LEGAL NOTES VOL 3/2023

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AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 2023 (2) SA 1 (CC)

Constitutional law — The state — Executive — Executive Ethics Code — Constitutionality — Code not requiring disclosure by members of executive of all donations made to campaigns for election to positions within political parties — Code only requiring disclosure where personal benefit accruing — Consideration of requirement in Ethics Act that Cabinet members and Deputy Ministers disclose 'any financial interest' — Transparency — Access to information — Right to make political choices — Constitutional Court confirming High Court order declaring Ethics Code unconstitutional and invalid to extent that it does not require disclosure of donations made to campaigns for positions within political parties — Executive Ethics Act 82 of 1998, s 2(2)*(c)*.

Words and phrases — 'Financial interests' — Meaning of in s 2(2)*(c)* of Executive Members Ethics Act 82 of 1998.

The present matter before the Constitutional Court was an application to confirm an order granted by the full court of the Pretoria High Court declaring the Executive Ethics Code, enacted in 2000 by the then President of South Africa in terms of s 96(1) of the Constitution to guide the conduct of members of the executive, to be unconstitutional,

[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!**

unlawful and invalid, insofar as *it did not require disclosure by members subject to the Code of all donations made to campaigns for election to positions within political parties*. Briefly, the genesis of this matter was as follows. In July 2019 the SA President, presently the respondent, applied to the Pretoria High Court for an order reviewing and setting aside findings and remedial actions the Public Protector made in the Report on an Investigation into a Violation of the Executive Ethics Code through an Improper Relationship between the President and African Global Operations (AGO), formerly known as Bosasa. A key finding was that the President had breached his duties under the Code, in that, among other things, he had failed to disclose donations made to an internal party-political campaign that supported his election as President of the African National Congress, commonly known as 'the CR17 campaign'. AmaBhugane Centre for Investigative Journalism NPC (amaBhungane), presently the applicant, sought to intervene in those proceedings, and sought an order that, should it be found that the Code did not require disclosure of donations made to campaigns for positions within political parties, the Code was unconstitutional and invalid to this extent. The High Court found in favour of the President and dismissed amaBhungane's conditional counter-application as not being properly before it. That matter went to the Constitutional Court on appeal. The CC dismissed the Public Protector's appeal against the granting of the review by the High Court, but found that the High Court ought to have considered amaBhungane's constitutional challenge, and so remitted the matter to the High Court. In doing so, importantly, the CC found and confirmed that under the Code the duty to disclose was only activated once *a benefit was given to a member of Cabinet in their personal capacity*, and that therefore not all donations made towards internal campaigns for election to party-political positions would be disclosable under the Code. The High Court was constituted as a full court and granted the order which was the subject of the present confirmation proceedings in the Constitutional Court.

Before the Constitutional Court, amaBhungane argued that the Code, as interpreted by the CC, breached the Executive Members' Ethics Act 82 of 1998 as well as the Constitution. The Ethics Act in s 2(2)*(c)* called for a code of ethics which required Cabinet members and Deputy Ministers to disclose (i) *all their financial interests* when assuming office; and (ii) *any financial interests* acquired after their assumption of office. A wide net was therefore cast in relation to the financial interests that a member

of the executive might have. In order to meet this standard of disclosure, the Code had to require disclosure of *all donations*, whether personally beneficial or otherwise, made to internal campaigns within political parties. Such a full disclosure, amaBhungane argued further, was also demanded by the Constitution: it was necessary in order for the state to meet its obligations imposed by s 7(2) to combat corruption; it would facilitate the core values secured in s 1 of 'accountability, responsiveness and openness'; it would be consistent with the right of access to information secured in s 32; it would enhance the right to make political choices as provided for in s 19; and it was required by the need for ethical government as recognised in s 96. The partial-disclosure function encapsulated in the Code was insufficient to meet the relevant constitutional and statutory obligations, as it permitted members of the executive to avoid having to make disclosure by structuring their campaign funding in such a way that it fell outside the personal-benefit requirement.

In opposition to the relief sought by amaBhungane, the Johannesburg Society of Advocates, the amicus appointed to assist the court, argued that the Code properly recognised and gave effect to the purport of s 2 of the Ethics Act. It argued further that the Constitution contained no obligation for the public disclosure of donations made to campaigns for election to internal party positions. Ultimately, it submitted that amaBhungane's application was impermissible, unwarranted and unfounded, and the court ought to dismiss the application for confirmation, set aside the full court's order and substitute it with one dismissing amaBhungane's application.

The Constitutional Court held that, at the centre of the debate as to whether or not the Code was constitutional, were the meaning and effect of s 2(2)*(c)* of the Ethics Act, in particular the meaning of 'financial interests', which, in terms of the provision, members of the executive were obliged to disclose. (See [58] and [59].) The court held that it had to be interpreted broadly to include all donations, not just those giving rise to a personal benefit (see [65]). In reaching this interpretation, the court had regard to the wide wording employed in s 2(2)*(c)* of the Ethics Act (see [37] and [58]), which the court suggested was deliberate. The court held further that such an interpretation was demanded by the Constitution (see [65]). In this regard, the court referred to the central founding values outlined in s 1, of a system of government that ensured 'accountability, responsiveness and openness' (see [31]); the state's obligation imposed by s 7(2) of the Constitution as well as various international instruments to combat and prevent

corruption, which called for transparency in campaign donations (see [39] and [64]); the right of access to information in s 32 (see [43]); and the rights of citizens under s 19 to make political choices, which had to be exercised meaningfully and on an informed basis (see [42]).

The court held that the partial-disclosure obligation of the Code, as it stood, was clearly insufficient to meet the relevant constitutional and statutory obligations. It permitted Ministers and MECs to avoid having to make disclosure by structuring their campaign funding in such a way that it fell outside the 'personal benefit' requirement. (See [66].)

The court summarised its views as follows: The Code fell short of the constitutional and statutory dictates of transparency, accountability and openness. The exclusion from disclosure of donations for internal party elections undermined the Ethics Act and the conflict-of-interest regime that was essential to promote transparency and to deal with the pervasive corruption bedevilling the country. (See [70].)

The court granted an order confirming the order of the Pretoria High Court declaring the Executive Ethics Code to be inconsistent with the Constitution and invalid to the extent that it does not require the disclosure of donations made to campaigns for positions within political parties; and directing that such order be suspended for a period of 12 months in order for the President to remedy the defect. (See [75].)

ESORFRANKI PIPELINES (PTY) LTD v MOPANI DISTRICT MUNICIPALITY 2023 (2) SA 31 (CC)

Government procurement — Misconduct — Delictual actionability — Whether economic loss caused by state's intentional breach of s 217 of Constitution recoverable in delict.

In this matter respondent municipality had awarded a tender to a third party, which appellant (Esorfranki) had obtained the setting aside of, the court having found that its award was tainted by the municipality's ulterior purpose, bias and bad faith in making the award to the third party (see [12]).

Esorfranki later instituted delictual proceedings against the municipality and third party, claiming the economic loss (lost profits) it alleged it sustained as a result of the municipality and third party's intentional misconduct in awarding the tender to the third party (see [15]).

The High Court dismissed the action, finding factual causation had not been established (absent the municipality's misconduct, Esorfranki would still not have received the contract), and nor legal causation (a *novus actus interveniens* had occurred, namely the readvertising of the set-aside tender by another government department and Esorfranki's failed bid for the readvertised award) (see [14], [16] and [17]).

Esorfranki had then appealed to the Supreme Court of Appeal, which dismissed the appeal, finding wrongfulness had not been established (the setting aside of the tender had extinguished any duty the municipality owed Esorfranki to not cause it economic loss (see [18])); a claim could not be permitted where a tender was set aside at the instance of a party in Esorfranki's position, the tender readvertised, and the party in Esorfranki's position bidding again, but not being awarded it (see [19]); nor factual causation (there being no evidence Esorfranki would have been awarded the tender absent the municipality and third party's unlawful conduct (see [20])); nor legal causation (the readvertised tender and Esorfranki's failure to be awarded it were a novus actus interveniens (see [20])).

Esorfranki then sought and was granted leave to appeal by the Constitutional Court. The issue on appeal was whether economic loss caused by intentional breach of s 217 of the Constitution was recoverable in delict (see [26], [30] and [34]). This implicated wrongfulness, where unlawful conduct causing pure economic loss is not presumptively wrongful, with wrongfulness requiring to be established in order for conduct to be actionable (see [29]). (Conduct's wrongfulness is conditional on it being reasonable to impose liability for damages flowing from the conduct, with reasonableness being determined by public and legal policy and constitutional norms (see [28]).)

Here, the existence of wrongfulness could be determined by examination of factors bearing on intentional breach of s 217, read with s 33, the right to just administrative action (s 33 was implicated because tendering was an administrative function) (see [36]).

Factors indicating wrongfulness were the intensity of the municipality's fault and authority for awarding damages for economic loss flowing from intentional dishonest conduct on the state's part (see [40] and [42]). Neutral factors were s 217's silence on

whether its breach was delictually actionable and the fact that the state had already been held to account by the setting aside of the tender (see [39] and [43]). Going against wrongfulness was subsidiarity: the Promotion of Administrative Justice Act 3 of 2000 had been enacted to give effect to s 33 and provided for compensation (s 8) as a species of just and equitable relief in a review, and this provision of the Act would be bypassed should resort be allowed to the common law (see [46], [49] – [50] and [55]).

Weighing these factors, the Constitutional Court ruled that economic loss as a result of intentional breach of s 217 was not wrongful, and so not recoverable in delict (see [57]).

Appeal dismissed (see [60]).

SIYANGENA TECHNOLOGIES (PTY) LTD v PASSENGER RAIL AGENCY OF SOUTH AFRICA AND OTHERS 2023 (2) SA 51 (SCA)

Government procurement — Procurement process — Irregularities — Invalidation of contract — Extinction of contractor's rights — Remedy of appointment of engineer to value works done — Contractor to be liable to recompense state entity for any amounts overpaid.

In this matter first respondent (PRASA) contracted with appellant (Siyangena) for Siyangena to provide access systems at train stations. PRASA later obtained the review and setting aside of its decisions on the basis that it had not complied with s 217 of the Constitution, and the High Court ordered that an engineer be appointed to determine whether any payments PRASA had made to Siyangena should be set off against the value of the works Siyangena had completed. Siyangena then applied for and the High Court granted leave to appeal to the Supreme Court of Appeal (SCA) (see [1] – [2] and [5]).

On appeal Siyangena accepted that the contracts fell to be invalidated, but it disputed the remedy on the ground that it did not preserve its rights under the agreements. Siyangama argued that this was inequitable because it was innocent of wrongdoing and had no knowledge of the inner workings of PRASA and the irregularities therein (see [3] – [4]).

In addition, Siyangena said it was hamstrung in demonstrating its innocence by the reviewing court's refusing to admit as evidence affidavits made by current and former employees of PRASA. The background to this was that the Judge President of the Division had constituted a first court to hear the matter, but it prior to the hearing mero motu ordered that the employees be given an opportunity to intervene as witnesses and to deliver affidavits in defence to allegations of wrongdoing on their part, apparent on the papers (see [24] – [25]).

The SCA *held* that the review court's order was unimpeachable: the first court had had no power to make the order, and the employees were not the subject of any relief PRASA sought as they had no interest in it (see [27]).

The SCA further considered the High Court's condoning of PRASA's delay of 10 months before PRASA brought its self-review, and the SCA concluded it was justified (see [33]). Weighing for condonation were the cause of the delay (the concealment of the irregular conduct); the extent of the material forensic investigators had had to go through in order to investigate the irregularities; and the public's interest in the review proceeding (this owing to the amount of taxpayers' money involved and to its deployment to purchase equipment which was not 'fit for purpose') (see [32]).

As for the High Court's conclusion that Siyangena was complicit in the corruption, that, in the SCA's view was the only possible inference, on a conspectus of the evidence (see [36]).

The SCA thereafter gave consideration to the remedy the High Court had granted: after invalidating the agreements, the High Court had ordered the appointment of an independent engineer to value the works Siyangena had done, and if the value of the works was less than the amount PRASA had paid therefor, then Siyangena would be liable to PRASA to recompense it with the amount overpaid (see [37] – [38]).

Siyangena's attack on the High Court's remedy was two-pronged: firstly, it was inequitable to invalidate the contracts but not preserve Siyangena's rights thereunder (see [40]); and secondly, the order, with respect to the independent engineer, could not be implemented because the order did not set out how the engineer should value the work done (see [45]).

The SCA *held* in this regard that Siyangena's first assertion failed on two bases: Siyangena had not shown that the High Court had not exercised its discretion judicially, and secondly, preserving Siyangena's rights and allowing Siyangena, which was complicit in the corruption, to profit, would in fact be inconsistent with justice and equity (see [43] – [44]). Moreover, the general position was that even if a contracting party was innocent of any wrongdoing, it would still not be allowed to benefit from an unlawful contract (see [44]).

Regarding Siyangena's second contention, it failed to take account of the fact that the court's order provided that if the parties disagreed on the valuation, the matter had to be re-enrolled for the High Court to make the determination (see [45]). There was furthermore precedent for appointing a third party to carry out such an assessment (see [46]).

Lastly, the SCA deprecated the record Siyangena's attorneys had prepared. It was 8000 pages long, but according to Siyangena's practice note, only 1000 pages were relevant, and, moreover, Siyangena's attorneys had not abided the appeal court's rules and prepared a core bundle (see [49]). Accordingly, for disregarding the rules, and requiring the appeal court to peruse 8000 pages, the court barred Siyangena's attorneys from claiming their costs for preparing the record, from Siyangena (see [50]).

Appeal dismissed (see [52]).

MINERAL SANDS RESOURCES (PTY) LTD AND OTHERS v REDDELL AND OTHERS 2023 (2) SA 68 (CC)

Abuse of process — SLAPP suit — Indicia of — Merits, motive and effect.

Applicants, who were mining companies and certain of their executives, had instituted defamation actions against the respondents, who were environmentalists, and who had publicly criticised applicants' mining activities (see [3], [6], [9] and [13]).

In response, respondents made the special plea that the suits were an abuse of process, with the suits' motive, so they asserted, constituting the abuse, the motive being to discourage public criticism of the mining operations — so called strategic litigation against public participation, otherwise known acronymically as SLAPP suits (see [7], [42] – [43], [47] and [89]).

In turn, applicants excepted to the pleas, asserting that no such category of abuse existed in our law (see [7]).

The High Court dismissed the exception and here the applicants applied to the Constitutional Court for leave to appeal directly to it. This it granted (see [8]).

The issue there was whether such a species of abuse should be recognised (see [55] and [93]).

Held, that it should be, and that the indicia of the abuse were three (see [95]).

Firstly, the merits: the suit not being brought to vindicate a right (see [95]).

Secondly, the motive: to cause the defendants prejudice (financial or other) in order to silence them (see [43] and [95]).

And thirdly, the effect: material violation of the constitutional right to freedom of expression (see [95] – [96]).

Held further, that respondents' special plea, grounded as it was on motive alone, had lacked necessary averments, and on this basis applicants' exception to it ought to have been upheld (see [98]).

Conversely, applicants' assertion that no such defence existed was defeated (see [98]).

Appeal upheld and the High Court's order set aside and replaced with an order upholding the applicants' exception and granting respondents 30 days to seek leave to amend their special plea (see [103]).

ASTRAL OPERATIONS LTD *t/a* COUNTY FAIR FOODS AND OTHERS v MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE AND OTHERS 2023 (2) SA 102 (SCA)

Environmental law — Review and appeal — Appeal — Powers of competent authority (an MEC) hearing appeal against decision of his employee (departmental director) — Environment Conservation Act 73 of 1989, ss 35(3) and (4).

In this matter the City of Cape Town applied to the Western Cape Department of Environmental Affairs and Development Planning for it to authorise the City's establishing a landfill near Atlantis, or alternatively Kalbaskraal (a site about 20 kilometres from Malmesbury), with the Department, per the Director: Integrated Environmental Management, later granting authorisation under s 22(3) of the Environment Conservation Act 73 of 1989, for use of the Atlantis site (see [8] and [13]).

The Director's decision was thereafter appealed to the Member of the Executive Council for Environmental Affairs and Development Planning (MEC), who decided firstly to set aside the Director's decision, and secondly, to authorise the alternative site, Kalbaskraal (see [13] – [15]).

First appellant (Astral) then obtained the review and setting-aside of both of the MEC's decisions, and remittal of the decisions to him to take afresh (see [19]). The MEC did so, and repeated his prior decisions: upholding the appeal of the Director's determination of Atlantis, and himself authorising Kalbaskraal (see [21]).

This caused Astral to again approach the High Court, and again — albeit by agreement — achieve the review and setting-aside of the MEC's latest decisions (see [23] – [24]). What the High Court also did was determine the following reserved question: whether the MEC, in dealing with the appeal against the Director's decision, could authorise the activities at Kalbaskraal (see [1] – [2]).

The High Court answered this question in the affirmative, and, with its leave, appellants appealed to the Supreme Court of Appeal (SCA) on this and another point (see [3] and [24]).

The first point concerned s 22(3), which provides that a competent authority (here the MEC or his delegee, the Director) may authorise an 'activity' (an activity which may have a substantial detrimental effect on the environment) or 'alternative . . . activity' (see [25] and [27]). The assertion was that establishing a landfill at Kalbaskraal was not an alternative 'activity' to establishing a landfill at Atlantis — it was the same activity at a different location — and accordingly the MEC erred in authorising the Kalbaskraal landfill as an alternative activity (see [29] – [31]).

Held, rejecting the assertion, that the phrase 'alternative . . . activity' was not limited to meaning a different activity at the same location, but could encompass the same

activity at a different location — a stance aligning with the position in the governing regulations (see [31] and [34]).

The second point involved s 35(3) and (4). In the present context, s 35(3) allowed a person aggrieved by a decision of the MEC's delegee to appeal to the MEC; and s 35(4) provides that the MEC 'may . . . confirm, set aside or vary the decision . . . or make such order as he may deem fit' (see [38]).

The issue was whether the MEC, in determining the s 35(3) – (4) appeal, could step into the Director's shoes and take any decision the Director could take, or whether the MEC, if the MEC upheld the appeal, had to remit the matter to the Director for the Director to redecide (see [29]).

The backdrop was the Director's deciding on the Atlantis site, and then the MEC, in the appeal, setting aside the Atlantis decision and deciding on the Kalbaskraal site.

Astral's assertion was that because the Director made no decision on the Kalbaskraal site, there could be no decision before the MEC on appeal in respect of Kalbaskraal that the MEC could confirm, set aside or vary (see [35]). Moreover, when the MEC set aside a delegee's decision on appeal, the MEC could not replace the delegee's decision with a decision of his own. This because the MEC had merely the powers 'to confirm, set aside or vary the decision', but not the power to substitute his own decision. Thus after setting aside the Atlantis decision, the MEC could not replace it with his own decision on Kalbaskraal. The MEC ought to have submitted the decision to the Director (see [36]).

Held, rejecting the contentions, that, firstly, a s 35(3) – (4) appeal was one in the wide sense, allowing the appellate authority to completely rehear and redecide the matter; and, secondly, given as the appellate authority, the MEC, delegated to the Director, the decision-maker of first instance, the powers given to the MEC by the Act, it followed that the MEC could exercise them on appeal. This meant that because the Director, at first instance, could authorise one or both of the sites, so, the MEC, on appeal, could too (see [41] and [43]).

Appeal dismissed (see [57]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v THE THISTLE TRUST 2023 (2) SA 120 (SCA)

Revenue — Capital gains tax — Taxation of trusts and beneficiaries of trusts — Capital gains in respect of disposal of vesting trusts' assets to respondent trust as beneficiary, which in turn made distribution to its beneficiaries in same year of assessment — Whether s 25B or para 80(2) of sch 8 applicable — Whether conduit-pipe principle applicable — Income Tax Act 58 of 1962, s 25B, sch 8 para 80(2).

Revenue — Tax administration — Assessment — Understatement penalty — Understatement resulting from 'bona fide inadvertent error' — Taxpayer following legal advice on tax treatment of capital gains — Commissioner raising additional assessment and levying understatement penalty — Taxpayer acted in good faith and unintentionally — Commissioner not entitled to understatement penalty — Tax Administration Act 28 of 2011, s 222.

The Thistle Trust was a beneficiary of a group of 10 vesting trusts (the tier 1 trusts) that conducted the business of the Zenprop Group, a group of property owners and developers. In the 2014, 2015 and 2016 tax periods, the tier 1 trusts disposed of certain capital assets. In the same tax periods, the capital gains so realised were distributed, inter alia, to the Thistle Trust, and from the Thistle Trust to its beneficiaries. The Thistle Trust, having obtained a legal opinion which another entity within the Zenprop Group had sought, treated the proceeds received as taxable in the hands of its beneficiaries.

The Commissioner, however, assessed it as taxable in the Thistle Trust's hands and imposed an understatement penalty, together with interest on the assessed liability. The Thistle Trust objected to the additional assessment on the basis that, since it derived no taxable income, the gains were properly taxable in the hands of the client's beneficiaries under s 25B of the Income Tax Act 58 of 1962 (the ITA) and para 80(2) of the eighth schedule to it. *

On appeal, the tax court agreed with the objection and, holding that s 25B applied, set aside the additional assessments.

The present case concerned the Commissioner's appeal to the Supreme Court of Appeal. The Commissioner contended that para 80(2) applied exclusively, so that

when the Thistle Trust distributed the amount it received to its beneficiaries — without determining a capital gain in respect of the disposal of a capital asset as required by para 80(2) — as far as the beneficiaries of the Thistle Trust were concerned, para 80(2) did not apply. The Commissioner also contended that s 25B did not apply, as it concerned taxation of income accruing to trusts and their beneficiaries; the reference to 'amounts' which accrued to trusts therefore did not include amounts or proceeds of a capital nature, which were dealt with in the eighth schedule. The Thistle Trust argued that para 80(2) ought to be read with s 25B, submitting that 'an amount' in the said section was inclusive of capital gains. (See [13], [14] and [17].) It further submitted that the 'conduit-pipe principle' was applicable, ie that it was no more than a conduit for the gain that flowed through it and was accordingly not subject to be taxed on the gain (see [23]).

Apart from the correctness of the assessment, the other issue before the SCA was whether, if it were correctly raised, the circumstances giving rise to the tax treatment by the Thistle Trust of the further distribution to its beneficiaries warranted the imposition of an understatement penalty. In this regard, s 222 of the Tax Administration Act 28 of 2011 (the TAA) provides that the penalty (as determined by the TAA) was payable unless the understatement arises from a 'bona fide inadvertent error'.

Held

When the provisions were read as a whole and in context, it was apparent that the legislature intended that s 25B be applied to the taxation of income that accrued to a trust or its beneficiaries, while sch 8 was to be applied to the taxation of capital gains accruing to trusts or their beneficiaries. The tax court accordingly erred in finding that s 25B applied in this instance. Paragraph 80(2) of the schedule, properly interpreted and applied, required that the capital gains accrued upon the disposal of assets by the tier 1 trusts were to be taxed in the hands of the Thistle Trust and not its beneficiaries to whom it distributed those gains. In the circumstances, the Commissioner was correct to raise the additional assessment for the relevant tax periods. (See [19] – [20], [22] and [26].)

The facts of this case did not support the application of the 'conduit-pipe principle'. The tier 1 trusts vested the capital gains in the Thistle Trust, which accordingly held a vested right therein. The distribution to it of the accrued gains resulted in it receiving

those gains as of right. The Thistle Trust did not dispose of any capital asset or determine a capital gain that was distributed to its beneficiaries. Instead, it distributed moneys that vested in it as of right. In these circumstances, the 'conduit-pipe principle' did not apply. (See [25].)

The Thistle Trust made a bona fide and inadvertent error, as it had believed, having obtained legal advice, that s 25B was applicable to its case. Though the Thistle Trust erred, it did so in good faith and acted unintentionally. In the circumstances, the Commissioner was not entitled to levy the understatement penalty. (See [29].)

LEBASHE FINANCIAL SERVICES (PTY) LTD v PRUDENTIAL AUTHORITY AND OTHERS 2023 (2) SA 130 (SCA)

Insurance — Curatorship — Preclusion of business rescue or winding-up of insurance company under curatorship — Effect of grant of curatorship order on application for winding-up made before grant of order or during order's extancy — Financial Sector Regulation Act 9 of 2017, s 32; Insurance Act 18 of 2017, s 54(5).

Insurance — Curatorship — Curator's duties — No duty to seek rescue or recapitalising of insurer — Financial Sector Regulation Act 9 of 2017, s 32; Insurance Act 18 of 2017, s 54(2).

The Prudential Authority, concerned at the capital adequacy of insurers B and N, had approached the High Court and obtained orders placing them under provisional curatorship (see [3] and [10]). The curators later on, on review of the insurers' businesses, had reported to the Prudential Authority that they were insolvent, and the Prudential Authority then, while the curatorships were still extant, had again approached the High Court and had obtained provisional liquidation orders (see [14] and [17] – [18]). These were given the same return date as the provisional curatorship orders, which the Prudential Authority indicated it would seek the discharge of (see [17] – [18]).

Appellant (Lebashe) thereon intervened in the liquidation proceedings, averring that s 54(5) of the Insurance Act 18 of 2017 and the provisional curatorship orders had precluded the grant of the provisional liquidation orders, and that their grant had accordingly been incompetent (see [19] – [20]).

On the return day, the High Court first discharged the provisional curatorship orders, then rejected Lebashe's contentions, and granted final winding-up orders (see [21]).

Lebashe, with the High Court's leave, appealed to the Supreme Court of Appeal (see [23]).

The first issue there was whether Lebashe had standing to obtain the relief it sought on appeal, the setting-aside of the liquidation orders, where the context was that Lebashe was a shareholder and creditor of the holding company of the insurers (see [20], [23] and [25]).

Held, that Lebashe's interest was too indirect to furnish it with locus standi in the appeal (see [25]).

The second question was whether s 54(5) or the provisional curatorship orders precluded liquidation orders (see [32]).

Section 54(5) provides that '(a)n insurer or a controlling company may not begin or enter business rescue or be wound-up while under curatorship within the meaning of the Financial Institutions (Protection of Funds) Act, unless the curator applies for the business rescue or winding up' (see [32]).

The issue was the meaning of 'be wound-up': whether this referenced commencement of winding-up by special resolution or winding-up order, or, as the High Court reasoned, the winding-up process (see [33]).

Held, on interpretation of the provision, that the phrase referenced the former — in this instance a winding-up order — with the effect here that the provisional liquidation orders, obtained at the instance of the Prudential Authority, were incompetent (see [38]).

What, though, of the liquidation applications? Were they rendered null and void?

Held, that, properly construed, s 54(5) prohibited the obtaining of a winding-up order, but not the institution of liquidation proceedings. Such proceedings would be valid, but by operation of law stayed, for the time that the curatorships were in place (see [40]).

That was the case here: the status of the Prudential Authority's winding-up applications, obtained when the insurers were already in curatorship, was one of abeyance (see [40]).

Concomitantly, once the High Court had discharged the provisional curatorship orders, the stayed winding-up applications could be proceeded with, and the final winding-up orders competently granted. That, even in the absence of provisional winding-up orders, here invalidated (see [41] – [42]).

The third issue was whether the curator had a duty to recapitalise the insurers (see [43]).

Held, that no such duty was indicated by the provisional curatorship orders or s 54(2) of the Act (see [44] – [45]).

Appeal dismissed (see [47]).

MADRASAH TALEEMUDDEEN ISLAMIC INSTITUTE v ELLAURIE AND ANOTHER 2023 (2) SA 143 (SCA)

Nuisance — What constitutes — Test for — Whether interference reasonable — Factors to consider — Plaintiff or applicant's sensitivity to interference — Interference would not be considered to be unreasonable when harm or complaint in respect thereof arose from special or extraordinary sensitivity of plaintiff or applicant to activity complained of.

Nuisance — What constitutes — Test for — Whether interference reasonable — Factors to consider — Need to consider whether conduct complained of was constitutionally guaranteed.

The first respondent, Mr Ellaurie, resided 20 metres from the appellant, the Madrasah Taleemuddeen Islamic Institute, a school for Islamic studies (the Madrasah) in Isipingo Beach, south of eThekwini in the KwaZulu-Natal Province. Daily, the Madrasah issued five calls to prayer ('*Azaans*'). This, Mr Ellaurie viewed as a nuisance. This prompted him to approach the Durban High Court to seek an order interdicting the Madrasah from issuing the calls to prayer to the extent that they could be heard beyond its property, as well as an order directing that the Madrasah cease operations on its property altogether. Motivating for his nuisance claim, Mr Ellaurie claimed that the *Azaans* invaded his personal space and happened at an 'unearthly time'. He complained further that they gave a 'distinctly Muslim atmosphere to the area'. In this regard he expressed the view that Islam promoted racism, bigotry and sexism, and claimed that the religion's protection in the Constitution was undeserved. The High

Court granted Mr Ellaurie an interdict to the effect that the Madrasah had to ensure that the *Azaan* would 'not [be] audible within the buildings on [Mr Ellaurie's] property'; it refused the other relief. In granting an interdict the High Court held as follows: that the freedom of religion guaranteed in the Constitution was no guarantee of the practice or manifestations of religion; therefore, the Madrasah had to demonstrate that the *Azaan* was essential to the practice of its religion. All that Mr Ellaurie had to prove was interference with enjoyment of his 'private space'. The Madrasah appealed against the High Court order, with the leave of the Supreme Court of Appeal.

Held, that the right to the undisturbed use and enjoyment of one's own property was not unlimited. A limited interference with one's property rights and one's enjoyment thereof by owners of other properties in the same neighbourhood was expected and acceptable in law. (See [7].) The test for determining whether an interference was tolerable was whether it could be considered 'reasonable', given the circumstances and milieu in which the interference was alleged to have occurred (see [8] and [9]). One of the factors to consider was the applicant's sensitivity to the interference: In this regard, an interference was not considered to be unreasonable when the harm or complaint in respect thereof arose from a special or extraordinary sensitivity of the plaintiff or applicant to the activity complained of. (See [9].)

Held, that, in order to succeed with his interdict application, Mr Ellaurie had to establish that the Madrasah had unreasonably interfered with his established right (see [11]). He did not do so: He failed to explain the nature and level of the noise produced by the issuing of the *Azaan*, or tender evidence of what a reasonable *Azaan* would be in the circumstances. (See [12].) Apart from this failure, Mr Ellaurie — given his deep aversion to Islam — placed himself within the realm of a specially or extraordinarily sensitive complainant. The reasonableness (or otherwise) of the *Azaan* could not be judged by his standards. It had to be judged by the standard of an ordinary person living in Isipingo Beach. On this there was, at best, a paucity of evidence. (See [15].)

Held, further, that, contrary to the findings of the High Court, the right to religion as protected in s 15 of the Constitution included the right to observe or manifest religious beliefs. (See [16] – [18].) Further, in the present case a determination of the reasonableness of the alleged interference with Mr Ellaurie's rights had to take into account these countervailing rights. (See [18].)

Held, in conclusion, that the appeal had to be upheld, and the order of the High Court replaced with one dismissing the application (see [18] and [20]).

MANNARU AND ANOTHER v MCLENNAN-SMITH AND OTHERS 2023 (2) SA 150 (SCA)

Way — Right of way — Security gate — Servitude holders constructing security gate on servitutal road for purposes of safety and security — Opposition by owner of servient tenement.

First to fourth respondents (respondents) were the owners of properties which were only accessible by way of a road over first appellant's (appellant's) property, and a servitude to this effect was registered against the title deeds of respondents' properties, but, by oversight, not that of appellant (see [4]). (It was, however, common cause that the servitude existed (see [19]).)

At a point respondents asked appellant if they could erect a temporary security gate across the road, citing the road's accessibility from the public street and the security risk this created. Appellant gave respondents permission to do so, and respondents did, and later on they asked for appellant's further permission to construct a permanent gate (see [5] – [6]). This appellant had refused, and his refusal eventuated in acrimony which culminated in an action respondents brought for, inter alia, a declarator of their right to construct a permanent gate, and that appellant register the servitude on the title deed of his property (see [6] – [7]).

The High Court granted the relief, and appellant then asked for, but was refused, leave to appeal, which appellant later obtained from the Supreme Court of Appeal, to appeal to it (see [8] – [9]).

Held, that the High Court correctly balanced appellant and respondents' interests: on respondents' part, to safety and security, and on appellant's, to reasonable access, and the appeal court endorsed in this regard the academic exposition of the principle involved, which was that installation of a gate by the servitude holder will be reasonable, provided it will not prevent the servient owner's reasonable access to and use of his land (see [14] and [16] – [18]).

As to the High Court's order that appellant effect registration of the servitude on his property's title deed, this was merely a confirming of the existence of the servitude, which was common cause between the parties (see [19]).

Appeal dismissed (see [22]).

MJK AND OTHERS v IIK 2023 (2) SA 158 (SCA)

Marriage — Divorce — Proprietary rights — Accrual system — Determination of accrual — Allegation that trusts established to facilitate concealment of assets to prejudice accrual claim — Whether basis to pierce veneer of trusts.

Respondent and appellant were married out of community of property. Respondent sued appellant for a decree of divorce and joined certain trusts with a prayer that their assets be considered in the calculation of appellant's accrual. Respondent's contention was that the trusts were appellant's alter ego and that appellant managed them in a fashion designed to prevent her from obtaining her share of appellant's accrued estate.

The High Court's finding, based on its examination of the trust deeds and the manner in which the trusts' affairs were conducted, was that the trust assets were solely controlled by appellant, and that while before appellant became aware of respondent's infidelity, appellant conducted his business through his corporations. After discovering the affair, appellant transferred all his assets to the trusts with the fraudulent or dishonest intent of concealing them to prevent respondent from receiving her rightful share of appellant's accrual. Accordingly, the trusts' veneer ought to be pierced so that the value of their assets could be considered in calculating the accrual of appellant's estate.

Appellant appealed to the Supreme Court of Appeal (SCA), assailing the High Court's judgment on three grounds: (1) the High Court strayed beyond the issues he and respondent had defined; (2) there was no factual or legal basis to pierce the trusts' veneer; and, entwined with (2), that (3) the High Court made errors of fact.

As to (1), appellant's contention was that the High Court's finding that appellant transferred the assets with the fraudulent intent of concealing them was not the case respondent had made. Rather, respondent's case was that the trusts were appellant's

alter ego that he manipulated to prevent respondent from obtaining her rightful accrual share.

The SCA agreed with this contention: an examination of respondent's pleadings and the courtroom evidence confirmed that respondent's case was that the trusts were appellant's alter ego, not that appellant's transfer of assets to them was effected with the fraudulent intent to avoid his obligation to account to respondent for the accrual of his estate (see [19], [23] – [24] and [29]).

As to (2), the SCA agreed with appellant's contention that there was no basis to pierce the trusts' veneer (see [30]). The legal precondition for piercing the trusts' veneer — evidence of abuse of the trust — was not established: it was undisputed that the trusts were created for estate-planning purposes and with the aim that respondent and the children would be cared for (see [33]). Respondent and the children were, in fact, the capital beneficiaries of the trusts (see [34]).

The SCA consequently upheld the appeal, setting aside the High Court's order and replacing it with an order that respondent's claim for an order that the trusts' assets should be used in the calculating of appellant's accrual should be dismissed (see [41]).

NEL v DE BEER AND ANOTHER 2023 (2) SA 170 (SCA)

Land — Sale — Pre-emption — Several plots of land subject to right of pre-emption — Grantor of right selling two plots — Whether right triggered.

Appellant, as lessee, and respondents, as lessor, entered into a lease of five farms, and respondents, in addition, in the lease agreement granted appellant a right of pre-emption in respect of them (see [2] – [3]).

However, during the term of the lease, respondents sold two of the properties to a third party, and appellant, on hearing of this, gave respondents notice that appellant was exercising his right, and appellant asked respondents to sign a sale agreement (see [3] and [5]). Respondents failed to (see [6]).

Appellant later asked the High Court for a declarator that he had exercised his right, and an order that respondents enter a sale agreement with appellant on the terms of respondents' sale agreement with the third party (see [7]).

The High Court dismissed appellant's application, inter alia, on the basis that only if respondents sold all of the farms would appellant's right be triggered (see [15]).

Appellant then appealed, with the Supreme Court of Appeal's leave, to it (see [1]).

The SCA *held*, inter alia, that, properly interpreting the lease agreement, the right of pre-emption would be triggered by a sale of any of the farms (see [27]).

The SCA *held*, further, based on old Cape authority, that where a grantee was given a right of pre-emption in respect of a unit of land, and the grantor sold a part but not the whole of that unit to a third party, then the grantee's right would be triggered. So too, if the grantor gave the grantee a pre-emption over several plots, and the grantor sold one of the plots, the grantee's pre-emption would be triggered. All of this, though, subject to a contrary intention in the agreement conferring the right (see [31]).

Appeal upheld, the High Court's order set aside, and replaced with an order, inter alia, directing appellant to submit a signed deed of sale to respondents, and that respondents sign the deed (see [38]).

ARANDA TEXTILE MILLS (PTY) LTD AND ANOTHER v COMPETITION COMMISSION 2023 (2) SA 182 (CAC)

Competition — Unlawful competition — Prohibited practice — Restrictive horizontal practice (cartel conduct) — Proof — Inferential reasoning in absence of (i) direct evidence of agreement or collusion or (ii) characterisation analysis — Competition Tribunal making finding, in absence of characterisation evaluation, of horizontality where firms stood in supplier – customer relationship prior to submission of allegedly collusive tender bids — Competition Appeal Court finding that Tribunal failed to appreciate that cartel conduct complained of was function of vertical, not horizontal, relationship between parties — Competition Act 89 of 1998, s 4(1)*(b)*.

Evidence — Assessment — Inferential reasoning — Inference sought to be drawn to be consistent with all proved facts — If not, inference either cannot be drawn or it must be most natural or plausible conclusion on probabilities.

The Competition Commission referred a complaint to the Competition Tribunal that the present appellants — Aranda, a manufacturer of blankets, and Mzansi, a supplier of blankets sourced from Aranda — had, contrary to s 4(1)*(b)*(i) and (ii) of the Competition

Act 89 of 1998 (the Act), engaged in cartel conduct by submitting collusive bids in response to a government tender. There was no direct evidence of either an agreement or of collusive tendering. Instead, the Commission relied for its case on the bid prices, which showed a consistent 7,25% mark-up by Mzansi on Aranda's prices. The Commission argued that the appellants' conduct amounted to price-fixing and collusive tendering in contravention of s 4(1)*(b)*(i) and (iii) of the Act. The Commission's emphasis was, throughout, on horizontality — a restrictive vertical practice was not pleaded. The Competition Tribunal, adopting the same inferential reasoning used by the Commission, agreed with the Commission's finding.

The appellants appealed to the Competition Appeal Court (CAC), denying collusion and contending that the interactions between them were in pursuance of bona fide and arm's-length business transactions. They argued that the Tribunal was mistaken in finding that there had been cooperation between them when there was no evidence of an agreement or concerted practice relating to pricing, and in failing to appreciate that the conduct complained of was a function of the vertical (supplier – distributor) relationship between them. They further argued that since cartel conduct was 'per se' prohibited conduct, * the Tribunal should have applied the correct characterisation analysis — by determining whether the parties were in a horizontal relationship and, if so, whether there was price-fixing or collusive tendering under s 4(1)*(b)* — which it had failed to do.

On appeal the CAC considered the role of inferential reasoning to prove a per se prohibition and whether a finding of horizontality in terms of s 4(1)*(b)* could be made where the appellants stood in a supplier – customer relationship before submitting their bids.

Held

While cartel conduct could be inferred where there was no direct evidence of an agreement or collusive tendering, there were stringent checks and balances. If a hypothesis of prohibited conduct was formulated on circumstantial evidence, it could undermine direct evidence to the contrary (which was what happened here — the Tribunal ignored most of the appellants' direct evidence while cherry-picking bits that supported its hypothesis). The best possible explanation as a yardstick in per se contraventions was subjective in nature and often overlooked glaringly objective facts.

A cautious and fact-sensitive approach had to be adopted when relying entirely on circumstantial evidence.

Cartels were usually clever enough not to leave evidence of their cartel conduct, so a combination of direct and circumstantial evidence, or even just circumstantial evidence, might be required. This might result in a finding based on a mosaic of postulations and inferences, and called for the application of sound legal principles and reasoning. Circumstantial evidence of cartel conduct would generally consist of communication, conduct and economic evidence. The latter required cogent economic reasoning and, often, expert testimony. Communication evidence was more important than economic evidence because the latter was invariably ambiguous unless supported by expert evidence

Evidence of cartel conduct would be most persuasive if it were not explicable by ordinary market forces or business behaviour. The court had to consider whether the conduct might have occurred in the absence of a cartel, having regard to the natural commercial and economic interests of the competitors. Evidence of cartel conduct included bidding patterns, information exchanges between competitors, abnormally high sustained profits, and past violations of competition law. Evidence to explain why certain structural features made a particular market more susceptible to cartel conduct might also be useful.

Inferential reasoning required an evaluation of all the evidence, not merely selected parts, and the inference sought to be drawn had to be consistent with all the proved facts. If not, then the inference could either not be drawn or it had to be the most natural or plausible conclusion among the conceivable ones. If the Commission's version was to prevail, it had to be the best explanation in the light of all the available evidence. (See [34] – [42].)

Here, the Commission's failure to prove primary facts showing agreement or collusive tendering meant that inferential reasoning could not be used to resolve the factual issues underlying the alleged contravention. It was, furthermore, wrong to view communication between a manufacturer and a distributor through a horizontalist lens without rigorous analysis. In a commercial society, discussions between manufacturers and distributors were routine, even with competitors like the appellants. In the light of the lack of evidence of an agreement or collusive conduct, the Tribunal

had no basis to conclude that Aranda and Mzansi fixed a price for the tender or that there were collusive dealings between Aranda and Mzansi. Its failure to properly characterise their conduct as falling within the ambit of s 4(1)*(b)* was fatal to its finding. (See [2], [43], [46], [55] – [56], [86], [89].)

Appeal accordingly upheld and the Tribunal's order replaced with one dismissing the Competition Commission's complaint referral against Aranda and Mzansi. (See [91].)

BAXTER v OCEAN VIEW BODY CORPORATE AND OTHERS 2023 (2) SA 205 (WCC)

Sectional title — Community schemes — Ombud service — Adjudicator — Decision of — Appeal against — 30-day period in which to appeal — Court may condone late filing of appeal — Community Schemes Ombud Service Act 9 of 2011, ss 57(1) and (2).

Appellant (Baxter) was an owner of a unit in a sectional title scheme with exclusive use of part of the common property (a balcony). First respondent was the body corporate of the scheme (Ocean View); second respondent was the Community Schemes Ombud Service established under the Community Schemes Ombud Service Act; and third respondent the Ombud Service's adjudicator (see [1]).

First respondent had made a decision to increase the levy on the exclusive-use balconies and this Baxter challenged before the Ombud Service, whose adjudicator confirmed it (see [13] – [14]). Baxter then employed s 57(1) of the Community Schemes Ombud Service Act 9 of 2011 to appeal to the High Court, but lodged the appeal after the expiry of the 30-day period that s 57(2) allows for the bringing of such an appeal (s 57(2)) (see [1] and [3]).

The first issue was whether s 57(2) implicitly gave a court the power to condone non-compliance with the 30-day time limit (see [4]). *Held*, that it did, provided good cause was shown (see [9]).

The second issue was whether there was good cause for condonation. *Held*, that there was, for the reasons at [11].

The third issue was whether the adjudicator's decision confirming the body corporate's decision should be set aside. In this regard the body corporate's conduct rules

provided that: 'An owner to whom an exclusive use right has been allocated shall . . . maintain and repair that area as if it were part of his/her/its section and keep it clean and tidy', and accordingly unit holders with such right were individually liable for the costs of maintenance and repair of the area concerned (see [17]).

Meanwhile the body corporate's decision to increase the levy on such areas was, inter alia, to defray the cost of maintaining these areas (see [13]).

This conflicted with the proviso of s 3(1)*(c)* of the Sectional Title Schemes Management Act 8 of 2011: 'A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include . . . to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs' (see [15], [17] and [19]).

The body corporate's decision was accordingly incompetent, and the adjudicator's confirmation erroneous (see [18]). Ordered, inter alia: the appeal upheld, the adjudicator's decision set aside and replaced with an order declaring the increase incorrectly determined, and directing its recomputation so as to comply with s 3(1)*(c)* (see [20]).

DISCOVERY HEALTH (PTY) LTD v ROAD ACCIDENT FUND AND ANOTHER 2023 (2) SA 212 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Liability of Fund — Past medical expenses — Benefits received from private medical scheme not deductible from claim for past medical expenses — RAF directive to contrary set aside as unlawful — Road Accident Fund Act 56 of 1996, ss 17 and 18.

On 12 August 2022 the Road Accident Fund (RAF) issued a directive stating that it would henceforth reject all claims for past medical expenses where they were paid by medical schemes on the basis that in such cases the claimant did not suffer a loss.

The applicant, South Africa's largest medical-aid scheme, urgently sought its annulment. The court ruled that the legal position was that benefits received by a claimant under an insurance contract with a third party were for the claimant's exclusive benefit and did not exonerate the RAF from its liability to discharge its obligations under the RAF Act. The court accordingly set aside the directive as unlawful. (See [29], [35] and [42].)

In the course of its judgment the court made the following observations about the directive:

- the social-security protection provided by the RAF Act was not intended to impoverish medical schemes which, were the directive to stand, would face a one-way downward business trajectory because they would not be reimbursed for past medical expenses and have no standing to recover them (see [30] – [31]); and

- the directive would result in a situation where claimants would be forced to abandon claims for past medical expenses to avoid prescription, and settle their hospital bills after receipt of their settlements under other heads of damages (see [37]).

GAUTENG REFINERY (PTY) LTD v ELOFF 2023 (2) SA 223 (GJ)

Magistrates' court — Civil proceedings — Summary judgment — Affidavit — Failure by plaintiff to explain in affidavit why counterclaim did not raise issue for trial, not resulting in invalid affidavit — Counterclaim ought to be considered when merits of summary judgment application were considered — Magistrates' Courts Rules, rule 14(2)*(b)*.

Subsequent to the respondent launching an action in the district magistrates' court against the appellant, the latter filed a plea in defence, as well as a counterclaim. In answer, the respondent successfully applied for summary judgment. In the present appeal, the appellant placed reliance on Magistrates' Courts Rule 14(2)*(b)*. It provides that a plaintiff seeking summary judgment must deliver, together with the notice of application, an affidavit in which they, inter alia, explain briefly why the defence as pleaded does not raise any issue for trial. The appellant argued that the rule obliged the respondent in its affidavit to deal with *both the appellant's plea and its counterclaim*. The respondent failed to address the counterclaim in its affidavit. This, the appellant argued, rendered the affidavit in breach of the rule, and the summary

judgment application fatally defective. Whether this was so, was the issue in dispute in the appeal.

Held, that a failure by a plaintiff seeking summary judgment to explain in its affidavit why the counterclaim, in addition to the plea, did not raise any issue for trial did not result in the invalidity of the affidavit. To hold that there was a formal requirement for a plaintiff to offer such an explanation in its affidavit would be contrary to the purpose of the summary judgment rule. Rather, the counterclaim ought to be considered when the merits of the summary judgment application were considered, and a plaintiff who did not include an explanation of why the counterclaim did not raise a triable issue, and therefore was a bar to summary judgment, ran the risk of failing on the merits. (See [13], [14] and [16].)

Held, further, that the appellant did not take issue with the magistrate's consideration and determination of the merits. Nor was there any basis on which it could do so. Appeal accordingly dismissed. (See [17] and [18].)

GQITHEKHAYA AND OTHERS v AMATHOLE DISTRICT MUNICIPALITY 2023 (2) SA 227 (ECEL)

Labour law — Employee — Wages — Deductions — Ex post facto implementation of no work, no pay principle — Employer making salary deductions five months after unprotected strike on ground that wage payments to striking workers were made in error and recoverable by common-law set-off or under BCEA s 34(5) — No consent or judicial process — Amounting to impermissible self-help by employer — Court order required — Final interdict granted — Basic Conditions of Employment Act 75 of 1997, s 34(1) and 34(5).

The applicants were paid while on an unprotected strike between 9 November and 15 December 2020. Five months after they went back to work, they received notices from their employer (the respondent municipality) informing them that it would make deductions from their salaries over a two-month period to give effect to the no work, no pay rule it had decided to invoke against the applicants. The reason for the decision (and the delay) was that the applicants were initially assumed not to have been involved in the strike. The deductions amounted to 25% of their salaries.

The applicants sought an interdict, claiming that they were given no opportunity to show why the deductions should not be made and that the respondent had contravened s 34 ('deductions') of the Basic Conditions of Employment Act 75 of 1957 (BCEA). Section 34(1) states that there may be no deductions from remuneration unless *(a)* the employee '*agrees* in writing'; or *(b)* it is 'required or *permitted in terms of a law*, collective agreement, court order or arbitration award'. Section 34(5) states that an employee may not be required to repay any remuneration *except* for overpayments . . . resulting from an *error in calculating the employee's remuneration*'.

The court, having found that the deductions were contrary to s 34, arbitrary and unlawful, issued an interim order prohibiting them and directing the respondent to repay sums already deducted. The court pointed out that it had jurisdiction because the applicants' fundamental rights to property and due process were violated. The respondent paid back the money, but the applicants insisted on final relief, which the respondent resisted on the ground that the salary payments were, in the light of the unlawfulness of the strike and the court-sanctioned implementation of the no work, no pay rule, made in error and hence susceptible, without more, to set-off or deduction under s 34(5) of the Act.

Held

It was obvious that an employee had no right to be remunerated for services not rendered and had to pay back the money if he or she was paid while participating in a strike. But notwithstanding the universal no work, no pay principle, its invocation did not elevate a wage deduction for work not done to one 'permitted in terms of a law' as envisaged in s 34(1)*(b)*. The respondent should have gone further in the interdict proceedings and asked the court for leave to deduct the renumeration it was entitled to withhold based on the no work, no pay principle, in the event of the court finding in its favour that the strike was unlawful. (See [21] and [57].)

But even if the applicants had been paid in error, this did not assist an employer in the position of the respondent when it wanted to recover the overpayment five months after the fact against present remuneration owing to an employee. It was settled law that s 34 did not permit arbitrary deductions but required that respect be given to an employee's constitutional rights to fair labour practices, of access to court, and the

right not to be arbitrarily deprived of their property. Section 34(5) could not be invoked without an employee's consent or an order of court. (See [34] – [35], [50].)

Nor did s 34(5) grant an employer a remedy or right to apply set-off where there had been an error in calculating an employee's remuneration; the provision merely confirmed a category of deductions that an employee could not be expected to challenge on the basis that she/she had no entitlement to it in the first place because it constituted an obvious overpayment or arithmetic miscalculation. The respondent had, by not including the applicants in the category of employees against whom it intended the no work, no pay rule, made a mistake, not an 'error in calculating [their] remuneration' as intended in s 34(5). (See [53] – [54].)

The court according made an order declaring that the deductions effected against the applicants' salaries were not permissible or at the time properly effected in accordance with the provisions of s 34(1) and amounted to self-help.

JAI HIND EMCC CC t/a EMMARENTIA CONVENIENCE CENTRE v ENGEN PETROLEUM LTD SOUTH AFRICA 2023 (2) SA 252 (GJ)

Appeal — Execution — Application to execute pending appeal — Requirements — Exceptional circumstances — Money order — Whether outside ringfence of exceptionality — Money orders not falling outside ringfence of exceptionality — Test fact-specific, meaning no general guidelines or principles — Superior Courts Act 10 of 2013, s 18(3).

Appeal — Execution — Application to execute pending appeal — Test — Restatement — Superior Courts Act 10 of 2013, s 18(3).

Appeal — Execution — Order for execution pending appeal — Appeal against — Procedure — Requirement of 'extreme urgency' meaning not appropriate to follow appeal procedure provided in rule 49 — Johannesburg High Court declaring that correct course of action would be to file notice of appeal and appeal index in digital file as soon as reasonably possible after s 18(3) order was made; and to simultaneously approach Deputy Judge President for directions about heads of argument and date for hearing — Superior Courts Act 10 of 2013, s 18(4); Uniform Rules of Court, rule 49.

This was an appeal, heard before the Johannesburg High Court, against an order in terms of s 18(3) of the Superior Courts Act 10 of 2013 (SC Act) putting into operation an order of court pending a potential appeal. The factual background to this matter was as follows: The appellant was Jai Hind EMCC CC (Jai Hind). It leased property from the respondent, Engen, upon which it operated a service station. On 16 October 2019 an order of court was obtained by agreement between the parties in terms of which: Jai Hind was declared, for various reasons, to be in unlawful occupation of the property; and that it should vacate the property on 31 March 2020, failing which it would be liable to pay a holding-over sum of R250 000 per month. Jai Hind failed to comply with the order, remaining in occupation after 31 March 2020. On 14 October 2021 Engen obtained an order by Keightley J directing Jai Hind to vacate and pay the holding-over sums, calculated retrospectively from 1 April 2022, by then 19 months in arrears, and amounting to R4 750 000. Jai Hind sought to appeal that order. For its part, Engen sought and obtained an order in terms of s 18(3) of the SC Act immediately putting into effect the Keightley order. Jai Hind, in terms of s 18(4), appealed the s 18(3) order. The present matter was the determination of such appeal.

The issues to be determined included the following (see [1]):

(a) Had a proper case been made out to order the putting into operation of the initial order? That is, had Engen proven, as was required by the relevant law, the following (see [8])?:

- *The existence of exceptional circumstances; and that it (Engen) would suffer irreparable harm if the order were not implemented at once*. Engen's essential case was that it had a clear right to possession of the property from 1 April 2020 and, if Jai Hind did not vacate then, it had an entitlement to a monthly holding-over payment made contemporaneously with the improper occupation by Jai Hind (see [9]). The further leg to Engen's plight was the unlikelihood of its getting paid the arrear holding-over sums were it required to wait for the exhaustion of the appeal process, given Jai Hind's impecunious circumstances; the question, though, was whether such vulnerability was relevant as a factor within the contemplation of the species of exceptionality catered for by s 18(3), warranting immediate compliance by Jai Hind; or did it constitute simply one of the ordinary perils of litigation? (See [10] – [12].) A further question was, having regard to the fact that none of the case law concerning the

application of s 18(3) dealt with the payment of money, whether 'money orders' in fact fell outside the ringfence of exceptionality (see [15]).

• *That, were Jai Hind to succeed in the appeal, sometime in the future, it would suffer no irreparable harm if it complied with the order implemented at once*. (See [8].) Jai Hind argued it would indeed suffer irreparable harm were the order implemented immediately: this was because the effect on its cash flow would be such as to cause it to stop trading; it would become extinct (see [10] and [18]).

(b) What was the appropriate procedure to give effect to the injunction in s 18(4)(iii) that an appeal in terms of s 18(4) be heard 'as a matter of extreme urgency', more especially in relation to the applicability of rule 49(6) – (10) in relation to s 18(4) appeals?

As to *(a)*, *held*, that 'money orders' did not fall outside the ringfence of exceptionality. First, the fact-specific attribute of the test meant there were no general guidelines or principles. Second, in any event, the order by Keightley J in favour of Engen was not a pure money order, and the money aspect could not be divorced from the order *ad factum praestandum* to vacate the premises. (See [15].)

Held further, that the following peculiarities of Engen's case qualified it for exceptionality and took it out of the broad range of ordinary perils of litigation: *(a)* the initial settlement agreement was made to settle a dispute; *(b)* the settlement included express provisions to secure Engen's interests if Jai Hind defaulted by not vacating the premises on 31 March 2020; *(c)* the provision for a holding-over payment anticipated the risk of a loss of a remedy if not paid contemporaneously with the holding-over; *(d)* no other security was held to cover the holding-over payments if Jai Hind did not vacate on due date; *(e)*on the probabilities, as evidenced from the evidence adduced, payment for holding-over could not be recovered ex post facto; *(f)* the consequences were that, without immediate compliance by Jai Hind, the relief was valueless; *(g)* the fact that Jai Hind was in breach of a court order, in terms agreed to by it, exacerbated the default. (See [17].)

Held further, that, plainly, the irreparable harm caused to Engen was self-evident from the attributes that made the case exceptional.

Held further, that the kind of harm that Jai Hind claimed it would suffer was not the kind of 'irreparable harm' contemplated by s 18(3). The latter catered for harm that derived from being unable to recover the performance made to comply with the order. It did not cater for the risk of insolvency, should the order be complied with; that risk was simply an ordinary incidence of litigation. (See [20].)

As to *(b)*, *held*, that it was inappropriate to prosecute a s 18(4) appeal in terms of the procedure provided for in rule 49, such procedure being incompatible with the extreme urgency demanded by rule 18(4)(iii). (See [25] and [26].) The correct course of action was: to file a notice of appeal and appeal index in the digital file as soon as reasonably possible after the s 18(3) order was made; and to simultaneously approach the Deputy Judge President for directions about heads of argument and a date for a hearing. (See [30].)

Held, in conclusion, that the appeal should be dismissed (see [31]).

MEC FOR FINANCE, EASTERN CAPE AND OTHERS v LEGAL PRACTICE COUNCIL AND OTHERS 2023 (2) SA 266 (ECMk)

Execution — Attachment — Of right, title and interest to credit balance in bank account of government department to satisfy judgment debt arising from medical negligence claims — Application for stay of execution pending application for variation of final orders to provide for payment in instalments — Duties of accounting officer and treasury — Development of common-law 'once and for all rule' — Finality of judgments — State Liability Act 20 of 1957, s 3; Public Finance Management Act 1 of 1999, s 1 sv 'unauthorised expenditure'.

The tenth to eighty-fifth respondents (the plaintiff respondents) were successful plaintiffs in medical negligence claims against the third applicant, the Member of the Executive Council for Health, Eastern Cape Province (the MEC). The judgments remained unsatisfied, and several of the plaintiff respondents issued writs of execution for the attachment of the rights, title and interest of the MEC and the fourth applicant, the Head of Department for Health, Eastern Cape (the HOD Health), in the Pay Master General account (PMG account). This account is funded from the Provincial Revenue Fund (the PRF), controlled by the second applicant, the Head of Department Eastern Cape Provincial Treasury (the HOD for Treasury).

The applicants, including the first applicant and the Premier of the Eastern Cape Province as fifth applicant, applied for relief that amounted to an interim interdict staying execution pending finalisation of the application for variation of the orders in favour of the respondent plaintiffs (see [10]). Citing financial constraints, they contended that payment of the existing judgment debts may lead to the total collapse of health services in the Eastern Cape. In this regard, the HOD for Treasury also suggested that the Eastern Cape Department of Health (the ECDOH) was not permitted to budget for judgment debts, so that any payment of a judgment debt constituted an 'unauthorised expenditure' in terms of the Public Finance Management Act (the PFMA). (See [14] and [43] – [46].)

The variation requested was to amend the dates of payment, to provide for various amounts to fall due as set out in a proposed schedule of instalments. The applicants contend that they were entitled to the variation by the development of the common law in respect of the 'once and for all' rule, to permit for the payment of the judgment debt in instalments.

In addition, the applicants sought declaratory relief to the effect that the State Liability Act 20 of 1957 (the SLA) (which governs the execution of judgment debts against the state) did not permit writs to be issued against the third and fourth applicant's right, interest and title in its PMG account (see [27] – [28]).

Held

As to the applicants' financial predicament, treasury was entitled to issue instructions, provided that they were not inconsistent with the PFMA. It was not empowered to issue directives in conflict with the provisions of the PFMA. It was the failure to budget for judgment debts as prescribed by the SLA which resulted directly in unauthorised expenditure. An instruction not to budget for these known debts and for contingent debts was an unlawful instruction. The SLA provided for the payment of judgment debts by the treasury if the ECDOH failed or was unable to pay; the Eastern Cape government had it within its power to raise revenue of its own; and, moreover, health was a joint competency of national and provincial governments. While the applicants had demonstrated the severe fiscal constraints imposed on the ECDOH, its imminent collapse was not reasonably anticipated. (See [48] and [50].)

As to the declaratory relief, it was bound by the full court of the division's decision in *Ikamva*, * that the MEC's right, title and interest in the PMG account were susceptible to attachment in execution. The right, title and interest in a credit balance in a bank account were incorporeal movable assets, susceptible to attachment. The legislature must accordingly be deemed to have known, when the SLA was adopted, that movable assets generally included incorporeal movable assets for purposes of execution. The SLA prescribed that a judgment debt must be paid from the appropriated budget of the relevant department, held in the PMG account of the ECDOH. It would be inimical to the structure of the SLA to exclude the single asset which had been specifically identified in the SLA as the source from which the debt was to be paid, from the movable property that was available for attachment. The declaratory relief would therefore not be sustained. (See [30], [34], [36] – [37].)

As to the application to vary orders of court, the effect of the intended variation was to change the substance of the orders. At common law, the court had no power to set aside or alter its own final order (as opposed to interim or interlocutory orders). While the Constitutional Court has given a clear indication of the likely development of the common law in this field, it also emphasised that 'each [individual] must be afforded an appropriate remedy and compensated fairly for the loss suffered'. The prayer for periodic payments constituted a special defence to the 'once and for all' rule, which must be properly pleaded. Evidence must be led to substantiate the defence and the court must, after consideration of all the relevant evidence, craft an appropriate remedy for the individual plaintiff. The development of the common law contended for, was a matter for trial. It could not be raised after the issues have been finally decided, simply because the applicants were in a financial pinch. (See [57] – [60], [68] – [70].)

As to the interim relief, the applicants had no prima facie right to the relief sought, nor did the balance of convenience favour them. The relief which they sought would discriminate against the poorer majority who were compelled to rely on public healthcare. In addition, they sought to interdict only those who had judgments arising from medico-legal claims against them, but not creditors who obtained judgments for contractual debts. This discrimination was not constitutionally defensible. (See [79] – [81].)

As to the suspension of the writs of execution, the inherent jurisdiction of the High Court did not include the right to tamper with the principle of finality of judgments, other than in specific circumstances, which did not arise in this case. In addition, it would offend s 9 of the Constitution, which provided for everyone to be equal before the law and to have equal rights to the protection and benefit of the law. Accordingly, the application was ill-advised and would be dismissed. (See [82] and [91].)

NEDBANK LTD v MABASO AND ANOTHER 2023 (2) SA 298 (GJ)

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Reserve price not achieved at sale in execution — Discretion available to court to order how execution was to proceed — Discretion sufficiently broad to allow court to revisit previously granted orders of special executability — Uniform Rules of Court, rule 46A(9)*(c)*.

The applicant bank, in satisfaction of judgments in its favour against the first and second respondents, had previously obtained orders declaring to be specially executable each of the respondents' undivided shares in certain immovable property constituting their primary residence, and authorising execution thereon with a *reserve price of R596 305,99*. The property was subsequently judicially attached, and a public auction held. However, according to the sheriff's report submitted in compliance with rule 46A(9)*(d)*, the highest bid achieved at the auction was R300 000 — below the reserve price — and that, as a result, the property was not sold in execution. Presently, the applicant approached the High Court with a reconsideration application in terms of rule 46A(9), seeking an order varying the previous orders so as to allow the property to be sold in execution without a reserve price. The sole justification offered was that it was 'hoped that more buyers would attend due to no reserve being set'. The second respondent opposed the application. He sought the setting-aside of the orders of special executability. In motivation of this, the second respondent claimed that he was now able to pay R3000 per month after securing payment. For its part, the applicant claimed that the course of action sought by the respondent was not open to the court, because the ability to pay was not a defence at this stage of the legal proceedings.

Held, that the scope of rule 46A(9)*(c)*, in affording a court a wide discretion to 'order how execution is to proceed', was indeed sufficiently broad to allow a court to revisit the previously granted orders of special executability, should it emerge from

information brought to its attention in the reconsideration proceedings that the circumstances of the matter had changed to such an extent that such an order was no longer warranted, for example, because there were other satisfactory means of satisfying the judgment debt. Such an approach was consistent with the purpose of the rule, which was to achieve an appropriate balance between the legitimate commercial rights of judgment creditors to payment, and the equally legitimate rights of indigent debtors to housing under s 26 of the Constitution. This underlying purpose remained a central consideration to the very last possible moment. If a rule 46A(9) application presented a court with an opportunity to address an inappropriate imbalance that had emerged between the competing rights of the parties, that opportunity had to be seized. (See [11].)

Held, nevertheless, in the circumstances of the present case, it would not be appropriate to revisit the special executability orders: while it was clear the second respondent had been making efforts to meet the instalments due and payable by him, the amount that he had been able to pay had consistently been considerably less than the required monthly instalment. This could only mean that the amount of the indebtedness had continued to increase, and that there remained no real prospect that the considerable arrears would be paid off in the absence of a sale of the property in execution. (See [15] and [16].)

Held, further, that it would also not be appropriate to allow a sale of the property in execution without a reserve price in the 'hope that this might attract more potential buyers', as the applicant alleged. To the contrary, it was apparent from the sheriff's report that there was not insignificant interest in the property at the unsuccessful auction. Clearly a reserve price had to be set. (See [18].)

Held, that the most sensible approach to the setting of the reserve price in the current case would be to set it at the amount of R300 000, being the highest bid submitted at the auction, which sale was described by the applicant itself as a 'real life scenario' that was 'the clearest and most accurate indication yet of the property's value'. (See [20].)

TSOGO SUN CALEDON (PTY) LTD AND OTHERS v WESTERN CAPE GAMBLING AND RACING BOARD AND ANOTHER 2023 (2) SA 305 (SCA)

Review — Grounds — Legality — Western Cape Gambling Board imposing condition for renewal that licensees must maintain level 4 broad-based black economic empowerment certification — Jurisdictional facts giving rise to power to impose such condition not satisfied — Absent jurisdictional facts, not empowered to impose impugned conditions — Decision set aside on review — National Gambling Act 7 of 2004, s 53(2)*(b)*.

Gaming and wagering — Gambling — Casino licence — Western Cape Gambling Board imposing condition for renewal that licensees must maintain level 4 broad-based black economic empowerment certification — Jurisdictional facts giving rise to power to impose such condition not satisfied — Absent jurisdictional facts, not empowered to impose impugned conditions — Decision set aside on review — National Gambling Act 7 of 2004, s 53(2)*(b)*.

The Western Cape Gambling Board (the Board) had adopted Codes of Good Practice, first in 2007 and then in 2013, under the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act), to which all gambling licences in the province were subject. On 13 July 2017 the Board notified licensees that it had decided to impose new conditions under the applicable B-BBEE framework in respect of their licences, requiring them to achieve an overall rating of level 4 and to submit documentation related to this to the Board (the new condition).

The first to third appellants held casino licences authorising them to operate casinos in the Western Cape, and the fourth appellant held a route operator licence by which it was authorised to operate a limited-payout machine business in the Western Cape Province. It was uncontested that, prior to the impugned decision, the appellants had voluntarily exceeded the level which the Board sought to impose in the new condition (see [5]). Aggrieved by the new condition, they challenged the legality of the Board's decision to impose the new condition in a High Court review application, but were unsuccessful.

This case concerned their appeal to the Supreme Court of Appeal. At issue was whether the new conditions met the requirements of s 53(2)*(b)* of the National Gambling Act 7 of 2004 for the exercise of the power to impose conditions on the

appellants. Section 53(2)*(b)* provides that '(a)t least once every year after the issuance of a licence . . . the provincial licensing authority that issued that licence may impose *further or different reasonable and justifiable conditions* on the licence *to the extent necessary* to address the matters referred to in subsection (1)*(a)* and *(b)*'. And ss (1)*(a)* provides that '(w)hen considering an application for a licence . . . a provincial licensing authority must consider the commitments, if any, made by the applicant or proposed transferee in relation to black economic empowerment'. (See [11].)

Held

On proper construction, there was a four-stage process which must take place in imposing further or different conditions under s 53(2). It must first consider the previous commitments of the licensee regarding black economic empowerment and review the achievements of the licensee in relation to those commitments. A discretion then arose as to whether, in the light of these two factors, further or different conditions should be imposed on the licensee. If so, the further or different conditions must be reasonable and justifiable, and must be imposed only to the extent that is necessary to address the matters set out in s 53(1)*(a)* and *(b)* of the National Gambling Act. This was a focused exercise, requiring each licensee to be evaluated separately. Only if an individual evaluation had been undertaken, did the power to impose further or different conditions arise. It was insufficient for the Board to impose further or different conditions on all the licensees without undertaking an evaluation of each licence holder. The required exercise differed entirely from that appropriate to the adoption of a general policy. (See [14] – [15].)

The Board elevated what was really a policy into an immutable rule which it applied indiscriminately to all licence holders, regardless of their circumstances; it did not undetake any of the stages of this four-stage process. It was clear that, even if it could be said that a discretion arose, none was exercised at all. As such, the power of the Board to impose further or different conditions on the appellants did not arise. For the same reason, the Board could also not show that the conditions were reasonable and justifiable or had been imposed only to the extent necessary to address the commitments and achievements of the appellants, since these were not considered. Accordingly, the jurisdictional facts which give rise to the power of the Board to impose

the conditions were not satisfied, and the imposition of the conditions was unlawful. The appeal would accordingly be upheld. (See [24] – [25] and [28].)

SOUTH AFRICAN CRIMINAL LAW REPORTS MARCH 2023

BIYELA v MINISTER OF POLICE 2023 (1) SACR 235 (SCA)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Reasonable suspicion — What constitutes — Suspicion by arresting officer could, depending on circumstances, be based on hearsay evidence, regardless of whether that evidence was later found to be admissible or not.

The appellant was one of 12 men who were arrested and detained on charges of intimidation and public violence. He sued successfully in a magistrates' court for unlawful arrest and detention. The arresting police officers relied on a report from a colleague, who was monitoring CCTV cameras, of the occupants of a minibus damaging a municipal bus. They located the minibus, pulled it over and arrested and detained the men. The two police officers, whose testimonies differed in certain respects, said that they found a rubber hammer and sticks and stones in said minibus. The CCTV operator, however, had no recollection of the incident and the digital recording was not available. The respondent based its contention, that the police officers had a reasonable suspicion, on the evidence that they received instructions from radio control emanating from the CCTV operator. The magistrate ruled this evidence inadmissible and found in favour of the appellant.

On appeal, the High Court held that the evidence of the arresting officers was credible and that the magistrates' court had misdirected itself by not having regard to the information available to the arresting officers to establish a reasonable suspicion at the time of the arrest. If it had done so, it would have found that the arrest of the appellant was lawful. On further appeal,

Held, that the question, whether a peace officer reasonably suspected a person of having committed an offence within the ambit of s 40(1)*(b)*, was objectively justiciable. It had to be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law. The standard of a reasonable suspicion was very low. It had to be more than a hunch; it should not be an unparticularised suspicion. It had to be based on specific and articulable facts or

information. The mere fact that the CCTV operator could not recall that he made the report was not dispositive of the matter and the absence of his recollection did not signify the absence of a report made by him. The court was therefore in agreement with the High Court's characterisation of the issues and that a reasonable suspicion could, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence was later found to be admissible or not. (See [33] – [34] and [37] – [38].)

Held, further, however, that the nature of the inconsistencies in the evidence of the police officials was such that the court a quo ought to have concluded that the respondent had not proved that the appellant had been lawfully arrested. (See [43] and [45].) The appeal was upheld.

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v MAGISTRATE, CAPE TOWN AND ANOTHER 2023 (1) SACR 245 (WCC)

Extradition — Review of — Decision that sufficient evidence to extradite person — Magistrate having no powers to review decision in terms of s 304(4) of Criminal Procedure Act 51 of 1977 or s 165 of Constitution — Extradition Act 67 of 1962, s 10(1).

Extradition — Powers of court — Extradiction enquiry — Magistrate required only to determine extraditability of person and not his or her criminal culpability — Extradition Act 67 of 1962, s 10(1).

Extradition — Costs — When to be ordered — Where proceedings by extraditee unnecessary and wholesale abuse of process, costs order both justified and necessary.

In the course of extradition proceedings of an extraditee (Tucker) to the United Kingdom (the UK) on 50 charges of alleged rape and sexual assault of children, there had already been a decision by a magistrate that there was sufficient evidence on which to extradite Tucker, and an order was made committing him to prison awaiting the Minister's decision.

Tucker challenged these decisions on appeal and review to the High Court, which found that there was no merit in them, but that the magistrate was obliged to accept certain evidence which Tucker wanted to place before the magistrate, which consisted

of media reports to which he took exception, together with an affidavit from an expert on British law which he claimed would show that it discriminated unfairly against homosexuals, so that this material could be included in the record which was submitted by the magistrate to the Minister. This despite it pertaining to the Minister's decision as to whether Tucker should be surrendered, and not the magistrate's determination of whether he was extraditable. In the circumstances the court decided that the matter should be remitted to the magistrate so that it could be transmitted to the Minister, together with the magistrate's report as envisaged in s 10(4) of the Extradition Act 67 of 1962.

Tucker then applied for leave to appeal from this decision, which was unsuccessful, as was a petition to the President of the Supreme Court of Appeal.

The Constitutional Court subsequently confirmed the terms of the remittal order. Instead of complying with the terms of the order, Tucker presented a 21-page affidavit which he had deposed to, in which he sought not only to refer to a bundle of press releases in the UK and South Africa, but also to rechallenge the decision that he be extradited. Many of the grounds on which he sought to do so were a repetition of those previously advanced by him, but there were also some new grounds. He said that he had made the affidavit for the purpose of demonstrating that he was not extraditable; that the charges on which his extradition was sought were invalid; and that the Minister was 'constitutionally barred' from agreeing to his surrender.

In response the Director of Public Prosecutions (DPP) requested an opportunity to file a response from the UK prosecutors in relation to the affidavit, and on 12 November 2021 an affidavit in response to Tucker's affidavit was furnished by the UK Prosecution Service by an independent barrister who served on the Attorney General's rape and serious sexual offences specialist panel, who had been instructed to prosecute Tucker on the charges on which he was sought in the UK.

The magistrate then delivered a judgment referring the matter to the High Court for special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA), stating that he had a 'serious lack of conviction' as to whether sufficient details of the offences on which Tucker was sought had been presented during the extradition hearing which had taken place before him. He was of the view that there had been an error in the assessment of the information which had not only led to a failure of justice,

but which also demanded the court's intervention in the interests of justice. He relied in this regard on s 165 of the Constitution. The magistrate's judgment did not make any reference to the affidavit presented by the prosecutor, and it had clearly been prepared without any regard to it.

Held, that, on any reading of s 165 of the Constitution, the section did not afford a magistrate the power to reconsider an order which he or she had previously made. The source of such a power could only lie in the provisions of the Magistrates' Courts Act 32 of 1944 and the rules made in terms thereof, or any other statutes which conferred such a power on a magistrate. The Extradition Act was not such a statute. (See [53].)

Held, further, that the magistrate had clearly failed to recognise that the presiding officer at an extradition enquiry was required only to determine the *extraditability* of an extraditee and not his or her criminal *culpability*, which was a matter for the trial court in the foreign state. Because of that important distinction the Constitutional Court had confirmed that the fair-trial rights which were provided for in terms of s 35 of the Constitution did not find application in extradition enquiries. (See [58].)

Held, further, that it was of great concern that the magistrate also went on a lengthy excursus in which he sought to criticise the jury system in the United Kingdom and the United States of America, particularly in relation to the effect which media publicity may have on trials which juries were required to adjudicate upon. Given that the requesting state in the present matter was the UK, why the magistrate saw fit to express a view in relation to the application of the jury system in the US was beyond comprehension. (See [60].)

Held, further, that after deciding the issues required of him in terms of s 10(1) of the Extradition Act, the magistrate had exhausted his powers and was functus officio, and therefore no longer at liberty to revisit those aspects and pronounce on them again. The only power which the magistrate could subsequently exercise was the one given to him in terms of the remittal order, which the court had made, and was strictly limited to him receiving an affidavit from an expert on British law and documentary evidence pertaining to media coverage for the purposes of forwarding that material to the Minister, together with the record in terms of s 10(4). (See [70] – [71] and [73].)

Held, further, that the magistrate presiding over an extradition enquiry could not refer it to the High Court for review in terms of the provisions of s 304(4) of the CPA. The magistrate's decision was accordingly incompetent and fell to be set aside, as it breached the principle of legality. (See [76] – [77].)

In respect of an application by the DPP for an order for costs against Tucker, the court held that what had occurred before the magistrate was an unnecessary and wholesale abuse of process. A costs order was both justified and necessary and Tucker could consider himself fortunate that a costs order on a punitive scale was not sought, because the circumstances merited it. (See [89].)

S v MNDELA 2023 (1) SACR 275 (ECM)

Sentence — Suspended sentence — Putting into operation of — Application for — Correct procedure — Prosecutor bringing application after accused brought before court on further charge of failing to pay maintenance, but prior to conviction — Court ruling that application premature — Prosecutor also ought to have summonsed accused under original case number for suspended sentence in that case to be put into operation.

The accused appeared in a magistrates' court on a charge of contravening s 31 of the Maintenance Act 99 of 1998 for failing to pay maintenance in compliance with a maintenance order. However, instead of putting charges to the accused, the prosecutor made an impromptu application to put into operation a suspended sentence arising from a previous conviction for failing to pay maintenance. The accused's legal representative argued that it was premature for the state to make such application before the accused was convicted. The presiding magistrate found in favour of the accused and dismissed the application on grounds of it being premature.

The senior public prosecutor, dissatisfied with the ruling, requested that the matter be referred for review. It appeared that the accused had been convicted in May 2020 of failing to pay maintenance and sentenced to pay a fine of R5000 or serve 90 days' imprisonment, the sentence wholly suspended for three years on condition that he was not again convicted of the failure to pay maintenance committed during the period of suspension. The following year he was again convicted and sentenced to pay a fine of R10 000 or undergo imprisonment for four months, also conditionally suspended. After that conviction no application for the putting into operation of the first suspended

sentence was instituted. The ruling of the magistrate in respect of the application made in the third prosecution was a new matter on which there was no conviction yet; and when the court made said ruling it made it clear that it was in respect of the latest charge in respect of which the accused had not yet been convicted.

Held, that the presiding magistrate was clearly correct in his ruling that the application for the putting into operation of a suspended sentence, in proceedings which had not reached any of the milestones necessary, was premature. The prosecutor should not have made the application when she did. The correct procedure would have been for the accused to be sum- monsed before court under the original case number for the putting into operation of the first suspended sentence. (See [11].)

S v SPHUHLE AND ANOTHER 2023 (1) SACR 280 (WCC)

Housebreaking — Composite charges — Single, combined charge of housebreaking with intent to rob and robbery with aggravating circumstances remaining competent charge and still part of law, despite provisions of s 51(2) of CLAA — Criminal Law Amendment Act 105 of 1997, s 51(2); Criminal Procedure Act 51 of 1977, s 1.

The two appellants, with the assistance of a third person, broke into the farmhouse of the two elderly complainants, assaulted them and robbed them of certain valuables. The two appellants were former employees of the complainants until the outbreak of the Covid-19 pandemic. They were respectively 26 and 31 years of age. They pleaded guilty to the three counts against them, namely of housebreaking with intent to commit a crime unknown to the state; assault with intent to do grievous bodily harm; and robbery with aggravating circumstances as intended by s 1 of the Criminal Procedure Act 51 of 1977, read together with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. Each appellant was then sentenced to an effective 23 years' direct imprisonment. The appellants admitted the assault on the 77-year-old male complainant, who had been struck on the head with a hammer, and the threatening of his 72-year-old wife with the hammer, which had induced fear in her that caused her to hand over R7000 in cash, a watch, a ring, a cellphone, a credit card and a Toyota Hilux vehicle. The wedding ring, the watch and the vehicle were recovered. The appellants were granted leave to appeal against the conviction on the limited aspect of an alleged splitting of charges, and on the sentences.

Held, that a single, combined charge of housebreaking with intent to rob and robbery with aggravating circumstances, as intended by the sections as set out in the indictment, remained a competent charge and was still part of our law. Judicial pronouncements on the effect of Act 105 of 1997, to the effect that a single, combined charge was no longer appropriate, and that there was good reason to have the charges formulated separately, had hamstrung the National Prosecuting Authority (NPA) in deciding on charges to be preferred. The exercise of that discretion was not the province of judicial officers, and the independence of the NPA had to be respected. (See [15] – [19].)

Held, accordingly, that the convictions of both appellants on all the charges were set aside and replaced with a conviction for housebreaking with intent to rob and robbery with aggravating circumstances, as intended by s 1 of the Criminal Procedure Act 51 of 1977, read together with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The sentences were reduced to sentences of 15 years' imprisonment. (See [26].)

S v TS 2023 (1) SACR 290 (WCC)

Rape — Sentence — Life imprisonment — When appropriate — Repeat rape of 12-year-old girl — Sentence hastily and mechanically imposed on basis of scant information — Sentence set aside and remitted to trial court for sentencing afresh, after consideration of expert witness reports on victim impact and ability of appellant to be safely reintegrated into society.

Trial — Record — Duty of presiding officer to keep proper record of proceedings — Record indicating that sketch made of interior of structure where offences committed, but sketch not forming part of record — Similarly, distances indicated in court, but court not recording distances in objective terms — Omissions leaving court on appeal ignorant as to precise import of indications.

The appellant appealed against his conviction in a regional magistrates' court of four counts of the rape of a 12-year-old girl in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as well as a sentence of life imprisonment, with all four counts being taken as one for the purposes of sentence. After considering the grounds and the evidence on record of the appeal

against conviction, the court was not persuaded that there was merit in any of those grounds and upheld the convictions. In respect of sentence,

Held, that the court a quo had taken note of the fact that the appellant was a 33-year-old first offender and had been incarcerated since August 2018 until December 2020, when he was sentenced. It had also noted the lack of remorse shown by the appellant; his dishonesty in denying the repeated rape of the complainant; and the fact that the rapes occurred when she lived in the same home as he did, all of which were considered to be aggravating circumstances, and led to the court's conclusion that there were no substantial and compelling circumstances which warranted the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment. The approach of the court to sentencing, however, appeared to have been a mechanical one in which scant regard was had to all of the factors relevant to sentencing. It had proceeded with undue haste and followed on immediately after conviction, and on the same day. (See [15] – [17].)

Held, further, that the ultimate sentence of life imprisonment was grossly inappropriate in the circumstances of the current case and indications in the material available were that a sentence of somewhere between 10 and 15 years' imprisonment would have fallen within the appropriate range. The information before the magistrate was too scant for her to be able to discharge the court's sentencing function judicially, and a presentence report would have allowed for all factors relevant to sentencing to have been placed before the trial court and enabled it to engage in a careful consideration of those factors. Included would have been the lasting impact of the crimes on the complainant, of which there was little to be gleaned from on the record, as well as the appellant's suitability for rehabilitation, given that he was a first offender. The appeal against the sentence accordingly had to succeed. (See [18] – [19].)

Held, furthermore, that there were shortcomings in the keeping of the record, in that a sketch had been made of the layout of the single-roomed structure in which the complainant testified she had been assaulted, and evidence adduced in relation to its contents, yet the sketch was not admitted as an exhibit. Similarly, there was more than one occasion during the trial in which the witness would indicate distances with reference to the spatial characteristics of the courtroom, and the court omitted to record such distances in objective terms. These omissions left the court clueless on

appeal as to the precise import of the indications made by those witnesses. (See [23].) The matter was referred back to the court for sentencing afresh after reports were obtained from expert witnesses on victim impact and ability of appellant to be safely reintegrated into society.

S v ZB 2023 (1) SACR 298 (WCC)

Human trafficking — Sentence — Imprisonment — Appellant having sent 15-year-old niece to much older man where she was repeatedly raped, assaulted and kept captive by her purported husband — Sentence of 12 years' imprisonment not inappropriate — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 71.

Sentence — Factors to be taken into account — Cultural practices — Practices constituting criminal conduct did not per se mitigate perpetrator's conduct for sentencing purposes — Appellant convicted of human trafficking, having sent 15-year-old niece to much older man where she was repeatedly raped, assaulted and kept captive by her purported husband — Sentence of 12 years' imprisonment not inappropriate — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 71.

The appellant appealed against her sentence of 12 years' imprisonment for human trafficking, in contravention of s 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, of her 15-year-old niece. The complainant lived with the appellant, who became her guardian upon the loss of her father. The appellant arranged for the complainant to be sent away to live with a much older man where she was repeatedly raped, assaulted and kept captive by her purported husband. It was contended that the appellant facilitated those offences, and she was accordingly convicted in accordance with the application of the overarching provisions set out in Act 32 of 2007. She appealed on the grounds that she was a first offender; that her cultural background was a strong mitigating factor; that she was not a danger to her community; that her young children would be disproportionately penalised by a custodial sentence imposed on her; and that a non-custodial sentence would be more appropriate in the circumstances of the matter. The complainant by contrast had been traumatised by the events and had been denied the opportunity to flourish and enjoy her childhood and complete her career at school.

Held, that the sentence imposed upon the appellant had in some measure to reflect censure upon appellant's conduct and behaviour, and the court was unable to unearth any misdirection or irregularity on the part of the court when it imposed its sentence. (See [13].)

Held, further, that the appellant's children were in the care of the appellant's sister and her husband, who was also their breadwinner, and they therefore would be adequately cared for if the appellant were incarcerated. A non-custodial sentence would not be a good example to set in connection with the person who had been convicted of human trafficking of a minor for sexual exploitation, and to allow her to return home to her minor children would possibly in itself be detrimental to her children's upbringing. (See [16] – [17].)

Held, further, in respect of the cultural practices alluded to by the appellant, that a cultural practice that constituted criminal conduct in our law did not per se mitigate the perpetrator's conduct for sentencing purposes. It had to be so that cultural differences did not excuse or mitigate criminal. To hold otherwise would undermine the equality of all individuals before and under our law, a crucial constitutional value. This was of particular significance in the context of gender-based violence, and all women were entitled to the same level of protection from their abusers. (See [21].) The appeal was dismissed.

S v GEMA AND ANOTHER 2023 (1) SACR 304 (NCK)

Trial — Presiding officer — Absence of — Magistrate having retired and relocated, and unable to travel because of Covid-19 — One of two accused serving sentence of imprisonment in another matter and second accused released on warning throughout trial — Interests of justice best served by part-heard proceedings being set aside, and trial commencing de novo before different magistrate.

The accused were being tried in a magistrates' court, and the trial was postponed on numerous occasions for various reasons. The magistrate then retired and relocated from Kimberley to the Southern Cape, and could not travel because of Covid-19 restrictions.

As to the question on review, whether the proceedings should be set aside and the accused acquitted, the court held that there had been an inordinate delay before the

matter was brought before the court on review, and there was no indication that the witnesses would be untraceable. While it could not be gainsaid that any accused whose trial, for whatever reason, was set aside, and who was tried de novo, would suffer some prejudice, the interests of justice did not only serve accused persons, but also the victims of crime and the broader community. The record of the proceedings revealed that the first accused was serving a sentence of imprisonment in a different matter and that the second accused had been on warning throughout. In those circumstances, the interests of justice would be served, should the part-heard proceedings be set aside and the trial commenced de novo before a different magistrate. (See [9] – [10].)

S v BEKKER 2023 (1) SACR 307 (GP)

Sentence — Previous convictions — Proof of — Prosecutor indicating that appellant had no previous convictions — Magistrate nevertheless asking appellant's attorney whether client was first offender — Attorney responding that it was for state to prove previous convictions — Magistrate repeating request and attorney indicating that accused had previous conviction — Subsequent *SAP*69 indicating previous conviction for rape — Magistrate not interrogating appellant as to previous convictions, and no irregularity committed.

The appellant was convicted in a regional court on a count of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and was sentenced to 10 years' imprisonment. The victim was 11 years and six months old at the time that the offence was committed. The appellant appealed against the sentence on the grounds, inter alia, that the court had committed a material irregularity in forcing the accused to disclose his previous conviction in circumstances where the prosecution had failed to do so, and had thereby elicited prejudicial information in contravention of the accused's right against self-incrimination. The record reflected that, after the state declined to prove any previous convictions, the magistrate asked the appellant's legal representative whether it was his instructions that his client was a first offender. The legal representative then indicated that he had not discussed the issue with the appellant, whereafter the magistrate provided him with an opportunity to do so. Said legal representative placed on record that it was for the state to prove previous convictions

and not for the defence to allude to any. The magistrate repeated his request that the appellant indicate whether he was a first offender or not. The legal representative then stated that the appellant was not a first offender. The magistrate concluded that the SAP69 was wrong and asked the prosecutor what he wanted to do. The prosecutor indicated that he would request a postponement to obtain an updated record. This the state obtained, and it proved one previous conviction, in that the appellant had been convicted of rape. On appeal,

Held, that, against the backdrop of the incident in question, the magistrate had not acted irregularly when he asked the appellant's legal representative whether his client was a first offender. The magistrate had only asked whether the appellant admitted the record produced by the state, and had not interrogated the appellant regarding previous convictions. (See [13].) The appeal was dismissed. (See [17].)

S v DLOMO 2023 (1) SACR 314 (KZP)

Murder — Premeditated or planned murder — What constitutes — Trial court finding presence of premeditation in fact that deceased had five years earlier killed appellant's brother — Insufficient evidence and too many variables needing to align to establish planning or premeditation — Finding of premeditation set aside on appeal, and sentence adjusted accordingly.

The appellant appealed against a sentence imposed by the High Court, of life imprisonment for premeditated murder. The trial court found the presence of premeditation in the fact that the deceased had some five years earlier killed the appellant's brother. On appeal,

Held, that it had to be accepted that the appellant was ordinarily resident in Durban, but that from time to time he returned home to a rural area, often briefly. There had been no direct evidence of planning or premeditation, or evidence of when the appellant decided to kill the deceased, and it was by no means certain, in the absence of any evidence to that effect, that on 8 April 2011, the day on which the deceased was killed, the appellant knew that the deceased was at that rural area and, more specifically, that he was to be found at the bottle store where he was killed. No evidence had been led as to why, after a period of five years, the appellant had decided that that was the day on which he would kill the deceased. There was also no evidence

of the circumstances under which the appellant acquired the firearm that he used to kill the deceased. (See [24].)

Held, further, that, on a conspectus of all the evidence, it seemed more probable that the appellant returned home and had a chance encounter with the deceased at the bottle store. There was insufficient evidence to establish that the murder was planned or premeditated, and there were too many variables that would need to align to make it premeditated murder. (See [27].) The sentence of life imprisonment was accordingly set aside and replaced with a sentence of 22 years' imprisonment.

S v KASONGO 2023 (1) SACR 321 (WCC)

Murder — Sentence — Life imprisonment — When to be imposed — Young offender — Accused killing girlfriend who was breaking off relationship with him — Savagely violent offence committed by first offender regarded by many as useful member of society — Youthfulness and first-offender status had to yield to brutality of offence, unnecessary denial of life to another and unmitigated toxic masculinity — No substantial and compelling circumstances justifying lesser sentence than life imprisonment — Criminal Law Amendment Act 105 of 1997, s 51(1).

The accused was convicted of assault with intent to do grievous bodily harm, theft, and murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA). The accused, a young man of 19 years, with no previous convictions, and by many accounts a well-behaved and compassionate person, had killed his girlfriend who was breaking off her relationship with him, and he did not want her to leave him. He strangled, bit and held the deceased's wrists so tightly that she suffered abrasions, and he held onto her phone and refused to hand it back. He stabbed the deceased 11 times with a knife on her head, back, left arm and side of the abdomen, and she died from the resultant injuries. The court heard evidence both of witnesses for the accused and for the state. It also heard the evidence of a professor who was the director of the Gender and Health Research Unit of the South African Medical Research Council, who had training in social epidemiology and had worked for more than 30 years as a researcher on interpersonal violence and gender-based violence. Her areas of expertise included research on the murder of women by their intimate partners. Her evidence was based on research findings from South Africa and

the rest of the world, and she had access to the typed records of the case of the accused.

The court held that, when sentencing a young person, it was appropriate that the sentence reflect not only the interests of society, but also those of the young person. The court was, however, unable to conclude that accused's conduct stemmed from the immature judgment of an unformed character, and that exacting full moral accountability and consequences might be too harsh in the circumstances. His attempt to cover up his involvement and conceal the body of the deceased was not an error, but a premeditated design to mislead. (See [35].) His savagely violent and unnecessary desire to inflict severe pain on the deceased, in horrifying circumstances, and with no feelings of concern, tipped the scales of justice towards the punitive and retributive. This was one of those instances where youthfulness, and being a first offender, had to yield to the brutality of the offence, the unnecessary denial of life to another and unmitigated toxic masculinity. (See [38].) There was a need to present a sense that the principle, that people received what they deserved in terms of moral correctness based on rationality and law, was still central to the nature of the rule of law in our constitutional democracy. The court was satisfied that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than life imprisonment on the count of murder. (See [39].) Two years' imprisonment was imposed on each of the remaining counts, to run concurrently with the sentence of life imprisonment. (See [40].)

S v KWAZA AND OTHERS 2023 (1) SACR 335 (WCC)

Sentence — Life imprisonment — When appropriate — Pretrial incarceration — Effect of lengthy pretrial detention, in present case six years — Supreme Court of Appeal not yet having spoken on effect of pretrial detention on sentences of life imprisonment — Leave to appeal to full bench granted.

In applications for leave to appeal against convictions for, inter alia, murder, and sentences of life imprisonment, the court refused leave against convictions based on the evidence on the record. In respect of the sentences of life imprisonment, counsel for the appellants contended that their pretrial incarceration for six years, before sentencing, constituted substantial and compelling circumstances warranting

deviation from the prescribed sentences. They sought leave to appeal to the full bench of the court against the sentences.

Held, that the cases which had served before the Supreme Court of Appeal (SCA) on the relevance to sentence of presentencing detention all related to instances of finite sentences, where adjustments to the imposed sentences were notionally possible. The court was unable to find any instances where this was considered by the SCA in respect of an indeterminate sentence such as life. The period of presentencing detention in the present matter was extraordinarily long, and the court was unable to find any comparable period considered by any other court. Long delays in the conclusion of criminal trials were not uncommon; in fact, they were by and large the norm. The question of the plight of awaiting-trial accused who had not been granted bail, and who had thus to remain incarcerated before their sentences actually commenced, was a matter of very real concern. The sentences imposed on each of accused Nos 2, 3 and 4 were appropriate in the circumstances and would otherwise not warrant reconsideration on appeal. But because the SCA had not yet spoken on the consideration of pre-sentencing detention in cases where the sentence ultimately imposed was life imprisonment, leave should be granted only in respect of accused Nos 2, 3 and 4 against the sentences of life imprisonment. (See [30] – [32].)

ALL SOUTH AFRICAN LAW REPORTS MARCH 2023

MEC for Department of Public Works, Eastern Cape and another v Ikamva Architects CC [2023] 1 All SA 579 (SCA)

Civil Procedure – Court orders – Enforceability – Section 172(1) of the Constitution requires a court when deciding a constitutional matter within its power, to declare any conduct unconstitutional and make any order that is just and equitable – Where order sought having effect of prohibiting execution of the default judgment, such order not just and equitable.

Civil Procedure – Leave to appeal – The grant of leave to appeal is governed by section 17(1)(a) of the Superior Courts Act 10 of 2013 which states that leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success.

In September 2019, the applicants brought an application for the review and setting aside of the Department of Public Works' decision of 29 August 2002 to appoint the respondent ("Ikamva") as consulting architects on a project involving the upgrading of hospital. A declaration was also sought that the contract between the Department and Ikamva was void *ab initio* and that Ikamva was entitled to no further payments under the contract. The Department had informed Ikamva that it had received a legal opinion that the appointment contravened the provisions of, *inter alia*, section 217 of the Constitution rendering the contract invalid. Ikamva accepted the repudiation, cancelled the contract and sued the Departments for damages incurred as a result of the cancellation. The Department's failure to comply with a rule 35 notice issued by Ikamva led to its defences being struck out, and default judgment being granted to Ikamva. That led to the Department's 2019 review application referred to above. The High Court dismissed the application and refused leave to appeal. The Department then brought the present application for leave to appeal before the Supreme Court of Appeal.

Held – The relief sought by the Department flowed from the provisions of section 172(1) of the Constitution which requires a court when deciding a constitutional matter within its power, to declare any conduct unconstitutional and make any order that is just and equitable.

The grant of leave to appeal is governed by section 17(1)(a) of the Superior Courts Act 10 of 2013 which states that leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. The court's wide powers in that regard have been emphasised in case law.

The sole issue for the court's consideration was the order declaring that Ikamva was not entitled to any future payments under the contract. Clearly, where the contract had been declared void *ab initio*, there was no danger that Ikamva would become entitled to any payments under the contract in the future. The Department's objective in persisting with the quest for the declaration on that aspect was to render the default judgment nugatory so as to prevent execution thereof. No direct authority could be cited where a court has ordered that, in the face of a valid and binding court order,

which was not impugnable, a judgment creditor should be prohibited from executing on it. The Department argued that courts have previously granted orders under section 172(1)(b) of the Constitution, either for repayment of moneys or prohibiting any further payments on invalid contracts; and that it is permissible under that section for a court to excuse payment of a valid and binding order of court which is not subject to challenge. However, cases where repayment or prohibition of payment orders were granted do not provide authority that a court may render nugatory an extant, valid, and binding court order. The Constitution and rule of law support the sanctity of valid and binding court orders and the right of persons in whose favour they have issued to enforce them.

Consequently, the Department had no prospects of success in persuading an appeal court that the order sought should be issued. Leave to appeal was refused.

Road Accident Fund and others v Mabunda Incorporated and others and a related matter [2023] 1 All SA 595 (SCA)

Constitutional and Administrative Law – Self-review – Cancellation of tender by Road Accident Fund – Regulation 13(1) of the Preferential Procurement Regulations promulgated under the Preferential Procurement Policy Framework Act 5 of 2000 permitting organ of State to cancel tender before award thereof if due to changed circumstances, there is no longer a need for the services, and if funds are no longer available to cover the total envisaged expenditure.

A tender issued by the Road Accident Fund ("RAF") in 2018 was cancelled in February 2020 due to unaffordability and changed circumstances. The respondents had been part of a panel of attorneys who had been appointed by the RAF to render legal services to the fund. They brought separate applications in the High Court, seeking to review the relevant decisions of the RAF which formed the basis of the cancellation of the tender. The High Court granted the applications and extended the agreements between the RAF and the respondents. According to the court, the board of the RAF which had taken the decision to cancel had been replaced by a new board, and the decision fell away with the appointment of the new board.

The RAF appealed against that decision.

The respondents challenged that cancellation of the tender on the grounds that the entity which purported to cancel the tender lacked the authority to do so, and that the basis for cancellation did not comply with the provisions of regulation 13(1) of the Preferential Procurement Regulations of 2017 promulgated under the Preferential Procurement Policy Framework Act 5 of 2000.

Held – The power to cancel had been delegated to a committee (the "BAC") by the RAF's board. The High Court's view that because a new board had been appointed after the delegation had been made, the legal effect was that the delegation fell away, was erroneous. The fact that the delegation was made by a previous board was irrelevant. The appointment of a new board does not invalidate a delegation by a previous board. Instead, the delegation remains effective until it is withdrawn or terminated. The contention that the BAC lacked the requisite authority to cancel the tender was devoid of merit.

The RAF justified the cancellation of the tender as being in line with regulation 13(1) of the Preferential Procurement Regulations, which permits an organ of State to cancel a tender before the award thereof if due to changed circumstances, there is no longer a need for the services, and if funds are no longer available to cover the total envisaged expenditure. Both those jurisdictional facts were established by the RAF in this case.

As the appeal had lapsed, the Court considered the issue of reinstatement thereof. Referring to the factors to be considered in that regard, reinstatement was granted.

The appeal was upheld and the High Court's orders set aside and replaced with orders dismissing the applications brought by the respondents.

Road Accident Fund and others v Mabunda Incorporated and others and a related matter [2023] 1 All SA 595 (SCA)

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The appeal was upheld and the High Court's orders set aside and replaced with orders dismissing the applications brought by the respondents.

Commissioner for the South African Revenue Services v Moloto and others [2023] 1 All SA 607 (GP)

Civil Procedure – Application for final confirmation of provisional anti-dissipation order – Nature of interdictory relief sought – Distinction between Mareva injunction and interdict sui generis recognised in South African law – Requirements of interdict sui generis are presence of a bona fide claim and that the debtor is dissipating assets or likely to do so with an intention to defeat the bona fide claim.

The applicant ("SARS") sought the final confirmation or discharge of a provisional order made in this matter. The first and second respondents ("Moloto" and "Bustque") were liable to pay SARS substantial amounts of money in respect of customs liability. When certain of their assets were moved to some of the other respondents in the matter, SARS applied for and obtained the provisional order preventing such transfer of assets. While the respondents alleged that the transfer of assets were normal arm's length transactions, SARS alleged that Moloto and Bustque were dissipating assets which would otherwise satisfy a judgment to be obtained against them for the customs liability.

Held – Clarity was required on the labelling of SARS' application. Based on the defences raised in the matter, the Court sought to clarify the legal position regarding a *Mareva* injunction (interdict). What the Court seeks to protect is a money judgment that could be satisfied by attaching the assets that are in danger of being removed. For an applicant to succeed, it must prove that there is a money debt and or judgment in its favour; that in order to satisfy the debt and or judgment, it must lay execution on the assets owned by the respondent; and that the assets that could satisfy the debt or judgment are in danger of being disposed of or removed. Essentially, a *Mareva* interdict is designed to protect the claimant against the dissipation of assets against which the claimant might otherwise execute judgment either immediately or in the future. For as long as the claimant has a claim against the defendant and that the defendant has assets which may be used to satisfy the judgment, a claimant may successfully apply for a *Mareva* interdict.

In South African law, the sole purpose of orders of the nature sought in the present application is to do justice to the plaintiff not to be saddled with a hollow victory and to protect a *bona fide* claim. Accordingly, the requirements of the granting of such an interdict are the presence of a *bona fide* claim and fear of being visited with an injustice. South African courts have appeared less willing to adopt the *Mareva* injunction as it stood, and the South African position is that such orders are granted under the requirements of an interim interdict. What pertains in matters of this nature is an interdict *sui generis* as opposed to a *Mareva* injunction in its purest form. The Court explained the necessary distinction between a *Mareva* injunction and the South African interdict *sui generis*. It stated that the requirements for the form of interdict pertaining to the present matter seem to be that there should not be an injustice done to the plaintiff; the debtor being possessed of sufficient funds to satisfy the claim; and that he is getting rid of such funds or likely to do so with the sole mind (intention) of defeating the creditors. Such intention to defeat must be proved on very firm grounds.

SARS succeeded in meeting the requirements of the interdict *sui generis*, and the interim order was confirmed.

East Asian Consortium BV v MTN Group Limited and others [2023] 1 All SA 632 (GJ)

Civil Procedure – Choice of laws – Determination of legal system applicable to cause of action – lex loci delicti commissi (law of the place where the delict was committed) – Where most of acts underlying cause of action occurred in Iran, Iranian law governing dispute.

Civil Procedure – Jurisdiction – Claim for damages relating to breach of contract – Party bound by terms of contract where agreement was reached regarding jurisdiction.

International law – Challenge to lawfulness of conduct of foreign State – Foreign act of State doctrine – Court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign States – Foreign States Immunities Act 87 of 1981 providing immunity to all foreign States from South African courts – Local court having no jurisdiction to entertain matter.

At the root of the present dispute was the issue by the Iranian government of an international tender invitation for Iran's first private licence for a global system for mobile communications. The plaintiff ("EAC"), in its claim for delictual damages from the defendants, made the following averments in its particulars of claim. Pursuant to the tender invitation, it was selected as licensee and an agreement between itself and the Iranian government came into existence. Acting in breach thereof, the Iranian government concluded an addendum to the agreement, displacing EAC and substituting it with the first defendant ("MTN"). Fundamental to the cause of action was that the Iranian government allowed and received another bid from MTN, allegedly induced by bribery and corruption by MTN.

EAC instituted action against the defendants, claiming damages as a result of their wrongful interference with EAC's contractual rights, alternatively, having unlawfully competed with EAC for those rights.

Held – The first issue involved choice of laws, with the court having to decide whether Iranian or South African law should be applied in determining the dispute. The parties submitted that the *lex loci delicti commissi* (law of the place where the delict was committed) was the starting point to determine the issue. EAC submitted that the *lex loci delicti commissi* may be displaced by another legal system, having a more significant relationship with the matter. The Court found the pleaded facts to favour the place of the commission of the delict as being Iran. The pleadings referred to a breach of an agreement and of the award of a tender, which was not something that occurred in South Africa. Most of the conduct central to the cause of action occurred in Iran, and there were very few references to conduct within South Africa. Applying the *lex loci delicti commissi*, the law of Iran would therefore apply to the conduct complained of. MTN was accordingly successful on the first issue.

MTN also raised three special pleas said to deprive the present Court of jurisdiction. In considering the issue of jurisdiction, the focal point of the enquiry was the particulars of claim. The allegations made by EAC referred to conduct by MTN, which induced the Iranian government to breach its contractual obligations to EAC and have it replaced. The conduct of the Iranian government was integral to the case. If it did not act wrongfully, there could never have been a delictual cause of action. MTN argued that the determination of EAC's claims required the Court to enquire into whether the

conduct of the Iranian government, within the borders of Iran and under Iranian law, was unlawful and that under the foreign State act doctrine it is not permissible and appropriate for the Court to enquire into and make a determination of the lawfulness of the conduct of such foreign State. Confirming the exclusive jurisdiction of the Iranian courts, the present Court held that EAC was bound by the terms of its contract with the Iranian government to the effect that the matter should be determined by the Iranian courts. The foreign act of State doctrine posits the principle that a court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign States. On that basis, the Court declined to exercise jurisdiction in the matter. Furthermore, the Foreign States Immunities Act 87 of 1981 provides immunity to all foreign States from the South African court. The Iranian government being absent, ie not appearing, had no limiting effect on the immunity provided for in section 2(1) of the Act. The result was the present Court having no jurisdiction to entertain the matter as pleaded by EAC and the special plea was upheld.

Hawarden v Edward Nathan Sonnenbergs Incorporated [2023] 1 All SA 675 (GJ)

Personal Injury/Delict – Delictual claim based on negligence of attorneys in business email compromise case – Plaintiff required to prove wrongfulness, causation, fault and harm – Whether to impose liability for pure economic loss flowing from cyber-crime through business email compromise as a result of defendant's negligent omission to forewarn plaintiff of known risks and to take necessary safety precautions – Considerations of legal and public policy requiring liability be imposed.

The plaintiff ("Ms Hawarden") sued a firm of attorneys ("ENS") for damages in the sum of R5,5 million plus interest, representing pure economic loss caused by omission. ENS was handling the conveyancing in a property purchase by Ms Hawarden. Ms Hawarden received an email from a secretary in ENS' property division regarding payment of the balance of the purchase price. However, a fraudster intercepted the email and altered ENS' account details to reflect those of the fraudster's account. The payment was thus misappropriated and could not be recovered by the bank. Ms Hawarden claimed that ENS should have been aware that it owed her a duty of care, and that in corresponding with her, had a legal duty to warn her of the danger of "business email compromise". She was adamant that she was never warned thereof.

She also contended that ENS should have loaded its trust account details on online banking systems so that the account number would not have to be sent out on unprotected and unsafe emails.

In addition to the above, Ms Hawarden raised certain other issues relating to ENS' obtaining of her personal and private information when it made a mirror image of her computer. She questioned the relevance to the trial of much of the information taken. She also objected to the fact that ENS had included in the trial bundle an email regarding her divorce settlement. Again, the relevance thereof to the present dispute was questioned. Several other such disclosures in the trial documents were identified.

Held – To succeed in a delictual claim, Ms Hawarden would have to prove the elements of wrongfulness, causation, fault and harm. Her case was that ENS had a duty to exercise sufficient care in the conduct of the transaction, to warn her of the dangers of business email compromise, and communicate its bank details in a safe manner. She blamed ENS for her loss stating that they should have done more to protect her against the risk of loss she suffered by employing more secure means to communicate with her. The conduct complained of for which she seeks to hold ENS liable was, essentially, their omission to protect her. For liability to accrue the impugned conduct must have been wrongful, as the first principle of the law of delict is that everyone has to bear their own loss.

Our law recognises that there is no general right not to be caused pure economic loss and, where such loss results, the conduct is *prima facie* lawful. Liability does not arise unless policy considerations require that the plaintiff be compensated. Conduct is negligent if the actor does not observe the degree of care which the law of delict requires. The standard of care which the law demands is that which a reasonable person in the position of the defendant would exercise in the same situation. Liability for negligence arises if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.

Finding that considerations of legal and public policy required liability in this case, the court upheld Ms Hawarden's claim.

Knoetze obo Malinga and another v Road Accident Fund (Pretoria Attorneys Association and others as *amici curiae*) [2023] 1 All SA 708 (GP)

Personal Injury/Delict – Road accident third party claims – Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 entitles Road Accident Fund, after furnishing a third party with an undertaking or upon direction by a competent court, to pay medical and related costs as and when they were incurred, rather than paying a lump sum – A court has no jurisdiction to direct the Fund to furnish an undertaking where the Fund did not make such an election – Court also lacking jurisdiction to find that injuries sustained by any plaintiff constitute serious injury or qualify for a claim for general damages in the absence of the injury having been classified as such.

The plaintiffs sought judgment against the Road Accident Fund and required the court's guidance on the questions of whether the court could order the furnishing of an undertaking as opposed to payment of a lump sum in respect of future medical expenses, in the absence of the exercise of an election by the Fund and whether it is permissible for the court to award general damages in the absence of a determination of whether the injuries sustained qualified as a "serious injury". An ancillary question was whether it is competent for a plaintiff to claim an undertaking as appropriate relief as of right, or whether the election is the sole prerogative of the Fund. Should it be found that the election was the sole prerogative of the Fund, the question was whether courts could take judicial notice of an alleged general practice in order to direct the Fund to furnish an undertaking in favour of a plaintiff? If there was no general practice, it had to be established whether the Fund had made a "blanket election" in all matters where plaintiffs claim future medical and ancillary expenses.

Held – Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 entitled the Fund, after furnishing a third party with an undertaking or upon direction by a competent court, to pay medical and related costs as and when they were incurred, rather than paying a lump sum. A plaintiff must still quantify its claim and seek relief for the compensation of damages in a single action according to the "once-and-for-all" principle. That means that the compensation claimed (and the award ordered by a court) must cater for past, present and future loss suffered from the same cause of action. Section 17(4)(a) was designed to remove contingencies created by estimating the future costs of medical and ancillary expenses and then recalculating those costs

to a present value, further estimating that it would be sufficient to cover expenses over the lifetime of a plaintiff (also a contingent estimate). The furnishing of an undertaking provides for an "as-and-when" payment scheme of actual expenses, removing all contingent permutations. Damages suffered are then paid as they eventuate.

The Court considered whether the words "or directed by a court" meant that a court may direct the furnishing of an undertaking, and pointed out that the words have already been interpreted by the court. A court has no jurisdiction to direct the Fund to furnish an undertaking where the Fund did not make such an election. The corollary is that, if a court cannot grant such relief, neither can a plaintiff claim it. Where the Fund has not made an election to furnish an undertaking either by choice or by default, the consequence is that it will only be competent for a court to award payment of an amount calculated to cover future medical expenses, once proven, taking into account the relevant contingencies.

The Court declined to take judicial notice of an alleged general practice to the contrary, or to find that a blanket election had taken place in respect of the furnishing of guarantees in all claims against the Fund where the costs of future medical and ancillary expenses are claimed as part of a plaintiff's damages.

Having regard to case law, the Court held that it did not have the jurisdiction to find that injuries sustained by any plaintiff constitute serious injury or qualify for a claim for general damages in the absence of the injury having been classified as such. The Fund's failure to accept or reject serious injury assessment reports even after being compelled to do so, did not detract from that.

Declaratory orders were issued on each of the questions addressed above.

Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology [2023] 1 All SA 731 (WCC)

Constitutional and Administrative Law – Procurement – Tenders – Whether decision by institution of higher learning to cancel tender relating to provision of student accommodation constituted administrative action – Determining whether a juristic or natural person exercises a public function or power generally requires consideration of a range of factors, none by itself determinative, and the weight to be given to each is dependent upon the peculiar features of the given case – Institution created for

public function of providing higher education and subsidised from the National Revenue Fund is an Organ of State and its decision relating to such public function constituted administrative action.

After selling its property to the respondent (the "CPUT"), the applicant ("Ma-Afrika") rented the premises from the CPUT, and the CPUT compensated it for providing and administering the accommodation for its students on the property. When the time approached for Ma-Afrika's lease to expire through effluxion of time, the CPUT advertised a request for proposals in respect of the future administration of the property. Ma-Afrika was one of two entities who submitted a tender. CPUT decided to award the contract to the other entity ("Baobab") but it was subsequently discovered that it had not met the qualifying criteria for the tender contract as it did not have the required experience. CPUT consequently cancelled the tender and put out a fresh tender invitation. Ma-Afrika had by then applied to court for an interdict against implementation of the tender award. It nonetheless submitted a new bid but reserved its alleged rights in the cancelled tender process. It then brought another application seeking to review the CPUT's decisions to cancel that process, and not to award the tender to it. The review application was brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000.

Held – An application for judicial review in terms of the Promotion of Administrative Justice Act is tenable only if the impugned decision (or failure to make a decision) constituted administrative action. The CPUT disputed that its decisions in relation to the procurement of a new service provider constituted administrative action within the meaning of the term in the Act. It also denied that it was an "Organ of State" as defined in the Act. Determining whether a juristic or natural person exercises a public function or power generally requires consideration of a range of factors, none of them by itself determinative, and the weight to be given to each is dependent upon the peculiar features of the given case. Examining the nature of the impugned decision in this case, the court held that the provision of student accommodation and matters closely related thereto fell within the public sphere. The CPUT was an institution that performed the public function of providing higher education. It was created for that purpose by the national government and its operation was substantially subsidised from the National Revenue Fund. It was thus an Organ of State as defined in section 239(b) of the Constitution. Its contracting for the provision of student accommodation similarly fell

within its public functioning. Furthermore, its decision to cancel the tender was also administrative action within the meaning of the Promotion of Administrative Justice Act, and was accordingly susceptible to being challenged in terms of section 6 of the Act.

The specific grounds of review were that the CPUT had failed to make a decision to award the tender to Ma-Afrika after rescinding the award to Baobab; that it had failed to comply with regulation 13 of the Preferential Procurement Regulations, 2017; and that the decision not to award the tender to Ma-Afrika after it rescinded the award to Baobab was not rationally related to the information before it as Ma-Afrika's tender satisfied all the mandatory requirements in the tender invitation. None of those submissions was sustainable. The Court emphasised that Ma-Afrika did not have a right to be awarded the contract when the award to the successful candidate was rescinded. Provided that it acted reasonably in the circumstances, CPUT was entitled to opt to cancel the tender and proceed with the intended procurement in terms of a fresh procedure. If its decision was one that an administrator in its position could reasonably have made, it would not be susceptible to being set aside on review.

The application was dismissed.

Maloka v Malebana [2023] 1 All SA 757 (GP)

Family Law and Persons – Marriage – Customary marriage – Existence and validity of customary marriage where one of the requirements therefore was not satisfied – Customary law is not static but flexible and evolving and development of customary law is unavoidable in the current constitutional order to bring it in line with the spirit of the Constitution – Absence of rituals not essential and/or mandatory, and not capable of rendering marriage invalid where parties had cohabited and conducted their lives in line with recognition of a valid customary marriage .

Alleging that she and the defendant had entered into a customary marriage in July 2009, the plaintiff now instituted an action for divorce, seeking the division of the joint estate, on the basis that the marriage had irretrievably broken down. She stated that the marriage was in accordance with customary law as provided for in section 3 of the Recognition of Customary Marriages Act 120 of 1998, and that *lobola* had been paid to her family. However, the defendant filed a plea and counterclaim, disputing the validity of the customary marriage and sought a declaratory order to the effect that no

valid customary marriage existed between the parties because the plaintiff was not accompanied by and delivered by her family to the defendant's family, and that no ceremonial rituals had taken place.

Held – The only issue to be determined by the court was the existence and validity of the customary marriage.

For a customary marriage to be valid, prospective parties to the customary marriage must both be over the age of 18 years, and must consent to be married to each other under customary law. Further, the marriage must be negotiated and celebrated in accordance with customary law as per section 3(1)(b) of the Act. *In casu*, while the requirement relating to age and consent were not in issue, the parties were in dispute regarding whether the marriage was celebrated in accordance with customary law. It therefore had to be determined whether customary law permits the waiving of the requirement of integration or performance of rituals/celebration of the bride.

Faced with two mutually destructive versions on the existence of the marriage, the Court turned to consider whether the plaintiff had, on a balance of probabilities established, having due regard to the credibility and reliability of the witnesses, that her evidence was true and accurate and therefore acceptable, and that the version of the defendant fell to be rejected. The Court highlighted conduct of the defendant which pointed to his recognition of his marriage to the plaintiff. It also emphasised that customary law is not static but flexible and evolving. Case law shows that the development of customary law is unavoidable in the current constitutional order to bring it in line with the spirit of the Constitution. It was found that the parties' living together post the full payment of *lobola*, acquiring residential properties together, and continuing with their lives under one roof was an indication that the absence of the rituals referred to by the defendant were not essential and/or mandatory. Further, they were not capable of rendering the marriage invalid. Litigants should be slow to cherry-pick aspects of customary law and/or rituals that are only favourable in advancing their interests to the detriment of others.

Plaintiff succeeded, on a balance of probabilities, in establishing that a customary marriage in community of property existed between her and the defendant. The relief sought was granted.

Mediterranean Shipping Company (Pty) Ltd v Transnet Freight Rail, an Operating Division of Transnet and others [2023] 1 All SA 779 (GP)

Constitutional and Administrative Law – Procurement – Tenders – Application for interim interdict preventing implementation of decision to award tender – Where no purpose would be served by interdict and no internal review had been pursued by the applicant, application for interim interdict failing.

In April 2022, the first respondent ("Transnet") issued an invitation to bid for a tender for the leasing of its freight rail sidings/facilities. The terms and conditions contained in the request for proposals were accepted by all the bidders, one of whom was the applicant ("MSC"). In July 2022, Transnet informed the third respondent ("Maersk") that it was the successful bidder. MSC requested a copy of Transnet's procurement policy applicable to the tender; a written undertaking that the tender/contract with Maersk would not be implemented until an investigation was finalised; and a copy of the Bid Evaluation Report at the time the decision was made. Transnet advised it to make use of the organisation's formal procedure to obtain the documents/information requested.

MSC consequently applied for an interdict preventing Transnet from implementing its decision to award a tender to the third respondent ("Maersk"), and for ancillary relief.

Held – Maersk submitted that MSC's application was fundamentally defective because a contract had already come into existence as a result of the award of the tender and MSC would not be able to obtain the relief it ultimately sought - namely the setting aside of the award. The court held that if it was MSC's allegation that there had been an irregularity in the tender process, and it wanted the award and the contract between Transnet and Maersk to be cancelled, its remedy was to apply to court for such an order. MSC did not attack the validity of the awarding of the contract to Maersk, but the tender process. The proposed interdict would therefore be purposeless. There was no purpose in granting an interim interdict pending the outcome of an internal review which could not change the situation or set aside the award or the contract. That on its own satisfied the court that the application should fail.

A further obstacle for MSC related to whether it had initiated or pursued an internal review. Although it had sufficient information at its disposal to at least submit a

provisional complaint and/or made provisional submissions in order to initiate and/or pursue the internal review proceedings, it had made it clear that it would only make submissions once its demands for the Bid Evaluation Report were met. Apart from that stance disqualifying it from seeking interdictory relief, it also led to the court making a costs order against it on a punitive scale.

The Court proceeded to briefly consider whether MSC had established the requirements for the interdictory relief sought. An applicant for an interim interdict must establish a *prima facie* right, though open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right; the balance of convenience; and that it has no other satisfactory remedy. MSC was found to have failed to establish those requirements.

The application was dismissed with MSC being ordered to pay the respondents' costs on the attorney and client scale.

TT v Minister of Social Development and others (Centre for Child Law as *amicus curiae*) [2023] 1 All SA 803 (GJ)

Family Law and Persons – Adoption – Review of conduct of Department of Social Development and social workers in frustrating and delaying adoption process – Validity of National Department of Social Development's Practice Guidelines on National Adoption – Incorrect interpretation and application of relevant provisions of Children's Act 38 of 2005 by authorities, leading to violation of constitutional rights of biological mothers and adoptive children, rendering all impugned decisions reviewable.

The first applicant decided to give her child ("B") up for adoption upon his birth, giving formal consent in the Children's Court in July 2018. The eleventh and twelfth respondents were the prospective adoptive parents of B, in whose temporary safe care B had been his whole life. B was currently four years old. His adoption proceedings were postponed 15 times at the instance of the first to third respondents (the "Department") between 2018 and 2020. Despite the Children's Court having ruled that B's adoption by the eleventh and twelfth respondents was in his best interests, the Department declined to issue the required letter of recommendation.

The second applicant's circumstances were similar. She consented to the adoption of her child ("L") in September 2019, and L was placed in the temporary care of the thirteenth and fourteenth respondents by order of the Children's Court, pending the finalisation of the adoption. L was currently three years old. Although the Department issued a letter of recommendation for the adoption, it later stated that the letter had been irregularly issued and applied for review of the decision, delaying the adoption process.

The social workers involved in the adoptions were instructed by the applicants not to inform applicants' parents of their pregnancies and adoption decisions. The social workers however, proceeded to inform first applicant's parents thereof, and threatened to do the same with the second applicant.

In approaching the court, applicants contended that the Department and the social workers misinterpreted and misapplied the relevant provisions of the Children's Act 38 of 2005, as perpetuated in the National Department of Social Development's Practice Guidelines on National Adoption (the "Guidelines"), and frustrated and unlawfully stalled the adoption process contrary to the children's best interests, violating applicants' right to choose adoption. The respondents were also said to have violated applicants' and the children's constitutional rights, including their rights to keep the pregnancy and adoption private.

Held – Section 28 of the Constitution deals with the protection of children's rights, and the Children's Act regulates local adoption of children. At the heart of the issues between the parties lay a proper interpretation of the relevant provisions of the Act. The stance of the Department and the conduct of the social workers were informed by their interpretation of the relevant statutory provisions of the Act and the Guidelines. The golden rule of interpretation requires a purposive, contextual linguistic approach. Considering the provisions regulating the process of local adoption proceedings, the Court found that the Department wrongly contended that determining whether a child is in need of care and protection is always required before adoption proceedings can continue. The relevant provisions further did not require that family members of the biological parent be consulted or their consent obtained for a child to be deemed adoptable, as the Department contended. As both the applicants were majors, they did not require consent from their parents prior to consenting to the adoption of their

children. Measured against the Constitution, the wording of section 231 militated against the Department's interpretation that a child must as a primary consideration first be placed within the biological family.

The Court set out the obligations of the adoption social worker under section 239 of the Act. Importantly, the social worker must provide information on whether the proposed adoption is in the best interests of the child. There is no single decisive factor as to what will serve a child's best interests. The Department's emphasis on preference being given to biological family in adoption had no legal basis.

The Guidelines, being permeated with invalid provisions, were declared invalid and were reviewed and set aside.

The Department and the social workers involved had also violated applicant's rights to bodily and psychological integrity under section 12 of the Constitution, rights to dignity and privacy under sections 10 and 14, as well as the constitutional rights of the children. Redaction of all personal and identifying information from all relevant documents filed in the case was ordered. The Department's letter of non-recommendation of the adoption of B was reviewed and set aside. The pending review application in respect of L was stayed. The conduct of the social workers was referred to the South African Council for Social Service Professions.

Umgeni Water v Naidoo and another [2023] 1 All SA 857 (KZP)

Contract – Fraudulent misrepresentation – Where innocent party entered into transaction wilfully and knowingly, with intention to bring about relevant legal consequences, contract not void ab initio, but voidable at instance of innocent party – Claim for restitution where contract entailed rendering of services not requiring restitution by plaintiff of any benefit it derived from the contract – Defendant liable for disgorgement of that received from plaintiff arising out of his fraud.

The plaintiff ran a graduate development programme in which the first defendant had applied for and obtained a place. In so doing, he had represented that he had a B.Sc degree in Engineering, as was required, and furnished a copy of his degree certificate and academic results. Alleging that he had misrepresented his qualifications, and that his place on the programme was procured through fraudulent means, the plaintiff sought repayment to it of all amounts that it had paid the first defendant during his 8-

year tenure. It stated that an attempt to verify the first defendant's qualifications years after he commenced employment, revealed that the university had no record of having conferred a degree upon him.

The first defendant denied that he was obliged to repay anything to the plaintiff. He contended that he had rendered a service for which he had been paid and that no queries were raised by the plaintiff regarding the quality of the work that he had performed.

In its replication, the plaintiff stated that it could not have been enriched by the services of an unqualified engineer. The first defendant's training and salary were said to have been occasioned by his fraud, and to permit him to keep what he received would be akin to rewarding him for his fraudulent conduct.

Held – Documentary evidence put up by the plaintiff was overwhelming, while the first defendant's testimony showed him to be an untruthful witness. His degree certificate and academic results were forgeries. In making the false representation in his application for employment that he had the required degree, he acted fraudulently. The plaintiff sought restoration of the situation prior to the contract being concluded, holding the view that the contract with the first defendant was void *ab initio* and not merely voidable. In determining whether a transaction induced by fraud is void or merely voidable, the test is whether the person seeking to have it set aside entered into the transaction wilfully and knowingly, with the intention to bring about the legal consequences which it entailed. If so, then it is a valid transaction until declared invalid, although it may be voidable at his instance on the ground that he was unlawfully induced to enter into it. In this case, the plaintiff had intended to contract with the first defendant until it discovered the truth. The contract was thus not void *ab initio*, but voidable at the instance of the plaintiff.

While a party claiming restitution is ordinarily required to tender that which it had received during the impugned relationship, restitution by the plaintiff of any benefit it derived from the contract with the first defendant was neither possible nor required. The plaintiff was entitled to restitution, and the first defendant was ordered to disgorge what he received from the plaintiff arising out of his fraud.

To that end, plaintiff sought, in terms of section 37D(1)(b) of the Pension Funds Act 24 of 1956, to execute against the first defendant's pension benefit held by the second

defendant. The purpose of that section is to protect the employer's right to pursue the recovery of money due to it arising, *inter alia*, out of any fraud perpetrated against it by its employee. There was no bar to such relief being granted.

As censure for the groundless opposition of the action, first defendant was ordered to pay plaintiff's costs on the scale as between attorney and client.

Williams v Legal Practice Council Executive [2023] 1 All SA 873 (WCC)

Constitutional and Administrative Law – Judicial review – Delay rule – In terms of section 7(1) of the Act, any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after exhausting of internal remedies, or from date on which applicant became aware of impugned decision – Delay in seeking review not condoned where shown not to be in interests of justice.

A complaint was lodged with the Cape Law Society by the applicant regarding a practising attorney in 2017. The Cape Law Society was subsequently replaced by the South African Legal Practice Council (the "LPC") as a result of the provisions of the Legal Practice Act 28 of 2014.

In his complaint, the applicant alleged that the attorney (Mr Elliot) had failed to hand over the applicant's files and release money held in trust on behalf of the applicant. Accusations of fraud, dishonesty, illegality were levelled against Mr Elliot. The applicant requested the LPC to order the immediate release of all legal files relevant to the mandate that had been granted to Mr Elliot and the immediate release of funds he regarded as owing to him into his account. Mr Elliot countered that there were amounts owing to his firm by the applicant, and that he was in the circumstances entitled to retain the applicant's files until such fees and disbursements had been paid.

The LPC's disciplinary committee found that a finding of unprofessional conduct could not be made, and applicant applied for review of that decision.

Held – Applicant confirmed that his review application was based on the Promotion of Administrative Justice Act 3 of 2000. In terms of section 7(1) of the Act, any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded, or where

no such remedies exist, the date "on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons". There are three main principles governing the delay rule, and the first is that a party must institute review proceedings within a reasonable time. Undertaking a factual enquiry, the court first considers whether the delay was unreasonable. If the delay is unreasonable, the court must determine whether it should exercise its discretion to overlook the delay. There must be a basis for the court to do so, based on objective facts. The test is flexible and is informed by several factors, including the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision. The second principle underlying the delay rule is the need for certainty and finality and the third is that in exceedingly rare cases, even if a review is unreasonably late and there is no basis to overlook the delay, a court may still be required to declare conduct unlawful. That applies only where the unlawfulness of the impugned decision is clear and not disputed. In assessing whether to extend the 180-day period, the court should have regard to, *inter alia*, the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.

Pinpointing the latest time by which the applicant had all of the information necessary to launch review proceedings, the Court confirmed that the review application was out of time. It therefore considered each of the relevant factors referred to above in considering whether condonation should be granted. It was concluded that the applicant had not established that condonation of his delay in the institution of the proceedings would be in the interests of justice.

End-for-now