LEGAL NOTES VOL 5/2023

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ETV (PTY) LTD v MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES AND OTHERS 2023 (3) SA 1 (CC)

Media — Broadcasting — Television — Legality of minister's decision to announce analogue switch-off date and deadline for registration of set-top boxes.

Review — Grounds — Legality — Minister's decision to announce analogue switch-off date and deadline for registration of set-top boxes without further notice — Nature of Minister's decision executive — Failure to give notice not procedurally rational — Remedy — Substitution not appropriate — Minister's decision set aside.

In the interim period between the migration from analogue to digital broadcasting frequencies, the government envisaged a period of 'dual illumination', with both analogue and digital radio and television transmissions being used until the analogue transmission was completely switched off and the digital transmission was completely switched on. And, because analogue television sets are unable to display information received from digital frequencies without a device such as a 'set-top box' (STB), capable of converting digital transmissions to analogue, the Broadcasting Digital Migration Policy (the BDM Policy) provided that STBs would be made 'affordable and available to the poorest TV-owning households' — which had to register if they wished to receive state-sponsored STBs.

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[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2023 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!**

Registration for the STBs was opened in 2015, without any closing date for registration. However, an amendment to the BDM Policy, published in March 2015, provided for the digital switch-on and analogue switch-off dates 'to be determined by the Minister of Communications in consultation with Cabinet'. On 29 September 2021 Cabinet approved the Minister's analogue switch-off implementation plan in terms of which the analogue switch-off would occur by the end of March 2022. On 5 October 2021 the Minister announced 31 October 2021 as deadline for the STB registration — without any further consultations with the public or other stakeholders.

On 12 October 2021 eTV launched an urgent application in the High Court on the basis that the analogue switch-off would permanently prevent millions of people, who had not migrated to digital television transmission and who were not in possession of STBs, from receiving free-to-air television transmission on their analogue television sets. Media Monitoring Africa (MMA) and SOS Support Public Broadcasting (SOS) were granted leave to intervene as co-applicants. They sought wide-ranging relief, including declaratory orders that the Minister may not complete the digital migration process until she had complied with her constitutional obligations to provide STBs to persons in need, and that the Minister must consult with affected parties before completing digital migration.

Dismissing the application, the High Court held that, since the applicants failed to provide any statistics to show that these households would qualify for STBs, it was an unknown variable which could not be allowed to delay a process that would eventually benefit all citizens. The court also held that three months would be sufficient to allow the Minister to complete the outstanding installation of STBs, thereby extending the analogue switch-off date to 30 June 2022; and made a costs order against eTV.

Aggrieved by the High Court's decision and orders, two urgent applications were lodged, one by eTV and another by MMA and SOS, for leave to appeal directly to the Constitutional Court (the CC). This case concerned these two applications, consolidated, and heard together.

The Minister argued that there was no need for further consultations regarding the determination of the analogue switch-off, because there was no general requirement for her to do so (see [47]); nor was she required to do so before determining a cut-off date to register for the installation of STBs, because she was merely exercising an 'adjunct' power to the original policy power of determining the analogue switch-off date (see [38]). The applicants contended that the Minister's power was administrative in

nature, and that accordingly she had a duty in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to consult with affected parties, her failure to do so resulting in these determinations falling to be reviewed and set aside under PAJA. In the alternative it was argued that, if the decisions were not administrative action but rather taken in terms of policy, the Minister still failed to discharge her duty to consult in terms of s 3(5) of the Electronic Communications Act 36 of 2005 (the ECA).

With regard to the STB registration cut-off date, the applicants submitted that millions of indigent South Africans would be left without access to television as a result of the Minister's failure to investigate the impact of the unreasonable deadline of 31 October 2021. The Minister countered that the STB registration process was only designed to determine how many people wanted and needed STBs and were qualified to receive the benefit. (See [56], [60].)

Issues

Whether the applications engaged this court's jurisdiction, and if so, leave to appeal directly to this court on an urgent basis should be granted

Held, that the matter concerned a review of the Minister's actions and a determination of whether the Minister acted within the bounds of the Constitution. It was clearly a constitutional matter and therefore engaged the CC's jurisdiction. And, as the matter was urgent and concerned issues of public importance, direct appeal would be granted. (See [25] – [27].)

As to the nature of the Minister's power to determine the analogue switch-off date and cut-off date to register for the installation of STBs

Held, that the determination of the analogue switch-off date was located within the Minister's original constitutional policy-making powers in s 85(2)*(c)* of the Constitution; it was the implementation of the BDM Policy and was thus executive in nature. The decision to determine the 31 October 2021 deadline for STB registration was also the implementation of policy, as an adjunct power to the Minister's policy function to determine the analogue switch-off date. (See [35] – [36].)

As to the legality of the Minister's determinations

Section 3 of the ECA regulated ministerial policies and policy directions. The implementation of policy was distinct from either ministerial policies or policy directions and hence did not fall within s 3 of the ECA (see [44]).

There were two relevant decisions which had to pass constitutional muster: *(a)* the decision to determine the analogue switch-off date; and *(b)* the decision to determine 31 October 2021 as the deadline to register for STBs to be supplied with such STBs before the analogue switch-off date. An 'adjunct' power was still an executive power which, at the bare minimum, must be rationally exercised. (See [38] – [39].)

In the light of the Minister's submissions that her decision was an executive one made in terms of s 85 of the Constitution, her decision in relation to the analogue switch-off date must comply with the Constitution in order to be lawful. Switching off analogue transmission was an integral part of digital migration; more than being connected to it, it was part of it. Therefore, digital migration policy discussions must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations on the analogue switch-off date. It was not procedurally rational for the Minister to set it without adequate notice to the industry and to affected parties, like MMA and SOS, to seek their views on the matter. In the result, the Minister's decision not to give notice and take account of the representations received on the analogue switch-off with the public or affected parties was unlawful. (See [51] – [53].)

And, as to the rationality of the cut-off date for registration of STBs, it was settled law that both the process by which the decision is made and the decision itself must be rational. The process leading up to the 31 October 2021 deadline did not provide adequate opportunity for affected households to register and, as a result, the process was tainted with procedural irrationality. The means employed by the Minister meant that her decision was made without any reliable indication of the households requiring STBs, and that she therefore failed to take a relevant consideration into account. (See [61], [72].)

Appropriate remedy

Granting the declaratory orders sought in this regard would have the effect of this court dictating to the Minister the process that must be followed to implement a lawful analogue switch-off process. This would be tantamount to substitution, which would not only be inappropriate under the circumstances of this matter but would also go beyond the scope of justice and equity and would violate the principle of the separation of powers. It was well established that courts should 'be reluctant to substitute their decision for that of the original decision maker', save in appropriate or exceptional circumstances. This court was not in as good a position as the Minister to make the decisions. The facts and circumstances of this case militate against substitution. The

extended relief sought by the applicants was inappropriate. The demands of justice and equity require that the Minister's decision be declared invalid and set aside. The decision of the High Court also fell to be set aside. It would be just and equitable to leave the implementation of this judgment to the Minister, to determine the analogue switch-off date in a manner that was consistent with the prescripts of legality. (See [90] – [100].)

Whether the rights under ss 16 and 27 of the Constitution have been infringed

Held, that, because of the finding that the decision of the Minister to determine the analogue switch-off date was unlawful, it was not necessary to deal with the arguments raised by the applicants that the analogue switch-off would infringe on the rights to freedom of expression and social security. (See [54].)

Whether the High Court erred in its finding that the Biowatch principle did not apply to eTV, therefore mulcting eTV in costs

Held, that the High Court failed to correctly apply the *Biowatch* principle. When considering it, the crucial consideration was not the character of the parties but the nature of the litigation at issue, which in this case was litigation for the broader public interest. (See [104] – [106].)

Accordingly, the appeal would be upheld; the order of the High Court would be set aside and replaced with an order declaring the analogue switch-off date and the imposed deadline to register for STBs unconstitutional, invalid and set aside. The Minister was also ordered to pay the applicants' costs, including the costs of two counsel. (See order at [110].)

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v STANDARD BANK OF SOUTH AFRICA LTD AND OTHERS 2023 (3) SA 36 (CC)

Court — High Court — Jurisdiction — Matters falling within magistrates' courts' jurisdiction but brought before High Courts — Whether High Courts could refuse to hear matters.

In this matter 13 individuals had borrowed sums of money from the first to third respondent banks, the 13 had defaulted on repayment, and the banks had proceeded in the High Court for default judgment, albeit that each of the amounts concerned was within the magistrates' courts' jurisdiction (see [2] – [3]).

The Judge President set the matters down before a full court, and directed the parties to address three issues:

(1) Whether a High Court was obliged to entertain a matter also within a magistrates' court's jurisdiction purely because the High Court had concurrent jurisdiction;

(2) whether a provincial division was obliged to hear a matter in the jurisdiction of a local division simply because the provincial division had concurrent jurisdiction; and

(3) whether financial institutions ought to consider the implications of costs and access to justice on financially distressed people when deciding in which of two courts with concurrent jurisdiction to litigate (see [3]).

The full court held that to institute a claim that was in the magistrate's courts' jurisdiction in the High Court was an abuse of process; and that in an instance where a matter in the magistrates' courts' jurisdiction was brought before the High Court the High Court had a discretion to decline a hearing (see [5]).

On appeal, the Supreme Court of Appeal overruled the full court, finding that, where a matter in the magistrates' courts' jurisdiction was brought before a High Court that had concurrent jurisdiction over the matter, the High Court was obliged to hear it (see [6]).

The South African Human Rights Commission, which was an amicus curiae in the High Court and Supreme Court of Appeal, applied to the Constitutional Court for leave to appeal.

The first issue there was whether the Commission had a sufficient interest to bring the application. *Held*, that it did (see [7]).

The second issue was whether it was in the interests of justice to grant leave to appeal. *Held*, that it was: a constitutional issue was raised (inter alia, the right of access to court was implicated); the matter was important (cases that were in the magistrates' courts' jurisdiction were frequently brought in the High Court); and there were reasonable prospects of success (see [23]).

The Commission's first contention was that 'may' in s 169 of the Constitution gave a High Court the discretion to not hear a matter. (Section 169 provides that 'The High Court . . . may decide . . . any constitutional matter [with certain exceptions] . . . and . . . any other matter not assigned to another court . . . .')

Held, that this interpretation would have absurd consequences; and that s 169(1) was silent on which divisions had jurisdiction over which matters and persons — this was regulated by s 21 of the Superior Courts Act 10 of 2013 (see [24] – [26]).

The Commission's second contention was that a discretion to hear a matter was demonstrated by the entitlement of the Constitutional Court to decline an application for leave to appeal. *Held*, that the contention confused the assumption of jurisdiction

and the manner of exercise of jurisdiction: the Constitutional Court assumed jurisdiction in such a case, and declined leave on the basis of the rule that leave should be refused if it is not in the interests of justice to grant it (see [29] – [30]).
Bearing on the further issues was what the court termed the 'mandatory jurisdiction principle': the obligation of a High Court to hear a matter over which it had concurrent jurisdiction with a magistrates' court (see [6]).
Pertinent in this respect was that the right of access to courts did not impact the principle in the sense of giving a defendant the right to choose the forum (authority was to the effect that the right gave no such choice); but that there were exceptions to the principle as, for example, where there was an abuse of process. In such a case the court was entitled to decline to hear the matter (see [31]).
Further pertinent was the second respondent bank's contention that there was no need to interfere with the principle, in that Uniform Rule 39(22) allowed for transfer of matters from the High Court to the magistrates' court if the interests of justice so required. *Held*, rejecting the contention, that the plaintiff might in such an instance refuse its consent and that an overburdened court was given no discretion to require the transfer (see [37]).
The Commission's further suggestion was that the Judges President exercise the High Court's inherent power in order to issue practice directives addressing any ills that were wrought by the bringing of matters that were in the magistrates' courts' jurisdiction. *Held*, that the inherent power did not give a court the power to refuse to hear a matter properly before it (see [38]).
Then in closing, the court acknowledged the negative consequences of the bringing of magistrates'-jurisdiction matters in the High Court (viz clogging of court rolls and associated delays; distance to High Courts and associated costs barring defence of actions) and directed that its judgment be furnished to the Minister of Justice on the basis that it might be of use in the legislative process (see [42] – [45]).
Appeal dismissed (see [48]).

CENPROP REAL ESTATE (PTY) LTD AND ANOTHER v HOLTZHAUZEN 2023 (3) SA 54 (SCA)

Delict — Elements — Negligence — What constitutes — Member of public while at shopping mall slipping on floor owing to presence of rainwater having been brought

inside by shoppers — Harm reasonably foreseeable given nature of tiles to become slippery when wet — SCA upholding decision of court a quo finding owner and entity in charge of shopping mall negligent in failing to take adequate steps to prevent incident from occurring — Insufficient to have merely appointed independent contractor to clean floors, where scope of work not setting out steps to be taken to address dangers posed in rainy weather.

Delict — Liability — Liability of employer for negligence of subcontractor — Member of public while at shopping mall slipping on floor owing to presence of rainwater having been brought inside by shoppers — Harm reasonably foreseeable given nature of tiles to become slippery when wet — SCA upholding decision of court a quo finding owner and entity in charge of shopping mall negligent in failing to take adequate steps to prevent incident from occurring — Insufficient to have merely appointed independent contractor to clean floors, where scope of work not setting out steps to be taken to address dangers posed in rainy weather.

The respondent, a 31-year-old woman (Ms Holtzhauzen), when visiting the Goodwood Mall in Cape Town on a rainy day, sustained a fracture to her elbow after falling on the mall's tiled floor — slippery, due to customer traffic bringing with it rainwater into the building. She claimed damages in the High Court, Cape Town, against the second appellant — Naheel Investments (Pty) Ltd (Naheel), the owner of the mall — and against the first appellant — Cenprop Real Estate (Pty) Ltd (Cenprop), which managed the mall on behalf of Naheel in terms of a management agreement entered with the latter. The single judge initially hearing the matter dismissed Ms Holtzhauzen's action. The full court, on appeal, however, found in her favour. The present matter was the appeal to the SCA.

Ms Holtzhauzen claimed that she fell due to the negligence of Naheel and Cenprop in failing to ensure the tiled floor was kept dry during rainy days, such as on the day in question, this when they knew that the floor tiles were such as to become slippery when wet and thereby pose a danger to the public.

Cenprop and Naheel denied negligence and/or causation, claiming that the accident was caused solely by Ms Holtzhauzen's own negligence in failing to keep a proper lookout and to take reasonable care, under circumstances in which she knew that the floor was wet, and having seen the 'wet floor' signs placed at the entrance of the mall. Cenprop and Naheel furthermore sought to escape liability on the basis that they had

appointed an independent contractor, the cleaning company JKL Cleaning Solutions, to keep the floors of the mall clean, dry and safe, that is, more particularly by spot-cleaning daily any spillage in mall walkways with warning signage. In making such appointment, they argued that they had discharged any duty of care on their side to ensure the premises were safe. Reliance was placed on the SCA case of *Chartaprops*, which, broadly, provided that a principal was not liable for the civil wrongs of an independent contractor, except where the principal was personally at fault. Naheel claimed that it was in any case excused from liability by virtue of the disclaimer notices that had been placed outside the mall, warning shoppers that they were entering at their own risk.

Held, that there was no basis to find that Ms Holtzhauzen herself had in any way been negligent: Her evidence, that on the morning of the incident the floor she slipped on was wet as a consequence of the rain, remained uncontroverted. Further, her evidence, that she proceeded slowly along the tiled corridor, but slipped and fell due to the wet tiles that were slippery and posed danger to her, was unimpeachable. (See [23].)

Held, further, that Naheel and Cenprop were negligent in their own right, and accordingly the defence that they had appointed an independent contractor could not come to their assistance (see [28] and [38]): The reasonable person would have foreseen the reasonable possibility of harm to the public on the rainy day in question, given the nature of the tiled floors to become slippery when wet. And a reasonable person would have put adequate measures in place to prevent such harm eventuating. Naheel and Cenprop failed to meet this standard, by merely appointing a cleaning company as an independent contractor, and in their scope of work simply referring to the cleaning of 'spillages', without setting out in any way what steps were to be taken in order to address the specific dangers posed in rainy weather. (See [28] – [34].)

Held, further, that Naheel's defence based on a disclaimer notice had to fail: The disclaimer notice on which reliance was placed displayed the name of St Tropez Property and not the current owner, Naheel. In any case, there was no evidence that it was displayed during the period of the accident. Further, assuming it was displayed, it was not visible to the public, based on photographic evidence. (See [36].)

Held, accordingly, that the appeal had to be dismissed (see [39]).

MURRAY NO AND OTHERS v HUMANSDORP CO-OPERATIVE LTD 2023 (3) SA 66 (SCA)

Company — Winding-up — Unlawful alienations and preferences — Voidable disposition — Disposition without value — Whether payment was made in terms of bank guarantee or constituted disposition without value — Insolvency Act 24 of 1936, s 26.

The appellants were the liquidators of Cape Concentrate (Pty) Ltd (Cape Concentrate), placed in liquidation after having been under business rescue. Cape Concentrate's business rescue practitioner at the time, one Mr Vienings, had procured a loan from Africa Agriculture and Trade Investment Fund (AATIF) to finance Cape Concentrate's tomato farming and processing operations. The respondent, the Humansdorp Co-operative Ltd (the Co-op), was an investment partner. Mr Vienings, with Cape Concentrate and another entity as co-founders, established the Tyefu Community Farming Trust (the Trust) to involve local-community farmers in the production of tomatoes for supply to Cape Concentrate. The Co-op then made a 'production loan' to the Trust, and as security therefor, inter alia, bank guarantees for the sum of the loan facility were furnished. When the Trust failed to make payment towards the loan facility, the Co-op demanded immediate payment of the guarantees. A feature of the guarantees (issued by The Standard Bank of South Africa Ltd) was that they were issued on the strength of various payments made by Cape Concentrate into the trust account of Pagdens Attorneys, where Mr Vienings was a partner. Six guarantees totalling R25 000 000 were provided by Pagdens Attorneys to the Co-op utilising the Standard Bank electronic 'third party fund administration system' (TPFA). The demand guarantees were hand-delivered to Pagdens by the Co-op, and payment was then effected to the Co-op by Pagdens loading the release amounts of the guarantees from the two TPFA accounts and transferring those amounts into Pagdens' trust account, and from there it was paid to the Co-op's account.

Shortly after payment was made under the guarantees, Mr Vienings resigned as business rescue practitioner. Approximately six months later, at the behest of the newly appointed business rescue practitioner, Cape Concentrate was placed in liquidation. The liquidators subsequently applied in the High Court to set aside the payment on the basis that it was a disposition without value made by Cape Concentrate. The High Court found that the payment was of demand guarantees made

by Cape Concentrate to the Co-op and, accordingly, was a disposition *with* value (see [2]). The present case concerned the liquidators' appeal to the Supreme Court of Appeal.

It was common cause that a debt was owed to the Co-op by the Trust; that while Cape Concentrate was under business rescue, the business rescue practitioner caused moneys of Cape Concentrate to be paid into the trust account of Pagdens, which then paid that money from its trust account to the credit of the Standard Bank TPFA accounts in order for Pagdens to cause guarantees to be issued by its utilisation of the Standard Bank's TPFA system; that the guarantees were to secure the debts of the Trust to the Co-op; and that the Trust was not able to honour its debt to the Co-op, which made demand in terms of the guarantees. The liquidators contended that Pagdens Attorneys paid the Co-op the amount required to settle the production loan it had granted to the Trust using the funds of Cape Concentrate, and, as such it was a disposition without value within the meaning of s 26 the Insolvency Act 24 of 1996. The Co-op's position was that the payment was pursuant to a demand guarantee, and that with the issuing of guarantees the funds deposited in the Standard Bank TPFA accounts became the subject of a pledge and cession in favour of Standard Bank and payable on demand.

Held

Once credited to the Standard Bank TPFA account, the moneys became subject to a pledge and cession in favour of Standard Bank. It was not in dispute that Cape Concentrate was the pledgor. Under the guarantee, Cape Concentrate ceded its rights to the moneys paid into the TPFA system accounts, divesting Cape Concentrate of those rights and vesting them in Standard Bank. The cession and pledge over the funds, which were intended to secure the guarantees, remained in place until the guarantees were paid. The fact that the cession was in respect of a property guarantee, as opposed to a demand guarantee, was irrelevant. Once a guarantee was valid on the face of it, the contractual obligation of the bank was to pay the nominated beneficiary once the conditions were met. (See [32], [34] – [35].)

The fact that the cession was in respect of a property guarantee, as opposed to a demand guarantee, was irrelevant. Once a guarantee was valid on the face of it, the contractual obligation of the bank was to pay the nominated beneficiary when the conditions were met. The guarantees were presentable and payable by electronic means, by making a demand to Pagdens. When the demand was made by the Co-op

for payment under the guarantees, payment of the pledged and ceded moneys was made by Pagdens, in line with its obligations under the guarantees. The payment was therefore made by Standard Bank in satisfaction of the demand guarantee. The appeal would accordingly be dismissed. (See [37], [39].)

EAST ASIAN CONSORTIUM BV v MTN GROUP LTD AND OTHERS 2023 (3) SA 77 (GJ)

International law — Private international law — Choice of law — Delict — Determination of system of law governing cause of action — Lex loci delicti commissi to be applied.
International law — Jurisdiction of courts — Act-of-state doctrine — Relevant principles fully discussed.
International law — State immunity — Relevant principles fully discussed.
Jurisdiction — Foreign jurisdiction — Submission to — Clause in contract that parties subject themselves to jurisdiction of foreign court — Enforceability — Nature of court's discretion.

The Johannesburg High Court was called to determine a number of separated issues in an action brought by the plaintiff, the Dutch company East Asian Consortium BV (EAC), against six defendants, the first four of which comprised MTN Group Ltd and various associated entities (collectively referred to as MTN), claiming in delict damages as a result of the defendants' having wrongfully interfered with EAC's contractual rights, alternatively, having unlawfully competed with EAC for those rights. EAC's claims as encapsulated in its particulars of claim were the following: It was the successful bidder in respect of an international tender put out by the Iranian government to be granted a private licence for the operation and maintenance of a GSM-type cellular phone system public network in Iran. Pursuant to the awarding of the tender to it, it was issued a final licence, and a binding agreement was entered into between itself and the government of Iran. Subsequently, MTN induced Iran, by means of, inter alia, bribery of its officials, to enter into a secret tender process and ultimately breach its agreement with EAC, by replacing the latter with MTN as the recipient of the licence. The issues to be determined in this application included the following:

- Did Iranian law, as argued by MTN, or South African law, as argued by EAC, determine whether the allegations made in paras 36 – 60 and 66 of the particulars of claim found a claim for damages, as the plaintiff contended?
- Should MTN succeed in the special pleas it raised, to the effect that the present court was deprived of jurisdiction *(a)* by virtue of the tender documents (art 29 of 'the regulations') granting Iran exclusive jurisdiction to determine '(a)ny dispute or litigation relative to [the tender regulations], or to the call for competitive bids to which they relate'; *(b)* through the application of the 'foreign-act-of-state doctrine'; and *(c)* through the application of the principle of 'state immunity'?

Choice of law

The court considered the various tests for guiding the choice as to which system of law should apply in the determination of whether EAC's particulars of claim founded a claim for damages, a claim which the parties were agreed was based in delict (see [9] – [10]). The court expressed its preference for the application of the *lex loci delicti commissi* — the law of the place where the delict was committed — for, inter alia, the following reasons: in most cases the *lex loci delicti commissi* would be clear, certain and appropriate; the rule reflected the reasonable expectations of most parties; the rule was in accordance with Roman-Dutch authority; the rule had been adopted in both Canada and Australia; there had been clear legislative moves in the United Kingdom and in Europe in support of the rule; and further the acceptance of the rule would ensure broad uniformity with many other influential jurisdictions across the world, including important trading partners (see [16]). The court went on to consider, on the assumption that the allegations made in the particulars of claim were correct, where the delict occurred. It was Iran, the court held: the conduct of MTN which formed the basis of the delict occurred in Iran; and the unlawful conduct of the Iranian government, in breaching the agreement with EAC, causing the latter loss, occurred in Iran. (See [11] – [15] and [17].) The court accordingly concluded that the law of Iran applied to the question in dispute (see [17]).

Exclusive jurisdiction of Iranian court

The court agreed with the applicant that the foreign-jurisdiction clause in question applied to the present litigation and was binding on the parties (see [36] – [39]). The court acknowledged, however, that in terms of the law it retained a discretion as to whether or not to enforce the clause (see [40]). In the present case, the court determined, the discretion should be exercised in favour of enforcing the clause, with

the result that Iranian courts had jurisdiction to hear the matter, and not those of South Africa (see [41] and [97]). In reaching this decision, the court had regard to the fact that, inter alia, the allegations (save for the preparatory actions) were situated in Iran; that the law of Iran pertained to art 29 and any relevant matter, and an Iranian court would not require expert testimony on Iranian law; that the plaintiff was not South African and did business in Iran; and given the central involvement of the Iranian government. (See [41].)

The foreign-act-of-state doctrine

The court noted that on various occasions the doctrine had been endorsed as part of South African law (see [46] and [50]). The court considered the application of the doctrine both in South Africa and in foreign jurisdictions, the pertinent features of which included the following:

- The doctrine, in general terms, demanded courts to not readily sit in judgment or adjudicate on unlawful conduct ascribed to foreign sovereign states (see [46] – [49]).
- The doctrine applied, even where, as here, the foreign party whose conduct was impugned was not party to proceedings. It was enough that the foreign party's conduct fell to be examined and determined. (See [49], [52], [53], [57], [72] and [74].)
- The doctrine did not apply simply by reason of the fact that the subject-matter may incidentally disclose that a state had acted unlawfully; it applied only where the invalidity or unlawfulness of the state's sovereign acts was part of the subject-matter of the action, in the sense that the issue could not be resolved without determining it. (See [79].)
- The doctrine applied when the proceedings related to acts done in the exercise of sovereign authority, as opposed to private acts, ie acts of a private character, such that a private citizen might have entered into (see [74]).

Applying the relevant law to the facts, the court concluded that the operation of the doctrine precluded it from exercising jurisdiction in the matter, and the special plea ought to be upheld (see [85]). In explanation, the court stressed that, on the pleadings, it was being asked to examine the lawfulness of conduct on the part of the Iranian government that involved the exercise of sovereign authority: the issuing and awarding of the tender qualified as the implementation of government policy, placing the entire transaction within the public-law sphere. (See [71], [75], [81], [84] and [92].) Further, the allegation of unlawful conduct on the part of the Iranian government was crucial to

EAC's case; if it had not acted wrongfully, there could never have been a delictual cause of action. (See [31] and [84].)

State immunity

The court referred to s 2 of the Immunities Act. It provided, in ss (1), that '(a) foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act'; and in ss (2), that '(a) court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question'. (See [85].) The effect of the operation of the principle, the court held, was that a court could not rule on the lawfulness of the conduct of a state, whether or not such state was party to litigation, when its judgment would imply an evaluation of the lawfulness of the conduct of such state (see [87], [89]).

The court held that in this matter it would be required to make adverse findings regarding the unlawful acts of Iran, as a finding would affect the interests or activities of Iran. It concluded that the provisions of the Immunities Act resulted in its having no jurisdiction to entertain the matter as pleaded by EAC, and the special plea had to be upheld. (See [93].)

K OBO M AND ANOTHER v ROAD ACCIDENT FUND 2023 (3) SA 125 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Judgment by default where Fund not defending action — Whether court granting default judgment may order that plaintiff's claim for future medical and hospital expenses be compensated by RAF by way of undertaking without RAF's tender to that effect — Whether plaintiff entitled to pursue general damages at trial without injury being found to constitute serious injury, where RAF had not accepted or rejected serious injury assessment report — Road Accident Fund Act 56 of 1996, ss 17(1) and 17(4)(1)*(a)*.

This case concerned a joint hearing of the two actions against the Road Accident Fund (the RAF), referred to a full bench by way of a directive issued (in terms of s 14(1)*(a)* of the Superior Courts Act 10 of 2013) by the Acting Judge President of the division, to answer two questions which arose because of the RAF's failure to defend or participate in the finalisation of the actions against it.

The first question posed in the directive was whether it was competent for a court granting default judgment to order that a plaintiff's claim for future medical and hospital

expenses be compensated by the RAF by way of an undertaking issued in terms of s 17(4)(1)*(a)* of the Road Accident Fund Act 56 of 1996 (the Act) in the absence of a tender to that effect by the RAF. Section 17(4)(1) entitles the RAF to furnish an undertaking — as opposed to a once-off payment — to compensate a third party for costs of future medical expenses after the costs have been incurred and on proof thereof (see [7]). In response to the directive, the RAF's chief executive officer stated on affidavit that the RAF had, since the directive, made a 'blanket election' to furnish undertakings in all matters where plaintiffs claim future medical expenses under s 17(4)*(a)*. (See [25] – [26].)

The second question was whether a plaintiff was entitled to pursue the adjudication of general damages by default in the trial court in instances where the Fund had not accepted or rejected the serious injury assessment report as contemplated in s 17(1) of the Act.

Held

Section 17(4)*(a)* was designed as an 'as-and-when' payment scheme of actual expenses, removing all contingent permutations — damages suffered to be paid as they eventuated. The right to furnish the undertaking was specifically given to the Fund. A court had no jurisdiction to direct the Fund to furnish an undertaking where the Fund did not make such an election. The corollary was that, if a court could not grant such relief, a plaintiff could not claim it. Where the Fund had not made an election to furnish an undertaking, either by choice or by default, it would only be competent for a court to award payment of an amount calculated to cover future medical expenses, once proven, taking into account contingencies. However, as a result of the RAF's blanket election, once a plaintiff proved its claim as contemplated in s 17(4)*(a)*, it was entitled to claim an order catering for a direction to the Fund to furnish such an undertaking, and a court was entitled to grant such an order. This applied also where orders by default were sought. (See [13] – [16] and [26].)

It was clear from case law that, in the absence of the injury having been classified as a serious injury in accordance with the prescribed process, a court did not have the jurisdiction to find that injuries sustained by any plaintiff constituted a serious injury or qualified for a claim for general damages. (See [49] – [56].)

MAPHOLISA NO v PHETOE NO AND OTHERS 2023 (3) SA 149 (SCA)

Administrative law — Administrative action — Review — Organ of state seeking to review decision of another organ of state — Pathway to review is principle of legality, not PAJA — Promotion of Administrative Justice Act 3 of 2000.

A doctor had treated a patient and a third party complained to the Health Professions Council of South Africa (HPCSA) that the doctor had conducted himself unprofessionally (see [8]). The Council in turn had conveyed the complaint to one of its constituent boards, the Medical and Dental Professions Board, which appointed a Committee of Preliminary Inquiry to investigate the allegations (see [4] and [8]). The Committee's finding (and resultant resolution) was that the doctor was guilty, and on conveyance of the finding to the Registrar of the HPCSA, the Registrar appointed a pro forma complainant (the appellant) (see [8]). The pro forma complainant prepared charges and conveyed these to the doctor, who declined an admission of guilt fine (see [9]).

Thereupon a Professional Conduct Committee was constituted, and an inquiry proceeded (see [9]). There the doctor raised a preliminary point that the third party who had lodged the complaint lacked locus standi, owing to the third party not being his patient, and so being unable to give evidence as to what had transpired. This point the Committee upheld (see [10]).

The pro forma complainant then brought High Court proceedings to review the Committee's decision, which proceedings the doctor met with a point in limine. It was that the Promotion of Administrative Justice Act 3 of 2000 required the pro forma complainant to exhaust any internal remedy before approaching a court, where here the regulations governing misconduct inquiries gave a respondent or pro forma complainant an appeal to an appeal committee against any finding of a Professional Conduct Committee (PCC) (see [6]).

The High Court upheld the point and, on this basis, dismissed the application, and in addition found that the PCC had been correct in its determination that the third party who had laid the complaint lacked standing (see [11]).

It refused leave to appeal, and, on the pro forma complainant's petition, the SCA referred the dispute to oral argument (see [1]).

The issue was whether the pro forma complainant ought to have exhausted its internal remedy, as PAJA required. This raised the question whether PAJA applied, which narrowed to whether PAJA applied where one organ of state reviewed the decision of another organ of state, as here (see [1] and [16]).

Held, following the reasoning in *Gijima* (see citation below), that it did not (see [18]). (In *Gijima* the issue was whether an organ of state reviewing its own decision ought to bring the review under PAJA or the principle of legality, with the Constitutional Court holding that PAJA availed only private persons. This because PAJA effected the constitutional right to just administrative action, which was enjoyed only by private persons (see [17]).)

Consequently, the principle of legality gave the pro forma complainant its review, and the common law (not PAJA, as in a PAJA review) regulated the procedure (see [17] and [21]). Under the common law there was no duty to exhaust internal remedies (see [21]).

This raised the question whether the Health Professions Act 56 of 1974 or the regulations governing misconduct inquiries created such an obligation. *Held*, that they did not, with the result that there had been no obligation on the pro forma complainant to approach the appeal committee before proceeding in the High Court, and that the High Court had erred in finding such a duty and dismissing the review on that basis (see [22]).

As to the merits, the question was whether the PCC (and the High Court) had been correct in its determination that the third party who had lodged the complaint with the HPCSA had lacked standing to do so. This turned on the breadth of the term 'complainant' in the regulations, and whether it accommodated a person in the third party's position.

Held, that it did: the term was very broadly defined, and reading it broadly would facilitate the PCC attaining its object of exercising its powers in the public's best interests. Such wide reading would also best promote the protection of the public (see [23] – [24]).

Leave to appeal granted, the appeal upheld, and the High Court's order set aside and replaced with an order that the PCC's decision (absence of locus standi) be set aside, and substituted, such that the PCC dismissed the doctor's preliminary point that the third-party complainant lacked standing (see [27]).

MH v OT 2023 (3) SA 159 (WCC)

Children — Parents — Relocation — Overseas — Applicant (mother and custodian parent) seeking court's permission to permanently remove child from South Africa against wishes of respondent (father) — Parties, never married, locked in intractable conflict, mostly over child — Relocation application granted in view of child's right to live free from conflict, and applicant's bona fides, but subject to safeguards relating to contact with father.

The applicant applied to relocate permanently to the Netherlands with the 5-year-old boy, K, she had had by the respondent, to whom she was never married. The parties, both Dutch citizens, had since K's birth been locked in conflict, which was the primary reason for her wish to relocate. She was already employed in a freelance position by the company that had interviewed her for a position at its Amsterdam office. The respondent had acquired permanent residence in South Africa and was involved in a stable relationship.

The respondent, supported by the Family Advocate, was of the view that this was not a good enough reason to allow a relocation and that allowing it would, moreover, result in the destruction of his relationship with K. An expert witness described the parties' relationship as 'extremely toxic' and expressed the opinion that this was likely to have significant negative effects on K. By all accounts, contact with K was central to the conflict between the parties, which had by 2017 become intractable. The principal consideration against relocation was the damage it might do to the still-developing (but already close) relationship between K and the respondent. The experts agreed, however, that the applicant was K's primary attachment figure.

The parties had in December 2015 concluded a detailed settlement agreement that was made an order of court. Under it the applicant was granted full parental responsibilities and rights, while the respondent was granted right of contact. In addition, his consent was required for the applicant to relocate permanently from South Africa with K.

Held

When a court sits as upper guardian of a minor child, there is no onus in the conventional sense: it had to take an overall view of the situation to determine whether the decision of the parent wishing to relocate was a reasonable one (see [45]).

Precedent made it clear that the paramountcy principle in s 28 of the Constitution did not mean that every relocation had to be approached only from the child's perspective, or that the child's best interests would always trump all other rights (see [47]).

While there was little doubt that K would wish to maintain frequent contact with the respondent, this had to be weighed against his rights to develop in an environment free of continuous conflict between his parents, and to have his primary attachment figure, the applicant, free from the anxiety that permeated her life since at least his birth. The applicant could not be expected to cope with the respondent's hostility for the next 13 years. (See [49] – [50].)

The applicant's reasons for wishing to relocate were bona fide and reasonable. There were no compelling reasons to override her decision and the bond between K and the respondent was such that it could withstand their separation. The court's order would put safeguards in place to ensure that the applicant facilitated contact after relocation. (See [58], [60].)

TM OBO MM v MEC FOR HEALTH, MPUMALANGA 2023 (3) SA 173 (MM)

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — What constitutes — Agreement that attorneys and advocates' fees and disbursements would be paid out of capital amount upon favourable finalisation of matter — Such agreement amounting to contingency fee agreement — Contingency Fees Act 66 of 1997.

Legal practitioner — Attorney — Fees — Duty to put client in position to determine reasonableness of fees — Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, promulgated under Legal Practice Act 28 of 2014.

Court — High Court — Powers — To make settlement agreements orders of court — Settlement agreement providing for payment of preparation, qualifying, reservation and consultation fees 'if any' of all 24 experts listed in draft order — Vagueness of such 'if any' orders problematic for taxing master and open to abuse — Court must remain vigilant against granting such orders.

Plaintiff's action against the MEC for Health on behalf of her child, who was diagnosed with cerebral palsy arising from alleged medical negligence at childbirth, was enrolled

for hearing on 3 August 2020 on the question of liability, and settled on 29 July 2020. It was then enrolled for hearing on 22 November 2021 on the question of quantum, which was settled on 11 November and removed from the roll on the same day. On 16 November 2021 a draft order of settlement was submitted to be made an order of court by agreement between the parties, accompanied by an affidavit * from the plaintiff's attorneys which stated that 'neither the plaintiff nor plaintiff's legal representatives entered into a contingency fee agreement as is contemplated in terms of section 4(1) of the Contingency Fees Act No 66 of 1997 [the CFA]'. (See [82].)

The court, concerned that the fee agreement amounted to a contingency fee agreement without compliance with s 4 of the CFA, issued a number of directives to the plaintiff's attorneys, requiring more information on the exact nature of the fee agreement (see [4] and [32]). They replied that there was no success fee that was involved, but that, having ascertained that it was a prosecutable claim, they agreed to recover reasonable attorney and own client fees, as well as all disbursements not recovered in the party and party bill of costs, upon finalisation of the matter (see [5] and [41]). It was common cause that the plaintiff was indigent and unable to pay fees upfront. The court then took issue with their replies to the directive, inter alia, that nothing was said about the amount of the daily or hourly rate of the attorneys and of the two advocates briefed (see [74]); and with the vagueness of the draft-order provision for payment of preparation, qualifying, reservation and consultation fees, 'if any', of all 24 experts listed in the draft order (see [45], [81] and [84]).

Held

A contingency fee agreement generally implied that only if a claim were successful would a fee be payable, possibly on a higher rate than normal and from the capital amount recovered in such claim. Here, it was common cause that payment of legal fees was dependent on the success of the litigation and was to be paid from the capital amount that may be recovered in the litigation. All was therefore dependent on a 'no win, no fee' model or on the so-called 'success fee'. An agreement where fees and disbursements are paid out of the capital amount upon favourable finalisation of the matter could be nothing else than a contingency fee agreement. (See [20], [42] and [72].)

The CFA was enacted to legitimise contingency fee agreements between legal practitioners and their clients, which would otherwise be prohibited at common law. Agreements without upfront payment of fees or immediately thereafter for legal

services rendered, and payment of fees from the capital amount arising from a successful litigation, were meant to be controlled under the CFA, with careful oversight by the courts as per s 4 thereof. Any entitlement to fees for services in respect of proceedings, payable after such legal proceedings were successful, would be unlawful at common law unless there was compliance with the provisions of the CFA. One could therefore not enter into a fee agreement based on a specific or implied agreement that fees would only be paid upon the success of the litigation without complying with the provisions of the CFA. Neither can one avoid the provisions of the CFA on the basis that a legal practitioner would only be entitled to charge a fee equal to his or her normal fees or less than his or her normal fees which specifically or impliedly were payable on the success of litigation. The agreement clearly constituted a contingency fee agreement and should be found to be illegal for non-compliance with the provisions of the CFA. (See [20], [30], [33], [35], [39] and [42].)

Under para 30.2 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (promulgated under the Legal Practice Act 28 of 2014), on acceptance of a brief counsel should stipulate to the instructing attorney the fee that will be charged or the rate that shall be applied to determine it. What was applicable to a fee agreement between an instructing attorney and counsel should apply to any agreement between an attorney and client. Nothing was said about the amount of the daily or hourly rate of the attorney and the advocates. The plaintiff was put in no position to determine the reasonableness of the fees, despite many opportunities for plaintiff's attorney and counsel to have stipulated their daily or hourly rate in affidavits or during argument. The prohibition of any contingency fee agreement at common law unless it complies with the curb in terms of the Act, and the prohibition of certain fee agreements in terms of the Code of Conduct and under the Legal Practice Act, was aimed at fee agreements concluded without a client having paid a cent, and requires that fees must be reasonable. Anything contrary to this legislative imperative was susceptible to abuse, at huge prejudice to those who find themselves in desperate situations. (See [56] – [57], [68] – [69], [74].)

When a fee agreement was concluded, it had been a practice for many years in the legal profession that the mandate would clearly stipulate the attorney's hourly charge, the deposit paid, when invoices would be rendered and were payable, etc. Any reliance on the asserted 'no contingency fee agreement' and 'reasonable fees', without complying with this established practice, had no legal basis. (See [75] and [80].)

One would have thought that the plaintiff's attorneys would have known at least by 16 November 2021 whom of the 24 experts were entitled to the fees. Instead, the parties opted for 'if any', when this could easily have been established or ascertained before the request for the draft order to be made an order of court was filed. This could only have been intended to tie the taxing master's hands by using a court order. Draft court orders with the hidden words 'if any' pose a serious problem to taxing masters. It has become the practice of legal practitioners in damages-claim cases to use the words 'if any' in draft orders to be made orders of court upon settlement, particularly regarding fees and costs in matters involving the Road Accident Fund and the Health Department. This was often followed by settlement of the bill of costs, to which there was also a practice that, once an order for costs was made in such vague terms, and once items on the bill of costs were settled, the taxing master would be told that all they had to do was to 'stamp' the bill of costs by issuing the allocator. Vigilance by the courts was necessary. (See [83], [89] – [91].)

MOLADORA TRUST v MEREKI AND OTHERS 2023 (3) SA 209 (LCC)

Land — Land reform — Statutory protection of tenure — Protected occupation of land — Occupier — Rights — Whether security of tenure protected by s 25(6) of Constitution and ESTA including right to graze cattle — ESTA occupier deriving any right to graze cattle on land they occupy by consent and not as adjunct to any occupation rights conferred by s 6(2) of ESTA — However, once consent to graze cattle obtained, right forming part of ESTA occupier's right of tenure protected by ESTA, albeit derived from consent and personal in nature — Where ESTA occupier has consent, right to graze cattle becomes subject to various ESTA protections, including those of ss 6(1), 6(2)*(a)*, 8 and 9 — Extension of Security of Tenure Act 62 of 1997, ss 6(1), 6(2)*(a)*, 8 and 9.

The present application, instituted on 11 May 2022 in the Land Claims Court, concerned the nature of rights held by occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) when grazing cattle, and what protections applied when such rights were terminated. In this matter the applicant, the Moladora Trust, sought an order directing the first to third respondents (the respondents) occupying part of one of their farms to remove all grazing animals they kept there. It was common

cause that the respondents were ESTA occupiers by virtue of being the children of a former employee who had since died ('before 2017'), and who had continued to live on the farm thereafter. The applicant claimed, however, that the rights of occupation the respondents possessed were only for residential or housing purposes; they had no right to graze cattle, having never been granted consent from the owners of the farm to do so. To the extent that the respondents' mother had the right to graze cattle, they argued, that was in terms of a personal agreement entered into between herself and the owners of the farm, and such right was not transferrable to the respondents through succession. The applicant launched these proceedings after having twice given what it described as reasonable notice (of one month) to the respondents to remove their livestock — first, in January 2018, to which there was no response, and again in October 2020, to which, once again, there was no response. There was no appearance on the part of the respondents in this application.

The nature of rights held by occupiers in terms of ESTA when grazing cattle, and available protections when terminated

Held, that, as confirmed by the Supreme Court of Appeal, an ESTA occupier derived any right to graze cattle on the land they occupied *by consent* and *not as an adjunct to any occupational rights* conferred by s 6(2) of ESTA (see [17] and [18]).

Held, however, that once consent to graze cattle was obtained, that right formed part of an ESTA occupier's right of tenure protected by s 25(6) of the Constitution and ESTA, albeit derived from consent and personal in nature. Furthermore, where an ESTA occupier had consent, the right to graze cattle became subject to various ESTA protections, including those of s 6(1), which granted to occupiers 'the right to reside on and use the land on which he or she resided . . . , and to have access to such services as had been agreed upon with the owner or person in charge . . .'; s 6(2)*(a)*, which granted to occupiers the right to security of tenure; s 8, which required that an occupier's right of residence may be terminated only on just and equitable grounds, having regard to the various factors set out in paras *(a)* – *(e)*; * and s 9, which placed various limitations on eviction. † (See [18] – [22].) Such an interpretation better served the remedial purposes of ESTA, including its protection of security of tenure and of the right to dignity, than an interpretation that sought wholly to disaggregate rights to graze cattle from ESTA occupation rights. It also served to balance rights of an owner or person in charge with those of an occupier. The generous interpretation gave fuller protection to other rights, such as the right to participate in the cultural life of one's

choice, and to enjoy one's culture and maintain cultural associations with other members of a cultural community, and the right of access to sufficient food. Further, it recognised the dignity of ESTA occupiers, whose lives and livelihoods would at times be bound up with their cattle holdings. Moreover, it gave due cognisance to the injunction that statutes not be interpreted in a manner that permitted rights to intrude on common-law rights of another, unless the intrusion was intended. (See [23].)

Whether respondents had consent to graze cattle

Held, that, under ESTA, 'consent' was broad and included both express and tacit consent (see [30]). And an ESTA occupier who grazed cattle under no agreement, but without any preventative measures taken by the owner, might be said to be grazing cattle with the tacit consent of the owner (see [30]). On the facts before the court, there was no doubt that the respondents had tacit consent to keep and graze cattle and that a tacit agreement arose (see [31] and [34]): The applicant did not contest in any way the respondents' right to keep and graze cattle for more than a year after the mother's death. And after sending the 2018 notice, the applicant did nothing more for a further 19 months, before sending the second notice. And after that, it waited another 19 months before instituting the present proceedings. (See [31].)

Held, that the conclusion that there was tacit consent was also reached by applying s 3(4) of ESTA, which created a presumption that a person continuously and openly residing on land for a year had consent to do so. Although s 3(4) used the language of 'openly residing', it could not be interpreted narrowly to apply only to a consent to being housed, but must include a consent also to use the land connected to that residence, in this case the grazing of cattle. (See [32].) On the facts, the respondents had not only openly resided on the farm, but had used the land for purposes of grazing their cattle. Applying s 3(4), it was then presumed that they had consent to do so. That presumption was not rebutted on the evidence before court. (See [33].)

Conclusion

Held, that the application ought to be dismissed: there had been no attempt by the applicant to comply with s 8 or 9 of ESTA which, as held above, applied to the termination of the right to graze cattle derived from consent. (See [35] and [36].) It was not sufficient for the applicant to simply terminate the right to graze cattle on reasonable notice (see [35]).

NATIONAL CREDIT REGULATOR v NATIONAL CONSUMER TRIBUNAL AND ANOTHER 2023 (3) SA 225 (GP)

Credit agreement — Consumer credit agreement — Cost of credit — 'On-the-road fee' — Agreed between motor vehicle dealer and consumer — Not imposed by credit provider — Not part of cost of credit — Not contrary to NCA — National Credit Act 34 of 2005, ss 100, 101 and 102.

Consumer protection — Credit agreement — Motor vehicle finance — 'On-the-road fee' — Agreed between dealer and consumer — Not imposed by credit provider — Not part of cost of credit — Not contrary to NCA — National Credit Act 34 of 2005, ss 100, 101 and 102.

This judgment held that 'on-road' fees in vehicle finance transactions were not part of the cost of credit, but rather of the initial transaction agreed upon between the dealer and consumer, and thus not contrary to the National Credit Act 34 of 2005 (the NCA). In 2017 the National Credit Regulator (NCR) issued compliance notices against the financial service divisions of Volkswagen, BMW and Mercedes-Benz (collectively, the finance houses), contending that the inclusion of on-road (OTR) fees in vehicle finance agreements were not permissible under ss 100 – 102 of the NCA. These provisions prescribe the types and nature of fees or services that credit providers may charge consumers under, inter alia, instalment sale agreements. Section 100 deals with prohibited charges and provides that a credit provider may not charge a consumer fees, charges or commissions prohibited by the NCA. Section 101 deals with the cost of credit and prohibits a credit agreement from requiring from the consumer payment for anything but the principal debt, interest and certain specified fees and charges, '*plus* the value of any item contemplated in section 102' (emphasis added). Section 102 contains a list of these items (fees or charges that may form part of the transaction: initiation fees, connection fees, delivery fees, etc). It provides that the credit provider may not charge for them unless the consumer appoints the credit provider as his or her agent in arranging for the service concerned. OTR fees are never mentioned.
The NCR's above-mentioned compliance notices ordered the finance houses to furnish it with a list of consumers charged OTR fees since 1 June 2007 (the effective date of the NCA), to show evidence of how much they were charged, and to refund those affected by mid-December 2017. When the National Consumer Tribunal

subsequently concluded that OTR fees were not only allowed, but also did not contravene the NCA, the NCR approached the Pretoria High Court, which proceeded to hear four consolidated statutory appeals involving the three finance houses and a cross-appeal by the NCR against the Tribunal's order for the refund of the OTRs. * The finance houses argued in essence that OTR and other predelivery fees were charged not by them, but by the dealers, who agreed on them with the purchasers as part of the total purchase price. As such, they were not an additional charge over and above the principal debt. They argued that, although 'the principal debt' was included in s 101, it was not 'cost of credit', but the amount on which costs were subsequently levied by the credit provider. They also argued that since OTRs implicitly fell into s 102, and the NCR nowhere explicitly prohibited charging them, doing so was lawful.

The matter was heard by a full bench of the Pretoria High Court. The majority (per Malungana AJ, Millar J concurring) pointed out that there was no vagueness to s 100. It prohibited the *credit provider* from charging or imposing monetary liability on the consumer in respect of prohibited fees or charges. But the credit provider imposed no obligation or financial liability when it financed the principal debt predetermined by the dealer. Section 101 was only triggered if the *credit provider* were to charge for the goods or services prohibited in s 100, as that would *increase the cost of credit*. Dealers and credit providers performed separate, complementary roles in the process leading up to the conclusion of the credit agreement. (See [38].)

So, in the present matter it was not the finance houses that had charged the consumers the OTR fees when they included them in the impugned credit agreements: they were added to the purchase price in the initial negotiations between the consumers and the dealers (the pre-agreement stage). The finance houses merely financed the principal debt that was made up of the purchase price and the other extras, including the OTR fees. There was therefore no merit in the NCR's argument that the finance houses had charged the consumers OTR fees in contravention of the NCA: *the dealers* had imposed it at the initial stage of the sale process. In the premises, the financiers did not contravene the implicated provisions of the NCA. Ordered accordingly. (See [43], [45] – [46].)

Moshoana J in a dissenting judgment reasoned that the submission that the value of items contemplated in s 102 was not to be included in the principal debt simply because it was 'charged' by the dealer was absurd and contrary to the entire NCA, read purposively. Logically, if a sum including an OTR was charged by the dealer and

then imposed on the consumer as part of the deferred amount, then the credit provider effectively 'charged' or 'imposed a monetary liability' on the consumer, contrary to ss 100(1)*(a)* and 102. (See [87], [105], [107], [111].)

TN OBO BN v MEC FOR HEALTH, EASTERN CAPE 2023 (3) SA 270 (ECB)

Damages — Bodily injuries — Medical expenses — Future medical expenses — Once-and-for-all rule and rule that damages must sound in money — Common law to be developed to provide for periodic payments and payment in kind — Future medical services available in public sector to be assessed against reasonable standard — Defendant discharging evidentiary onus to adduce evidence in support of extension of common law.

BN suffered a brain injury during childbirth at a public hospital falling under the auspices of the defendant (the MEC), with severe sequalae including cerebral palsy (see [4]). In his mother's delictual damages claim on his behalf, the MEC conceded liablity and settled on several heads of damages (see [7]), while others remained in dispute (see [10]).

In relation to the claim for future medical expenses and supplies, the MEC pleaded the 'public healthcare' and 'undertaking-to-pay' remedies, as recognised obiter by the Constitutional Court (the CC) in *MEC for Health and Social Development, Gauteng v DZ obo WZ* — the so-called '*DZ* defences'(see 'Cases cited' below). There, the CC acknowledged obiter that the common-law requirement — that reparations for damages must in the form of lump-sum monetary compensation be assessed on a 'once and for all basis' — should be developed to accommodate such remedies, but declined to do so as it was not presented with sufficient evidence (see [107] – [114]).

The main issues in this case were whether the common law should be developed to accommodate the *DZ* defences; who bore the onus regarding such development; and what the appropriate standard was at which hospitals should be able to provide services in order for the public healthcare remedy to be sustained, ie a reasonable standard, an acceptably high standard, or a standard equivalent to that in the private healthcare sector.

Held

Where, as in this case, a plaintiff established a prima facie case apropos a claim for damages and the defendant pleaded an extension of the common law, the defendant bore the evidentiary onus to rebut the prima facie case put up by the plaintiff — ie the defendant was required to adduce evidence in support of its contention (see [23] – [24]).

For the purposes of such a common-law development, the standard against which the future medical services available in the public sector must be assessed, was a 'reasonable standard' (see [133]).

An assessment of the evidence led regarding development of the common law, supported its development (see [134] – [165]).

The defendant has tendered extensive and valuable evidence which pointed ineluctably to the conclusion that both hospitals concerned, working in tandem, were capable of providing BN with the medical services and supplies he requires at a reasonable standard or above. Accordingly the defendant established that the hospitals concerned were able to provide these services and supplies at the required standard. (See [180].)

SOUTH AFRICAN CRIMINAL LAW REPORTS MAY 2023

WALUS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2023 (1) SACR 447 (CC)

Prisoner — Parole — Life imprisonment — Eligibility of prisoner for placement on parole — Denial of parole based on trial court's sentencing remarks and nature and seriousness of crime — Rationality of — Correctional Services Act 111 of 1998, s 36.

The applicant, Mr Walus, was one of two people convicted for the murder in April 1993 of Mr Hani, the Secretary-General of the South African Communist Party (the SACP) at the time. One Mr Derby-Lewis (since deceased) and Mr Walus, who had shot and killed Mr Hani, had conspired to assassinate a number of anti-apartheid leaders. Mr Hani's assassination nearly plunged South Africa into a civil war that would have derailed the negotiations aimed at introducing democracy. They were both sentenced to death, the trial court (and subsequently the Supreme Court of Appeal) remarking, inter alia, that their 'atrocious crime demands the severest punishment which the law

permits'. Their sentences were commuted to life imprisonment following the abolition of the death sentence in 2000. (See [4] – [6], [19] and [22].)

Since 2011 Mr Walus had applied on several occasions to be placed on parole, but all his applications were declined by the various Ministers responsible for correctional services (see [7] – [15]). In March 2020 the first respondent, the Minister of Justice and Correctional Services, while admitting that Mr Walus had complied with all other requirements for parole, again dismissed Mr Walus' application, citing the nature and seriousness of the crime and the sentencing remarks of the trial court, which the Minister stated would be negated if parole were granted.

Mr Walus subsequently instituted a High Court application to have the Minister's decision set aside on review. The Minister, Mrs Hani (the widow of the murdered Mr Hani) and the SACP opposed the application. The High Court, in dismissing the application, was satisfied that the Minister had taken into account all the factors that he was required to consider (see [24] – [27]). Mr Walus next petitioned the Supreme Court of Appeal for leave to appeal against the High Court's decision, but that court dismissed his petition on the grounds that the matter had no reasonable prospects of success and that there was no other compelling reason why his appeal should be heard.

The present case concerned his application for leave to appeal to the Constitutional Court, which granted leave on the basis that the appeal related to an issue affecting the possible release on parole of those serving life-imprisonment sentences, ie whether, when a prisoner had served so many years of a life sentence — 26 in Mr Walus' case — and, by the Minister's own admission, had complied with all other requirements for parole, the nature and seriousness of the crime and the sentencing remarks of the trial court could still be used to deny them parole (see [35] – [36]).

The main ground of the appeal was that the Minister's decision was irrational, given that the only two factors upon which the Minister relied to support his decision were factors that would never change, and that there was no connection between the Minister's exercise of power given to him in this regard and the purpose for which that power was conferred (see [38] and [60]). The Minister relied, inter alia, on departmental policy and on s 63(1) of the Correctional Services Act 8 of 1959 (the 1959 Act) — which applied to Mr Walus by virtue of s 136(1) of the Correctional Services Act 111 of 1998 (the CSA) — for the proposition that the decision-maker was enjoined to have regard to the nature of the offence and any remarks made by the

court in question at the time of the imposition of sentence, for purposes of the decision whether or not to place an offender on parole (see [57] – [59]).

Held

Section 36 of the CSA provided the statutory basis for the proposition that our prison services were correctional services; it emphasised that part of the objectives of imprisonment was the rehabilitation of prisoners. This suggested that, where, on all the evidence, the risk of a prisoner reoffending, if they were released on parole, was low, the relevant authorities should seriously consider releasing such prisoner on parole because the objective of the implementation of a sentence of imprisonment would have been achieved. (See [37] and [47].)

The types of remark made by the trial court and the SCA at the time of imposing a sentence were not what the Department's policy contemplated should be taken into account. The sentencing remarks to which the policy document referred could only be remarks about the minimum period of imprisonment that a convicted person or offender should serve before they could be considered for parole. (See [72] – [73], [76] – [77].)

Section 276(B)(1)*(b)* of the Criminal Procedure Act 51 of 1977 limited the length of the period during which a court may prevent the Correctional Services authorities from considering a prisoner for parole. A court may not say that a prisoner may not be considered for parole for his or her entire period of imprisonment; its power was limited to a maximum period of two-thirds of the term of imprisonment to be served by the accused or to 25 years, whichever is shorter. Therefore, no matter how serious the crime was for which a person was sent to jail, the court had no power to say that he or she should not be considered for parole after the expiry of 25 years of imprisonment. (See [75].)

The meaning and effect of the statement by the Minister, that to release the applicant on parole would negate the sentencing remarks of the trial court and the SCA, needed to be considered carefully. If, in the Minister's view, releasing Mr Walus on parole in 2020 would have made his life-imprisonment sentence ineffective or useless, he would always see releasing the applicant in that light in the future. It, therefore, seemed unlikely that the Minister would ever release him on parole in the future. If the Minister were to release the applicant on parole on the same facts in the future, how would he justify his two conflicting conclusions on the same facts? The Minister did not explain any of this in his answering affidavit. His failure to explain this rendered his decision

to deny Mr Walus parole inexplicable and irrational. There was no connection between the exercise by the Minister of his power and the purpose for which the legislation conferred that power on him. His decision therefore fell to be reviewed and set aside. (See [23], [80] – [82].)

As to the remedy, the two factors that the Minister considered to count against Mr Walus could no longer stand in the way of his release. Given the history of the matter, it would be just and equitable that the Minister be ordered to place the applicant on parole. (See [95].)

TODD v MAGISTRATE, CLANWILLIAM AND OTHERS 2023 (1) SACR 481 (WCC)

Inquest — Finding — Review of — Magistrate holding informal enquiry instead of public enquiry as recommended by Director of Public Prosecutions — Misdirection in doing so, but decision not vitiating findings — Inquest Act 58 of 1959, s 8(1) and 16(2)*(d)*.

Inquest — Review of — In what cases — Restatement of test for.

The applicant applied for the review of the decision of an inquest magistrate who found in terms of s 16(2)*(d)* of the Inquests Act 58 of 1959 (the Act) that, although there were no witnesses to give direct evidence as to how the applicant's wife had died, the available circumstantial evidence strongly indicated foul play on the part of the applicant. The magistrate found that the death of the deceased had been brought about by an act or omission that prima facie involved or amounted to an offence on the part of the applicant. The applicant further contended that the magistrate had erred in holding a non-public inquest into the deceased's death based solely on affidavits and without recourse to oral evidence.

Held, that the decision of the magistrate to hold an informal inquest, despite the recommendations of the Director of Public Prosecutions and the request by the daughter of the deceased, was wrong and mistaken. The magistrate was ordinarily under an obligation deputed to him by s 8(1) of the Act to call for oral evidence, and it was axiomatic that public confidence and satisfaction would normally best be promoted by a full and fair investigation, publicly and openly held, giving interested parties an opportunity to assist the magistrate holding the inquest in determining not only the circumstances surrounding the death under consideration, but also whether any person was responsible for such death. Notwithstanding, the failure to hold a

public inquest did not mean that the decision had to be reviewed by the court. Something more was required. The onus rested on the applicant to satisfy the court that the exercise of the magistrate's discretion was so unreasonable and so capricious that it infringed his fundamental rights. The applicant in the present matter had not shown that he had suffered any prejudice pursuant to the magistrate's decision to hold an informal inquest. (See [29] – [31].)

Held, further, that the applicant had not given a plausible explanation of what really caused the deceased, an accomplished sportswoman, to fall off the cliff. She was a cyclist of note who had won many trophies, including internationally, and was medically sound and physically fit. Her fall from the cliff was mysterious and demanded an answer which only the applicant could provide, but the applicant had failed to do so. There was no basis whatsoever warranting the setting-aside of the decision of the magistrate. (See [37] – [41].) The application was dismissed. (See [42].)

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND ANOTHER v DEMOCRATIC ALLIANCE AND OTHERS 2023 (1) SACR 492 (SCA)

Prisoner — Parole — Medical parole — Role of Medical Parole Advisory Board — Powers of National Commissioner of Correctional Services — Commissioner not entitled to release inmate on parole in absence of positive recommendation of Board — Section 75(7) of Correctional Services Act not creating alternative pathway to medical parole — Correctional Services Act 111 of 1998, ss 75(7) and 79(1).

Section 75(7) of the Correctional Services Act 111 of 1998 (the Act) empowers the Commissioner to release on medical parole an inmate serving a sentence of incarceration for 24 months or less; and s 79(1) sets out three substantive requirements for medical parole, namely: *(a)* terminal disease or physical incapacity; *(b)* low risk of reoffending; and *(c)* appropriate post-release arrangements. The substantive requirements of s 79(1)*(a)* are given effect by reg 29A(5) – (7). (See [35] – [37].)

On 29 June 2021 the second appellant, Mr JG Zuma (Mr Zuma), the former President and Head of State of the Republic of South Africa, was sentenced to 15 months' imprisonment by the Constitutional Court for failing to obey that court's order to appear before a Judicial Commission of Inquiry. Mr Zuma started serving his sentence on 8 July 2021, but was immediately transferred to the hospital wing of the Estcourt Correctional Centre. On 29 July 2021 the operational manager at the Estcourt

Correctional Centre recommended to the Correctional Supervision and Parole Board (the Board) that Mr Zuma be released on medical parole. The Board met in late August 2021 to consider Mr Zuma's medical-parole application, and on 2 September 2021 decided against recommending medical parole.

The first appellant, the National Commissioner of Correctional Services, nevertheless released Mr Zuma on medical parole three days later, with immediate effect (see [15]). Shortly thereafter, the first respondent, the Democratic Alliance, the second respondent, the Helen Suzman Foundation, and the third respondent, Afriforum NPC (Afriforum), launched separate applications in the High Court, challenging the Commissioner's decision on various grounds in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Their applications were consolidated and heard together. On 15 December 2021 the High Court reviewed and set aside the Commissioner's decision, substituting it with one rejecting Mr Zuma's application for medical parole. In this regard it reasoned that remission would not serve any purpose, 'as the Commissioner will have no discretion to exercise'. It also directed that Mr Zuma be returned to the custody of the Department of Correctional Services (the Department) to serve out the remainder of his sentence of imprisonment; and made two declaratory orders. The first declared that the time Mr Zuma spent out of jail on medical parole should not be considered for the fulfilment of his 15 months' imprisonment imposed by the Constitutional Court; and the second that the statutory body to recommend whether medical parole should be granted or not was the Board.

In this case, the Commissioner and Mr Zuma's appeal to the Supreme Court of Appeal, it was submitted on behalf of the Commissioner that —

- the recommendation of the Board was not binding on him because the Act conferred a discretion on him whether or not to release an inmate on medical parole; if the legislature intended the recommendation of the Board to be binding, s 79 of the Act would have made that clear (see [43]);
- s 75(7) created an alternative pathway to medical parole, without the need to comply with the substantive and procedural requirements of s 79, since the general provisions of s 79 could not limit the provisions of s 75(7) (see [40]).

The South African Institute of Race Relations, admitted as amicus curiae, submitted that a person detained for contempt of court was not a 'sentenced offender' within the

contemplation of the Act, and could therefore never be released by a person or body other than the court that committed the person (see [17]).

Held

As to the amicus' submissions

Section 1 of the Act defined a 'sentenced offender' simply as a 'convicted person sentenced to incarceration or correctional supervision'. It made no distinction in respect of offenders based on the nature of proceedings from which the sentence flowed, or whether the sentence was coercive or punitive. The order of the Constitutional Court manifested a clear intent — to punish Mr Zuma for defying its earlier order and to have him serve a prison sentence for that. A person convicted and sentenced for contempt of court ordinarily fell to be dealt with in terms of the laws relating to prisons, including the privilege to be released on parole if they so qualify. It was immaterial that the proceedings which culminated in the sentence were criminal or civil, and whether the order for their imprisonment was coercive or punitive. (See [19], [23], [26].)

As to whether s 75(7) created an alternative pathway to medical parole

Inmates serving sentences of incarceration for 24 months or less were excused from complying with s 75(1) – (6), which dealt mainly with the medical parole of inmates serving lengthy imprisonment terms. Section 75(7)*(a)* removed the involvement of the Board and case-management committees in respect of applications of inmates serving sentences of incarceration for 24 months or less. Their applications were considered directly by the Commissioner. However, in respect of both categories of inmate there must be compliance with the substantive and procedural requirements of s 79. The requirements set out in s 79(1) constituted jurisdictional facts that must be met for medical parole to be granted. If any of them was not present, an offender would not qualify for parole. These provisions apply to Mr Zuma (despite his status as former President and Head of State) as they would to any other inmate. That was the content and reach of the constitutional value and promise of equality before the law. The reading of s 75(7) as being capable of an independent application from s 79 would result in an absurdity, as it would allow an inmate to be released on 'medical' parole without any 'medical' basis. For a sensible result, ss 75(7)*(a)* and 79 must be read together. (See [38], [40], [42].)

As to whether the Commissioner was entitled to release an inmate on parole without the Board's positive recommendation

The Correctional Matters Amendment Act 5 of 2011 amended s 79, interposing the Board in a professional and advisory role to the Commission. Before, the Commissioner thus had the sole power to decide whether a medical condition was one that qualified in terms of the Act for the granting of medical parole. This was open to abuse, as there was no provision for an independent medical opinion to verify the diagnosis by the inmate's treating doctor. Thus, the interposition of the Board was for a good reason, namely, to allow for an independent and expert determination as to the medical aspect of the process, ie a professional judgment as to whether an inmate suffered from a terminal illness or physical incapacity. Therefore, the legislature evidently intended the Board's advice, opinion and recommendation to the Commissioner to be crucial to his or her decision on whether to release an inmate on medical parole. Given this context, and its specialist and professional composition, the Board's recommendation held sway. It furnished the Commissioner with a basis for his or her opinion as to whether an inmate had a terminal illness or physical incapacity; the Commissioner could not simply ignore it because he or she held a different view. It followed that the Commissioner's discretion to release an inmate on medical parole was not triggered unless the Board made a positive recommendation on the appropriateness to grant medical parole, based on a determination in terms of s 79(1)*(a)* as to the inmate's terminal illness or physical condition. It was only once the Board made a positive recommendation that the Commissioner might enquire whether the inmate met the requirements of s 79(1)*(b)* and *(c)*. Furthermore, an interpretation that allowed the Commissioner to grant medical parole to an inmate, without the recommendation of the Board to that effect, would give the Commissioner the same power he or she had prior to amendment, and so would undermine the very purpose for which the Board was created, rendering the provisions of s 79(1)*(a)* nugatory. (See [45] – [48], [50] – [51].)

As to remedy

The High Court was correct in making the substitution order. Without the Board's positive recommendation, the Commissioner had no discretion, but to refuse medical parole. The Board had decided that Mr Zuma did not qualify for medical parole. Accordingly, the High Court was in as good a position as the Commissioner to make a decision. However, the first declaratory order — that the time Mr Zuma was out on medical parole should not be considered for the fulfilment of his sentence of 15 months imposed by the Constitutional Court — implicated separation of powers. Matters

concerning how an inmate served his or her sentence, when and how he or she qualified for and was to be released on parole, resided with the executive — the Department in this instance. This declaratory order would accordingly be set aside, meaning Mr Zuma's position as it was prior to his release on medical parole would be reinstated. Put differently, Mr Zuma, in law, had not finished serving his sentence. Accordingly, he must return to the Estcourt Correctional Centre to do so. Whether the time spent by Mr Zuma on unlawfully granted medical parole should be taken into account in determining the remaining period of his incarceration, was not a matter for this court to decide, but for the Commissioner to consider. The High Court's declaratory order in this regard would accordingly be set aside. The second declaratory was not one envisaged in either ss 8(1)*(d)* or 8(2)*(b)* of PAJA. It was not a declaration of rights, but a restatement of the law, and would also be set aside. (See [57] – [60], [62] – [64].)

S v DUBE 2023 (1) SACR 513 (MM)

Murder — Premeditated or planned murder — What constitutes — Not required that death be premeditated or planned, but rather aim of criminal act — In casu, where accused planned to cause bodily harm, which resulted in person's death, and where possibility of death foreseen by perpetrator, premeditated murder established.

The accused was convicted of housebreaking with the intent to assault and murder where intention in the form of dolus eventualis was present. It appeared that on the accused's birthday he was celebrating at a tavern when he was phoned by his brother who asked him where he was. On being informed, his brother said that he would join him there, but failed to do so. After leaving the tavern, the accused passed his girlfriend's home. He stopped there, and discovered his brother and girlfriend engaging in sexual activities. He broke down the door, entered the house and stabbed his girlfriend at least five times, one of which severed her carotid artery, causing her death. As to whether the murder was premeditated,

Held, that it was not the death that had to be premeditated or planned, but rather the aim of the criminal act. If A premeditated an assault upon B, and carried out the assault, while foreseeing that the assault might cause B's death, B's murder was premeditated despite that the original plan was only an assault. (See [20].)

Held, further, that the accused had indicated in a statement that he knew that stabbing a person several times with a knife could lead to that person's death, and he had accordingly reconciled himself with that foresight, for he proceeded to stab the deceased five times, including once severing one of her main arteries. He had broken into her home to cause her bodily harm and carried out the assault while knowing that such assault could cause the deceased's death. Although the assault took place within moments after breaking the door on entering the house, the evidence showed premeditation to cause the deceased bodily harm by assaulting her, and he accordingly committed premeditated murder, as contemplated by s 51(1) of the Criminal Law Amendment Act 105 of 1997. (See [35] – [36].)

S v SLINGERS 2023 (1) SACR 522 (WCC)

Sentence — Committal to regional court for sentence — Whether magistrate could refer matter to regional court after receipt of record of previous convictions and having heard arguments in mitigation of sentence — Jurisdictional competence of regional court not ousted by mitigating or aggravating factors placed before district court — Criminal Procedure Act 51 of 1977, s 114.

The issue before the court in the present matter was whether a district magistrate could refer a matter in terms of s 114 of the Criminal Procedure Act 51 of 1977 (the CPA) to the regional court for sentencing in circumstances where the district magistrate had proceeded to listen to arguments in mitigation of sentence after receiving the SAP69 of the accused. The regional magistrate took the view that, once the district magistrate was addressed in mitigation of sentence by the defence, the court could not refer the matter to the regional court, and that the magistrate would have been aware of the accused's previous convictions before being addressed in mitigation of sentence.

Held

Section 114 of the CPA envisaged a split procedure in which an accused person was convicted on a plea of guilty in the district court and thereafter committed for sentence in the regional court. The three grounds on which such a committal could be made were independent of each other and need not all be present, and need not all be viewed cumulatively. Once one of those grounds was satisfied the magistrate had to stop the proceedings and commit the accused for sentence by a regional court. The

jurisdictional competence of the regional court to hear a matter transferred from the magistrates' court was not ousted by the mitigating, or aggravating factors placed before the district magistrate. In any event, before a regional court imposed a sentence, all evidential material relevant to sentencing had to be placed before it. In so doing, the court was exercising its sentencing jurisdiction in the ordinary course. In the circumstances, the magistrate was wrong in refusing to proceed with the matter in the regional court. (See [8] – [9], [12] and [14].) The regional court was ordered to finalise the matter (see [15]).

BURT v ADDITIONAL MAGISTRATE AND OTHERS 2023 (1) SACR 527 (WCC)

Prosecution — Prosecutor — Conduct of — Senior public prosecutor threatening accused with imprisonment if he pleaded not guilty and having trial take place in absence of accused's Legal Aid attorney — Such conduct reprehensible and to be deprecated.

Trial — Presiding officer — Conduct of — Magistrate permitting trial to proceed without accused's legal representative who had been on record for some time — Magistrate ought to have interrogated accused's appearance without legal representative — Conduct highly objectionable and to be discouraged.

The applicant applied for the review of proceedings in a magistrates' court in which he was found guilty on a charge of theft, after his plea of guilty was accepted. The applicant had been represented by a Legal Aid attorney who made representations, to the senior prosecutor, which were unsuccessful. When the matter came up for trial, the prosecutor threatened the applicant that, if he pleaded not guilty, he would be sentenced to imprisonment. The applicant then decided to plead guilty and was convicted in the absence of his legal representative.

Held, that the actions of the senior prosecutor were a matter of grave concern, in that he dispensed with the applicant's right to legal representation when he caused the applicant to engage with the state witness in the absence of his legal representative. Furthermore, the acts of intimidation and threats of imprisonment demonstrated improper behaviour on his part. Such conduct was reprehensible and had to be deprecated, as it had no place in a country based on human dignity, equality and freedom. Prosecutors were trained professionals and should be relied upon not to

allow matters to proceed under s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977 when that was not appropriate. (See [8] – [11].)

Held, further, that it was highly concerning that the magistrate was satisfied with the prosecutor's submission that Legal Aid's mandate had been terminated, without confirming that with the accused or requiring the legal representative to withdraw as attorney of record in open court. The magistrate should have interrogated the applicant's appearance without his legal representative, as the record indicated that a Legal Aid representative had appeared on previous occasions and there was no indication that he had at any stage withdrawn. The sloppy and lackadaisical conduct of the magistrate in the matter was highly objectionable and had to be discouraged. (See [13].) The proceedings were tainted by gross irregularity calling for intervention by the court, and the conviction and sentence had to be set aside. (See [15] – [16].)

S v BERGMAN AND ANOTHER 2023 (1) SACR 533 (WCC)

Plea — Guilty — Questioning in terms of s 112(1)*(b)* of Criminal Procedure Act 51 of 1977 — Magistrate required to establish intention of accused and whether admitted that conduct unlawful — Where answers inducing sense of uncertainty, more questions to be asked or plea of not guilty noted — In casu, proceedings unfair and convictions and sentences set aside.

In two cases that came before the court on review the magistrates' court had convicted the accused on their pleas of guilty to, respectively, charges of robbery and driving whilst the level of alcohol in the accused's blood was in contravention of s 65(2)*(a)* of the National Road Traffic Act 93 of 1996. In the robbery case the questioning of the accused by the magistrate in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 did not address the issues of whether the accused intended to commit robbery, which meant that he intended to take the victim's property whilst using force, and with the intention to deprive the owner permanently of his property and make it his own. In the second matter the accused stated, in answer to the question posed by the magistrate whether he knew that it was unlawful to drive on a public road whilst under the influence of alcohol, that he thought that the law was that one could not drive whilst simultaneously drinking alcohol. Despite this, the magistrate continued to question the accused after allowing the prosecutor to address the court, and then convicted him on his plea of guilty.

Held, that the magistrate had a duty to establish the intention of the accused in both cases and whether they admitted that their conduct was unlawful. In circumstances where the answers induced a sense of uncertainty on the part of the presiding magistrate, more questions ought to have been asked, in order to cover all the elements of the offence, or a plea of not guilty ought to have been noted. (See [15] – [19].) The magistrates had not adhered to the constitutional requirement of fairness when considering the plea proceedings and the convictions and sentences were therefore set aside. (See [21] – [22].)

S v MOHLAHLANE AND OTHERS 2023 (1) SACR 540 (GP)

Fraud — Sentence — Appellants having diverted government funds intended to assist previously disadvantaged and emerging farmers, especially women and youth, into commercial farming sphere, but used for purchase of frivolities — Appellants having abused respective positions and system, and no redeeming qualities to be found in their conduct — Appeal against imposition of minimum sentence of 15 years' imprisonment dismissed.

The appellants appealed against their convictions for fraud, and the second and third appellants were also convicted of contravening the money-laundering provisions of the Prevention of Organised Crime Act 121 of 1998. They were sentenced as follows: the first appellant was sentenced to 7 years' imprisonment; the second appellant was sentenced to 15 years' imprisonment on the first count and 15 years' imprisonment on the second count, and 10 years of the sentence in respect of the second count were to be served with that of the first count; the third appellant was sentenced to 15 years' imprisonment on each count and six years of the sentence in respect of the second count were to be served concurrently with that of the first count; and the fourth appellant was sentenced to a fine of R50 000 conditionally suspended for five years. The offences had their genesis in 2005 in an empowerment project known as the AgriBEE Fund (the Fund), established by the National Department of Agriculture to bring previously disadvantaged and emerging farmers, especially women and the youth, into the commercial-farming sphere. The Fund received an initial injection of R100 million from Treasury, which was paid in two instalments. The Fund was managed by the Land Bank on behalf of the Department, and it allocated money in the form of grants, qualifying projects and persons. Two witnesses testified for the

state as s 204 witnesses, the first being the person to whom applications for funding were submitted for the empowerment project. The second witness was the chief executive officer (the CEO) of the Limpopo Youth Commission in the office of the Premier of Limpopo. The first appellant was appointed as acting CEO of the Land Bank and then as Deputy Director-General of the Department of Agriculture. The second appellant was a Member of Parliament and was appointed as chairperson of the Portfolio Committee on Agriculture in September 2007. It was therefore clear that the first and second appellants, and the first s 204 witness, were ineligible for grants in terms of the Manual in respect of the Fund. The third appellant was an attorney who attended meetings with the other accused and the witnesses, and the money received from the Fund went into the trust account of his firm (the fourth appellant) and was disbursed from it. The money was instead directed towards purchasing of paintings; two BMW vehicles belonging to the second appellant; vacation-ownership products; a stationery shop and other items amounting to some R6 million. The court upheld the convictions on appeal, and then turned to consider the sentences.

Held, that the convictions on counts 1 and 2 carried with them a prescribed minimum sentence of 15 years' imprisonment each, and the court a quo took into account the pre-sentencing reports of all the appellants, as well as their personal circumstances, the gravity of the crimes and the fact that this was a white-collar crime. All three appellants had abused their respective positions and abused the system. Money that was earmarked specifically for the upliftment of their communities and to provide employment were instead spent liberally on their own gratification and the purchase of (for the most part) frivolities, with the sole aim of their enjoyment and their lifestyles. Such conduct could not be countenanced. There was no redeeming quality to be found in their actions or conduct, and the fact that a farm was eventually purchased with part of the funds also did not assist them, as it had been done as a 'last gasp' to divert attention from their conduct, and the land was never really intended to benefit the community. The sentences imposed had to stand, and they were neither harsh nor startlingly inappropriate, given the particular facts of the case. The appeals were dismissed. (See [106] – [107].)

All South African Law Reports May 2023

Commissioner for the South African Revenue Service v Medtronic International Trading SARL [2023] 2 All SA 297 (SCA)

Tax – VAT – Default on payment of Value-Added Tax – Voluntary disclosure agreement – Application for remission of interest – Whether SARS could lawfully refuse to even consider request for remission and to thereafter take a decision in respect thereof – Refusal undermining constitutional right to administrative action that is lawful, reasonable and procedurally fair, warranting review under section 6(2)(g) read with sections 6(3) and 8(2) of the Promotion of Administrative Justice Act 3 of 2000.

The respondent ("Medtronic") applied to the appellant ("SARS") for relief under its Voluntary Disclosure Programme ("VDP") provided for in the Tax Administration Act 28 of 2011. The application was necessitated by fraud perpetrated by Medtronic's accountant who had submitted false Value-Added Tax returns to SARS. Under the VDP, a tax payer in default, may obtain relief from SARS, upon meeting the prescribed requirements and avoid prosecution and payment of penalties, where they make voluntary disclosure to SARS in order to purge their default. During negotiations preceding the conclusion of the parties' VDP agreement, Medtronic requested that the VDP unit waive the interest payable as a result of its default of payment of VAT to SARS, taking into account the circumstances in which the loss had occurred. SARS stated that it was not empowered to do that, and advised that Medtronic could either pay what SARS termed the post-relief amount in full, or withdraw from the VDP programme and follow the normal course in remedying its default. Medtronic opted to proceed under the VDP, an agreement was entered into, and Medtronic paid the post-relief amount in full, including interest resulting from the default. Subsequently, relying on section 39(7) of the Value Added Tax Act 89 of 1991, Medtronic, without reference to the VDP Unit, requested SARS to remit the interest levied on the capital tax representing the amount of default. SARS asserted that the provisions regarding remission of interest contained in section 39(7) were inapplicable to VDP agreements and the request was invalid. Medtronic was advised to lodge an objection instead.

Medtronic approached the High Court to review SARS' decision. The Court held that a request for remission of interest is not precluded in VDPs and that SARS had a statutory duty to consider and decide on such request. The impugned decisions were set aside, leading to the present appeal. The crux of SARS's case was that when the Tax Administration Act came into effect, it gave rise to a permanent VDP relief

statutory framework in respect of which interest was excluded. And that whilst section 39(7) of the Value Added Tax Act remained in force, it found no application in respect of interest on outstanding VAT dealt with in terms of Chapter 16, Part B, of the Tax Administration Act.

Held – It was agreed that the impugned decisions constituted administrative action reviewable under the Promotion of Administrative Justice Act 3 of 2000.

The dispute could be resolved on a narrow basis. The core issue was whether SARS could lawfully refuse to even consider the request for remission and to thereafter take a decision in respect thereof. The Promotion of Administrative Justice Act seeks to give effect to the right to administrative action that is lawful, reasonable and procedurally fair as contemplated in section 33 of the Constitution. SARS' refusal to consider and determine Medtronic's request undermined a fundamental constitutional right. Such conduct was inimical to the constitutional duty that SARS bore as an Organ of State. In this case, that duty was to at least consider the request and decide it on its merits. SARS' refusal to do so warranted a review under section 6(2)(g) read with sections 6(3) and 8(2) of the Promotion of Administrative Justice Act.

The appeal was dismissed with costs.

Shoprite Checkers (Pty) Ltd v Mafate [2023] 2 All SA 332 (SCA)

Civil Procedure – Claim for delictual damages – Special plea of prescription – Interpretation of sections 12 and 13 of the Prescription Act 68 of 1969 – Whether appointment of curator ad litem *for mentally incapacitated plaintiff results in delaying of prescription due to impediment contemplated in section 13 ceasing to prevail – Where patient still suffered from mental incapacity, impediment persists and prescription remains delayed.*

In February 2017, the respondent ("Mr Mafate") was appointed as *curator ad litem* of a person ("Ms Mkhwanazi") who sustained injury in October 2014 whilst working in the appellant's store, leaving her permanently mentally incapacitated. Upon his appointment, Mr Mafate instituted action for damages in his representative capacity, against the entity which he believed bore liability as owner of the store. When two special pleas to the claim were raised, Mr Mafate withdrew the action. He subsequently instituted fresh proceedings, in October 2018, against the appellant ("Shoprite Checkers"). Shoprite Checkers filed a special plea of prescription, asserting that the claim had prescribed.

Filing a replication to the plea, Mr Mafate averred that it was only upon the filing of the special pleas on 28 July 2017 that he became aware of the true identity of the debtor, with the result that prescription commenced to run only from 28 July 2017 - and was interrupted by the service of the summons on Shoprite Checkers as the true debtor.

The High Court dismissed the special plea of prescription leading to an appeal.

Held – Parties accepted that prescription commences to run as soon as the debt is due as provided in section 12(1) of the Prescription Act. A debt becomes due when it is immediately claimable or recoverable. In the ordinary course, that will coincide with the date upon which the debt arose, although that is not necessarily always the case. Section 3 of the Prescription Act 68 of 1969 makes provision for postponement of completion of prescription in certain circumstances. Where a person is under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4, the period of prescription would be completed within three years from the day on which the relevant impediment has ceased to exist. In terms of section 12(3), a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. And the creditor is, in turn, deemed to possess the requisite knowledge if he or she could have acquired it by exercising reasonable care. Section 13 provides that the completion of prescription is delayed in certain circumstances. The outcome of the appeal revolved around the proper interpretation of the above sections of the Act. The proper approach to statutory interpretation entails a simultaneous consideration of the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which it is directed.

Shoprite Checkers' case was that when Mr Mafate was appointed as *curator ad litem* on 1 February 2017, the impediment standing in the path of Ms Mkhwanazi instituting action ceased to exist, and Mr Mafate should have instituted action within one year from 1 February 2017. The Court held however, that as Ms Mkhwanazi still suffered from mental incapacity, her impediment persisted. The completion of the relevant period of prescription would not occur for as long as the impediment persisted.

The appeal was dismissed.

AK and others v Minister of Home Affairs and another [2023] 2 All SA 349 (WCC)

Immigration – Illegal foreigner – Possession of fraudulent visa leading to declaration as prohibited person – Refusal by Director-General of Department of Home Affairs to declare applicant not to be a prohibited person – Judicial review of refusal – Decision set aside where Director-General found to have failed to properly apply his mind, failed to properly exercise discretion conferred upon him by Immigration Act, and failed to consider the interests of applicant's minor children.

Having been recruited in Moscow, to be a dancer at a bar in Cape Town, the first applicant (the "applicant") arrived in South Africa in 2010 after obtaining a work permit at the South African Embassy in Moscow. The work permit was valid until July 2013. Prior to that date, applicant successfully applied for a study visa, which was valid until 30 July 2015. Before expiry of her study visa, the applicant employed the services of an immigration consultant ("Aksu") to assist her with obtaining another work visa. That visa was obtained in August 2015 and was valid until 5 July 2020. Applicant relied on that work visa to obtain employment.

In 2011, the applicant met a South African with whom she began cohabiting in 2014. Two children were born of their relationship. Before the birth of her second child, the applicant applied for a visitor's visa together with a request for work authorisation in terms of section 11(6) of the Immigration Act 13 of 2002. The application was rejected on the basis that she was in possession of a fraudulent visa. She was arrested on a charge of fraud. It was only then that she became aware that the work visa obtained on her behalf by Aksu, and issued by the Department, was obtained fraudulently. Being in possession of a fraudulent visa, the applicant was designated a "prohibited person". A permanent residence visa cannot be issued if the holder is a prohibited or undesirable person. A prohibited person is in South Africa illegally and the deportation of such a person is inevitable unless application is made to uplift the prohibition. The present application for review was directed at the decision of the second respondent (the "DG") in terms of section 29(2) refusing to declare the applicant not to be a prohibited person.

Held – The application impacted the interests of the applicant's minor children as the practical effect of the impugned decision was that the applicant would either have to leave her minor children behind in South Africa or depart with them to Russia which was at war with Ukraine. Given the potential impact that the decision might have on

the minor children, three legal representatives were appointed on a *pro bono* basis as *amici curiae* to assist the court by making submissions in relation to the children.

In rejecting the applicant's explanation that she was a victim of the fraud and was not complicity in the obtaining of the fraudulent visa, the DG resented no evidence to controvert the applicant's testimony. A mere suspicion, even if genuinely held, cannot be elevated to a finding of fact without more. The DG had to consider all the facts placed before him by way of representations when exercising his discretion under section 29(2) of the Immigration Act. Whether the applicant knowingly falsified her visa or was innocent was a material factor. There was no indication that the DG or his officials attempted to investigate the applicant's explanation that Aksu had perpetrated the fraud and that the officials of the Department might have been involved. The DG therefore failed to properly exercise the discretion conferred upon him by the Immigration Act. He also failed to consider the interests of the minor children, separately and apart from that of the applicant. Section 28 of the Constitution provides that every child has the right to family or parental care and the best interest of the child is of "paramount importance" in every matter concerning children. The DG ignored the impact on the children should the applicant be forced to return to Russia, with or without them.

Concluding that the DG had failed to properly apply his mind, the court set aside his decision and declared applicant not to be a prohibited person.

CNN v NN [2023] 2 All SA 365 (GJ)

Family Law and Persons – Divorce – Divorce order incorporating settlement agreement providing for payment of half of pension interest to non-member spouse – Application to vary divorce order so as allow applicant to claim pension benefits that had accrued to non-member spouse – Pension benefits that accrued before divorce was ordered cannot be claimed because section 7(8) of the Divorce Act 70 of 1979 only deals with a benefit that accrues to the member spouse due to divorce – Where variation sought would not be in keeping with section 7(8) and would not be enforceable, it could not be granted.

In 2022, the court granted a decree of divorce terminating the parties' marriage and incorporating their signed settlement agreement in its order. About two months after being served with the divorce summons in 2021, the respondent resigned from his employment and exited his retirement fund. Consequently, at the time of granting of the divorce order, he was not a member of a retirement fund and did not have a pension interest from which the applicant could be allocated a portion. Upon granting

of the divorce order, the applicant attempted to claim payment from the fund of what she believed was due to her, but was advised that the respondent's pension benefit had already accrued to him and that he was no longer a member of the fund. The fund informed the applicant that the divorce order fell short of the legislative requirements and could not be enforced. Applicant was advised that she needed to provide the fund with a divorce order directing the fund to pay a pension benefit as opposed to a pension interest. She therefore brought an application to amend the divorce order incorporating the settlement agreement by replacing the phrase "pension interest" with "accrued pension benefit".

The question before the court was whether the court could vary a divorce settlement agreement by replacing the statutorily recognised and defined phrase "pension interest'' with the phrase "accrued pension benefit" which is not defined in the Divorce Act 70 of 1979. It had to be determined whether such an order could be enforced.

Held – Where there is a justifiable need to do so, any litigant can approach the court that granted an order to vary its own order. Rule 42(1)(b) of the Uniform Rules of Court provides the court with a discretion either on its own accord or on application by an affected party to rescind or vary any order or judgment which is ambiguous, or where that judgment has a patent error or omission. The court can only rescind or vary to the extent of such ambiguity, error or omission.

A settlement agreement signed by divorcing parties that prescribes that the pension fund in which one of the spouses is an active member should pay to the non-member spouse a portion of the member's pension interest will be enforceable should the agreement be made an order of court. In this case, neither the Court nor the applicant was aware at the time the divorce order was granted that the respondent had already exited the fund. Even though the applicant only discovered that the respondent had resigned after the order was granted, at the time the order was granted the respondent did not have a pension interest as defined in section 1 of the Divorce Act. The Court was led to grant an unenforceable order, which could not be made enforceable even if the order were to be varied. The applicant could not claim pension benefits that accrued before the divorce was ordered because section 7(8) of the Divorce Act only deals with a benefit that accrues to the member spouse due to divorce. As such, the variation sought by the applicant would fly in the face of section 7(8) and would not be

enforceable. Non-member spouses' access to their member spouse's benefits is dependent, first on divorce, and secondly, on whether member spouses are active in their funds, even though those benefits are still held by such funds.

The application was dismissed.

Ericsson South Africa (Pty) Ltd v City of Johannesburg Metropolitan Municipality and others [2023] 2 All SA 378 (GJ)

Constitutional and Administrative Law – Access to information – Refusal of access to forensic report on basis of non-joinder of third party authors of report – Where no relief, direct or indirect was sought against report authors, joinder not necessary.

The appellant ("Ericsson") sought an order compelling the respondents to provide copies of a draft and final forensic report on the City of Johannesburg's Broadband Network Project. Ericsson had filed a request with the City for the relevant information under the Promotion of Access to Information Act 2 of 2000, but the request was refused.

By the time the present application was brought, the City had provided four different grounds for its refusal to provide Ericsson with a copy of the report and related information. Then, in its answering affidavit the City eschewed any reliance on its previous grounds for refusal. Instead, it opposed the application on the basis that it was exempt from providing Ericsson with the requested information under sections 37, 39, 40, 44 and 46 of the Act. Ericsson took issue with the respondents' reliance on new grounds of refusal in its answering affidavit. It submitted that it was not open to them to do so and that they should be bound by the grounds advanced in response to the request and internal appeal.

The application was dismissed on the basis of non-joinder of the entity ("Nexus") which compiled the forensic report.

Held – Section 82 of the Act deals with the court's powers when dealing with an application under section 78.

The Act gives content and effect to the constitutional right of access to information contained in section 32 of the Constitution. Section 11(1) of the Act provides that a requester must be given access to a record of a public body if he complies with all the procedural requirements in the Act relating to a request for access to that record; and

access to that record is not refused in terms of any ground for refusal contemplated in the relevant provisions. When access is sought to information in the possession of the State, it must be readily availed. Refusal constitutes a limitation of the right of access to information. As such, a case must be made out that the refusal of access to the requested records is justified. Chapter 4 sets out a range of exemptions. Section 81 of the Act expressly places the burden on the State to prove that a refusal of a request for information was justified. The evidentiary burden must be discharged on a balance of probabilities. The State is required to put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed. The court *a quo* erred in holding that Nexus had a direct and substantial interest in the application. No relief, direct or indirect was sought against it. The Court below thus erred in upholding the non-joinder point. The Court also erred in ruling that the respondents were not permitted to advance new grounds in their answering affidavit. The Constitutional Court had already decided the contrary in another matter.

The respondents failed to justify their refusal of Ericsson's request. The court directed that the request be complied with, subject to measures being taken to protect third parties involved.

EW v VH (Women's Legal Centre Trust as *amicus curiae*) [2023] 2 All SA 404 (WCC)

Family Law and Persons – Duties of support in permanent opposite-sex life-partnership – Right of life partners to claim maintenance from each other following termination of partnership – Alleged discrimination on basis of marital status and gender constituting unequal protection before the law – Claim for development of common law – Where remedy already existing, development of common law not necessary.

The eight- to nine-year-long relationship between the parties in this matter ended in April 2022, leading to the applicant instituting an action seeking a declaration that they had been in a permanent life-partnership. She also sought an order of maintenance in her favour. The respondent disputed the allegation that the relationship was a permanent life-partnership in terms of which they had undertaken reciprocal duties of support towards each other. While the action remained pending, the applicant launched the present urgent application. She ultimately sought development of the common law to recognise the existence of a duty of support between partners in unmarried opposite-sex permanent life-partnerships, entitling such parties to claim

maintenance from one another. The specific relief sought was cash maintenance of R56 000 per month with effect from 1 May 2022 and payment of applicant's medical and motor vehicle expenses. She also sought an order, as part of her maintenance claim, that the respondent pay an amount of R1 million as an initial contribution towards her costs in the pending action, to be paid within 10 calendar days of the granting of an order to that effect, as well as the costs of the application itself.

Held – The three central issues were whether the applicant was entitled to final relief (development of the common law) to ground a claim for interim maintenance when substantially the same final relief was sought in the pending action between the parties; whether development of the common law was required and appropriate; and whether the applicant should succeed in her claim for interim maintenance and a contribution towards her costs. The first issue was not taken any further as the respondent and the *amicus* appeared to be tolerant of the stance adopted by applicant's Counsel despite the pending action.

In support of her prayer for development of the common law, the applicant stated that the lack of legal recourse for life partners to claim maintenance from one another following the termination of their partnership was constitutionally unacceptable since it discriminated on the basis of marital status and gender and constituted unequal protection before the law. Contrary to her assertion that nothing was being done to protect individuals in her position, there has been clear recognition by the Legislature of the need to protect vulnerable life partners upon termination of their partnerships. The process of working towards legislative reform was assumed to be slow as the issue was complex and policy-laden. In any event, in her founding affidavit, the applicant herself, in referring to a case which had already developed the common law, showed that there was no need for the development she requested. The applicant thus already has a common law remedy and her entitlement or otherwise to maintenance rested squarely on that remedy.

The claim for interim maintenance and a contribution towards costs was based on a finding in applicant's favour for final declaratory relief. Given the Court's conclusions on that issue that was the end of the matter, and the application was dismissed.

In a dissenting judgment, it was held that where constitutional issues are raised in a matter, application of the law should be more generously approached. The issue of

prejudice to the applicant was emphasised and the dissenting judgment favoured provision of a limited right in specified circumstances to allow for the applicant and those in similar situations to claim interim financial relief from their permanent life partners.

JK Structures CC v City of Cape Town and others [2023] 2 All SA 431 (WCC)

Constitutional and Administrative Law – Procurement by Organ of State – Rejection of tender bid as non-compliant based on grading of contractor – Interpretation of Regulations promulgated under Construction Industry Development Board Act 38 of 2000 – Stipulation of grading higher than was necessary to undertake contemplated works resulting in unfairness and requiring setting aside of decision to disqualify contractor and decision to award tender.

A tender submitted by the applicant for appointment to a panel of contractors to be used by the City of Cape Town for the replacement of sewer pipes was rejected by the City. In framing the tender invitation, the City estimated its total expenditure as R180 million. The invitation to tender issued by the City stipulated that tenderers were required to be contractors registered in terms of the Construction Industry Development Board Act 38 of 2000, with a minimum grading of 7CE. Contractors with a 7CE grading were considered qualified to undertake a civil engineering works contract with a tender value of up to R60 million. In limiting the tender to contractors with such grading, the City purported to be acting in terms of regulation 25(1) and 25(1B) of the Construction Industry Development Regulations, 2004 (the "regulations"). The applicant's tender was not evaluated by the bid evaluation committee and was rejected as non-compliant because its registered grading was lower than 7CE. Its 6CE designation was supplemented by a "PE" designation denoting registration as "a potentially emerging enterprise". Notwithstanding the stipulated 7CE grading requirement, the applicant was under the impression that its tender would nevertheless qualify for consideration by virtue of regulation 25(8) which catered for potentially emerging enterprises being considered, alternatively, in terms of regulation 25(7A) which allowed an organ of State to evaluate and award a tender offer from a tenderer who was registered but who tendered outside of its tender value range. The applicant had in fact previously been contracted to render the same type of construction work which had a required grading of 4CE. That was the original grading attached to the current tender by the bid specification committee in line with the applicable Guidelines. The requirement was amended to 7CE only after a directive

by the municipal manager was applied. That directive cautioned against following the Guidelines on the ground that it undermined the relevant Regulations.

The applicant sought to have the relevant decisions by the City declared unlawful and set aside.

Held – The City Manager's criticism of the relevant provisions of the Guidelines was incorrect and his construction of the applicable Regulations, the import of which was centrally in dispute in the current matter, was at odds with the principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA). The principles of interpretation espoused in that case highlighted the particular importance when construing written language, of being mindful of context and apparent purpose. The Regulations fell to be construed, as far their language allowed, consistently with the governing Act, as their evident purpose was to facilitate the implementation of the statute. The City Manager's interpretation would exclude any contractor from tendering for any project that would potentially lead to construction works contracts each worth no more than R6 million being awarded to it during a three-year period unless the contractor had been graded as able to execute construction works contracts up to ten times that value. Such interpretation would imply that the City could employ only relatively large and well-resourced contractors to undertake works projects well within the established capability of much smaller contractors.

The City's decisions in the tender process in issue in the current case amounted to administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000. The stipulation of a 7CE grading as the minimum category status of potential contractors, when the regulations indicated that a 4CE grading would suffice, resulted in unfairness to the applicant which held the legally requisite grading to execute the contracts but was excluded by the bid specification from tendering. It fundamentally tainted the procurement process, including the legality of the award to the two successful tenderers. The applicant was consequently entitled to the review of the City's decision. Insofar as the review application might have been brought out of time, the court was satisfied that condonation should be granted if deemed necessary.

Kgetlengrivier Concerned Citizens and another v Kgetlengrivier Local Municipality and related matters [2023] 2 All SA 452 (NWM)

Civil Procedure – Contempt of court – Nature of order in respect of which non-compliance was alleged – When a rule nisi is coupled with an interim order, once the return day of a rule nisi coupled with an interim order passes without being extended, both the rule nisi and the interim order lapse – Application must be made for revival of rule nisi for allegation of contempt of court to be adjudicated.

Local Government – Duties of municipality – Service delivery – Breach of constitutional obligations – Dismissal of contempt of court application confirmed where underlying interim order had lapsed.

At the heart of the present appeal were the issues of the right to water and a healthy environment free from the harmful effects of sewerage spills, and the breach by the Kgetlengrivier Municipality and its municipal manager of duties in that regard. The first appellant (the "KCC"), acting in the interests of the broader community falling under the municipal jurisdiction of the municipality, approached the court to assert rights to water and a clean unpolluted environment.

On 18 December 2020, an order was issued declaring the municipality and municipal manager in breach of their constitutional obligations, and granting consequential relief. A subsequent application to hold the municipality in contempt was dismissed. Central to the appeal by the KCC, was the interpretation of the 18 December order as amended and amplified on 12 January 2021 (the "Gura J orders").

Held – The right to potable water is a basic human right entrenched in section 27(1)(b) read with section 27(2) of the Constitution. The right to a healthy environment is inextricably linked to the right to basic sanitation services.

While striving to deal decisively with those who do not honour their constitutional mandate in serving the people, the court must ensure that due process which accords with the letter of the law is followed.

In examining the nature and implication of the Gura J orders, the court referred to the principles applicable to the interpretation of a court order. It was also considered prudent to consider the authorities relevant to rules *nisi* and interim orders as background to the Gura J orders. An interim order or interim interdict has specific legal consequences which may extend beyond a specified date as in the case of a return date for a rule *nisi*. When a rule *nisi* is coupled with an interim order, the order will have interim effect until the return day, when same is either confirmed or discharged.

Once the return day of a rule *nisi* coupled with an interim order passes without being extended, both the rule *nisi* and the interim order lapses/expires. Thus, KCC had to apply for the revival of the rule *nisi* which lapsed on 12 January 2021, if it wanted to have the allegation of contempt of court adjudicated. On a purely procedural basis, the court *a quo* was not vested with any powers to consider the contempt of court application and the dismissal of the application was justified. In addition thereto, the Court explained that the relief sought by the KCC on motion proceedings and granted an unopposed basis by Gura J on 18 December 2020 in terms of which a sanction was imposed for the common cause breach of the constitutional duties of the municipal manager, was not competent. The order granted impacted on the constitutional right to liberty of the municipal manager in circumstances where he was "convicted and sentenced" without trial. The appeal by the KCC in respect of the relevant contempt application accordingly stood to be dismissed.

All the appeals before the court were dismissed.

Khoza v Minister of Home Affairs and another [2023] 2 All SA 489 (GP)

Family Law and Persons – Application to be declared a citizen – South African Citizenship Act 88 of 1995 – Section 2(2) of the Citizenship Act prescribing requirements that must be met before citizenship can be conferred on a person.

Family Law and Persons – Late registration of birth – Section 9 of the Birth and Deaths Registration Act 51 of 1992 requiring notice of birth of any child born alive in South Africa to be given within 30 days after birth – Section 9(3A) providing that where notice of birth is given after expiration of 30 days from date of birth, the birth shall not be registered unless notice of the birth complies with the prescribed requirements for a late registration of birth.

The applicant stated that he was born in South Africa on 17 April 1997 and had never left the country. He currently resided on a game farm in Limpopo where he was enrolled in a learnership for game rangers and general workers. His mother, who was an illegal foreigner in South Africa, died before registering his birth. The applicant was placed in the care of a youth centre. When he was 16 years old, the applicant applied at his local Home Affairs office for birth registration and an identity document. The Control Immigration Officer issued a report stating that he could not dispute that the applicant was born in South Africa nor that his parents did not register him at birth. As the applicant's mother was from Eswatini, it was requested that the relevant officials allow the applicant to enter Eswatini to register his birth and obtain a passport. However, Eswatini officials refused such entry, claiming that applicant's mother was

not from Eswatini. Applicant was 18 years old by the time the Department of Home Affairs announced that it would not register his birth as he had no claim to South African citizenship. Consequently, he brought an application for an order directing the first respondent to register his birth in terms of the Birth and Deaths Registration Act 51 of 1992; and declaring him to be a South African citizen by birth in terms of section 2(2) of the South African Citizenship Act 88 of 1995. In support of his application, applicant stated that as a result of the Department's decision he could not study, work legally, get married, get a driver's licence, open a bank account, or access any formal social assistance. He averred that he had no citizenship of any country, including Eswatini, and accordingly he could not be deported to any country.

The respondents disputed virtually every aspect of the applicant's founding affidavit.

Held – The applicable framework for determining disputes of facts recognises that bare or bald denials are insufficient to constitute a proper dispute. Addressing each of the aspects disputed by the respondents, the Court rejected the numerous denials of facts alleged by the applicant, and found that the alleged disputes were far-fetched and not genuine. The applicant's evidence was thus substantially unchallenged and the Department's disputes were dismissed on the papers.

Section 9 of the Birth and Deaths Registration Act deals with notices of births and applies to "any child born alive" in South Africa, regardless of the parent's nationality. In the case of any child born alive in South Africa notice of his birth should be given within 30 days after birth. Section 9(3A) provides that where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered unless the notice of the birth complies with the prescribed requirements for a late registration of birth. The respondents argued that the applicant's application for the late registration of his birth did not meet the mandatory requirements. However, the court, noting the impossibility of applicant furnishing all the documents required, was satisfied that he had substantially complied with the requirements in question. His application for the late registration of his birth succeeded.

Section 2(2) of the Citizenship Act has three requirements that must be met before citizenship can be conferred on a person. The applicant must not fit the requirements of section 2(1) of the Citizenship Act; must have no ties to other countries; and his birth must be registered in terms of the Birth and Deaths Registration Act. The

requirements were found to have been met and it was ordered that citizenship be conferred upon the applicant. The court also found that the applicant fulfilled the requirements for citizenship in terms of section 4(3) of the Citizenship Act and that citizenship should be conferred upon him in the alternative to section 2(2) of the Citizenship Act.

The application succeeded and a punitive costs order was made against the respondents for the handling of the applicant's case.

Mgenge v Mokoena and another [2023] 2 All SA 513 (GJ)

Family Law and Persons – Marriage – Customary law marriage – Validity of marriage certificate – Section 3 of the Recognition of Customary Marriages Act 120 of 1998 prescribes requirements for the conclusion of a valid customary marriage – Marriage certificate standing as prima facie proof of marriage, and where applicant's contentions did not suffice to cast any doubt on the validity of the marriage certificate, application could not succeed.

The applicant sought an order cancelling the marriage certificate recording that her son (the "deceased") and the first respondent had entered into a customary marriage. She stated that as mother of the deceased, she had not consented to his marriage, and was unaware of the existence thereof. She averred that in terms of customary law, she, as the mother of the deceased, was required to have participated in any pre-marriage negotiations between the families of the first respondent and the deceased. In summary, her complaint was that given the absence of her consent to the union, the certificate incorrectly recorded that the deceased and the first respondent were married in accordance with customary law.

Held – The requirements for the conclusion of a valid customary marriage are contained in section 3 of the Recognition of Customary Marriages Act 120 of 1998. The prospective spouses must both be older than 18; must both consent to be married to each other under customary law; and the marriage must be negotiated and entered into (or celebrated) in accordance with customary law. If either of the intended spouses is a minor, his or her parents must both consent to the marriage. The intended spouses must not be prohibited from entering into the marriage because of a proscribed relationship by blood or affinity, as determined by customary law.

In countering the applicant's assertions that no marriage had come about, the first respondent referred to the customary negotiations between the two families and produced a copy of the resultant *lobola* agreement. The applicant's contention that

the *lobola* document did not indicate the successful negotiation of a customary marriage was negated both by the wording of the agreement and the part-payment of the agreed *lobola*.

Turning to the issue of whether the marriage was celebrated in accordance with customary law, the Court addressed the matter of the integration of the bride into the groom's family (the "handing over" of the bride). Instead of deciding the issue on the basis of which particular customary traditions applied, the court decided the question of whether the requirement of handing over was met on the basis of more general considerations.

A marriage certificate stands as *prima facie* proof of the marriage. The applicant's contentions did not suffice to cast any doubt on the validity of the marriage certificate. The assertion that the customary requirement of the integration of the first respondent into the deceased's family had not been satisfied was held not to accord with either the authorities or the evidence and was rejected. The Court confirmed that the marriage certificate correctly recognised the existence of a marriage between the first respondent and the deceased during the lifetime of the deceased.

The application was dismissed with costs.

Sedwin Investments (Pty) Ltd v Datnow and a related matter [2023] 2 All SA 525 (ECP)

Insolvency – Application for sequestration – Proof of insolvency – Applicant bears onus of proving an act of insolvency, and to establish factual insolvency, evidence must be adduced of debtor's liabilities and the market value of his assets – Applicant also bearing onus of establishing that sequestration would be to the advantage of creditors – Failure to adduce evidence to discharge onus of proof resulting in sequestration being refused.

Two applications for sequestration were brought by the applicant ("Sedwin") after warrants of execution against the respondents in each application rendered *nulla bona* returns of service. A provisional sequestration order was sought in respect of the respondent (Nathan) in one of the applications, while a final order was sought against the respondent (Maria) in the other. In seeking the provisional sequestration order against Nathan, Sedwin relied on three grounds, namely that he had committed an act of insolvency as provided for in section 8(b) of the Insolvency Act 24 of 1936; that he was factually insolvent as contemplated in sections 9(1) and 10 of the Act; and that it would be to the advantage of creditors if Nathan's estate was sequestrated. Nathan

disputed the validity of the warrant and the *nulla bona* return. He contended that Sedwin had failed to prove an act of insolvency as contemplated in section 8(b); that the *nulla bona* return of service was defective; that actual insolvency was not evident on the papers; and that Sedwin had not alleged that it was a registered credit provider with the National Credit Regulator and it had thus contravened section 40(1) of the National Credit Act 34 of 2005.

Held – In exercising its discretion as to whether or not to grant a provisional sequestration order, the court may refuse to sequestrate where, in light of the evidence adduced by the debtor in opposition to the application, it is satisfied that, notwithstanding the act of insolvency, the debtor is in fact solvent.

Dealing first with the case against Nathan, the court upheld Nathan's contentions that the warrant was not properly executed. A significant omission from the *nulla bona* returns in both applications was the amount claimed, vitiating their validity. The returns also reflected a wrong or irrelevant invocation of the law. Sedwin bore the onus of proving an act of insolvency. To establish factual insolvency, it had to put up evidence of the debtor's liabilities and the market value of his assets. Actual insolvency means that the debtor's liabilities actually exceed the value of his assets, Sedwin failed to address Nathan's assets, and failed to prove that he was insolvent. As sequestrating creditor, Sedwin also bore the onus of establishing that the sequestration would be to the advantage of creditors. In order for there to be an advantage to creditors, a pecuniary benefit in the form of a dividend, which is not immaterial, must be anticipated. There must be a reasonable prospect of a not negligible dividend, not necessarily a likelihood but a prospect which is not too remote. Sedwin placed no facts before the court to discharge that onus. Furthermore, the Master's certificate was not before court when the matter was heard and thus there was non-compliance with the provisions of section 9(3) of the Act. In the premises, the application for Nathan's sequestration was dismissed.

In the case against Maria, a provisional sequestration order had already been obtained. The invalidity of the *nulla bona* return as referred to above meant that Sedwin had failed to prove that Maria committed an act of insolvency, as envisaged in section 8(b) of the Act. It was not shown that Maria was insolvent or that her sequestration would be to the advantage of creditors. The provisional order of sequestration was discharged and the application itself dismissed with costs.

Supaluck Investments (Pty) Ltd v Valuations Appeals Board: City of Johannesburg and another [2023] 2 All SA 546 (GJ)

Constitutional and Administrative Law – Judicial review – Delay – Section 7(1) of Promotion of Administrative Justice Act 3 of 2000 provides that 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 applicant became aware of the decision and reasons therefor – Where delay was unreasonable and prospects of success on merits were non-existent, it was not in the interests of justice to condone such delay.

The applicant sought the review of a decision by the Valuation Appeal Board for the City of Johannesburg to increase the property value of applicant's property. The issue of condonation was central to the matter as the applicant was given the decision and reasons on 13 July 2016 and the application to review was only served on the second respondent on 19 October 2019. That was three years and two months since the applicant became aware of the reasons of the decision.

Held – The first question was whether in the circumstances of this case, and on the facts and strength of the explanation advanced by the applicant, the delay in prosecuting the review application was unreasonable. If found to be so, the second question was whether the delay should be overlooked and condoned. If the answers were in the negative, it would be the end of the application, and it would be unnecessary to deal with the merits.

An application for judicial review must be instituted without unreasonable delay and within 180-days after the applicant became aware of the decision and reasons of the decision.

The first question for determination was whether in the circumstances of this case, and on the facts and strength of the explanation of the applicant, the delay in prosecuting the review application was unreasonable; and if so whether the delay should be overlooked and be condoned.

Section 7(1) of Promotion of Administrative Justice Act 3 of 2000 provides that 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 as contemplated in subsection

(2)(a) have been concluded; or "where no such remedies exist, 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". To cater for litigants who missed the 180-day period as contemplated in section 7(1), section 9(1) provides for the extension of this period by agreement between the parties and where there is no agreement by application to court. Section 9(2) provides that such an application may be granted where the interests of justice so require.

The delay in this case was held to be unreasonable, and the prospects of success on merits were non-existent. It was not in the interests of justice to condone the delay, and the application was dismissed.

Z obo Plaintiff v Road Accident Fund [2023] 2 All SA 563 (FB)

Personal Injury/Delict – Claim for damages arising from injury in motor vehicle accident – Loss of earnings and general damages – Court's assessment of evidence in support of claims taking into account expert evidence and awards made in comparative cases – Actuarial calculation applying relevant contingencies accepted.

When the plaintiff was five years old, she suffered injury after being hit by a vehicle. The defendant only accepted liability and tendered an undertaking for future medical treatment on the day of trial. As the plaintiff was *doli incapax* at the time of the accident, she was unable to receive treatment for the following seven years of her life, and her chances of rehabilitating were negatively affected by the defendant's failure. In the action against the defendant, plaintiff claimed damages representing past medical and hospital expenses, future loss of income and general damages. The parties agreed that the expert reports of the plaintiff could be accepted as evidence and indicated that they would argue contingencies only.

Held – The evaluation of the probabilities in respect of expert evidence has been described in case authority. Ultimately, acceptance of a plaintiff's case depends on the probative strength of plaintiff's case, and whether it is sufficient to cast an evidential burden on the defendant to present evidence.

The defendant tendered an undertaking in terms of section 17(4)(A) of the Road Accident Fund 56 of 1996 for future medical, hospital and related expenses relating to

goods, services and accommodation required. In assessing the plaintiff's injuries and the impact on her future prospects, the court found that taking into account the family history, the current school system, and plaintiff's intellectual ability, she would have been able to complete at least grade twelve pre-accident, and would have been able to find employment in the open labour market. Post-accident, her performance and learning was negatively affected by the accident. She required various forms of therapy interventions failing which her career options would be limited. In any event, her future income earning prospects were severely circumscribed. The actuarial calculations applied contingencies of 5% on the past loss of income and 20% on the future pre-morbid income. Given the uncertainties of the plaintiff's income, the contingencies applied by the actuary were accepted, bringing the loss off earnings to R1 988 373.

In assessing general damages, the court noted that the plaintiff had suffered serious and debilitating physical and cognitive deficits. Having regard to comparable cases, and considering all the injuries, the consequences the plaintiff would suffer in future as well as the delay in receiving treatment and unnecessary suffering the plaintiff had to endure for seven years because the defendant did not issue an undertaking when the claim was lodged, the Court awarded R1 600 000 as general damages.

<u>END-FOR-NOW</u>