LEGAL NOTES VOL 4/2023

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SOUTH AFRICAN LAW REPORTS APRIL 2024

AK v MINISTER OF POLICE 2023 (2) SA 321 (CC)

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For 15 hours, from mid-afternoon, 9 December 2010 till early the next morning, the applicant was assaulted, held captive and repeatedly raped in a bushy area among

[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!**

the sand dunes near Kings Beach, Gqeberha. The area was inhabited by several homeless vagrants referred to as the 'bush dwellers'. At around 23h30 the police found the applicant's car in the Kings Beach parking area, which was covered by CCTV cameras. Some 75 minutes later the search and rescue section of the K9 unit arrived and began a foot search of the surrounding area, but failed to find the applicant. At 01h45 a police helicopter arrived, but its 20-minute search also proved fruitless. Early the following morning the applicant managed to escape. It later emerged that she had been held at a spot about 700 metres from where her car was found and that both the search-and-rescue officer and the helicopter had come close to finding her. The perpetrators were never found.

In the applicant's view, the quality of the search and investigation was substandard compared to what the Constitution required of the police. In November 2013 she sued the respondent in delict out of the Eastern Cape High Court for the failure of the police to conduct an effective search and investigation, contending that this had extended her ordeal and compounded her psychological trauma. The respondent argued, inter alia, that the applicant failed to show factual causation because the trauma resulting from rape was indivisible and the police could thus not be said to have caused part of it. The respondent also argued that judgment in favour of the applicant would have a chilling effect on police performance because any mistake during a search or investigation, however minute, would result in liability. The High Court, however, agreed with the applicant, remarking that a proper search would have spared her more than four hours of suffering and that this, coupled with the subsequent failure by the police to conduct a proper investigation, had exacerbated her suffering. The High Court consequently upheld the applicant's claim, ruling that the respondent was liable for 40% of her proved damages.

The respondent appealed to the Supreme Court of Appeal (SCA), which allowed the appeal, ruling that no quantifiable psychiatric loss could be attributed to the applicant not having been found earlier. The SCA found that the police had mobilised all available resources and taken all reasonably practicable and appropriate steps for an effective search, and that there had been no negligence in the search or subsequent investigation. In addition, the imposition of liability on the police would be unreasonable and have a chilling effect on future police investigations. According to the SCA, the High Court's findings on negligence, wrongfulness and causation were, moreover, not supported by the evidence. As to costs, the SCA held that since the applicant had not

raised a constitutional issue against the state, the *Biowatch* principle did not apply and that she was thus liable for costs.*

The applicant sought leave to appeal to the Constitutional Court (CC), where she argued, among other things, that, by finding that causation was not established because the harm she suffered due to police negligence could not be quantified, the SCA had, by requiring mathematical certainty, applied an incorrect test. One of the amici † argued on the issue of wrongfulness that the common law had to be developed to impose a heightened duty of care on the police in the investigation of gender-based-violence cases.

Held per Tlaletsi AJ for the majority (with Khampepe J, Madlanga J, Majiedt J, Mhlantla J and Theron J concurring)

As to the jurisdiction of the CC, the respondent's argument, that the case was not about gender-based violence and did not involve a constitutional issue, but was a normal delictual action, ignored the novel legal question whether a negligently conducted police search and investigation resulting in harm to a person could be wrongful and give rise to delictual liability. This question bore directly on ss 12 and 7(2) of the Constitution and required the court to consider whether the police's s 205(3) obligations to protect and combat and investigate crime should translate into private-law duties. That question certainly raised a constitutional issue, giving the court jurisdiction. (See [59] – [60].)

The enquiry would be centred on whether the police acted reasonably in the light of their obligation to protect and fulfil the rights of a woman like the applicant, to dignity, equality and freedom and security of the person, including the right to be free from violence from both public and private sources (see [71]).

As to *the search*: The initial failure of the police to conduct even a basic foot search before the arrival of the search-and-rescue officer and the K9 unit was clearly negligent. The search-and-rescue officer should have either included the further area in his search or should specifically have instructed the helicopter to do so. The SCA was therefore wrong to hold that the search was not negligent because the police had mobilised all the resources available to them. (See [74], [77] – [78] and [81].)

As to *the investigation*: It was also negligent because the police failed to pursue reasonable leads such as immediately viewing the CCTV footage, investigating the bush dwellers, or even obtaining their particulars. The investigation was not deficient because the perpetrators were never caught, but because the methodology was

flawed. The police failed to investigate diligently and with the skill required by the Constitution. (See [82] – [86].)

As to *international-law norms* for effective search and investigation and their application in South Africa: The duty to prevent rape and other forms of gender-based violence was a norm of international law, and South Africa was a party to international treaties that protected the rights of women. European Court of Human Rights (ECHR) judgments had imposed a high standard of professional conduct on the police, requiring effective investigation capable of establishing the cause of the victim's injuries and the identification of those responsible. All reasonable steps to secure evidence had to be taken. This was a far more exacting approach than the one taken by the SCA in the present matter. The stricter ECHR standard was more consistent with the positive obligation to combat gender-based violence established in *Carmichele*. ‡ Therefore, the police were under a duty to act promptly and expeditiously and to take all reasonable measures available in the circumstances. It was not sufficient to mobilise the resources at hand; they had to deploy those resources diligently and effectively. They had to act with haste, and take appropriate steps to secure the available evidence, including eyewitness accounts, potential leads and suspects, and subject it to forensic analysis. They should never act in a cavalier manner or display indifference to the plight of women in the position of the applicant. (See [87] – [95].)

As to *causation*: The negligent omissions of the police were a *factual cause* of the harm suffered by the applicant. Causation had to be established on a common-sense weighing-up of the evidence; *mathematical certainty* was not required. The respondent's argument against factual causation based on the indivisibility of the applicant's trauma was untenable: it would make it virtually impossible for survivors of gender-based violence to hold the police liable for secondary trauma caused by their omissions. Since the present omissions meant that the applicant's trauma was significantly prolonged, the SCA had misdirected itself when it found that no quantifiable psychiatric loss could be specially attributed to whether she could have been found earlier. *Legal causation* was established by the fact that the omissions evoked moral indignation and were also sufficiently closely connected to the harm. The High Court's decision to hold the Minister liable for 40% of the damages was therefore unassailable. (See [100] – [114].)

As to *wrongfulness* and the alleged *chilling effect* of the High Court decision: In fact, *not* imposing liability would have a chilling effect on the ability of victims of gender-based violence to hold the police liable for secondary victimisation resulting from substandard work. The chilling-effect argument was also at odds with the state's *norm of accountability*, which imposed on it a positive obligation to uphold fundamental rights. Nor would the imposition of liability *open the floodgates*: any potential applicant would still have to satisfy the elements of delictual liability. The police omissions were serious and significant, and should be actionable. Moreover, the fact that they had occurred in the context of gender-based violence tipped the scales in favour of imposing delictual liability. This should have formed part of the SCA's public-policy analysis in the wrongfulness test. It would, moreover, improve police performance and public confidence in them if they were held to account for their below-par searches and investigations. For all these reasons, wrongfulness was established. (See [115] – [123].)

As to the suggested *common-law development* to place a heightened duty on the police in gender-violence cases: The common law had already been developed by replacing the standard of the reasonable person with the standard of the reasonable organ of state and did not require further development. All that was required of the police was that they had to act within the established common-law framework and approach such cases with diligence and care. (See [124] – [125].)

The SCA's order of *costs* against the applicant, based on its finding that this was an ordinary delictual matter which did not raise a constitutional issue, was misdirected, since genuine constitutional issues regarding the vindication of constitutional rights and the constitutional duties of the police were raised. Public-policy considerations in relation to gender-based violence enjoined the court to apply *Biowatch*. (See [127].)

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

Held per Theron J in support of the majority judgment (Majiedt J concurring)

Our courts have long recognised that a negligent omission by the police in the exercise of their duties, resulting in a third party causing a plaintiff bodily harm, was actionable in delict, and there was no cogent reason why a negligently conducted *search* that resulted in prolonged harm to a person at the hands of an assailant should fall outside the ambit of this principle. This was in line with the *norm of accountability*, under which

the state's negligent harm-causing omissions were considered wrongful, absent an alternative means of holding it to account or compelling countervailing considerations. While the contention that the police could be held liable for a negligently conducted *investigation* that caused a complainant psychiatric injury was novel, only *egregious* omissions or errors would attract delictual liability. While 'egregious' was a wide term, it indicated at least that mere negligence would not suffice. And in the present case the police had indeed made egregious errors in the investigation. (See [132], [137], [146] – [147].)

Held per Pillay J in dissenting from the majority judgment (Mogoeng CJ and Jafta J concurring)

The applicant's complaints were about a series of omissions by the police, and if none were found, then the police did not breach their legal duty, which would be the end of the enquiry. But if there were omissions and they impaired the searches and investigations, imputing liability to the police would follow only if it was reasonable to do so. Each of the applicant's complaints had to be examined first against what the police did before considering what they omitted to do. Having regard to what they did, the question was whether what they *did not do* was a wrongful omission. (See [153], [161], [178], [199].) Wrongfulness should not be assumed based on regret and wisdom after the fact. The applicant failed to meet the threshold of proving any material omissions on the part of the police, and imposing liability on the respondent would in the circumstances be unreasonable, since the legal convictions of the community, conscious of the Constitution, would not support it. (See [216], [286].)

REDDELL AND OTHERS v MINERAL SANDS RESOURCES (PTY) LTD AND OTHERS 2023 (2) SA 404 (CC)

Defamation — Damages — Trading corporation — May claim general damages for defamation, save where statements concerned part of public discourse on issue of public importance.

In this matter respondents were mining companies involved in mining operations on the Western Cape coast and applicants environmentalists who in a variety of public fora (television, lecture, radio, online social media) had made statements critical of the operations (see [3] and [6] – [9]).

These, the corporations alleged, were defamatory of them, and prompted them to sue for very considerable damages for their alleged injuria (see [4]).

To their claim, the environmentalists raised a special plea which came to be labelled the 'corporate defamation defence'. It was that the law did not give a trading corporation, as a remedy for defamation, a claim of general damages for non-patrimonial loss (see [2], [4] and [11]).

The corporations met the plea with an exception that no such defence existed in our law, and this exception the High Court upheld, bound by Supreme Court of Appeal (SCA) precedent that a claim of general damages indeed availed a trading corporation (see [5] and [11]).

The environmentalists then appealed to the Constitutional Court (CC) directly, directly as only the CC could overrule the SCA precedent (see [5]). The CC upheld the appeal, declaring that a trading corporation could be awarded general damages, save for where the speech concerned was part of public discourse on an issue of public importance (see [152]).

Reaching this conclusion, a first issue was the source of a trading corporation's right to reputation, and its obverse, the right to protect it (see [47]).

This, the CC *held*, was the common law, not the constitutional right to dignity as SCA authority had found (see [47], [68] and [87]).

Following from this was the question whether a trading corporation could suffer non-patrimonial loss from injury to its common-law right to reputation (see [92]).

The finding was affirmative: Roman law considered injury to reputation to be injury to two interests — internal (feelings, which a corporation could not possess) and external (good name and reputation, which a corporation did possess), with a solatium redressing both (see [94] – [96]).

Further flowing from this, as a derivative, was that a trading corporation was entitled to general damages for injury to its reputation (see [96]).

Against this background, the issue shifted to whether an award of general damages was constitutional, which issue devolved to whether such damages limited the right to freedom of expression (see [97] and [101]).

This the CC again answered in the affirmative, identifying the source of the limitation as the chilling effect such awards had on free speech (see [101]).

This in turn prompted the question of whether the limitation was justifiable, with the CC finding that permitting such an award in all instances would be unjustifiable, but

excluding certain instances from susceptibility to such awards would render the limitation justifiable (see [101], [113] and [132]). Those instances would be statements made in the course of public discourse on issues of legitimate public interest (see [114]).

Ordered, accordingly, that leave to directly appeal be granted, and the appeal upheld to the limited extent that it be declared that a trading corporation could claim general damages for defamation, save where the speech concerned was part of public discourse on issues of public interest (see [152]).

Unterhalter AJ, diverging from the majority, found that the constitutional right to dignity could be interpreted to apply to trading corporations but that it was unnecessary to finally decide the point in that even if trading corporations were not protected by the right, such corporations had a common law right to defend their reputations (see [155] – [156] and [159]).

On this point Unterhalter AJ converged with the majority, agreeing that infringement of the common law right entitled a trading corporation to sue for general damages for non-patrimonial harm (see [165] – [166] and [170]).

The key difference, though, was Unterhalter AJ's view that the majority had not established a basis for finding that there was a limitation of the right to freedom of expression (on the grounds set out in [175] – [191]), and that even if there were one, such limitation could be justified (on the grounds set out in [193] – [205]).

Unterhalter AJ would have dismissed the appeal (see [210]).

WALUS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2023 (2) SA 473 (CC)

Prison — 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 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].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v AIRPORTS COMPANY SOUTH AFRICA 2023 (2) SA 506 (SCA)

Revenue — Tax Administration — Objection to additional assessment — Application for amendment to objection — No procedure in TAA for amendment of objection — Taxpayer not entitled to such amendment in terms of Uniform Rule 28(1), read with rule 42(1) of Tax Court Rules — Tax Administration Act 28 of 2011.

Section 103(1) of the Tax Administration Act 28 of 2011 (the TAA), under the heading 'Rules for dispute resolution', provides that the Minister of Finance 'may . . . by public notice make rules governing the procedures to lodge an objection and appeal against an assessment or decision . . .'. Rule 42(1) of the subsequently promulgated rules (the Tax Court Rules) provides that, 'if these Rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for the High Court . . . to the extent consistent with [the TAA] and these Rules, may be utilised by a party or the tax court'.

The taxpayer had applied to the tax court for leave to amend its objection to an additional assessment issued by Sars on 30 March 2016 in respect of the taxpayer's 2011 year of assessment. As neither the TAA nor the Tax Court Rules provides for the amendment of an objection to an additional assessment, the tax court had held that the taxpayer was permitted under rule 42(1) of the Tax Court Rules (rule 42(1)), read with rule 28(1) of the Uniform Rules of Court (rule 28), to amend its objection against the additional assessment. This case concerned Sars' appeal against the tax court's ruling, directly to the Supreme Court of Appeal. At issue was whether it was permissible to amend the grounds of objection against an additional assessment

issued by the appellant (Sars), after the expiry of the periods prescribed in the Tax Court Rules. The taxpayer contended that the order of the tax court was interlocutory and thus not appealable.

Held

Uniform Rule 28(1) only found application to pleadings and documents filed once legal proceedings had commenced. Legal proceedings before the tax court only commenced once the appeal was noted to the tax court. An objection was part of the prelitigation administrative process and was not a pleading. It was also not a document filed in connection with judicial proceedings envisaged in terms of rule 28(1). Rule 42(1) only came into play when the Tax Court Rules did not make provision for a procedure in the tax court; it did not apply to pre-litigation administrative procedures such as an objection to an assessment, governed under part B of the Tax Court Rules. The tax court thus erred in granting leave to the taxpayer to amend its notice of objection in terms of rule 28. (See [13], [19] – [21].)

The effect of the amendment sought by the taxpayer would be to extend the period for the filing of an objection (or the filing of new grounds of objection) long after the peremptory periods prescribed in s 104 of the TAA, read with rule 7, had expired. To permit amendments to an objection would unjustifiably undermine the principles of certainty and finality. It would also permit the taxpayer to impermissibly introduce new grounds of objection to the additional assessment. The tax court wholly misconceived the matter. Its order was plainly wrong and it would not be in the interests of justice to permit it to stand. In the result, the appeal would be upheld. (See [23] – [24], [26] – [27].)

MEC FOR PUBLIC WORKS, EASTERN CAPE AND ANOTHER v IKAMVA ARCHITECTS CC 2023 (2) SA 514 (SCA)

Constitutional law — Courts — Powers of courts to make just and equitable orders in constitutional matters — Not competent to prohibit enforcement of valid and binding default judgment on basis that it was just and equitable to do so — Constitution, s 172(1)*(b)*.

On 1 December 2015 default judgment for damages was granted in favour of the respondent (Ikamva) against the appellant (the MEC) pursuant to the latter's

repudiation of a contract they had concluded in August 2002. The MEC was refused leave to appeal and thereafter unsuccessfully applied for rescission of the default judgment. Next, the MEC appealed the dismissal of the rescission application to the full court, which refused the appeal. Both the Supreme Court of Appeal and the Constitutional Court refused the MEC's applications for leave to appeal.

In September 2019 the MEC and others, again unsuccessfully, applied to review and set aside the contract with Ikamva (see [4]). The present case concerned an application to the Supreme Court of Appeal for leave to appeal. At issue was whether — if a court order was not susceptible of being set aside by way of rescission or appeal — it could be held to be just and equitable under s 172*(b)* of the Constitution that another court could prohibit its enforcement.

Held

The Constitution and rule of law established a strong principle supporting the sanctity of valid and binding court orders and the right of persons in whose favour they have been issued to enforce them. In the light of this, and also the need to uphold the rule of law; the public interest in finality; the constitutional imperative that court orders must be complied with; the lack of precedents in our law and the absence of specific powers granted to courts to render a judgment nugatory in this fashion, the discretion under s 172(1)*(b)* did not extend to such an order — it was not permissible. The application for leave to appeal would accordingly be dismissed. (See [33] – [34] and [37].)

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND ANOTHER v DEMOCRATIC ALLIANCE AND OTHERS 2023 (2) SA 530 (SCA)

Prison — 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, nor 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 Correctional Supervision and Parole 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].)

OLIVIER NO v MEC FOR HEALTH, WESTERN CAPE AND ANOTHER 2023 (2) SA 551 (WCC)

Damages — Bodily injuries — Claim for general damages — Transmissibility to heirs — Plaintiff dying after having instituted claim but before litis contestatio — Long-standing common-law rule precluding transmission of claim in such circumstances — Western Cape High Court declining to develop common-law principle to allow transmissibility of claim for general damages before litis contestatio being reached.

Practice — Pleadings — Amendment — After close of pleadings — Whether amendment will reopen pleadings, with litis contestatio falling away — Factors to consider.

The present matter concerned the transmissibility of the general damages claim of the deceased, the late Ms Olivier, to her estate, represented by the plaintiff as executor.

Ms Olivier had instituted a claim for damages, including non-pecuniary general damages, on 17 October 2014 against the first defendant, the MEC for Health, Western Cape, in respect of injuries sustained arising out of the alleged negligence of medical staff in its employ.

Pleadings were closed in January 2016, after the joinder of the second defendant, and the filing of amended particulars of claim in January 2016. After this, however, on 4 October 2017, Ms Olivier effected a third amendment to her pleadings, increasing the quantum claimed for future medical and hospital expenses. Shortly afterwards, on 9 October 2017, and prior to the expiry of the 15-day period afforded to the first defendant to file an amended plea in response to the amended particulars of claim, which it had not done, Ms Oliver died. She has since been substituted by the plaintiff as claimant, in respect of her claim for general damages in the amount of R950 000.

The first defendant opposed the action. It claimed that the common-law principle — that a litigant's claim for general damages was transmissible to their estate only if they should die after reaching of litis contestatio, ie the stage at which a claim became certain or fixed had been reached — applied to exclude the plaintiff's claim for general damages: the effect, it argued, of the plaintiff's amendment on 4 October 2017 of her pleadings was for pleadings to be reopened and the previously reached litis contestatio to fall away; pleadings remained open at the time of Ms Olivier's death; consequently, Ms Olivier's claim for non-patrimonial damages could not be transmitted to the plaintiff.

The key issues that gave rise included the following: Did the amendment effected by Ms Oliver on 4 October 2017 have the result of reopening the pleadings, with litis contestatio falling away, meaning that Ms Olivier would be viewed to have died before litis contestatio? If so, was the deceased's non-pecuniary claim for general damages transmissible to her estate? This in turn called for a determination of whether, given the facts of the present case, the common-law principle referred to above ought to be developed, as had been done in *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ), to recognise the transmissibility of claims for general damages to litigants' estates, should they die before litis contestatio being reached.

Held, that the plaintiff's amendments, given that they were substantial and material, redefining the issues for determination, had the effect of reopening the pleadings, with litis contestatio falling away. (See [20] – [23].)

Held, further, that there was no justification in this case for a departure from the established common-law principle, to recognise the transmissibility of general damages before the stage of litis contestatio being reached (see [37]): The plaintiff had failed to allege sufficient facts to show that the common-law rule as it stood offended the spirit, purpose and objects of the Bill of Rights. (See [31], [37] – [40].) In this regard, to the extent that the plaintiff had lost the opportunity to claim general damages, there had been no explanation why there had been such a delay in the closing of pleadings (see [27]).

TT AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT AND OTHERS 2023 (2) SA 565 (GJ)

Children — Adoption — National Department of Social Development's Practice Guidelines on National Adoption — Requirement that, in assessing prospective adoptive parents, preference should, firstly, be given to family and extended family; and, secondly, to prospective adoptive parents from same community as child or sharing same culture — Requirement that, before child could be found to be 'adoptable' in terms of s 230(3) of Act, there always had to first be investigation carried out by designated statutory social worker in order to determine whether child was in need of care and protection — No such requirements in terms of Children's Act — In imposing such requirement, Guidelines breaching principle of legality — Guidelines reviewable on such basis — Children's Act 38 of 2005, ss 7(1)*(f)*, 230(3) and 231(3).

Children — Adoption — Application — Conduct of Gauteng Department of Social Development, and social workers appointed by them — Threats to inform biological mother's family of her pregnancy and intent to give up child for adoption — No need for biological mother to consult with, or obtain consent from, family when applying to give up child for adoption — Breach of rights of biological mother to dignity, bodily and psychological integrity, and privacy, protected in, respectively, ss 10, 12(2) and 14 of Constitution.

This matter concerned two adoption applications in terms of s 239 of the Children's Act 38 of 2005 (the Act): one instituted by the first applicant, TT, in respect of her minor child, B, presently four years of age; the other by the second applicant, BM, in respect of her minor child L, presently three years of age. Both applicants were unmarried, unemployed major students, and both had been abandoned by the biological father shortly after they had become pregnant. They had decided that it would be in the best

interests of their child to put them up for adoption, as they could not look after them financially and emotionally. Both chose not to inform their parents of their pregnancies or the adoptions. The 11th and 12th respondents were the prospective adoptive parents of B; the 13th and 14 respondents, of L. B has been in the temporary care of his adoptive parents since shortly after his birth; L, since his birth. The Department (referring collectively to the Minister of Social Development; the MEC for Social Development, Gauteng; and the Head of Department, Gauteng Department of Social Development, respectively, the first to third respondents) declined to issue a letter of recommendation for B's adoption, as required in terms of s 239(1)*(d)* of the Act, this in spite of a previous ruling of the children's court (Krugersdorp) that B was adoptable. In respect of L, the Department issued a letter of recommendation, but was presently seeking to set it aside in pending review proceedings. The general position of the Department was that it was in the best interests of B and L that they not be adopted by their prospective adoptive parents, but that, in the case of L, he be removed from his prospective adoptive parents and placed in the care of the Department, and that adoption proceedings be commenced de novo; and in the case of B, that he be placed in the foster care of the first applicant's parents, who had expressed willingness to care for the child.

Presently, before the Johannesburg High Court, the applicants argued that the set of directives issued by the National Department of Social Development — Practice Guidelines on National Adoption (the Guidelines) * — that informed the Department's stance, was based on an incorrect interpretation of the Act. They sought the review and setting-aside of *(a)* the letter of non-recommendation, under PAJA, alternatively under the principle of legality; and *(b)* the Guidelines, under the principle of legality. They argued too that the way the Department, as well as various social workers appointed to their case — the fourth to sixth and eighth to ninth respondents — dealt with their adoption applications caused unnecessary delays and violated their constitutional rights, as well as those of B and L. They referred, in this regard, inter alia, to the following: *(a)* The social workers on many occasions caused the applicants great distress by threatening to inform their parents of the adoption, against the applicants' wishes (they did in fact carry out their threat in the case of B). *(b)* In the case of B, the Department caused the postponement of proceedings before the children's court on numerous occasions, this to obtain unnecessary reports, for example, amongst others, confirming that B was 'in need of care and protection'. *(c)* In

the case of B, the Department had sought and obtained an order, without the first applicant's knowledge or consent, and, purportedly on the basis that he was a child in need of care and protection, for his removal from the hospital where he was born to a temporary care facility, for a period of four months, from which he was returned to his prospective adoptive parents in poor physical condition.

The Department sought to justify its position based on what it saw as numerous contraventions of the law by Ms Wasserman, the private adoption social worker who had dealt with both the applicants' adoption matters, as well as the children's court, which it argued rendered such processes unlawful. As mentioned above, the Department relied on the Guidelines, which reflected the Department's understanding of the Act, the key relevant features of which were the following: *(a)* Before a child could be found to be 'adoptable' in terms of s 230(3) of the Act, there had to first be an investigation carried out by a designated statutory social worker in order to determine whether the child was in need of care and protection, in terms of ch 9 of the Act. There had been no such investigation by Ms Wasserman. *(b)* Having regard to s 7(1)*(f)* and s 231(3) of the Act, in assessing prospective adoptive parents, preference should, firstly, be given to family and extended family; and, secondly, to prospective adoptive parents from the same community as the child or sharing the same culture. *(c)* The extended family of a child had the right to be informed of the biological mother's intention to put her child up for adoption.

Held, that the approach adopted by the Department, that the requisite procedures were not followed, was not supported by cogent facts (see [80]): The applicants had provided the necessary formal consent in terms of s 230(3)*(g)* of the Act before the children's court, shortly after they gave birth. Ms Wasserman, who was an accredited social adoption worker, produced the necessary reports accompanying the adoption applications, in

terms of s 239 of the Act, to the effect that B and L were adoptable, that it was in the best interests of B and L that they be adopted by their prospective adoptive parents, who, in addition, were fit, proper and willing to undertake parental responsibilities. (See [80] – [86].)

Held, as to the interpretation of the Act as reflected in the Guidelines, that, in circumstances such as the present, where, in terms of s 230(3)*(g)*, a biological mother

had consented to the adoption of her child, there was no need under s 130(3) for any investigation into whether such child was 'in need of care and protection' before such child could be found to be adoptable. (See [74]), [76], [77], [162].)

Held, further, that s 7(1)*(f)* and s 231(3) *could not be interpretated* in such a manner as to support the contention that a child, as first choice, must be placed with family, extended family and parents of the same culture (see [89], [91], [98], [99] and [109]). Under s 7(1), where a provision of the Act required the application of the best-interests-of-the-child principle, 'the need for the child to remain in the care of his or her parent, family and extended family; and to maintain a connection with his or her family, extended family, culture or tradition', was but *one of a number of factors* that had to be taken into account — none of which were given paramountcy. The determination of any particular child's best interests had thus to be individualised to that child's particular circumstances. (See [94] – [99].) Further, s 231(3) did no more than *mention* community and cultural diversity as factors which may be taken into account in the assessment of prospective adoptive parents (see [88].)

Held, further, that the Act did not require that family members of the biological parent be consulted, or their consent obtained, for a child to be deemed adoptable, as the Department contended (see [79] and [99]).

Held, accordingly, that the Guidelines had to be declared invalid and were to be set aside (see [154]): whoever was responsible for the Guidelines was not empowered to include provisions that did not comply with the Act and that, in addition, undermined certain rights in the Constitution; accordingly, they were ultra vires and in breach of the principle of legality (see [150]).

Held, that the Department acted unlawfully and contrary to B and L's best interests, by — in circumstances in which the applicants had provided the necessary consents and followed the required procedures — delaying B's adoption by seeking multiple postponements over an extended period of time, for investigations to be conducted and reports obtained that were not required; removing B to a temporary care facility; disregarding the ruling of the children's court (7 August 2020) that B was adoptable; and, in the case of L, delaying adoption proceedings by seeking to set aside the letter of recommendation on a flawed basis, ie that Ms Wasserman's report failed to investigate whether L was a child in need of care and protection. (See [155] – [171] and [240].)

Held, that the Department and the social workers' refusal to take account of the applicants' unequivocal instructions not to inform their parents of their pregnancies and intended adoptions undermined various of the applicants' constitutional rights, including their rights under ss 10, 12(2) and 14 of the Constitution to dignity, bodily and psychological integrity and privacy. (See [178].) Further, the Department, in delaying adoption proceedings, and seeking to remove B and L from their adoptive families with whom they had formed close bonds, placing them at risk of being psychologically harmed, breached B and L's rights in terms of s 28 (Children) of the Constitution. (See [193] – [216].) The applicants were entitled to declaratory relief under s 172(1)*(a)* of the Constitution (see [217]).

Held, that the reasoning adopted by the Department in refusing to issue a letter of recommendation for B's adoption under s 239(1)*(d)* of the Act was fatally flawed and reviewable on various grounds, including the Department's flawed interpretation of the Act. (See [228].) Accordingly, the Department's decision fell to be set aside (see [229]). *Held*, further, that the pending proceedings launched by the Department, to review their decision to issue a letter of recommendation for the adoption of L, should be permanently stayed (see [218]).

VISAGIE v HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA AND OTHERS 2023 (2) SA 626 (GP)

Medicine — Medical practitioner — Disciplinary proceedings — Expert evidence — Assessment — Proper approach — Professional Conduct Committee of Health Professions Council of South Africa erring in (i) failing to properly weigh up expert evidence; (ii) saddling practitioner's expert with 'onus'; and (iii) finding that expert's failure to acquit himself thereof meant that case against practitioner proved.
Medicine — Medical practitioner — Disciplinary proceedings — Finding — Review — Before imposition of penalty — Launching of internal appeal constituting reasonable step to exhaust internal remedies — Refusal by appeals body to entertain appeal rendering exhaustion futile — Court may entertain review.
Medicine — Medical practitioner — Disciplinary proceedings — Unprofessional conduct — Practitioner may be charged with 'unprofessional conduct', but must be found guilty of either 'improper' or 'disgraceful' conduct — Finding of unprofessional

conduct without more by Conduct Committee of Health Professions Council of South Africa set aside on review — Health Professions Act 56 of 1974, s 1 sv 'unprofessional conduct', s 42(1).

Practice — Particular defences — Defence of lis alibi pendens — Appeal and review — Distinct and dissimilar remedies — Defence of *lis pendens* not available — Purpose of defence (avoidance of multiplicity in litigation and potentially conflicting decisions) would be defeated if, after being fully ventilated on review, matter were to be dismissed because appeal was issued first.

The applicant (Dr Visagie) sought administrative review of a finding by the fourth respondent, the Professional Conduct Committee of the Medical and Dental Professional Board (the Conduct Committee), that his failure to make a correct diagnosis constituted unprofessional conduct under s 42(1) of the Health Professions Act 56 of 1974 (the HPA). Section 1 of the HPA defines 'unprofessional conduct' as 'improper or disgraceful or dishonourable or unworthy conduct' by a person registered under the HPA. Section 42(1) says that a registered person 'who is found guilty of improper or disgraceful conduct . . . shall be liable to . . . the following penalties . . .'. In its reasons the Conduct Committee rejected the evidence of Dr Visagie's expert, stating that it was 'defensive' and 'did not prove anything on the balance of probability'. The Conduct Committee nevertheless declined to impose a penalty, on the ground that its finding was reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Dr Visagie indicated that he wished to proceed on review, but, to comply with his duty under s 7(2) of PAJA to exhaust internal remedies, he first appealed to the respondent's Appeals Committee, which refused to entertain the appeal, on the ground that the Conduct Committee did not impose a penalty and the appeal was thus not ripe for hearing. Dr Visagie appealed this ruling to the High Court in terms of s 20(1) of the HPA (the pending appeal). Although the relief sought in the appeal was initially just an order directing the Appeals Committee to entertain the appeal, the notice of appeal was subsequently amended to include a request for the setting-aside of the Conduct Committee's finding of unprofessional conduct. The idea was that, due to the overlap in the evidence, the appeal and review would be heard simultaneously, but in the end the present court was charged with only the review application, which

was met with a defence of *lis alibi pendens* (a suit pending elsewhere) in light of the pending appeal.

The main issue before court (as in the appeal to the Appeals Committee and the appeal to the High Court) was whether the finding of the Conduct Committee could be reviewed or appealed *before a penalty had been imposed* and whether that finding was appealable or reviewable (see [21]).

In its judgment the High Court dealt with the following matters: (i) whether *lis pendens* was applicable in view of the pending appeal; (ii) whether Dr Visagie complied with the obligation to exhaust internal remedies under s 7(2) of PAJA; (iii) whether the court could entertain the review before a penalty was imposed; and, if so, (iv) whether the finding of unprofessional conduct ought to be set aside.

Held

(i) The aim of the principle of *lis pendens* was the avoidance of a multiplicity of litigation and potentially contradictory judgments on the same issues. But while the present appeal and review were between the same parties and pertained to the same finding, the appeal was on the merits while the review on administrative justice. The approach by the presiding officers and the principles applied would be wholly different (though the result might be the same). *Lis pendens* was therefore not applicable. It was in any event appropriate that the review be disposed of, since it would ordinarily not be available if the appeal failed. The matter was fully ventilated before the present court and dismissing it on *lis pendens* would entail unnecessary duplication. (See [14] – [17].)

(ii) The appeal to the Appeals Committee was a reasonable step to exhaust an available internal remedy, and its refusal to entertain it rendered exhaustion futile. While the review application was 12 days out of time, the delay was negligible and if extension were refused, there was a real possibility that the appeal would be heard, which would again entail unnecessary duplication. It was therefore in the interests of justice to grant an extension. (See [21], [27].)

(iii) The strength of two of Dr Visagie's review grounds meant that he would suffer irreparable harm if he was to be prevented from securing immediate judicial consideration. In addition, a suspension from practice or erasure (removal from register) would stand in the event of an appeal. These were exceptional circumstances that warranted the hearing of the review at the present stage. (See [29] – [32].)

(iv) The Conduct Committee's finding was not supported by the reasons given because of its failure to subject the expert evidence to assessment in accordance with established legal principles. It gave no reason for preferring the evidence of the respondents' expert over Dr Visagie's or for its finding that the testimony of the latter was 'defensive'. The only conclusion was that the Conduct Committee did not give due consideration to the expert evidence. (See [39] – [40].) The Conduct Committee also erred in seemingly saddling Dr Visagie's expert with an onus while stating that the prosecutor had 'adequately' proved the case against him: the onus to prove the case was on the prosecutor and adequacy was not the test for a finding of guilty. These errors of law and erroneous approach to the evidence sufficiently tainted the Conduct Committee's decision for it to be set aside under s 6(2)*(d)* (error of law) and 6(2)*(f)*(ii)*(dd)* (irrationality of reasons) of PAJA. (See [39] – [43].) Lastly, under s 42(1) of the HPA Dr Visagie could be charged with unprofessional conduct, but had to be found guilty of either 'improper' or 'disgraceful' conduct. The guilty verdict without the specification of improper or disgraceful conduct was also subject to review, and a clear reason why it had to be entertained before a penalty was imposed. (See [44] – [47].) The court, emphasising that it was not making a decision on the merits, ruled that the sum total of the above-mentioned irregularities rendered the finding of the Conduct Committee unreasonable, unlawful and unfair. The finding of the Conduct Committee was clearly reviewable and would be set aside. So ordered. (See [50] – [52].)

SOUTH AFRICAN CRIMINAL LAW REPORTS APRIL 2024

S v ZULU 2023 (1) SACR 343 (MM)

Trial — Delay — Unreasonable delay — Application of provisions of s 342A of Criminal Procedure Act 51 of 1977 — Accused repeatedly terminating mandates of legal representatives, and counsel absent from court on number of occasions without properly accounting for such — Delay causing potential prejudice to state and having negative effect on administration of justice — Strict deadlines imposed for further conduct of trial.

Legal practitioners — Conduct of — Absence from court — Counsel failing to give proper account of his absences — Conduct concerning and warranting referral to

Legal Practice Council — Code of Conduct for Legal Practitioners, promulgated under Legal Practice Act 28 of 2014.

As a result of repeated delays in the trial of the accused, who was charged with very serious offences of violence towards women, the court proceeded to hold an enquiry in terms of s 342A of the Criminal Procedure Act 51 of 1977. It appeared that the crimes were committed as far back as 2011 – 2014. After his arrest in 2011 he failed to attend court and was only rearrested in 2018. The matter was transferred to the High Court in October 2019, but by October 2022 it had not yet commenced. The delays were caused by and large by the accused terminating mandates of his various legal representatives from time to time and by the failure of his counsel to attend court. It appeared that, apart from the occasions when the matter had been stood down for one and two days, to facilitate consultations with the accused, the matter had been formally set down for trial on at least six occasions. Throughout, the accused had been legally represented, initially through Legal Aid, and, after terminating the mandates of three different legal practitioners from Legal Aid, he had also enjoyed the benefit of a private legal practitioner at the expense of Legal Aid. The matter had been postponed on two occasions when the accused was ill, and on four occasions when his counsel was ill. On one occasion, when counsel

failed to appear, he explained subsequently that an incident occurred while attending a meeting of the ANC in which his car was torched. He also could not communicate with any of his colleagues because he had left his phone behind whilst running away from the protest action. He failed, however, to provide contemporaneous proof of that incident or explain why his failure did not constitute unprofessional conduct. Similarly, his professed absence because of ill health was concerning, as there was only one medical certificate on file, and that seemed to be from a pharmacy clinic.

Held, that the Legal Practice Act 28 of 2014, and the accompanying Code of Conduct, * placed a mandatory positive obligation upon legal practitioners to maintain the highest standards of honesty and integrity, uphold the Constitution of the Republic and the principles and values enshrined therein, and honour any undertaking given by them in the course of their business or practice. Practitioners were obliged to treat the interests of their clients as paramount, subject always to their duty to the court, the

interests of justice, observance of the law and the maintenance of the ethical standards prescribed by this Code, and any ethical standards generally recognised by the profession. (See [34] – [35].)

Held, further, that the conduct displayed by counsel in the matter was concerning and warranted a referral to the Legal Practice Council. The charges were not complex, but very serious, and the victims of those cases could effectively not be allowed to 'heal' and move on with their lives for as long as the proceedings were pending. The delay caused potential prejudice to the state and it had an undeniable negative and eroding effect on the administration of justice. The mere fact, that an alleged rapist and kidnapper over a period of 11 years had not been tried, sent a message of incompetence to the community at large. (See [44] – [46].) The court made an order in terms of s 342A(3)*(b)* for a final postponement on strict deadlines set out in the order.

S v SCHWARTZ 2023 (1) SACR 358 (GP)

Appeal — Record — Lost, destroyed or incomplete — Reconstruction of — Duty to reconstruct — Appellant responsible for arranging record and reconstruction where incomplete — Importance of all parties in facilitating process, however, highlighted — Uniform Rules of Court, rule 51(3).

The appellant appealed against a conviction for rape and indecent assault, and a sentence of life imprisonment, imposed in a regional court. The complainant was the appellant's 15-year-old niece with whom he had been residing at the time. It appeared that the record was incomplete, and the matter had come before the appeal court on two occasions where the hearing could not proceed due to the incomplete record. The appellant contended that what was available on the record was inadequate for the purposes of the appeal and that he had been prejudiced by the turn of events. The parties differed in their perspective on who was responsible for facilitating the reconstruction of the record and whether each party had fulfilled its obligations in this respect. The court held that, according to rule 51(3) of the Uniform Rules of the High Court, the ultimate responsibility for ensuring that the copies of the record were in all respects properly before the court rested on the appellant or his attorney. The appellant was dominus litis and therefore responsible for presentation of the full record to court. (See [17] and [22].) The importance of collaboration by the parties in

facilitating the process for reconstruction of a workable record or gathering of essential evidence was, however, also highlighted. (See [23].) The conduct of the clerk was moreover found wanting, seemingly having been satisfied with the information that the magistrate was no longer at the particular court, and not having bothered to do anything more in furtherance of the reconstruction process. (See [24].) But the appellant could not play a passive role and thereafter claim an advantage, or to be entitled to be released due to no record, of proceedings being available. (See [26].) The court accordingly postponed the matter *sine die* and gave instructions for the appellant's legal representative to consult with the appellant on the whereabouts of the record and the clerk of the court to locate the whereabouts of the magistrate who had presided over the trial proceedings. Further orders were made relating to the reconstruction of the record. (See [33.)

S v GILA 2023 (1) SACR 369 (WCC)

Sentence — Factors to be taken into account — Xenophobia — Appellant convicted of murder and attempted murder of foreign nationals — Attack on deceased and his brother relentless and pitiless, and motivated solely by xenophobia — Court required to send strong message that such attacks would not be tolerated — Effective sentence of 20 years' imprisonment confirmed on appeal.

The appellant was given leave to appeal against sentences of 20 years' imprisonment imposed on a count of murder and 10 years' imprisonment in respect of a count of attempted murder. The sentences were ordered to run concurrently in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 (CPA). The circumstances of the murder and attempted murder were that the appellant and three others had attacked the deceased and complainant merely on the basis that they were foreigners, by stabbing them with knives and hitting one of them with a beer bottle. The personal circumstances of the appellant were that he was a 22-year-old first offender who had no previous convictions and had only completed grade 4. He was unmarried with two children for whom he contributed an amount of R600 per month per child for their maintenance. At the time of his arrest he had a small house shop where he sold cigarettes, chips and sweets. He had been awaiting trial for a period of three and a half years, of which he spent 16 months incarcerated due to a violation of his bail conditions. On appeal,

Held, that the regional-court magistrate correctly found that there was nothing about the appellant's personal circumstances which could be considered special or out of the ordinary. Further, these were by far outweighed by the aggravating circumstances. The appellant was the perpetrator of a violent, unsolicited assault based on xenophobia, which led to the death of an innocent person; he presented a false alibi; he stabbed the deceased several times and continued to do so after he had fallen to the ground, and he had shown no remorse whatsoever. The trial court had exercised its discretion and had showed the appellant mercy and an opportunity to rehabilitate. (See [17] – [19].)

Held, further, that the deterrent value of appropriate sentencing, especially in crimes of this nature, could not be underestimated. Everybody, whether South African citizen or foreign national, was entitled to move around freely in a safe environment. The attitude displayed by the appellant, and the community by not lending assistance whilst the deceased and his brother were openly attacked in daylight, evidenced the harsh reality that those kinds of crime were not regarded with the seriousness they should be, and undermined our constitutional democracy. The court a quo had correctly described the incident as a heartless, relentless, callous and pitiless attack, yet, in the exercise, whilst sending a strong message that such attacks would not be tolerated, tempered the sentence by deviating from the minimum prescribed sentences and by employing s 280(2) of the CPA. (See [31].) The appeal was dismissed. (See [32].)

S v SJ 2023 (1) SACR 380 (ECB)

Evidence — Witness — Oath — Admonition to speak truth — When such procedure competent — Provisions of s 164(1) peremptory, and thorough questioning required to determine whether oath should be administered, particularly when dealing with older child — In casu, fact that child witness 15 years old not in itself test of her intelligence and knowledge — Absence of enquiry constituting fatal misdirection rendering her evidence inadmissible — Criminal Procedure Act 51 of 1977, s 164(1).

The appellant appealed against his conviction in a regional court on five counts of the rape of his daughter committed when she was between the ages of 18 and 21. In convicting the appellant the court relied on eyewitness evidence of the complainant's half-sister, who was 15 years old when she testified. The record immediately preceding her evidence revealed that, after she informed the trial court of her age and

that she was in grade 9, the court said to her: 'I want to encourage and warn you to stick to speaking the truth today you understand?' To which she replied in the affirmative. The court then said: 'Whatever you say, it must be something you have personal knowledge of, not something anybody else told you.' After she stated that she would, the magistrate said: 'Alright, the witness is admonished to speak the truth.'

Held

The wording of s 164(1) of the Criminal Procedure Act 51 of 1977 was peremptory, and, particularly when dealing with an older child, such as the witness, thorough questioning had to be aimed at determining whether the oath should be administered. If the court was persuaded that the oath should be administered, it must do so, and not merely admonish the child witness. The fact that the witness testified that she was 15 years old, which would have placed her in the category of an older child, was not in itself a test of her level of intelligence and knowledge. The fact that no enquiry was held at all was a fatal misdirection which rendered her evidence inadmissible. (See [24 – [29].)

In exploring the issue of whether the events as testified by the complainant had happened or not, the magistrate found that the complainant had accounted for each time she was raped between 2013 and 2016, but that was not correct. The accounting produced by the complainant was sparse, erratic, inconsistent and contradictory. The trial court appeared to have recognised this when it referred to the 'discrepancies'. The trial court's finding, that such discrepancies had not distorted the picture before the court, was in error. Furthermore, the court's conclusion that her statements to the police were consistent with the evidence in court, which they were not, should have led the trial court to have found that her evidence was not honest and reliable. (See [32] – [34].)

Sections 58 and 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 seemed to have placed significant limits on the inferential processes that could legitimately be conducted by the courts. Courts were no longer at liberty to draw adverse inferences from either *only* the failure of the complainant to make a consistent statement, or *only* the length of the delay between the alleged commission of the offence and the making of such a statement, commonly referred to as 'the first report'. The deliberate inclusion of the word 'only' in both those sections presupposed, however, that if there were any other grounds for the drawing of an adverse inference, failure to report, or the making of inconsistent reports, or a delay in

reporting, might, in a given set of circumstances be considered as a further ground to justify the drawing of adverse inferences. It was therefore incumbent on the trial court at the very least to explore and evaluate the reasons why the complainant allegedly reported the rapes when she did, why there were inconsistencies in her own version, why the first person she allegedly made this delayed report to was not called as a witness, and why her maternal aunt's version of what was said to her did not gel with any of the versions proffered by her. (See [41] – [42].) Furthermore, the court's failure to have given any consideration at all to the appellant's version, and whether it was reasonably possibly true in the circumstances, amounted to a further misdirection. The appellant was accordingly entitled to an acquittal on all the charges. (See [45].)

S v LJ 2023 (1) SACR 396 (WCC)

Child — Offences by — Failure to apply provisions of Child Justice Act 75 of 2008 — Magistrate failing in numerous respects to apply CJA and not following recommendation of probation officer that child offender be sentenced to correctional supervision, as seemingly child in need of care as envisaged by s 150(1) of Children's Act 38 of 2005 — Failures deprecated — Conviction and sentence set aside, and matter remitted for further action in terms of Children's Act.

Child — Offences by — Imposition of imprisonment or detention — Review — Child offender having unqualified right to have proceedings reviewed automatically — Judicial Matters Amendment Act 42 of 2013, s 85(1).

The accused was a 17-year-old male who came before the court in August 2022 on a charge of possession of housebreaking instruments. He was remanded in custody for a bail application and was assisted by a Legal Aid practitioner. It was discovered that he had a previous conviction for theft earlier in the same year, for which he had been sentenced to a wholly suspended sentence of three years' imprisonment on each of two counts, which were ordered to run together. In the present matter he was released on warning, but after he failed to appear in court at a later appearance he was arrested and sentenced in the warrant proceedings to a fine of R300 or three months' imprisonment. He went to serve his sentence at a prison where it was discovered that he was under the age of 18. He was then brought back to court which ordered his release on warning, but because of the sentence imposed in the warrant proceedings he was still not released. The senior magistrate then sent the matter on immediate

review. The court was provided with the record of proceedings in the earlier matter as well. The circumstances of the two cases revealed a number of serious irregularities arising from the misapplication or failure to apply the provisions of the Child Justice Act 75 of 2008 (the Act). What emerged was, inter alia:

(a) In the warrant proceedings the accused was treated as an adult and there was no preliminary enquiry conducted; a probation officer did not assess the child offender; there was no consideration whatsoever whether the matter should be diverted or not; the proceedings were held in open court and not in camera, as required by s 63(5) of the Act; he was not assisted by his parent or guardian or appropriate adult during the proceedings, as required by s 65 of the Act; the court did not observe the time limits relating to postponements; he was committed to prison; the court did not consider that prison had to be the last resort, as the accused was a child offender; and the court had not sentenced him in accordance with ch 10 of the Act. (See [16] – [17].)

(b) The court did not determine the age of the child offender. (See [19].)

(c) The juvenile was previously convicted in the same court as before, where the prosecutor and the Legal Aid practitioner were the same as before, whereas, in the earlier proceedings, the matter had been held in a child justice court and both officers of the court ought to have been aware that the accused was a minor. (See [22] and 25].)

(d) The proceedings at the warrant enquiry were not digitally recorded and the record of proceedings was very cryptic and recorded on a pro forma form. That kind of notation was not encouraged, as it might not always result in a true and accurate reflection of the actual proceedings. Rule 66 of the Magistrates' Courts' Rules did not envisage the usage of templates or pro forma forms, and made it abundantly clear that only the shorthand notes of the presiding officer or the transcribed record of the digitally recorded proceedings formed part of the record. (See [28].)

(e) In the earlier proceedings a severe sentence was imposed on each of two counts of theft of items which appeared to be of nominal value only. (See [52].)

(f) After sentence the magistrate had marked the matter as not reviewable on the basis that the accused was represented by a Legal Aid attorney. Whereas the amendment of s 85(1) of the Judicial Matters Amendment Act 42 of 2013, which had come into effect on 22 January 2014, made it abundantly clear by providing that, in addition to the qualified right to automatic review created by s 302 of the Criminal Procedure Act 51 of 1977 (CPA), if a child was sentenced to any form of imprisonment

or detention in a child and youthcare centre, they had an unqualified right to have the proceedings reviewed automatically. In the circumstances the suspended sentence was reviewable in terms of s 85(1) of the Act. (See [38] – [42].)

(g) The magistrate was obliged in terms of s 65(3) of the Act to have informed the accused, before the plea was tendered, of the nature of the allegations against him, and to have explained to him his rights and the procedures to be followed, notwithstanding that he was legally represented. The court failed to adhere to this injunction. Furthermore, the two statements made on behalf of the accused in terms of s 112(2) of the CPA were lacking in essential detail regarding the commission of the offence. (See [44] – [48].)

(h) What was most concerning were the allegations in the probation officer's presentence report that the accused committed the theft cases at the instigation of a man with whom he lived in the streets and who provided him with drugs as a reward for committing the offences. The report recommended that the court sentence the accused to correctional supervision in terms of the Act. Notwithstanding these persuasive recommendations and the fact that the accused appeared to be a child in need of care, as envisaged by s 150(1) of the Children's Act 38 of 2005 (the Children's Act), the court imposed its maximum penal jurisdiction in respect of each count. (See [49] – [52].)

The convictions and sentences in both cases were set aside and the matter referred to the social worker for an investigation as contemplated in s 155(2) of the Children's Act.

S v MM 2023 (1) SACR 415 (ECB)

Sentence — Prescribed minimum sentence — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Role of legal practitioners — Limited information provided to court in mitigation or aggravation of sentence — Court to be placed in possession of as much relevant information as possible before imposition of prescribed minimum sentence; at very least, personal circumstances of accused to be properly taken into account — Sentence of life imprisonment set aside, and matter remitted for reconsideration by court a quo.

The appellant was convicted in a regional court of the rape of his 10-year-old niece in whose care she had been placed by her mother. He appealed against his sentence of life imprisonment. The court noted that there was little in the record that served to

advance the appellant's case on appeal, his legal representative having made submissions that were very limited in nature. In addition to the fact that the appellant was a first offender who was 44 years old and capable of rehabilitation, his attorney mentioned only that there was no indication that the complainant suffered any serious physical injury or trauma. No evidence was led on sentence.

Held, that the availability of evidence and the correct analysis and understanding thereof remained just as important considerations during sentencing proceedings as the trial itself. The exercise of formulating and handing down sentence was not simply an afterthought added at the very end of the arduous process of deciding whether the accused was guilty or not. A court had a compelling duty to ensure that the punishment fitted the crime and this relied to a great extent on the quantity and quality of information placed before the court. (See [20].)

Held, further, that it was of no assistance to the accused, the court, or the administration of justice, for practitioners to place a bare minimum of information at the disposal of the presiding officer. There was a time and a place for submissions made from the bar, but more was expected when what was at stake was a lifetime of incarceration. In the present matter the submissions made in mitigation occupied no more than 16 lines of the record, much of which was qualified by the transcriber's comment that the submissions were inaudible. In aggravation, the record reflected a total of 12 lines of argument and there was no victim-impact assessment or any presentencing report, and there was simply no information at all that permitted the court a quo the reflection necessary to ensure that the prescribed minimum sentence of life imprisonment was indeed proportional to the offence in question. (See [22] – [23].)

Held, further, that at the very least, the personal circumstances of the accused had to be properly taken into account. Overall, however, the court had to ensure that it had been placed in possession of as much relevant information as possible before imposing the prescribed minimum sentence. A life sentence had to be reserved for cases devoid of substantial factors that would otherwise compel the conclusion that such a sentence was inappropriate and unjust. In the circumstances, the appeal had to be upheld and the sentence set aside, and the matter remitted to the court a quo for reconsideration of the sentence to be imposed. (See [27] and [32].)

S v KOTZE AND ANOTHER 2023 (1) SACR 426 (WCC)

Plea — Guilty — Questioning in terms of s 112(1)*(b)* of Criminal Procedure Act 51 of 1977 — Use of pro forma documents — Practice to be discouraged.

Traffic offences — Sentence — Suspension of driver's licence — Court ordering that licence not be suspended after questioning accused in terms of s 112(1)*(b)* of Criminal Procedure Act 51 of 1977 — Court required to hear evidence under oath before making such order — National Road Traffic Act 93 of 1996, ss 35(1), (3) and (4).

Two matters were submitted on review after a judicial quality inspection at a magistrates' court. In the first matter the accused was facing a charge of driving a motor vehicle under the influence of alcohol, alternatively driving whilst the concentration of alcohol in his blood was not less than 0,05 grams per 100 millilitres. The accused pleaded guilty, and the magistrate found the accused 'guilty as charged', without specifying whether it was on the main or the alternative count. It also appeared that the magistrate had made use of pro form documents during the proceedings.

On review, the court held that it was evident that one of the pro forma forms used was a prerecorded record, because the information contained in it was clearly recorded before the hearing. The obvious problem with using such prerecorded forms was that they could create an impression that a certain action was done, whereas it had not been done. They were not a reliable mechanism for accurate record-keeping and it was bad practice to use them with the aim of completing the record later. (See [17] – [18].) The court accepted that the magistrate had to deal with an excessive caseload and congested court rolls, but the increase in the court caseload should not compromise judicial performance in such a manner.

There were other irregularities in the trial: the questioning by the magistrate was confusing, as it straddled both the elements of a contravention of s 65(2)*(a)* of the National Road Traffic Act 93 of 1996 (the Act) and a contravention of s 65(1)*(a)* of the Act. What further complicated the issues was that the accused was charged with the main count, together with an alternative, and it was not clear which charge was put to the accused during the plea proceedings. The J15 form simply showed that the accused pleaded guilty and was found guilty as charged. Another problem was that

the accused was questioned as to whether he was aware at all times that it was an offence to drive a vehicle on a public road while under the influence of intoxicating liquor, and that such offence was punishable in a court of law. There was no answer recorded in the pro forma to indicate whether the accused in fact answered that question. The accused did mention that he was still capable of driving and that he had not caused any accident. ([21] – [24].) The finding of the magistrate was not supported by the record and the facts of the case, and the conviction and sentence had to be set aside. (See [25.)

In the second matter the accused was found guilty on a charge of reckless/negligent driving in contravention of s 63 of the Act. He pleaded guilty and was questioned by the magistrate in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977, and admitted that he had overtaken a vehicle on a barrier line. He was also found guilty without the court determining whether it was on the main or alternative count.

The court held that the questioning of the accused was deficient and superficial. It appeared that the court had been limited by the space available on the pro forma document to question the accused further and elicit information on his degree of negligence. Such a dereliction of responsibility was reprehensible and could not be countenanced. (See [32].) In addition, upon sentence the court made an order that, in terms of s 35(5) of the Act, the licence of the accused was not to be endorsed. It appeared that the magistrate intended to make that order in terms of s 35(3) of the Act. That section and s 35(4) made clear that, before a sentence was imposed in a matter where there was an automatic suspension of the licence upon conviction, the accused had to be informed of the right to present evidence under oath as to why the suspension order in terms of s 35(1) should not take effect. The court, however, had made the order without hearing evidence under oath. On the facts, the court was of the view that the accused was negligent and that his conviction should be amended accordingly to that of negligent driving. (See [32] – [35].)

S v MALIA 2023 (1) SACR 438 (FB)

Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Deviation from — Such allowed where substantial and compelling circumstances exist, but presiding officer must record reasons for doing so.

Trial — Presiding officer — Conduct of — Regional magistrate commenting to appellant's attorney at close of state's case, 'You can change your plea, either way' —

Also displaying irritation with appellant and questioning him at length in manner that conveyed impression that she did not believe his version — Conduct deprecated as improper, but trial ultimately not unfair.

The appellant appealed against his conviction in a regional court on a charge of robbery with aggravating circumstances in terms of the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997, but did not appeal against his sentence of seven years' imprisonment. It appeared that the appellant was one of a gang of three men who had approached a man who had just alighted from his vehicle, and the appellant pointed a firearm at him, and, when the complainant grabbed the appellant's hand and pointed the firearm downwards, the appellant shot the complainant twice in his leg. People who were nearby came to the scene and one of the other assailants took out a firearm and fired at the people in order to dissuade them from coming to the scene. The men then searched the complainant's pockets, removed an amount of R3100 from him and then left the scene.

The court dismissed the appeal against the conviction, but mero motu commented on the conduct of the regional magistrate who had, at the close of the state's case, commented to the appellant's attorney, 'You can change your plea, either way.' The magistrate had not ended there, and when the appellant and his witness testified, during examination by the court she asked the appellant and his wife 53 questions. The tone, length, form and content of the questions conveyed an impression that the presiding officer did not believe the truthfulness of the appellant's alibi or version. The magistrate also displayed irritation or impatience with the appellant. Both counsel on appeal submitted that the trial court's questions were improper, but that it could not be said that the appellant had not received a fair trial. The court ultimately concluded that the presiding officer's conduct was uncalled for and improper, but further agreed with counsel's submissions. (See [30] and [33].)

The court further raised the issue of the sentence, despite it not being appealed, remarking that the prescribed sentence for the offence the appellant was convicted of was 15 years' imprisonment, and the court had a discretion to increase the sentence with a period not exceeding five years if the interests of justice so demanded. The court was also allowed to deviate from the sentence if satisfied that there were substantial and compelling circumstances warranting such deviation. However, the

magistrate had merely stated: 'After weighing all the factors the court concludes that in this case the accused can be rehabilitated.' Without further ado she had imposed the sentence of seven years' imprisonment. The court noted that in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997 the magistrate was required to place on record the reasons for deviating from the prescribed sentence, but the magistrate had provided no reasons. It was also difficult to comprehend what had persuaded her to deviate from the prescribed sentence in the circumstances of a gruesome robbery, where the complainant was shot twice and injured in broad daylight, and more shots were fired at the public to scare them away. A court had to conduct a proper enquiry to determine if there were substantial and compelling circumstances warranting deviation, and, should it arrive at a conclusion that such circumstances existed, it had to record those circumstances. (See [34] – [36].) The appeal was dismissed.

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Berzack v Huntrex 277 (Pty) Ltd and others [2023] 2 All SA 1 (SCA)

Property – Servitude – Classification of nature of servitude – Whether a garden servitude registered against the servient tenement for the benefit of the dominant tenement is a praedial or personal servitude of usus – Where interpretation of clause containing servitude establishing that element of utilitas was present, court concludes that features of garden servitude met distinctive characteristics of a praedial servitude, not a personal servitude.

Mrs Berzack owned residential property, a portion of which she subdivided and sold to comply with land use regulations. A garden which she had created fell within the subdivided portion, and Mrs Berzack was compelled to reserve her rights to the garden by means of a servitude. She therefore sold the land subject to a praedial servitude. The land was sold on a few times with the first respondent ("Huntrex") eventually purchasing it. A dispute arose between Ms Berzack and Huntrex relating to a fence erected across the servitude area. The High Court found in an application brought by Huntrex, that the servitude was one of usus and therefore personal in nature. It held that the registration of the servitude was prohibited by section 66 of the Deeds Registries Act 47 of 1937. That led to an application by Mrs Berzack for leave to appeal.

Held – The appeal raised important questions of law, such as whether a servitude involving reservation of rights of access to use and enjoyment of a garden by Ms Berzack, registered against the property of Huntrex, was a praedial servitude or a personal servitude of usus and, therefore, hit by the prohibition in section 66 of the Deeds Registries Act. It was therefore in the interests of justice for leave to appeal to be granted.

The main issues for determination on appeal were whether the terms of the clause containing the servitude amounted to a praedial or personal servitude of usus; and, depending on the nature of servitude that was created by the clause, whether such

servitude was capable of being registered in terms of section 66 of the Deeds Registries Act. The High Court erred in is interpretation of the clause dealing with the servitude, failing to interpret the clause with regard to the grammatical meaning of the words used in light of the context, purpose and the background circumstances under which the servitude-creating contract came about. The Court wrongly adopted an isolationist approach to interpreting the contract. The meaning of the clause, read as a whole, showed that the element of *utilitas* was present. The Huntrex property had been serving the Berzack property continuously for a period spanning more than thirty years. The right to the garden was reserved on the servient land and it enured in favour of the Berzack property. The features of the garden servitude met the distinctive characteristics of a praedial servitude, not a personal servitude. That conclusion undercut the submission that section 66 of the Deeds Act prohibited registration of the servitude.

The application for leave to appeal was granted and the appeal upheld.

City of Cape Town v Commando and others [2023] 2 All SA 23 (SCA)

Constitutional and Administrative Law – Right to adequate housing guaranteed in section 26 of the Constitution – Provision of emergency accommodation by government forms part of right of access to adequate housing entrenched in section 26 of the Constitution – Whether City's constitutional duty extends to provision of housing at a specific location – Legislative measures and programmes taken by government giving effect to section 26 of the Constitution do not impose duty to provide temporary emergency accommodation at a specific locality.

The Western Cape High Court made an order compelling the City of Cape Town to provide the first to twenty-sixth respondents (the "occupiers"), and their dependents residing with them, with temporary emergency accommodation or transitional housing in Woodstock, Salt River or the Inner-City Precinct. In the wake of eviction orders being granted against the occupiers, the occupiers launched the application which was the subject of the present appeal. They sought a declaration that the City was under a constitutional duty to provide them and their dependents residing with them with temporary emergency accommodation in a location as near as possible to the property where they currently resided. The central issue on appeal was whether the City's constitutional obligation to provide adequate housing extended to making temporary emergency accommodation available at a specific location.

The City contended that the order is inappropriate because it offended the doctrine of separation of powers by trespassing into the area of policy-laden and polycentric matters of housing delivery. Its effect was also said to be overbroad. According to the City, the courts lack knowledge of the wide-ranging housing needs confronting the City, the socio-economic and other competing conditions to be met by the City, the City's budget devoted thereto, the land available, the economies of scale and what informs allocation of resources to those needs and for housing, and which areas had to be considered. It was contended that the court could thus not dictate to the City in which location a particular housing programme was to be implemented.

Held – Section 26 of the Constitution entrenches the right to adequate housing. To qualify as reasonable, a housing programme must clearly set out responsibilities and tasks of the different spheres of government and make available financial and human resources. The programme must be coherent and capable of facilitating the realisation

of the right. The Housing Act 107 of 1997 gives effect to section 26 of the Constitution as part of the legislative measures taken by the State, and section 9 thereof specifies the duties of the municipality. The National Housing Code, 2009 further provides for emergency housing, as the provision of emergency accommodation by the government forms part of the right of access to adequate housing entrenched in section 26 of the Constitution.

The legislative measures and programmes taken by the government giving effect to section 26 of the Constitution do not impose a duty on it to provide temporary emergency accommodation at a specific locality. Case law confirms that the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment. The court also highlighted the distinction between permanent and emergency housing.

While a case had not been made out for the declaration of unconstitutionality of the City's housing programme and its implementation as sought by the occupiers, and for the provision of temporary emergency housing at a specific locality, the court still had to make a just and equitable order, so as not to render the occupiers homeless. Upholding the appeal, the Court ordered the City of Cape Town to provide the occupiers and their dependants with temporary emergency accommodation in a location as near as possible to where they currently resided.

Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd [2023] 2 All SA 44 (SCA)

Tax – Income Tax – Calculation of nett income – Inclusion of income earned by foreign entity – Applicability of exemption provided in section 9D of the Income Tax Act 58 of 1962 – Section 9D(2) provides for the imputation of the nett income of a controlled foreign company to a South African resident company holding participation rights in that controlled foreign company, unless it falls within the ambit of the exemption relating to a "foreign business establishment" – Exemption only applies to foreign entities that qualify as a "controlled foreign company" – Where entity not meeting requirements for a foreign business enterprise exemption in terms of section 9D(1), its nett income is imputable to South African resident company.

The respondent ("CIMSA"), the holding company for the Coronation Group, was registered and tax resident in South Africa. During 2012, it was a 90% subsidiary of Coronation Fund Managers Limited and the 100% holding company of Coronation Management Company and Coronation Asset Management (Pty) Ltd ("CAM"), both registered for tax in South Africa. CIMSA was also the 100% holding company of CFM (Isle of Man) Ltd, tax resident in Isle of Man. CFM (Isle of Man) Ltd, in turn, was the 100% owner of Coronation Global Fund Managers (Ireland) Limited ("CGFM"). The issue in this appeal was whether the nett income of CGFM should be included in the taxable income of its South African holding company, CIMSA, or whether a tax exemption in terms of section 9D of the Income Tax Act 58 of 1962 was applicable to the income earned by CGFM. The appellant ("SARS") included the nett income of

CGFM in CIMSA's taxable income. The overruling of that decision in the Tax Court led to an appeal. The Tax Court upheld CIMSA's objection and found that CGFM was a "foreign business establishment" ("FBE") as defined in section 9D(1) of the Act, thus qualifying for a tax exemption.

Held – From 2001, the Revenue Laws Amendment Act 59 of 2000 changed the South African tax regime from a source-based one to a resident-based system. Section 9D was introduced to address how South African tax payers should be taxed on their income earned abroad, especially income earned by South African owned foreign entities. The section imposes tax on South African owners on the income earned by their foreign entities as if those entities immediately repatriated their foreign income when earned, while providing for exemptions which allow certain foreign companies to operate free from tax insofar as an objective rationale exists for maintaining operations abroad, and when such operations pose no threat to the South African tax base. The aim of the exemptions was to provide a balancing mechanism between tax avoidance and competitiveness. The exemption only applies to foreign entities that qualify as a "controlled foreign company". Section 9D(2) provides for the imputation of the "net income" of a controlled foreign company to a South African resident company holding participation rights in that controlled foreign company, unless it falls within the ambit of the FBE exemption. Section 9D(1) of the Act sets out the requirements of an FBE. The location of the primary operations referred to in section 9D(1)(a)(ii)-(iv) was pivotal in determining whether CGFM was an FBE as defined. That required a determination as to the nature of CGFM's business in Ireland, and in particular, whether the primary operations had been outsourced, and if so, whether an exemption in terms of section 9D was applicable.

Having regard to the core function of the business that CGFM operated in Ireland, it was found not to meet the requirements for a foreign business enterprise exemption in terms of section 9D(1). Consequently, the nett income of CGFM was imputable to CIMSA for the 2012 tax year in terms of section 9D(2).

Regarding the understatement penalty imposed by SARS, CGFM had clearly relied on a tax opinion obtained by it in submitting its tax returns. Its *bona fides* could not be questioned, and there were no grounds for assuming any deliberate understatement.

The appeal was upheld but SARS' claim for understatement penalties was set aside.

South African Reserve Bank and another v Maddocks NO and another
[2023] 2 All SA 61 (SCA)

Corporate and Commercial – Company's bank accounts – Forfeiture orders – Legal consequences of issue of forfeiture orders made after liquidation of companies – Liquidation does not nullify a prior blocking order in respect of a company's assets and forfeiture orders issued after liquidation of companies not affected by liquidation – Monies declared forfeit to State not falling into estates of insolvent companies and liquidators not entitled to demand that the funds be paid out to them for distribution.

The South African Reserve Bank issued three forfeiture orders declaring forfeit to the State monies standing to the credit of two companies, in various South African banks. That followed blocking of the accounts on the reasonable suspicion that the companies had exported from South Africa, large sums of money without permission of the second appellant, the National Treasury, and made advance payments for imported

goods without submitting proof of importation of goods into the country to the authorised dealer. The effect of the forfeiture orders was that no person could withdraw or cause the withdrawal of funds together with the interest thereon and/or accrual thereto in accounts held at the banks. The orders were made after the liquidation of the companies and pursuant to the provisions of regulation 22B of the Exchange Control Regulations made under section 9 of the Currency and Exchanges Act 9 of 1933. The Reserve Bank's refusal to accede to a demand by the liquidators of the companies that the forfeited monies be paid to them to be administered in terms of the insolvency laws led to a successful application for such relief in the High Court. The Reserve Bank and the National Treasury appealed.

The thrust of the liquidators' case as upheld by the High Court was that after the commencement of the winding-up, it was no longer legally permissible for the Reserve Bank to exercise a power under regulation 22B to order the forfeiture of the assets of the companies in liquidation and that the purported forfeiture orders were ultra vires. The factual basis for that contention was that the Reserve Bank, after issuing the blocking orders in respect of the monies standing to the credit of the companies, became their creditor. It was required to participate in the concursus creditorum, and could therefore not validly deal with the assets of the companies in liquidation by the issue of forfeiture orders, which prejudiced other creditors.

Held – The primary issue concerned the legal consequences of the forfeiture orders made by the Reserve Bank after the liquidation of the two companies. The Court discussed the legal consequences of a forfeiture order issued in terms of regulation 22B after the winding-up of a company, finding that liquidation does not nullify a prior blocking order in respect of a company's assets issued in terms of regulation 22A and/or 22C. The companies in question were already subject to the blocking orders long before their liquidation. The operation of the blocking orders did not result in the creation of a debtor-creditor relationship between the companies and the Reserve Bank. The forfeiture orders issued after the liquidation of the companies were not affected by the liquidation and the monies which were declared forfeited to the State did not fall into the estates of the insolvent companies. The liquidators were therefore not entitled to demand that the funds be paid out to them for distribution.

The appeal was upheld.

Becker v Minister of Mineral Resources and Energy and others [2023] 2 All SA 73 (WCC)

Constitutional and Administrative Law – Discharge by Minister of nuclear activist appointed as non-executive director of the Board of the National Nuclear Regulator – As Minister's decision constituting administrative action, it was required to pass rationality test – Minister bound to exercise power lawfully, reasonably, and procedurally fairly and within the confines of section 33 of the Constitution – Failure by Minister to seek views of constituency represented by board member and to advise such constituency of the removal from the Board, rendering decision irrational.

The applicant ("Mr Becker"), a nuclear activist, was appointed as a non-executive director of the Board of the National Nuclear Regulator (the "Regulator"), largely to represent communities who might be affected by nuclear activities. Comments made by him regarding his concerns about nuclear safety led to the Minister of Mineral Resources & Energy discharging him as director of the Board on the basis that he had

a conflict of interest which arose from his having expressed critical views concerning the desirability of nuclear energy. Mr Becker contended that the Minister's decision was vitiated by multiple material irregularities, irrationality, unreasonableness and unlawfulness, and sought review of the decision.

Held – Mr Becker was appointed by the Minister in terms of section 8(4)(2)(iii) of the Act, to represent communities who might be affected by nuclear activities. He was appointed as such after his nomination was supported by civil society organisations. That meant that he served on the Board not in his personal capacity, but in a representative capacity. The Minister did not deny the fact that he knew Mr Becker's background when he appointed him to the Board.

In making comments to an online magazine, Mr Becker was not speaking on behalf of the Board. A subsequent meeting he held with civil society organisations was in his capacity as representative on the Board, but he had notified the Regulator thereof and his conduct was in line with his role as representative of the communities affected by nuclear activities.

The Court considered whether the decision taken by the Minister was administrative or executive action. In interrogating the power of the Minister to discharge Mr Becker, the Court concluded that the decision constituted administrative action – which was required to pass rationality test. The Minister was bound to exercise such power lawfully, reasonably, and procedurally fairly and within the confines of section 33 of the Constitution. The fact that the Minister did not seek the views of the constituency represented by Mr Becker on the Board and the fact that the Minister did not advise the constituency he represented that he had removed him from the Board, rendered the decision totally irrational. Mr Becker could also not be found to have committed any misconduct as alleged by the Minister.

The Minister's decision was thus set aside.

Courtney v Boshoff NO and others [2023] 2 All SA 100 (GJ)

Civil Procedure – Applications – Onus of proof – If the material facts are in dispute and there is no request for referral to oral evidence, a final order will only be granted if the facts as stated by the respondent, together with the facts as alleged by the applicant that are admitted by the respondent, justify such an order – Where a respondent sets up a special defence, the onus of proof shifts from the applicant to the respondent.

Insolvency – Granting of a final sequestration order without a provisional order first being sought and granted not supported by provisions of Insolvency Act 24 of 1936 – Final sequestration order not void ab initio but remains in place until set aside or varied by a subsequent order, such as replacement with provisional sequestration order.

In 2020, the third respondent ("Absa Bank") brought an application for the sequestration of the estate of the applicant. The applicant gave notice to oppose the application but failed to serve and file any answering affidavits. The bank served a Notice of Set Down in respect of the matter having been enrolled for hearing on the unopposed motion roll on 4 May 2020. There was no appearance for the applicant on the date of hearing. The bank obtained a final sequestration order against the applicant

and first and second respondents were appointed as liquidators. Applicant brought an application to have that order declared a nullity and set aside, and related relief.

Held – In an interlocutory application brought by the liquidators, the court had to consider whether they should be granted leave to deliver a further affidavit dealing with facts raised in the applicant's replying affidavit regarding whether the applicant should be declared a fugitive from justice. The Court held that the liquidators were entitled to respond to the matters raised in the applicant's replying affidavit by filing a further affidavit.

The liquidators argued in their special defence that the applicant and his wife were fugitives from justice and, as such, the applicant should be denied access to court and thus lacked the requisite *locus standi* to institute the application for the relief sought. A fugitive from justice has been described as someone avoiding the processes of the law through voluntarily exiling or hiding within the jurisdiction of the court. The legal principles when deciding an application are that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent, together with the facts as alleged by the applicant that are admitted by the respondent, justify such an order. Applying that to the determination of whether the applicant should be classified as a fugitive from justice, the onus of proof becomes critical. Where, as in this case, a respondent sets up a special defence, the onus of proof shifts from the applicant to the respondent. The respondents were found to have failed to discharge the onus of proving, on a balance of probabilities, that the applicant was a fugitive from justice.

In defence of the granting of a final sequestration order without a provisional order first being sought and granted, the respondents placed reliance on section 9(5) of the Insolvency Act 24 of 1936 which allows the court to "make such other order in the matter as in the circumstances appears to be just". The interpretation that those provisions permit a court to ignore the provisional stage of sequestration applications was rejected. In an application for the sequestration of a debtor's estate the petitioning creditor, as applicant, must first seek a provisional order of sequestration of the debtor's estate in terms of section 10 of the Insolvency Act 24 of 1936. The effect thereof is that if the court is satisfied that the petitioning creditor has made out a *prima facie* case for the sequestration of the debtor's estate, it will issue a rule *nisi* returnable on a fixed date. The applicant is then obliged to satisfy the provisions of sections 11 and 12 of the Act and, if the court is satisfied on the return date that the creditor has made out a proper case for the sequestration of the debtor's estate, it is then at that stage (and only at that stage), that the court will grant a final order of sequestration. The court in this case accordingly did not have the authority to make the final order of sequestration. The order was not void *ab initio* but remained in place until it was either set aside or varied by a subsequent order. The court issued an order varying the final sequestration order by replacing it with a provisional order.

Financial Sector Conduct Authority v Municipal Worker's Retirement Fund [2023] 2 All SA 131 (GP)

Financial Services Regulation – Retirement fund – Composition of board of trustees – Non-compliance with section 7A(1) of Pension Funds Act 24 of 1956 – Granting by Financial Sector Conduct Authority of exemption from compliance – Section 7B(2) of Act not requiring that exemption be for a limited duration, and granting of exemption subject to condition as to limited duration not based in law.

The respondent was a retirement fund responsible for the management of collective retirement savings of municipal employees employed by various municipalities throughout the country. In March 2020, it obtained a declaratory order that its board of trustees as presently constituted complied with the provisions of section 7A(1) of the Pensions Fund Act 24 of 1956. The Financial Sector Conduct Authority ("FSCA"), which was the regulatory body of the fund, appealed against that order.

On appeal, the fund also persisted with its alternative relief, for a declaratory order in the event the court found that its board did not meet the requirements of section 7A(1), that the FSCA be required to grant the fund an exemption from the requirement to comply with section 7A(1) for an indefinite period. Related thereto was its prayer for an order reviewing and setting aside the decision of the Registrar of Pension Funds granting an exemption for only a definite period.

Held – The dispute turned mainly on the interpretation of section 7A(1), which was to be read with the rules of the fund in respect of the constitution of the fund's board of trustees. In terms of section 7A, every fund shall have a board, consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect. A fund may however in terms of section 7B, apply for an exemption from compliance with the requirements as imposed by section 7A(1). The fund must have rules giving effect to the provision of section 7A(1) on the constitution and election of the trustees to the board.

Whether or not the fund complied with section 7A(1) depended on the interpretation of the provisions of the subsection and the purpose for which it was created. The golden rule of statutory interpretation is that the words of a statute must *prima facie* be given their ordinary meaning wherever possible and when they are clear, plain and unambiguous, requires the courts to give effect to that meaning, irrespective of the consequences. All statutory provisions are to be purposively interpreted, in the right context and construed consistently with the Constitution and where reasonably possible, preserving their constitutional validity.

The purpose of section 7A(1) is to give fund members an equal right to express their personal choice, which is a public interest right that carries a special and important significance in the context of enforcing democratic management of funds as a constitutional imperative. Having regard to the FSCA's submissions, the court upheld the appeal on the contention that as long as the fund rules did not provide for the direct participation of the fund members in the election of the trustees, and continued to exclude fund members whose employer did not employ more than 20 of their members, its Board's constitution would not comply with the requirements of section 7A(1)(a).

The issue of the duration of the exemption was found to be already determined by section 7B(2). The FSCA's purporting to determine the period or condition of endurance of the exemption was thus contrary to the Act. Instead, it was obliged to grant an indefinite exemption.

The appeal was upheld.

Hartog v Daly and others [2023] 2 All SA 156 (GJ)

Legal Practice – Mandate agreement involving conveyancing attorney – Instruction to attorney to pay proceeds of property sale into specified account – Non-compliance with instruction due to theft of money through business email compromise – Liability for loss – Contractual terms – Alleged tacit term – Tacit term is to be inferred from express terms of contract and surrounding circumstances and is imputed if the parties would have agreed on such a matter if only they had thought about it – Where tacit term never became part of mandate agreement, attorney in breach by not making payment as requested and bearing liability for loss.

The first and second respondents had given the appellant, an attorney, an oral mandate to act as conveyancer to transfer their immovable property should it be sold. After the sale of the property, the appellant was to pay some of the proceeds into the third respondent's bank account. The money was never received into third respondent's account but was paid into a Standard Bank account opened in the name of a fraudster, and was then stolen. The dispute between the parties concerned who should be held liable for the loss, which was caused through "business email compromise" ("BEC"). The appellant contended that the respondents were liable as the mandate involved a tacit term requiring the respondents to exercise the utmost caution when instructing the appellant to make payment, and to do all that was reasonably possible to ensure the integrity of the emails addressed to the appellant and keep and maintain their data security.

The court a *quo* found the appellant to be liable to pay the respondents the amount claimed, plus interest and costs. The appellant's delictual claim seeking to hold Standard Bank liable for the loss was also dismissed with costs. That resulted in the present appeal. The appellant submitted that a key dispute of fact existed, relating to what was agreed in respect of the means by which third respondent's banking account details would be provided and identified and the security of the means which would be used.

Held – There was no indication that the parties expressly agreed that the bank account particulars would be provided by way of email. It could not be said that any party made a specific election to use emails as the manner of communication as both parties used that platform.

A tacit term to a contract has been defined to mean "an unexpressed provision of the contract, derived from the common intention of the parties". Such intention is to be inferred from the express terms of the contract and from surrounding circumstances, including the conduct of the parties after the conclusion of the contract. The term is imputed if the parties would have agreed on such a matter if only they had thought about it. In this matter, the court was not dealing with a tacit term which the parties had in mind but did not bother to include in their oral agreement. Rather, it was contended on behalf of the appellant that the tacit term should be included in the contract as the imputed intention of the parties – ie although the parties did not consider the tacit term, if they were subsequently asked what would happen should the security of emails be compromised, they would have been in agreement as to the terms of the tacit term. The mere allegation of the existence of a tacit term on the appellant's papers and the denial thereof by the respondents did not create a factual dispute in itself. The alleged tacit term never became part of the mandate agreement and the appellant breached the mandate agreement by not making payment of the

proceeds of the sale into third respondent's account, therefore remaining responsible for such payment. The case against Standard Bank also not established.

The appeal was dismissed.

Nelson Mandela Bay Business Chambers NPC and another v National Energy Regulator and others [2023] 2 All SA 176 (GP)

Constitutional and Administrative Law – Municipal electricity tariffs – Approval by National Energy Regulator annual increases – Challenge to methodology used in determining tariff increases, based on principle of legality – Court having duty to ensure in public law matters that organs of State act lawfully, within the confines of legality – Failure by National Energy Regulator to take relevant factors into account rendering benchmarking method unlawful.

The applicants, who were not-for-profit business chambers, challenged the lawfulness of the methodology used by the first respondent ("NERSA") when approving annual increases in municipal electricity tariffs. According to the applicants, the method was unlawful for being inconsistent with the principles prescribed for electricity tariffs in section 15(1) of the Electricity Regulation Act 4 of 2006.

NERSA was a regulatory authority established in terms of section 3 of the National Energy Regulator Act 40 of 2004 to regulate electricity in accordance with the provisions of the Electricity Regulation Act. Its regulatory functions and duties included the oversight and enforcement of the regulation of the generation, transmission, distribution, importation, exportation and trading in electricity; and issuing of licences for the lawful conduct of those activities. The present proceedings involved the method used by NERSA in one of its regulatory functions, that of approving electricity tariffs for municipalities.

All municipalities that reticulate electricity have to apply annually, to NERSA for its approval, to charge electricity tariffs. In order to facilitate the application process, NERSA developed a method, the Guideline and Benchmarking Method, which it applies when considering the applications. It was that method that the applicants were challenging in these proceedings.

Held – It had to be determined whether the impugned decision constituted administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000. Section 1(1) of the Act provides that an administrative action means any decision taken by an Organ of State when, exercising a public power or performing a public function in terms of any legislation, and which adversely affects the rights of any person, and has a direct external legal effect. It was common cause that NERSA, as an Organ of State, made decisions in the exercise of public power or in the performance of public functions. The question was whether the determination of the method was taken whilst exercising public power or performing a public function in terms of any legislation and whether such a determination had a direct external legal effect. Both those questions were answered in the negative. On the latter point, the Court stated that what was being considered was still a guideline, which was not something having direct external legal effect.

Identifying exactly what the applicants were seeking in approaching the court, the court held that it was only the legality of the method currently used by NERSA that was under challenge. That was a legality challenge, the adjudication of which fell squarely within the authority conferred on the court by section 165(1) of the Constitution. It is the court's primary function to ensure in public law matters that Organs of State act lawfully, within the confines of legality. The suggestion that declaring the methodology employed by NERSA unlawful and invalid would offend against the principle of the doctrine of separation of powers was rejected by the court.

On the merits, the court upheld the applicants' complaint that the tariffs set by NERSA's method reflected average levels of tariffs charged by all municipalities instead of reflecting the costs that an individual municipality incurred. The benchmarking method was ruled unlawful. The method also violated the requirement in section 15(1) of the Electricity Regulation Act that licence conditions relating to prices and tariffs must avoid undue discrimination between customer categories and not permit cross-subsidy of tariffs to certain classes of customers. A declaration of invalidity was issued, suspended for 12 months, to afford NERSA an opportunity to correct the defect.

Obiang v Janse van Rensburg and others [2023] 2 All SA 211 (WCC)

Civil Procedure – Rescission application – Uniform Rule of Court, Rule 42(1)(a) – Appeal against refusal of rescission – Rule 42(1)(a) provides for rescission of "an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby" – Where appellant failing to bring case within requirements of the rule, rescission rightly refused.

At the command of the appellant, who was the vice president of the Republic of Equatorial Guinea, the first respondent was imprisoned for 423 days in a prison in that country. He subsequently obtained judgment against the appellant for damages for his unlawful incarceration, torture and assault in prison.

Appellant's application for rescission of that judgment was dismissed, leading to the present appeal.

Held – The appellant's non-compliance with the rules of court featured prominently in the proceedings. It is incumbent upon a party who knows that a court rule has not been complied with to seek condonation for such non-compliance without delay. The appellant only sought condonation in this matter belatedly. The numerous irregularities as highlighted by the first respondent, were explained by the appellant as relating to his having terminated the mandate of his attorneys during the course of the litigation and various procedural notices not having come to his attention. However, the court noted the service of processes at the appellant's embassy, and found that to be satisfactory.

The application for rescission was based on rule 42(1)(a) which provides for rescission of "an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby". The first enquiry was whether the appellant was legally absent from the court when the matter was determined. Commenting on the appellant's disregard for the law, the Court rejected his stance that he was ignorant of the law and that his staff at the official embassy had let him down. He was aware of

the litigation against him, and upon terminating the mandate of his attorneys, he bore a duty to establish the status of the pending litigation. His choosing to do nothing for nearly a year did not make him an "absent" litigant as contemplated in rule 42(1)(a).

As the rescission rule is used to rescind judgments granted due to a mistake in the proceedings, the appellant contended that the orders against him were erroneously granted because he did not receive notice of any court process or document following the termination of his erstwhile attorney's mandate to represent him. In the void created by the termination of the attorney's mandate, the service of processes at the embassy, where previous service had been successfully served, was competent.

The court has a discretion not to order a rescission under the rule. One factor a court will consider in exercise of its discretion is that of prejudice to the other party if rescission is granted. The first respondent would suffer significant prejudice in this case, should rescission be ordered. Moreover, rule 42(1)(a) is designed to correct an obviously wrong judgment or order. All the previous orders against the appellant were correctly granted within the meaning and scope of the rule. The appeal was accordingly dismissed.

A dissenting judgment would have upheld the appeal, with the view being that there was no proper service of the relevant processes on the appellant.

Pieters and another v Stemmett and another [2023] 2 All SA 234 (LCC)

Property – Eviction – Whether occupation of property governed by Extension of Security of Tenure Act 62 of 1997 – Extension of Security of Tenure Act applies to all land other than land in a township – Where property in respect of which eviction order applied has accepted attributes of a township, occupiers cannot rely on protection of Extension of Security of Tenure Act as property falls outside provisions of that Act.

An application by the respondents (the "Stemmets") for the eviction of the appellants (the "Pieters") in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") was followed some months later by an urgent spoliation application brought by the Pieters. They alleged that additional locks had been placed on a gate, that movement to and from their dwelling on the property was being curtailed, that they were prevented from having certain visitors and that access to water and electricity had been cut. An urgent interim interdict was sought pending the outcome of a declarator that the Pieters' occupation was governed by the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and not PIE. Finding that the Pieters were not occupiers in terms of ESTA, the court dismissed their application for a declarator. It found further that the relevant provisions of PIE had been complied with, and granted an eviction order against the Pieters. The Pieters appealed against both orders.

Held – The dispute between the parties turned on whether the land on which the Pieters resided was in a township, and if it was, then whether the specific land had been designated for agricultural purposes. If it was not in a township (or if despite being in a township, it was land designated for agricultural purposes) then the regime under which the Pieters might be evicted was determined by ESTA and not PIE.

The determination of what constitutes a township and land designated for agricultural purposes under ESTA required the court to analyse the meaning to be

given to those terms. Regard must be had to the words used in their setting, the context in which they are used and the purpose for which the words are intended – taking into account all relevant and admissible circumstances in which the document came into existence. ESTA delineates land to which its provisions apply and those to which PIE applies. Section 29(2) makes it clear that a person entitled to occupy land to which ESTA applies cannot rely on the provisions of PIE. The land envisaged by section 29 which a person is entitled to occupy or use under ESTA, is determined under section 2(1). In terms thereof, ESTA applies to "all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including any land within such a township which has been designated for agricultural purposes in terms of any law". The question raised was whether there is a two-fold test which determines whether land has the attributes of a township and if so whether it was developed under some lawfully exercised power or whether the word "township" has some constant meaning for the purposes of ESTA irrespective of any factual matrix. The Stemmets alleged that the land in question became a township in 1955 well before the appellants commenced residing on the property. On a conspectus of the authorities, the Court concluded that unless there are local zoning laws to the contrary, land which has the attributes identified in the Land Survey Act 8 of 1987 and is subject to a general plan as described and registered in terms of that Act will be within a township, and will therefore fall outside the provisions of ESTA. Applying the above, it was found that the property was excluded from ESTA by reason of section 29 read with section 2(1).

The appeal was thus dismissed.

Scalabrini Centre of Cape Town and another v Minister of Home Affairs and others (Consortium for Refugees and Migrants in South Africa as *amicus curiae*) [2023] 2 All SA 256 (WCC)

Immigration – Asylum seekers – Renewal of visas pending processing of application for asylum – Provision that asylum seekers who have not renewed their visas in terms of section 22 of the Refugees Act 130 of 1998 within one month of the date of expiry of the visa, are considered to have abandoned asylum applications – Section 22(12) and 22(13) of the Refugees Act 130 of 1998 unconstitutional and invalid due to lack of rational connection between limitations imposed and their ostensible purpose.

First applicant was a non-profit trust whose purpose was to assist and safeguard migrant and displaced communities, including asylum seekers and refugees. Acting primarily in the interest of asylum seekers who, due to poverty or lack of legal means, were unable to act in their own name, the applicants challenged the constitutionality of section 22(12) and (13) of the Refugees Act 130 of 1998 (the "Act"), as well as Regulation 9 and Form 3 of the Regulations in the Refugees Amendment Act 11 of 2017, which provide that asylum seekers who have not renewed their visas in terms of section 22 of the Act within one month of the date of expiry of the visa, are considered to have abandoned their asylum applications. That resulted in asylum seekers then becoming undocumented and treated as illegal foreigners, subjected to arrest, detention and deportation. Consequently, persons with valid refugee claims may be returned to countries where they may face the risk of persecution and other harm. Applicants submitted that Home Affairs officials have a duty to ensure that applicants who are not statutorily excluded are given every reasonable opportunity to apply for a visa, and that a delay in applying for refugee status should not preclude

and disqualify someone from applying therefor. The applicants and the *amicus* contended that the impugned provisions were unjustifiably arbitrary and violated the right to *non-refoulement* under international law and the South African Constitution. While acknowledging that the abandonment provisions violated constitutional rights, the respondents contended, that the impugned provisions were rational and justifiable in terms of section 36 of the Constitution, as they were intended to avoid backlogs which strained the system.

Held – A constitutional challenge to any act involves a two-stage test. First, it must be determined whether the statutory provision infringes on any constitutional right. Second, if there is such an infringement, it must be determined whether it is reasonable and justifiable in terms of section 36 of the Constitution. The respondents bore the onus of proving that any limitation of rights was justifiable in an open and democratic society having regard to all relevant factors, including the nature of the rights infringed, the importance of the purpose of the limitations and the nature and extent thereof, the relationship between the limitations and their purpose, and whether there were less restrictive means to achieve the intended purpose.

The principle of *non-refoulement* is the cornerstone of international refugee protection. It provides that no refugee should be returned to any place where there is a likelihood that he may risk persecution, torture, inhuman or degrading treatment. Section 2 of the Refugees Act enshrines the right of *non-refoulement*. Having ratified international agreements in that regard, South Africa is obliged to establish systems and allocate resources to ensure the international human rights law protection of refugees and asylum seekers.

Until an asylum claim is upheld and an asylum seeker is granted a refugee permit in terms of section 24 of the Act, such person is granted a visa which may be periodically extended. Recognising that there may be compelling reasons preventing asylum seekers from timeously renewing a visa, the court found the impugned provisions to be arbitrary and a violation of the core principles of refugee law that asylum seekers must be treated as presumptive refugees until the merits of their claims have been finally determined through a proper process. The principle of *non-refoulement* and its impact on children was also considered. The abandonment provisions operated automatically after the expiry of 30 days without any regard to the impact on affected children. The State failed to advance any acceptable justification for that limitation of children's rights.

In the absence of a rational connection between the limitations and their ostensible purpose, the impugned provisions were inconsistent with the Constitution, and therefore invalid.

The court's declaration of invalidity was referred to the Constitutional Court for confirmation.

Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and others
[2023] 2 All SA 279 (ECG)

Civil Procedure – Review and setting aside of tender process– Application for immediate execution of orders in main application in terms of section 18 of the Superior Courts Act 10 of 2013 pending appeal process – Jurisdictional requirements are exceptional circumstances for departure from general rule, and proof on balance

of probabilities that applicant will suffer irreparable harm if the court does not grant order and that the other party will not suffer irreparable harm if the court does grant order – In absence of exceptionality, departure from general rule that pending appeal processes, judgment or order issued remains suspended not justified.

In June 2022, the tender process followed by the first respondent municipality in its evaluation, adjudication and award of a tender for the planning, design and construction of water services infrastructure in the Alfred Nzo District Municipality was reviewed and set aside. Applications by the successful tenderers and the municipality for leave to appeal were dismissed, leading to applications to the Supreme Court of Appeal for special leave to appeal. In the present application, the applicant urgently sought an order for the immediate execution of the judgment or orders in the main application in terms of section 18 of the Superior Courts Act 10 of 2013, pending the appeal processes.

Held – Section 18(1) states that "unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal". In terms of section 18(3), a "court may only order otherwise as contemplated in subjection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders". Those were the three jurisdictional requirements that had to be established by the applicant for it to obtain the relief sought.

The exceptionality relied upon by the applicant was that without the execution order being granted pending the appeal processes, the successful tenderers would continue with the works to finality as if there never was a declaration of invalidity, and would thus receive undue benefits despite the court having ordered them to stop work. In considering the meaning of "exceptional circumstances and the high threshold in that regard, the Court turned to consider whether the applicant had met that threshold. What the applicant referred to as being exceptional circumstances did not qualify as such. Emphasising the importance of deference to legislative intention, the court stated that the section 18 requirements are not subject to the discretion of the court, but must be established on the basis of a factual enquiry that must be conducted. Case law referred to established that what is required is an extraordinary deviation from the norm. The applicant failed to establish such circumstances as would justify a departure from the general rule that pending the appeal processes, the judgment or order issued remains suspended. That alone was dispositive of the application. The Court nevertheless considered the existence of irreparable harm, concluding that that was also not established by the applicant.

The application for the granting of an execution order was dismissed.

END-FOR-NOW