place direct reliance upon section 33 of the Constitution. A further obstacle was that the doctrine of ripeness precluded any determination of the fairness of the impugned administrative action, as the zoning application was still pending and had not yet been decided by the City. The application for interdictory relief was therefore premature. In addition, the applicants were not entitled to an order that would prevent the City indefinitely from exercising its constitutionally mandated powers. There is no authority for the proposition that the court may intervene and prohibit a statutory power from ever being exercised.

In light of the above, the applicants failed to establish a *prima facie* right to the interim interdict sought. They also did not meet the remaining requirements for such relief. The application was thus dismissed.

Williams v Member of the Executive Council, Department of Health, Eastern Cape and another [2023] 1 All SA 562 (ECP)

Civil Procedure – Evidence – Expert witnesses – Function of – Key function of expert witness is to guide court in its decision-making process on questions which fall within the ambit of the expert's specialised field of knowledge – Determination of issues of fact is task of court and not that of expert witness.

Personal Injury/Delict – Claim for damages – Medical negligence – Negligence will be established if a reasonable person would foresee the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and would have taken reasonable steps to guard against the occurrence of harm.

The plaintiff claimed compensation from the defendants, respectively the provincial health department and the medical superintendent, after her husband died upon falling from the fifth floor of a public hospital. On being admitted to the hospital, the deceased was identified as having a history of alcohol abuse, displaying irrational behaviour, suffering from chronic alcoholic liver disease and demonstrating clear signs of severe alcohol withdrawal.

Held – The issues of negligence and causality would be tried separately from, and prior to, the remaining issues in the action.

The treating medical and nursing personnel were under a legal duty to provide the deceased with adequate and timeous medical treatment with such professional skill and care as may reasonably be expected of reasonable medical and nursing personnel in similar circumstances, failing which, it was reasonably foreseeable that the deceased would wander around the hospital in a state of psychosis and confusion, whilst having visual and auditory hallucinations and alcohol withdrawal delirium.

The only oral evidence tendered at trial was that of the parties' respective expert witnesses. In considering the expert evidence adduced, the Court reminded that it is the court's task to determine issues of fact and not that of an expert witness. The key function of an expert witness is to guide the court in its decision-making process on questions which fall within the ambit of the expert's specialised field of knowledge. The Court was satisfied that the factual basis upon which the respective expert witnesses expressed their opinions, was not in dispute between the parties. A conflict did arise in the experts' analysis of the established and/or common cause facts; and regarding the accepted standard of care/treatment by a medical practitioner in certain circumstances. The opinion advanced by an expert witness must be properly motivated. Where the court is presented with competing opinions, it is incumbent upon it to carefully consider the underlying reasoning of the respective experts to enable it to choose which of the opinions to adopt, if any, and to what extent. In doing so,the court, after a careful evaluation of the expert testimony, is required to justify its preference for one opinion over the other.

Negligence will be established if a reasonable person would foresee the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and would have taken reasonable steps to guard against the occurrence of harm. The established test relating to the *diligens paterfamilias* was set out by the court. The onus rested on the plaintiff to establish the presence of negligence. The Court found that negligence on the part of the hospital staff was established, as was causation.

The defendants were held liable, jointly and severally, for plaintiff's proven damages.

South African Criminal Law Reports January 2023

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2023 (1) SACR 1 (SCA)

Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Exclusion of interest in property from operation of order — Meaning of 'interest' in terms of s 1 of Act.

Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Exclusion of interest in property from operation of order — Ranking of competing claims for exclusion from forfeiture — To be determined according to common-law principles.

Words and phrases — 'Interest' — Meaning of in s 1 of Prevention of Organised Crime Act 121 of 1998.

The appellant (the Land Bank) and the first respondent (the Minister) made funds available for the purchase of a farm which was to be registered in the name of a trust, of which 39 identified previously disadvantaged individuals would be the beneficiaries.

Because of corruption and fraud, the property was registered in the name of CPAD Farm Holdings (Pty) Ltd (the fourth respondent). The Minister paid an amount of R2,6 million and the Land Bank advanced a further R5 million secured by a first mortgage bond which was registered in the Deeds Registry. The fourth respondent defaulted on the loan and the Land Bank obtained judgment. The property was declared executable and was attached. In the meantime, the National Director of Public Prosecutions (the NDPP) instituted a criminal prosecution against a director of the fourth respondent and a former employee of the Minister. The NDPP obtained a preservation order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of the property and provided for notice of the order to interested parties, including the Land Bank. The Land Bank's attorney engaged officials of the NDPP, and they assured him that they acknowledged the Land Bank's security consisting of the bond; that its interest in the property would be excluded from the forfeiture order; and that it was not necessary for it to enter an appearance or become involved in the application for a forfeiture order. The High Court then granted an order declaring the property forfeited to the state. However, not only was no mention made of the interest of the Land Bank, but the order provided that the property 'be handed back' to the Minister. The Land Bank then applied for an amendment of the original order and the court ordered that the preservation order be subject to the rights of bondholders. The full court of the High Court found on further appeal that the interest in the property of both the Minister and the Land Bank should be limited to the equivalent of their capital loss without ranking in status or prior position. The Land Bank appealed against this decision to the Supreme Court of Appeal.

Held, that, the purpose of ch 6 of POCA was to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the state. That would be undermined if the forfeiture was subjected to vague and flimsy interests, as opposed to legal rights. Although ambiguity may have been avoided by the employment of the word 'means' in s 1, * that was the meaning that, in the context, had to be ascribed to the word 'includes'. In sum, 'interest' meant any right, and any right to property as defined was an expression of wide import, which might include a contingent right to property. On the facts, the Minister had no right to the property. (See [28] – [30].)

Held, further, that the legislature must have contemplated that competing applications could be made for the exclusion of interests in property from a forfeiture order, yet it did not prescribe principles for the ranking of such competing claims. It followed that this had be determined according to principles of common law. Two main principles were relevant: the first was that a real right generally prevailed over a personal right; and the second was that the *maxim qui prior est tempore potior est iure* applied to the ranking of rights that were equal in hierarchy. On the application of these principles the interest of the Land Bank had to be afforded precedence over that of the Minister. (See [36].)

Held, further, therefore, that the rights of the Land Bank under the bond, judgment and attachment of the property should to their full extent have been excluded from the operation of the forfeiture order as the first charge against the proceeds of the property. The Minister's claim for the exclusion of an interest should have been disallowed, on the basis that the Minister had no such interest in law, or, at least, assuming that the Minister had such an interest, on the ground that the exclusion of such interest from the forfeiture order would not constitute an efficacious remedy. (See [38].) The appeal was accordingly upheld.

RESIDENTS, INDUSTRY HOUSE AND OTHERS v MINISTER OF POLICE AND OTHERS 2023 (1) SACR 14 (CC)

Search and seizure — Search — Without warrant — Constitutionality — Area searches conducted in cordoning-off operations authorised under s 13(7) of South African Police Service Act 68 of 1995 — Powers conferred by para *(c)* overbroad and in violation of right to privacy — High Court declaration of invalidity of subsection confirmed, but order varied — Constitution, s 14.

Search and seizure — Search — Without warrant — Constitutionality — Area searches conducted in cordoning-off operations authorised under s 13(7) of South African Police Service Act 68 of 1995 — Paragraphs *(a)* and *(b)* not inchoate and serving as mechanisms to enable police service to fulfil its constitutional obligations — Provisions constitutional.

Damages — Constitutional damages — Award of — When appropriate — Area searches conducted in cordoning-off operation authorised under s 13(7) of South African Police Service Act 68 of 1995 in breach of right to privacy — Granting of

damages not just and equitable since more appropriate and effective alternative remedies available — Constitution, s 14.

The applicants applied, inter alia, for the confirmation of an order of invalidity of s 13(7)*(c)* of the South African Police Service Act 68 of 1995. Paragraph *(a)* of the section provided that the National or Provincial Commissioner could authorise that a particular area or any part thereof be cordoned off where it was reasonable to restore public order or to ensure the safety of the public. Paragraph *(b)* provided that the written authorisation had to specify the period, not exceeding 24 hours, during which the area could be cordoned off. Paragraph *(c)* provided that on receipt of the written authorisation any member could cordon off the area and, without warrant, search inter alia any person, premises or vehicle, or any receptacle or object of whatever nature in that area, and seize any article referred to in s 20 of the Criminal Procedure Act 51 of 1977 (the CPA) found in the possession of such person.

The application had its origin in action taken by the South African Police Service (the SAPS), the Johannesburg Metropolitan Police Department and the Department of Home Affairs in conducting warrantless searches of 11 buildings occupied by some 3000 people. In all but two of the raids and cordoning-off, written authorisations had been issued by the sixth or seventh respondent in terms of s 13(7). Each of the searches was conducted in virtually the same manner with the occupants being forced out onto the street, searched, fingerprinted, and members of the police and the Metropolitan Police demanding copies of their identity documents, passports, visas, or asylum-seeker permits. Anyone not in possession of such was detained in terms of the Immigration Act 13 of 2002. Whilst this occurred, members of the SAPS and the Metropolitan Police entered the buildings, broke down doors to each unit and searched each of the applicants' possessions. The applicants were not given a warrant or any other written authority for the searches of their homes. Once the searches were over, those applicants who had not been detained were allowed to re-enter their homes and often found their possessions in disarray and items of value missing.

The High Court held that paras *(a)* and *(b)* of s 13(7) were constitutionally valid and that neither of those provisions infringed the s 14 right to privacy — the power to cordon off an area was an important legislative mechanism that enabled the police to discharge their constitutional mandate effectively. Although it accepted that the three

paragraphs should be read as a whole, it concluded that there was no justifiable reason to declare the entire section constitutionally invalid, when only one of its parts (para *(c)*) infringed a constitutional right. The latter paragraph infringed the right to privacy and was so sweeping that it permitted warrantless searches into private homes which included the most protected inner sanctum of the person. Section 13(7) could have achieved its ends through less damaging means and the decisions to authorise the raids had been exercised for an ulterior motive, namely the arrest of illegal immigrants, and to enable the City to survey the occupants of the buildings occupied by the applicants and audit the 'hijacked' buildings. The decisions to authorise the raids were therefore set aside in terms of the Promotion of Administrative Justice Act 3 of 2000. The court also dismissed claim for constitutional damages in the amount of R1000 for each applicant in respect of each raid, on the grounds that there was no primary evidence from each of the applicants concerning the search of their homes and how they were treated by members of the police during the search. In addition, on the evidence, not every room or floor had been searched in each building, but each applicant claimed damages. The court concluded that it would therefore not be appropriate to grant a blanket order for constitutional damages.

In the confirmation proceedings, the court held that, when that considering s 13(7)*(c)* provided neither for urgency when authorising searches nor guidelines for the manner in which the searches had to be conducted or required that a reasonable suspicion of criminality had to exist before the search, it was overbroad. The court accepted that the limitation (on privacy through warrantless search and seizure) was rationally connected to the purpose of restoring public order and ensuring the safety of the persons in the area but held that there were less restrictive means available to the police to fulfil the objects of s 205(3) of the Constitution and the purpose set out in s 13(7). If the need arose the provisions of ss 21 and 22 of the Criminal Procedure Act 51 of 1977 could be utilised. It followed that the portion of s 13(7)*(c)* permitting warrantless searches without any appropriate safeguards was inconsistent with s 14 of the Constitution, invalid and had to be severed. (See [57] – [60].)

In respect of the constitutionality of paras *(a)* and *(b)* of s 13(7), the court held that the basis on which the applicants challenged the constitutionality of those paragraphs was limited. It was not that they limited the right to privacy or any right in the Bill of Rights, but that they served to provide a framework that made it possible for the warrantless

searches under para *(c)* to be conducted. If the latter para was unconstitutional, which it was, then the preceding paragraphs were left inchoate and served no other purpose than to facilitate possible nefarious use like a show of force and intimidation. But it was not the whole of s 13(7)*(c)* that was unconstitutional, only that portion that permitted warrantless searches without appropriate safeguards. What the applicants missed was that it was not obligatory for there to be searches when a member of the police gave effect to a s 13(7)*(a)* authorisation. What was being authorised was the restoration of public order or safety and quite conceivably that could be done without any searches, warrantless or otherwise. That put paid to the idea that the two preceding paragraphs were merely inchoate and necessarily had to fall with the impugned portion of s 13(7)*(c).* Therefore paras *(a)* and *(b)* passed constitutional muster and served as mechanisms that were meant to enable the police service to fulfil its constitutional obligations. (See [62] – [64] and [71].)

As to the remedy, the constitutionally repugnant part of s 13(7)*(c)* included not just the warrantless search of a person's home, as found by the High Court, but also their vehicle or person, or any receptacle or object of whatever nature and had to be replaced with lawful search-and-seizure provisions that did not divest the police of the power to conduct searches and seizures, where those might be necessary. The court therefore read-in, on an interim basis, the following at the end of the severed portion: 'and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977'. The severance and reading-in would be of immediate effect and there was no reason for the court to suspend the declaration of invalidity. (See [73] – [76].)

The order had to be prospective to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under the invalid statute, but the prospective nature of the order would not affect the availability of potential additional relief sought by the applicants in the present case. The warrantless searches were, before the declaration of invalidity, not only unlawful, but, because they exceeded the parameters of the empowering legislation, also breached the rights to privacy and dignity of the applicants. (See [77] – [80].)

In respect of the claim for constitutional damages, there were two overarching considerations: namely, the existence of an alternative remedy that would vindicate the infringement of the rights alleged and whether that alternative remedy was effective or appropriate in the circumstances. In the circumstances the applicants had two clear alternative routes to obtain compensatory relief for the breach of their rights to privacy and dignity and the administrative justice rights — under the common law and legislation, respectively. In the present matter the appropriate deterrent remedies were delictual claims to prevent further individual infringement of the applicants' rights and the declaration of constitutional invalidity to deter systemic violations. It was not fair to burden the public purse with financial liability where there were alternative remedies that could sufficiently achieve that purpose. Therefore, the granting of constitutional damages would not be just and equitable because the applicants had alternative remedies available to them which were effective and more appropriate. The appeal in respect of the claim for constitutional damages accordingly had to be dismissed. (See [103], [112], [118] and [120] – [121].) The court accordingly made an order confirming the declaration of invalidity but varying the impugned paragraph.

In a minority judgment, Victor AJ was in agreement with the main judgment except that he considered all three paragraphs of s 13(7) unconstitutional and would have declared the section invalid in its entirety. (See [221].)

S v LOTZ 2023 (1) SACR 88 (KZP)

Indictment and charge — Charge-sheet — Name of accused — Proper citation of — Employee of company cited in personal capacity without any reference to provisions of s 332(2) of Criminal Procedure Act 51 of 1977 — Conviction and sentence set aside on appeal.

The appellant was charged in a magistrates' court with contravening s 50(1) of the National Land Transport Act 5 of 2009 (the Act), in that he had personally operated a public-transport-service vehicle upon a public road without holding the necessary permit or operating licence. He was sentenced to a fine of R15 000 or 10 months' imprisonment. Leave to appeal was refused.

The appellant was neither the driver nor the owner of the vehicle, but merely worked for the owner, a company which leased motor vehicles, but also from time to time provided a passenger service to clients — in the present instance, transporting four

UK nationals from the airport in Johannesburg to a hunting lodge near Dundee in KwaZulu Natal. The vehicle was stopped whilst being driven by a different employee of the company, who had been instructed to undertake the journey, and impounded. On the following day the driver and the appellant drove down to Dundee from Johannesburg to collect the vehicle. The appellant was, however, arrested and subsequently convicted of 'the offence of contravening s 50(1) read with ss 1, 124, 126 and 127 of Act 5 of 2009'. The prosecution appeared to have been conducted without any reference to the provisions of s 332 of the Criminal Procedure Act 51 of 1977 (the CPA) which permitted liability to be visited upon a corporate body for criminal conduct by way of citing a person as representative of the corporate body. Leave to appeal was granted on petition to the Judge President.

Held: The qualification in s 332(2)*(d)* of the CPA, * that the person had to be cited in the charge-sheet as a representative of the corporate body, was of singular significance. (See [10].)

Further, difficulties for the state immediately became apparent in that the appellant at no stage personally operated a vehicle in breach of the Act; he was not the owner of the business; he was not the owner of the vehicle, nor was he the driver thereof. He was not even in the province of KwaZulu-Natal when the offence was allegedly committed. There was therefore no evidence to demonstrate that he personally conducted the service that the state found offensive and contrary to the law. Furthermore, since the appellant was never charged in his capacity as a representative of the company, although he ought to have been, he personally acquired a criminal conviction. In addition, there were no ss 124, 126 and 127 in the Act and what sections were relied on by the state were therefore unknown. (See [12].) The appeal accordingly had to be allowed and the conviction and sentence set aside.

S v VAN DER MERWE 2023 (1) SACR 94 (ML)

Bail — Application for — Onus — On accused — Section 60(11)*(a)* of Criminal Procedure Act 51 of 1977 — Accused to satisfy court of 'exceptional circumstances' permitting release — Discharge of onus — Both state and applicant failing to provide sufficient particulars as required by section — Applicant's reliance on failure of state not helpful, however, as duty remaining with him alone — Bail refused on appeal.

Bail — Application for — Onus — On accused — Section 60(11)*(a)* of Criminal Procedure Act 51 of 1977 — Accused to satisfy court of 'exceptional circumstances' permitting release — Discharge of onus — Both state and applicant failing to provide sufficient particulars as required by section — Applicant's focus ought to be on initial application rather than attempting to persuade court in subsequent appeal — Bail refused on appeal.

The appellant appealed against the decision of a magistrate refusing to release him on bail pursuant to a formal bail application under sch 6 to the Criminal Procedure Act 51 of 1977 (the CPA), wherein the evidence from both sides was adduced by way of affidavit. The charge against the appellant was that he had allegedly raped an 8-year-old girl.

In the bail proceedings the investigating officer did not oppose bail and further asked the court to release him if the court found him a suitable candidate for bail. The state did not expend much effort on arguing, except to submit that the appellant could be released on bail with certain conditions. On appeal, though, the state argued for the first time that the appellant had failed to adduce evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release on bail. In support of the contention that the magistrate was wrong in refusing him bail, the appellant alleged that the magistrate did so in circumstances where bail was not opposed by the state. In her judgment, the magistrate stated that the matter was very serious because it involved an 8-year-old child and that the state had not presented its case properly as far as the seriousness of the matter was concerned. She stated that the investigating officer should have come to testify and tell the court in full why she was not opposed to bail. The court concluded nevertheless that it was not satisfied that the applicant had adduced sufficient evidence that there were exceptional circumstances which in the interests of justice permitted his release on bail.

Held, that there was a clear indication that the court a quo was placed in a difficult position, not only by the state, but also by the defence failing to fulfil its core duty in terms of s 60(11)*(a) of* the CPA when applying for bail. The investigating officer's attitude was simply that 'only if the appellant has successfully made out a case that the interests of justice permit his release, the court could then release him on bail'. It was clear that the appellant was unable to adduce evidence that satisfied the provisions of s 60(11). In the entire reading of the record, it could easily be deduced

that the appellant approached its application in a nonchalant manner, which was unsuitable for an applicant faced with a high standard to meet. The applicant's reliance on the failure of the state to do anything was not helpful to his cause, as the duty remained with him, and with him alone. (See [16], [19] and [26].)

Held, further, that an applicant for bail should not be found to have neglected his or her duty in the hope that they would attempt to persuade the court during the appeal. The primary focus should always be to endeavour to satisfy the court of first instance. If the applicant failed to do so, as in the present case, they should not be allowed to do so at the appeal stage, as allowing this would amount to unequivocally undermining the court of first instance. In the circumstances the court was not persuaded that the magistrate was wrong in her refusal of the bail application, and the appeal accordingly had to fail. (See [30] – [32].)

DIRECTOR OF PUBLIC PROSECUTIONS, NORTHERN CAPE v SWARTS AND ANOTHER 2023 (1) SACR 101 (NCK)

Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — What constitutes — Even if trial court ignoring evidence or displaying lack of appreciation for relevance, this not amounting to error of law.

Subsequent to the acquittal of the two respondents by a circuit court on a charge of murder and charges of possession of a firearm and ammunition, the appellant applied to the trial court to have certain questions of law reserved in terms of the provisions of s 319 of the Criminal Procedure Act 51 of 1977, but the application was dismissed. On petition to the President of the Supreme Court of Appeal, leave to appeal against the dismissal of the application was granted.

The appellant submitted that there were three questions of law that required determination: first, whether the trial court failed to properly consider and appreciate relevant evidence or erroneously approached or treated relevant evidence presented by the state against both the respondents; secondly, whether the trial court correctly appreciated and applied the legal principles relating to circumstantial evidence by not applying those legal principles under consideration to all the relevant evidence presented by the state; and thirdly, whether the trial court disregarded the established legal principles of liability, particularly the doctrine of common purpose, by not applying

such principles to the relevant and proven evidence against the first respondent. Counsel on behalf of the appellant submitted that the trial court's failure to correctly consider and evaluate all the relevant evidence constituted an error of law and not of fact, whereas counsel for the respondents argued that all of the questions raised were questions of fact.

Held, that it was clear from the judgment of the trial court that it was satisfied from a totality of the evidence that the state had not proved its case beyond reasonable doubt against the respondents. The judgment confirmed that the evidence led by the state was accounted for and due weight accorded to it, and the conclusion at which the trial court arrived was that the evidence was insufficient to establish the guilt of the respondents. Even if a trial court ignored evidence or displayed a lack of appreciation for its relevance, this did not amount to an error of law. The appellant was in essence requesting the court to approach the matter as if this were a full appeal on the merits. The questions raised by the appellant were questions of fact and not of law. The application was accordingly dismissed. (See [18] – [19] and [21].)

MSHUDULU v REGIONAL COURT MAGISTRATE, KIMBERLEY AND ANOTHER 2023 (1) SACR 108 (NCK)

Review — Criminal proceedings not finalised — When permissible — Test for — Application for review of decision not to hold trial-within-trial — Applicant failing to show exceptional circumstances and irreparable harm — Application dismissed.

The applicant was facing nine charges in the regional court of, inter alia, corruption, attempting to defeat the ends of justice, extortion, and assault to do grievous bodily harm. He pleaded not guilty to all the charges and the matter proceeded to trial. During the evidence-in-chief of the first witness, the prosecution wanted to introduce recordings of certain telephonic conversations the said witness had recorded of himself and the applicant. The defence objected and motivated for the procedure of a trial-within-a-trial to be followed. The trial magistrate, however, ruled that this was not necessary. After the recordings were played in court, the applicant moved for the matter to be postponed so that the present application to review the decision not to hold a trial-within-a-trial could be launched.

Held, that, to succeed, the applicant had to establish both exceptional circumstances and irreparable harm before the court would interfere in criminal proceedings that had

not yet terminated in the lower court. The applicant in his affidavit in support of his application did not set out or establish such. He only suggested that he would suffer irreparable harm if a trial-within-a-trial were not held, without any attempt to elaborate and identify or explain the harm that could not be rectified on appeal. (See [12] – [15].)

Held, accordingly, that the applicant had not established the minimum basis required for the court to intervene before the proceedings in the magistrates' court had been concluded, and the review accordingly had to be dismissed.

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AK v MINISTER OF POLICE 2023 (1) SACR 113 (CC)

Court — Constitutional Court — Jurisdiction — Constitutional matters — What constitutes — Whether negligently conducted police search and investigation in gender-based-violence case could be wrongful and could give rise to delictual liability — Question bore directly on ss 7(2) and 12 of Constitution and did raise constitutional issue.

Police — Powers and duties of — Investigation of crime — Search and investigation in gender-based domestic-violence matter — South Africa party to several treaties which enshrined rights of women, and European Court of Human Rights required high standard of professional conduct of police, consistent with positive obligation to combat gender-based violence — Police negligently conducting search and investigation, giving rise to delictual liability.

The applicant had been assaulted, held captive and raped in a clearing between bushes in sand dunes near a beach. The police had conducted a search for her after they had received information that she was missing, and had searched the general area of the beach, but had missed seeing her despite having used a helicopter with a very bright light. She claimed damages from the police for their negligence in conducting the search and in the subsequent negligence in the carrying-out of the investigation. She contended that those failures had caused her to suffer additional psychopathology. The High Court upheld her claim and held the respondent liable for 40% of the damages that she would be able to prove. The respondent appealed to the Supreme Court of Appeal, which upheld the appeal, holding that no quantifiable psychiatric loss or contribution to her psychopathology could be attributed to her not having been found earlier, and that the decision to call off the helicopter search had

been based on safety considerations and was reasonable. It also held that the police had mobilised all the available resources at their disposal and taken all reasonably practicable and appropriate precautions to carry out an effective search. It held that there had been no negligence in either the conducting of the search or of the subsequent investigation. It also held that the High Court had erred in failing to consider whether it was reasonable to impose liability on the police for the harm suffered by the applicant, and that to impose liability for such harm would make it difficult for the police to conduct their investigations in the future. The applicant applied for leave to appeal to the Constitutional Court.

Held (per Tlaletsi AJ for the majority), as to the jurisdiction of the court in the present matter, that the argument by the respondent that the applicant's case was not about gender-based violence, nor did it involve a constitutional issue, but was a normal delictual action, ignored the novel legal question whether a negligently conducted police search and investigation, which caused a person harm, could be wrongful and give rise to delictual liability. That question bore directly on ss 12 and 7(2) of the Constitution, and required that the court consider whether the police's 205(3) obligations to protect, combat and investigate crime should translate into private-law duties. That question certainly did raise a constitutional issue and the court accordingly had jurisdiction. (See [59] – [60].)

Held, further, as to the search and the interference with the factual finding of the High Court, that not even a basic footsearch had been conducted between the time the police discovered the applicant's vehicle and when the officer from the search-and-rescue section of the K9 unit arrived 75 minutes later, that factual finding could only be interfered with on appeal if the finding was clearly wrong, which was not the case in the matter at hand. Reasonable police officers would have conducted a basic footsearch of the area with or without torches and they could easily have found the applicant. The total failure to conduct the most basic of footsearches before the office's arrival was certainly negligent. (See [74].)

Held, further, that the search-and-rescue officer, who possessed expertise in searching, would have either included the further area in his plan when actually conducting the search or would have specifically instructed the helicopter to search that area. The appellate court had therefore erred when it held that the conduct of the

police in respect of the search was not negligent merely because they mobilised all the resources available to them in the circumstances. (See [78] and [81].)

Held, further, that there were at least two fundamental omissions by the police that tainted the investigation. Although they knew on the morning after the applicant went missing that she was being kept in and around the vegetated sand-dune area populated by so-called 'bush dwellers', they had failed to immediately round up that community to search for possible suspects while the incident was fresh. Secondly, with full knowledge that the parking area at the beach was covered by CCTV cameras, the police should immediately have made plans to obtain and view the video footage for possible leads, but the investigating officer had only watched part of the footage three days later. The police had failed to take reasonable measures which were available to them in the circumstances and had failed to act promptly and expeditiously so as to follow up on any available leads. They had failed to act diligently and with the skill required of them by the Constitution. (See [82] – [83] and [86].)

Held, further, that it was trite that the duty to prohibit rape and other forms of gender-based violence was a customary norm of international law and South Africa was a party to several treaties which enshrined the rights of women. The European Court of Human Rights had imposed a high

standard of professional conduct on the police, and the approach taken by it was far more strenuous than the relatively lax approach which the Supreme Court of Appeal took in the present matter. That standard was consistent with the positive obligation to combat gender-based violence established by the Constitutional Court. (See [88] and [94].)

Held, further, as to factual causation, that the applicant did not need to determine causation as a matter of mathematical certainty or science, but, rather, causation was established on a common-sense weighing-up of the evidence. Therefore, the Supreme Court of Appeal had misdirected itself in finding that no quantifiable psychiatric loss could be attributed specifically to whether the applicant could have been found earlier, and that there was no method of quantifying the psychopathological damage suffered because of the omission. (See [110].)

Held, further, as to legal causation, all that was required was for the police to cover a wider area than they had with the resources already employed, both in the search and

investigations. Based on the Constitutional Court's strong pronouncements on the duty of all sectors of society to combat the scourge of gender-based violence, the omissions in this case invoked moral indignation and were not too remote to attract delictual liability. (See [114].)

Held, further, as to whether the finding by the High Court would have a 'chilling effect' on the police's ability to discharge its constitutional obligations, not imposing liability would have a 'chilling effect' on the ability of survivors of gender-based violence to vindicate their rights and hold the police liable for any secondary victimisation they had caused. The imposition of liability in those circumstances would not open the floodgates because any potential applicant would still have to satisfy all the elements of delictual liability, and this would be dependent on the facts of each case. In the instant case, the fact that the shortcomings of the police occurred in the context of the scourge of gender-based violence helped tip the scales in favour of imputing delictual liability. The conduct of the police was wrongful. (See [121], [123].)

Held, further, that, with regard to the order of costs against the applicant by the Supreme Court of Appeal, based on its finding that this was an ordinary delictual matter which did not raise a constitutional issue, the matter raised a genuine constitutional issue regarding the vindication of constitutional rights and the constitutional duties of the police. Public-policy considerations in relation to gender-based violence enjoined the court to apply the standard principle of costs in constitutional matters. (See [127].)

An order was accordingly made, (i) granting leave to appeal; (ii) upholding the appeal; (iii) setting aside the order of the Supreme Court of Appeal; and (iv) ordering the Police Minister to pay the applicant's costs in the Supreme Court of Appeal. (See [129].)

Theron J wrote a *concurring* judgment in which Majiedt J also concurred (see [130] – [148]). Pillay J wrote a dissenting judgment in which Mogoeng CJ and Jafta J concurred (see [149] – [287]). The dissenting judges felt that the applicant did not meet the threshold of proving material omissions on the part of the police, that imposing liability on the respondent was in the circumstances unreasonable and that the applicant's claim for compensation therefore ought to fail.

S v TYATYEKA 2023 (1) SACR 193 (ECB)

Evidence — Witness — Oath — Administering of — Child witness — Magistrate conflating oath and admonishment, but clear that witness able to distinguish between truth and falsehood — Evidence admissible — Criminal procedure Act 51 of 1977, ss 163 and 164(1).

On appeal against a conviction in a regional court for the rape of a 14-year-old girl, the appellant contended that the court a quo had not complied with the peremptory requirement to admonish the complainant who was a child witness, and that consequently her evidence was neither given under oath nor under admonishment and was therefore inadmissible. Extracts from the record indicated that the regional magistrate enquired of the complainant whether she understood what it meant to take the oath, and she replied that she did and that it meant that one would have to tell the whole truth and that it was wrong not to tell the whole truth. The record showed that the complainant was duly sworn in. The matter was subsequently postponed and on resumption the regional magistrate once again adverted to the issue of the competency of the witness to tell the truth. She stated that she was satisfied that the witness could distinguish the difference between the truth and a lie, and accordingly admonished the complainant in terms of s 164(1) of the Criminal Procedure Act 51 of 1977 to speak the truth.

Held, that, although the regional magistrate appeared to have conflated the administering of an oath in terms of s 163 and the admonishment in terms of s 164(1), it appeared that she was satisfied that the witness was able to distinguish between truth and falsehood. This she repeated in her judgment when she indicated that the complainant testified that she was 15 years old and understood what it meant to take an oath. Moreover, considering the general tenor of the complainant's evidence, there was no doubt that she appreciated the duty of speaking the truth, had sufficient intelligence, and could communicate effectively. The regional magistrate had exercised her discretion properly by swearing in the complainant instead of admonishing her, and the record amply demonstrated that the complainant understood what it meant. There was accordingly no misdirection by the court a quo in accepting her evidence. (See [28] – [29].) The appeal was dismissed.

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v AP 2023 (1) SACR 203 (KZP)

Sentence — White-collar crime — Imprisonment — Fraud against three banks involving losses of approximately R46 million — Accused first offender — Wholly suspended sentence wholly inappropriate — Sentence of eight years' imprisonment increased on appeal to 12 years' imprisonment of which four years were suspended for five years.

Fraud — Sentence — Imprisonment — Fraud against three banks involving losses of approximately R46 million — Accused first offender — Wholly suspended sentence inappropriate — Sentence of eight years' imprisonment increased on appeal to 12 years' imprisonment of which four years were suspended for five years.

The appellant appealed against a sentence of eight years' imprisonment imposed in a Specialised Commercial Crime Court, wholly suspended for five years, imposed for 16 counts of fraud to which the respondent had pleaded guilty. The crimes were committed by the respondent having submitted false documents to three different banks in order to obtain credit, which purported to reflect the financial condition of a company, of which he was the shareholder, as being in a better financial condition than it actually was. The amount of credit granted was R109 million. After the company was finally wound up and the respondent sequestrated, two of the banks suffered losses totalling R31 million and the third bank, whose losses were not revealed, but were estimated by the court to have been roughly similar to each of the other banks, making a total of approximately R46 million. The crimes were committed between March 2011 and December 2013. The respondent did not testify in mitigation of sentence, but made a statement in support of his plea of guilty, in which he stated that his sister, a medical doctor, had contracted a form of tuberculosis (MDR) which had rendered her unable to work. Her employer, the Department of Health, had refused to accept responsibility for her condition and pay for the expensive treatment she required. The respondent had then set up an intensive-care unit at his home to care for his sister, which was paid for from the accounts of his company. On appeal,

Held, that, the effective sentence imposed was disproportionately low by a very considerable margin and had come about by certain misdirections by the magistrate. The proposition that it mattered that the company managed to service its loans until the respondent's frauds were discovered was of no consequence unless it could be established that, as improbable as it seemed, none of the proceeds of the frauds

perpetrated upon any of the three banks facilitated servicing of any of the loans which were the product of the fraudulent misrepresentations. Yet no effort had been made to establish that. Further, the implication that the fraud was used solely for the maintenance and treatment of the respondent's sister was not borne out by the respondent's statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. This was carefully crafted to avoid any estimate of the actual costs incurred by the respondent in taking care of her. (See [11] – [16].)

Held, further, that the magistrate had made certain further elementary errors which had presumably contributed to the ultimate decision, namely that she classified the respondent as a primary caregiver to his children, but it appeared that the respondent's wife was a doctor employed by the state as a pathologist and that they resided with the respondent's parents. The magistrate had also asserted that the insurers had paid the complainants, although there was no evidence thereof. In addition, the magistrate had stated that the respondent had lost his sister who was an asset to the community due to his failure to maintain her after his sick restoration, whereas there was no evidence to that effect. (See [17] – [19].) The appeal had to be upheld and the court substituted the sentence with an effective 12 years' imprisonment of which four years' imprisonment were suspended for five years.

S v MOTSI 2023 (1) SACR 218 (WCC)

Bail — Application for — Onus — On accused — Section 60(11)*(b)* of Criminal Procedure Act 51 of 1977 — Accused to satisfy court 'in interests of justice' to permit release — Discharge of onus — Public prosecutor failing to lead any evidence or provide answers to essential questions relating to charges — State required to provide sufficient information — Accused admitted to bail on appeal.

Bail — Application for — Onus — On accused — Section 60(11)*(b)* of Criminal Procedure Act 51 of 1977 — Accused to satisfy court 'in interests of justice' to permit release — Discharge of onus — On affidavit — Essential requirements set out. — —

In an application for bail in a magistrate's court on a charge of murder, the appellant's attorney read the appellant's affidavit into the record in which he motivated for his release on bail. The public prosecutor did not lead any evidence and immediately proceeded to address the court. He could not, however, provide answers to essential issues such as what had allegedly happened; what the appellant had allegedly done

which caused him to be arrested for committing an offence; and what the charges were against the appellant. On the following day, the state formally opposed bail because of the appellant's position as a policeman and the community's reaction to a case of gender-based violence. On appeal,

Held, as to the appellant's affidavit, that the essentials of a bail application included addressing the relevant offence if the applicant so elected, and such particulars as might be reasonably sufficient to satisfy the court that the interests of justice permitted the release of the applicant. The affidavit must be intended to result in that the court being fully informed of the facts and evidence envisaged in s 60(11) of the Criminal Procedure Act 51 of 1977. Such evidence refers to the available body of facts and information which indicated that the proposition by the applicant, that the interests of justice permitted their release, was a valid and true proposition. The regurgitation of law in the affidavit generally served no purpose. From the facts of the present application, s 60(4)*(d)* and *(e)* of the Act * called for specific attention. No facts were placed before the magistrate which would found a conclusion on the grounds as envisaged in paras *(a)* – *(c)* of s 60(4). The speculative opinions of an investigating officer were not sufficient. (See [27] – [29].)

Held, further, that it would be a sad day if the present case had been deliberately dealt with in a clumsy and unskilful way simply because the appellant was one of those who served in the criminal-justice system as a police official. It was only at the bail appeal stage that the state indicated that the applicant would be tried in the High Court and that he stood to be charged with five counts, including one for premeditated murder. There was no objection for the court being approached on appeal in a matter where, all things being equal, the state had to know more than it had at the time of the bail application, which new information might have tilted the scales in favour of the strength of the state case. On the record of the bail proceedings on the whole, however, the state case was subject to some serious doubt and was not sufficient to tilt the scales against the appellant's right to be presumed innocent. In the circumstances the court was persuaded that the interests of justice permitted the release of the applicant on bail in an amount of R10 000 on certain conditions. (See [37] – [39].)

END-FOR NOW