LEGAL NOTES VOL 6/2023

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RESIDENTS, INDUSTRY HOUSE AND OTHERS v MINISTER OF POLICE AND OTHERS 2023 (3) SA 329 (CC)

Constitutional law — Human rights — Right to privacy — Warrantless search and seizure in cordoned-off area under s 13(7) of South African Police Service Act 68 of 1995 — Paragraph *(c)* of s 13(7) allowing police to conduct warrantless search of any person, premises, vehicle or object found in cordoned-off area and seize objects in possession of those searched — Disproportionate, overbroad and allowing impermissible violation of person's innermost sanctum — Constitutional Court confirming declaration of invalidity subject to severance of overbroad part and reading-in of words allowing only lawful searches.
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[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2023 SACR, you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

allowing impermissible violation of person's innermost sanctum — Constitutional Court confirming declaration of invalidity subject to severance of overbroad part and reading-in of words allowing only lawful searches.

Criminal procedure — Search and seizure — Without warrant — Warrantless search and seizure in cordoned-off area under s 13(7) of South African Police Service Act 68 of 1995 — Constitutionality — Paragraphs *(a)* (allowing police commissioner to authorise cordoning-off in interests of public order or safety) and *(b)* (commissioner to specify period of cordoning-off and area to be cordoned off) of s 13(7) serving as mechanisms to enable police to fulfil their constitutional obligations — Provisions constitutional.

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Police — Powers — Warrantless search in cordoned-off area under s 13(7) of South African Police Service Act 68 of 1995 — Paragraph *(c)* of s 13(7) allowing police to conduct warrantless search of any person, premises, vehicle or object found in cordoned-off area and seize objects in possession of those searched — Overbroad and allowing impermissible violation of person's innermost sanctum — Constitutional Court confirming declaration of invalidity subject to severance of overbroad part and reading-in of words allowing only lawful searches.

The applicants applied for the confirmation of the order of invalidity made by the Johannesburg High Court in June 2020 in respect of s 13(7)*(c)* of the South African Police Service Act 68 of 1995. * Section 13(7)*(a)* gave national and provincial police commissioners the power to authorise, in writing, the cordoning-off and search of a designated area to restore public order or safety. Section 13(7)*(b)* required the authorisation to specify the area and period of the cordoning-off, and the object of the proposed action. Section 13(7)*(c)* allowed the police, upon receipt of the authorisation, to cordon off the designated area and, where reasonably necessary to achieve the object specified in the written authorisation, search without warrant any person, premises, vehicle or object in it.

The application had its origin in an operation in May 2018 during which the police, acting in terms of s 13(7) authorisations, cordoned off a high-crime area of inner Johannesburg and conducted a warrantless search of the homes and persons of 3000 occupants of 11 derelict buildings. Several illegal immigrants were arrested. Police

officers kicked in the front doors of the living units and ransacked the occupants' possessions.

The applicants, residents of one of the buildings, sought the quashing of s 13(7)*(c)* on constitutional grounds (violation of privacy and dignity) and the revocation of the commissioners' authorisations on administrative grounds (under the Promotion of Administrative Justice Act 3 of 2000 (PAJA)). They argued that since paras *(a)* and *(b)* of s 13(7) served no other purpose than to provide a framework for the (unconstitutional) para *(c)*, they had to suffer a similar fate. Ergo, the entire s 13(7) was unconstitutional.

The High Court ruled, however, that an order declaring the whole s 13(7) invalid would be too broad since only s 13(7)*(c)* was unconstitutional (violation of privacy). The authorisations had been made for ulterior purposes (the arrest of illegal immigrants and enabling the city to deal with the problem of hijacked buildings), and fell to be rescinded for that reason. But the High Court dismissed the applicants' claims for constitutional damages because they had failed to provide sufficient primary evidence about how the searches were conducted and their treatment by the police.

In confirmation proceedings before the Constitutional Court two questions arose: (i) whether the High Court's order invalidating s 13(7)*(c)* should be confirmed; and (ii) whether leave to appeal should be granted against the High Court's refusal to find paras *(a)* and *(b)* of s 13(7) unconstitutional or to grant constitutional damages.

Held per Mhlantla J for the majority (with Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Theron J and Tshiqi J agreeing)

Section 13(7)*(c)* went well beyond the prescripts of ss 20 – 22 of the Criminal Procedure Act 51 of 1977 (the CPA), which stipulated that warrantless searches were allowed with consent or where the officers conducting them were confident that a court would have issued a warrant but that applying for one would have frustrated the purpose of the search. (See [17].) The language used in s 13(7)*(c)* was so sweeping that it would permit warrantless entry by police into private homes and allow them to rifle through intimate possessions, which activities intruded, in terms of Constitutional Court jurisprudence, on the most protected inner sanctum of the person concerned. This was a direct invasion of personal privacy. (See [34].)

While it was clear that the police sometimes needed to conduct operations of the sort envisaged by s 13(7), the provision was overbroad for failing to provide guidelines for the way searches had to be conducted or to require urgency or a reasonable suspicion

of criminality for their authorisation. While the limitation (on privacy through warrantless search and seizure) was rationally connected to the purpose of restoring public order and ensuring the safety of the persons in the area, there were less restrictive means, such as those contained in ss 21 and 22 of the CPA, available to the police to achieve the purpose of s 13(7). It followed that the part of s 13(7)*(c)* permitting warrantless searches without appropriate safeguards was inconsistent with s 14 of the Constitution, invalid and had to be severed. Paragraphs *(a)* and *(b)* were not rendered inchoate by this and passed constitutional muster as self-standing mechanisms intended to enable the police to fulfil their constitutional obligations. (See [35], [57] – [64] and [71].)

As to the appropriate remedy, the constitutionally repugnant part of s 13(7)*(c)* included not just the warrantless search of a person's home, but also of their person or vehicle, or of 'any receptacle or object of whatever nature'. It had to be replaced with lawful search-and-seizure provisions that did not divest the police of the power to conduct searches and seizures when required. Therefore, the aforementioned provisions of ss 21 and 22 of the CPA had be read into the vacuum left by the severed part of s 13(7)*(c)* to allow the police to conduct such searches where they were necessary. The severance and reading-in would be with immediate effect. (See [73] – [76].)

The order had to be prospective to avoid the dislocation and inconvenience of undoing decisions or actions taken under the invalid statute. This would not affect the availability of potential additional relief sought by the applicants in the present case. The authorised searches conducted in the present matter exceeded the parameters of s 13(7) and were thus unlawful even before the declaration of invalidity of s 13(7)*(c)*. (See [77] – [80].)

As to the claim for constitutional damages: there were two overarching considerations, namely whether there existed an alternative remedy that would vindicate the infringement of applicants' rights to privacy and dignity and whether constitutional damages would be effective or appropriate in the circumstances. To be awarded, constitutional damages had to be the *most appropriate* remedy available to vindicate constitutional rights. Here the applicants had clear alternative routes under the common law (delict) or statute (PAJA s 8(1)*(c)*(ii)*(bb)*) to obtain compensatory relief for the breach of their rights. It would, moreover, not be fair to burden the public purse with financial liability where there were alternative remedies available. The appeal in

respect of the claim for constitutional damages therefore fell to be dismissed. (See [103], [112], [118] and [120] — [121].)

In his concluding remarks Mhlantla J pointed out that the applicants had collectively experienced more than 15 targeted raids over a period of a year, with each one infringing their rights to privacy and dignity. They were conducted for the ulterior purpose of enabling the Department of Home Affairs to arrest those suspected of being illegal immigrants. This abuse of power indicated wanton and calculated disregard for the law and a predacious, mechanical scheme to terrorise and arrest non-citizens and forcibly evict suspected unlawful occupiers, under the guise of restoring public order. The respondents were under the impression that because the applicants were largely suspected to be non-citizens or undocumented, their rights could be violated without consequence. This could not be so. (See [123] – [124].).

The court accordingly made an order (i) confirming the declaration of invalidity and (ii) severing and varying the offending part of s 13(7)*(c)* by reading-in (see [126]).

Held per Jafta J concurring (with Mogoeng CJ, Madlanga J, Mathopo AJ Mhlantla J and Tshiqi J)

An award of constitutional damages had to be necessary for the purpose of enforcing the Bill of Rights. There was no need for constitutional damages if common or statutory law provided adequate and effective protection of fundamental rights. It was not permissible in such cases for a claimant to ask for constitutional damages because they could be more conveniently established. The present matter did not meet any of the requirements for awarding constitutional damages and the claim had to fail. (See [148], [150] and [152].)

Held per Victor AJ dissenting

Paragraphs *(a)* and *(b)* of s 13(7) would be unconstitutional even after the excision of provision for warrantless searches under para *(c)*, for what would remain was the directive that the police had to cordon off the area, leaving paras *(a)* and *(b)* inchoate and subject to abuse. The entire s 13(7) was disproportionate to its purpose and severing it completely was the kind of remedy that would restore the dignity of the applicants and result in the structural changes required to moderate the conduct of the police. It ought to be declared unconstitutional and invalid in its entirety. (See [188], [214], [219] – [221].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v CORONATION INVESTMENT MANAGEMENT SA (PTY) LTD 2023 (3) SA 404 (SCA)

Revenue — Income tax — Controlled foreign companies — Exemption of 'foreign business establishment' — Whether 'controlled foreign company' as defined was 'foreign business establishment' as defined, qualifying for exemption — Effect of outsourcing on where 'primary operations' based — Essential operations must be conducted within jurisdiction in respect of which exemption sought — Income Tax Act 58 of 1962, s 9D(1) and 9D(2).

Section 9D(2) of the Income Tax Act 58 of 1962 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 'is attributable to a foreign business establishment' (FBE) of that controlled foreign company (see [8].)
The taxpayer, Coronation Investment Management SA (Pty) Ltd (CIMSA), was the holding company for the Coronation Group, registered and tax resident in South Africa. CIMSA was also the 100% holding company of CFM (Isle of Man) Ltd, a tax resident in Isle of Man, which in turn was the 100% owner of Coronation Global Fund Managers (Ireland) Ltd (CGFM), registered and tax-resident in Ireland.
Sars assessed the tax liability of CIMSA for the 2012 tax year to include in its income an amount equal to the entire 'net income' of CGFM. The tax court upheld CIMSA's appeal, finding that CGFM income was attributable to a 'foreign business establishment' (FBE), entitling it to the s 9D(2) exemption. In this case, Sars' appeal to the Supreme Court of Appeal against the tax court's decision, it was common cause that in the tax year of assessment, CGFM was a controlled foreign company as envisaged.
The central issue was whether CGFM was an FBE as defined in s 9D(1). The SCA's approached was that the location of the 'primary operations', referred to in s 9D(1)*(a)*(ii) – (iv), was pivotal in determining the issue, and that this depended on what the primary functions of CGFM in Dublin, Ireland, were. This in turn required a determination as to the nature of CGFM's business in Ireland, and in particular the effect of CGFM's outsource business model; and whether the primary business of CGFM was that of investment (which was not conducted in Ireland), or that of maintaining its licence and managing its service providers (which was conducted in Ireland). If the nature of CGFM's business in Ireland was that of an investment company, which it was common

cause was not located in Ireland, then its net income as a controlled foreign company would be imputable to CIMSA. And, if CGFM's primary business was 'the managed outsourcing of the investment management functions in accordance with the terms of the licence', which was located in Ireland, then CGFM qualified as an FBE and its net income would not be imputed to CIMSA because the s 9D(2) exemption would apply. (See [9], [11] and [40].)

Held

The licence granted to CGFM was for fund management, which included investment management, administration and marketing. That it elected to outsource these functions and merely manage these functions did not change the nature of the licence or elevate the managerial role to any other than an ancillary one. CGFM's licence was limited to collective investment management, which was integral to its licence as an authorised management company. (See [38] – [39].)

Outsourcing was a commercial reality, especially in Ireland. The fact that CGFM was permitted to outsource functions did not mean that the scope of its business was confined to supervision of the functions which it had outsourced, together with regulatory compliance. Its operations were determined by those activities for which it sought, and was granted, a licence. The choice of a particular business model did not alter the primary operations of a company. If the key operations of the business were outsourced (here, investment management), then the fixed place of business in Ireland would lack the staff and facilities to conduct those operations. If these operations were central to the business of CGFM, because they go to the very nature of what this business did, then CGFM did not conduct its primary operations in Ireland. The essential operations of the business must be conducted within the jurisdiction in respect of which exemption was sought. While there were undoubtedly many functions which a company may choose to legitimately outsource, it could not outsource its primary business. The primary operation of CGFM's business was that of fund management, which included investment management. These were not conducted in Ireland, and therefore CGFM did not qualify for an FBE exemption in terms of s 9D(1). Accordingly, the appeal would be upheld. (See [41], [49] – [52], [54] – [55] and [66].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v MEDTRONIC INTERNATIONAL TRADING SARL 2023 (3) SA 423 (SCA)

Revenue — Value added tax — Penalty and interest for failure to pay when due — Remission of — Whether competent to request under s 39(7) of VAT Act after conclusion and implementation of voluntary disclosure agreement — Tax Administration Act 28 of 2011, s 227; Value Added Tax Act 89 of 1991, s 39(7).

Revenue — Voluntary disclosure — Penalty and interest for failure to pay value-added tax when due — Request for remission of after conclusion and implementation of voluntary disclosure agreement — Sars' refusal to even consider such request constituting unfair administrative action reviewable under PAJA — Promotion of Administration Justice Act 3 of 2000; Tax Administration Act 28 of 2011, s 227; Value Added Tax Act 89 of 1991, s 39(7).

Section 39(7)*(a)* of the Value-Added Tax Act 89 of 1991 (the VAT Act) * provides that the South African Revenue Service (Sars) may consider a remission of interest levied on late payment of value-added tax (VAT). The taxpayer (Medtronic), after discovering internal fraud which had caused an underpayment of VAT, had applied for and was granted voluntary disclosure relief as contemplated in ss 225 – 233 of the Tax Administration Act 28 of 2011 (the TAA).

Subsequently, Medtronic's attorneys wrote to Sars requesting it — in terms of s 39(7) of the VAT Act, read with Sars interpretation note 61 — to remit the interest that it had levied on the capital tax representing the amount of default. Sars refused this and subsequent requests, contending that remission of interest was not catered for in a voluntary disclosure programme (VDP) under the TAA, and accordingly s 39(7) of the VAT Act found no application to VDP agreements. Sars' position was that the interest was paid pursuant to the VDP agreement which did not provide for the remission of interest (see [29]).

Medtronic thereafter applied in the High Court for review, under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), of Sars' decisions relating to the refusal of Medtronic's request for remission; and also for declatory relief, inter alia, as to the application of s 39(7). The High Court set aside Sars' impugned decisions as 'errors of law', holding that in the absence of an explicit provision in the TAA proscribing

remission of interest, it followed axiomatically that Sars was vested with powers to entertain requests for remission of interest and adjudicate them on their merits.

In the present case, Sars' appeal to the Supreme Court of Appeal (the SCA) against the High Court's decision, the SCA's approach was that the issue that was dispositive of the appeal was whether Sars was justified in law to refuse to even consider a taxpayer's application for remission of VAT, by virtue of such request having been made subsequent to the conclusion and implementation of a voluntary disclosure agreement (see [41]).

Held, by the majority, that:

- Nowhere did the VAT Act or the TAA provide expressly or by necessary implication that a taxpayer (a vendor in the context of this case) who had entered into an agreement under the voluntary disclosure programme, was excluded from the benefit for which s 39(7) provided (in particular when such an agreement has been discharged through performance of the contractual obligations undertaken in terms of the contract). Section 39(7) remained in force insofar as it related to any interest payable in respect of a VAT debt, and the Commissioner was accordingly still empowered under certain circumstances to remit interest. (See [28] and [47].)
- In its preamble, PAJA provided that it sought 'to give effect to the right to administrative action that is lawful, reasonable and procedurally fair . . . as contemplated in section 33 of the Constitution . . .'. Section 33(3)*(b)* of the Constitution imposed a duty on the state in all its manifestations to give effect to the rights in ss 33(1) and 33(2) of the Constitution. Sars' refusal to consider and determine Medtronic International's request altogether undermined one of the fundamental rights entrenched in the Bill of Rights. Such conduct was inimical to the constitutional duty that Sars bore as an organ of state in terms of which it must respect, protect, promote and fulfil the rights in the Bill of Rights. In sum, Sars bore a statutory duty buttressed by the Constitution to, at the very least, give consideration to the request and decide it on its own merits. This, Sars irrefutably refused to do, and under the circumstances a review under s 6(2)*(g)* read with ss 6(3) and 8(2) of PAJA was warranted. At the very least, Sars was required to entertain the application for remission and to consider and adjudicate it on its merits. The question whether remission of interest should be allowed and, if so, to what extent, did not arise in this appeal. In the result, the appeal would be dismissed. (See [44], [46] and [50].)

Held, by the minority ([58] et seq), that:

- A finding that the refusal to consider Medtronic's request for remission of interest was without justification in law, could not be made without deciding whether a request for remission may be made after conclusion of a voluntary disclosure agreement. (See [60].)
- In the absence of an assessment, a tax debt was not payable. In order to establish liability for the payment of a tax debt flowing from an understatement, and to render such debt due and payable (and therefore recoverable by Sars), something other than an assessment was required. The Legislature determined that mechanism to be a voluntary disclosure agreement — a contract entered between the taxpayer and Sars — which was enforceable in the ordinary course as a contractual obligation. In view of the critical purposes served by the VDA, it was not open to a court to ignore the conclusion of a voluntary disclosure agreement. No basis was advanced to suggest that under the agreement the amount of the interest included in the tax debt occurred under reservation of rights. The provisions of part B of ch 16, properly interpreted, did not permit a taxpayer who had entered into a voluntary disclosure agreement, to seek a remission of interest, the amount of which was incorporated in the determined tax debt due, after the conclusion of the voluntary disclosure agreement. To hold otherwise would undermine the legal consequences that attach to the conclusion of such agreement. (See [85], [88] – [89], [92] – [93].)

DRDGOLD LTD AND ANOTHER v NKALA AND OTHERS 2023 (3) SA 461 (SCA)

Appeal — Appealability — Order certifying class action and declarator in regard to transmissibility of claims for general damages — Jurisdiction of Supreme Court of Appeal to hear appeal from High Court sitting as court of first instance — Jurisdictional requirements under s 16(1) of Superior Courts Act, that order sought to be challenged constituted 'decision' — Meaning of 'decision' in s 16(1) same as 'judgment or order' under Supreme Court Act 59 of 1959 — General attributes for appealability absent — Interests of justice not qualifying orders as appealable decisions — Matter struck from roll — Superior Courts Act 10 of 2013, s 16(1).

In the High Court, the respondents, acting as proposed class representatives, sought orders certifying a class action and a declaratory order developing the common law so

that claims for general damages in a class action would be transmissible to the estate of a class member who passed away after the institution of the certification application, but before litis contestatio. The High Court had ordered certification and made a wider declaratory order not limiting the common-law development sought.

The present case concerned an appeal to the Supreme Court of Appeal against both of the High Court orders, prosecuted by only two of the original 32 mining companies cited as respondents in the High Court pursuant to a settlement reached between the parties. The SCA's approach was that the appealability of the orders was dispositive of the appeal. More specifically at issue was whether each order was a 'decision' as contemplated in s 16(1) of the Superior Courts Act 10 of 2013, clothing the SCA with jurisdiction.

All of the applications that formed part of the consolidated application for certification were launched prior to the commencement of the Superior Courts Act, which had repealed the Supreme Court Act 59 of 1959 with effect from 23 August 2013. The appellants contended that it was in the interest of justice that the certification be set aside on appeal because their participation in the class action would cause them to suffer undue prejudice.

Held

The SCA had no original jurisdiction and its common-law inherent power to regulate its own procedures, entrenched in s 173 of the Constitution, did not clothe it with jurisdiction: its jurisdiction was derived only from the Constitution and statute. It made no material difference if the issue of appealability were determined under the Superior Courts Act or its predecessor. The meaning of 'decision' in s 16(1) of the Superior Courts Act was the same as that of 'judgment or order' and 'decision' under the Supreme Court Act. The jurisdictional requirements for a civil appeal from the High Court sitting as a court of first instance were that leave to appeal was granted, and that there was a 'decision' of the High Court within the meaning of s 16(1)*(a)* of the Superior Courts Act. If the attributes of a 'decision' were lacking, such an order would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings (codified in s 17*(c)* of the Superior Court Act) or if the interests of justice required it to be regarded as an appealable decision. (See [13], [15], [27], [29] – [30].)

Certification was no more than a procedural device aimed at facilitating the determination of the class action. It had no final effect, but was susceptible to alteration

by the court hearing the class action; it was not definitive of any rights, nor did it dispose of any portion of the relief claimed in the main proceedings, that is, the class action. Consequently, the question was whether the interests of justice nevertheless qualified the certification as an appealable decision. The appellants' complaint of prejudice in this regard appeared to be exaggerated and did not favour a piecemeal appeal. The certification was accordingly not appealable at this stage. (See [31] and [33] – [35].)

As to declarator, it also did not have the attributes of 'a decision'. Therefore, one again, the question was whether the interests of justice qualified it as such. Should an appeal against the declarator be entertained at this stage, there may be a further appeal which may postpone litis contestatio in the class action, yet may culminate in a decision that litis contestatio remained determinative for the transmission of claims for non-patrimonial damages. That may cause the extinction of any number of claims for general damages of claimants that passed away before litis contestatio. The overwhelming interests-of-justice consideration was that the finalisation of the class action should be expedited. In the result, the interests of justice did not qualify the declarator as an appealable decision. (See [39].)

Neither the certification nor the declarator was a decision under s 16(1) of the Superior Courts Act. Even though leave to appeal against both was granted, this court lacked jurisdiction. The matter would be struck from the roll with costs. (See [40].)

EDEN CRESCENT SHARE BLOCK LTD v OLIVE MARKETING CC AND ANOTHER 2023 (3) SA 476 (SCA)

Servitude — Interpretation — Whether invalid owing to vagueness — Whether special or general.

Applicant (Eden) and first respondent (Olive) owned adjoining erfs which they had bought from Ethekwini Municipality. In Eden and the Municipality's sale agreement it was stipulated that a parking servitude of 250 parking spaces would be created over Eden's property in favour of Olive's property; and in Olive and the Municipality's sale agreement it was recorded that Olive's property enjoyed a parking servitude over Eden's property.

Eden later asserted that the servitude was invalid and refused to provide parking to Olive, which caused Olive to proceed in the High Court for an order enforcing the servitude. In this it was successful. Eden then applied to the High Court for leave to

appeal but this was refused, prompting Eden to petition the Supreme Court of Appeal for its leave to appeal to it. It referred the application to oral argument (see [1] – [2]).

There, Olive, the Municipality and a third party asserted that the servitude was valid, while Eden asserted that it was invalid. That, on two bases.

First, that it was a specific servitude but failed to specify essential elements, so rendering the servitude-creating agreement vague and unenforceable. The essential elements were (1) the number; and (2) the location, of the parking spaces (see [3] and [15]).

Held, as to (1), that there was no uncertainty as to the number of parking spaces specified: the servitude provided that Eden was to make spaces available for 'at least 250 motor vehicles' (see [16]).

As to (2), the failure to specify the location of the spaces raised the question of whether the servitude was, as Eden contended, a specific servitude (see [17]).

Held, on interpreting the agreement, to the contrary — the parties' clear intention had been to create a general servitude. Indicia in this regard were the stipulation that the servitude was to be made 'over the lot'; the absence of any detail as to location; and the absence of any suggestion that the parties intended to agree on a location later (see [19] – [21]).

Eden's second attack on the validity of the servitude relied on the proposition that the creation of the servitude was an alienation of property within the meaning of s 8(1)*(c)* of the Share Blocks Control Act 59 of 1980 and s 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988; that the prerequisites set in those acts for valid alienation had not been met; and accordingly that the servitude was invalid (see [3] and [23]).

As to the alienation, Eden explained that it took transfer of the property, but only a year later was the servitude registered. Thus it had taken transfer of unencumbered property and the servitude's registration a year later comprised an alienation of rights. There had been no compliance with the Act's preconditions for such alienation and hence the servitude was invalid (see [26]).

Held, that at all times that Eden had occupied the property, it had been under an obligation to allow Olive the use of 250 spaces — that is, under the lease of Eden and the Municipality, then after transfer in terms of the sale agreement of Eden and the Municipality in which Eden agreed to the creation of the servitude, and then from registration of the servitude. Accordingly it could not be said that there had been an

'alienation' of property rights in the terms of the Acts such as to attract the application of ss 8(1)*(c)* and 4B — those sections would have no effect on the validity of the servitude (see [27] – [28], [30] – [31] and [33]).
Ordered that Eden's application for leave to appeal was dismissed (see [38]).

GOLDRUSH GROUP (PTY) LTD v NORTH WEST GAMBLING BOARD AND OTHERS 2023 (3) SA 487 (SCA)

Company — Shares and shareholders — Shareholders — Proceedings by and against — Declaration of rights affecting company — Locus standi — Own-interest litigant — Financial interest — Purely financial interest of shareholder not sufficient to establish own-interest standing; interests of justice must also favour affording standing.
Practice — Parties — Locus standi — Own-interest litigant — Financial interest — Purely financial interest not sufficient to establish own-interest standing; interests of justice must also favour affording standing.

The third to fifth respondents (licensee companies) were holders of 'bingo' and 'route operator' gambling licences, originally issued to them, in terms of the North West Gambling Act 2 of 2000, in 2009 by the first respondent — the North West Gambling Board (the Board), which oversaw gambling in the North West Province. The appellant, Goldrush Group (Pty) Ltd (Goldrush), at the time of the application giving rise to this appeal, held 40% of the shares in the licensee companies, with the sixth to tenth respondents, representing North West Black residents or entities majority-owned by local Black residents, holding the balance. What gave rise to the present appeal was, principally, the decision by the Board, in March 2019, to reject the licensee companies' applications to renew their licences, as they were required to do each year, and had successfully done in the past. The reason given for the decision was as follows: It was, at all relevant times, a requirement of the licences issued to the licensee companies that at least 60% of the shareholding in a company with a licence had to be held by 'local PDIs', ie natural Black persons resident within the North West Province, or juristic persons in whom the majority ownership, employment and beneficiation were held or accrued to natural persons who were resident in the North West Province. But, as a consequence of the sale by one of the local PDI shareholders

of 4% of its shareholding to Goldrush, Goldrush now held between 43,45 and 44% of the shares, and the local PDI shareholders therefore less than 60%, meaning the condition was no longer met. One of the various steps taken by Goldrush was to approach the High Court for an order declaring to be unlawful and invalid the imposition by the Board of conditions on licences issued in terms of the Act requiring the licensee to ensure that, at all times during the subsistence of the licence, at least 60% equity ownership in the licensed entity was held by previously disadvantaged individuals who resided in the North West Province. The High Court dismissed the application, but granted leave to Goldrush to appeal to the Supreme Court of Appeal. The Board argued that Goldrush did not have locus standi to seek the relief it had, and that any application ought to have been brought by the licensee companies. Goldrush argued that it had standing on the grounds of its being a shareholder whose ability to deal with its shareholding was circumscribed by the local PDI requirement.

Held, that, in order for a litigant to establish own-interest standing, the showing of purely financial self-interest was not enough; the interests of justice also had to favour affording standing. (See [19] – [20].)

Held, that, at best for Goldrush, its interest was purely financial. Accordingly, it was necessary for the interests of justice to tip the scales in favour of Goldrush for it to have locus standi. (See [20].) However, Goldrush failed to provide any focused evidence on, or make any submissions concerning, the interests of justice (see [21] – [22]). The result was that Goldrush had failed to make out a case for standing (see [22]).

Held, that, further, this being the case, the court ought to dismiss the case on such basis: this was not one of those exceptional cases in which public interest called for a court to enter into the merits, even despite lack of standing. (See [15] and [28].)

Held, that, in the result, the appeal should be dismissed (see [29]).

KUTTEL v MASTER OF THE HIGH COURT AND OTHERS 2023 (3) SA 498 (SCA)

Trust — Trustee — Sale of trust's immovable property to trustee — Whether court approval required.

This matter concerned the P trust, whose beneficiaries included Peter, Adrian and Francois Kuttel. Adrian and Francois were also trustees (see [4] – [5]). At a point the P trust sold shares in company S (S Co) to company G (G Co). S Co was owner of

immovable property. G Co's shareholders were the X trust and Y trust, and their beneficiaries, respectively, were Adrian and Francois (see [8] and [14]). Peter attacked the validity of the sale (see [1]).

The High Court dismissed Peter's application, refused leave to appeal, and Peter applied to the Supreme Court of Appeal for leave (see [2]).

Peter's first attack was based on authority that a court's confirmation was required in order for a trust to sell immovable property to a trustee. Here he said, the sale by the P trust of the shares in S Co to G Co was in effect sale of the immovable property to trustees Adrian and Francois. That without confirmation of the court (see [29] and [34] – [35]).

Held, that the argument relied on the proposition that ownership of a share in a company was ownership too of the company's property. This ran contra to the axiom that a company's property was owned by the company, not its shareholders. Moreover, a share was movable property, not immovable (see [36]).

The second attack referenced the requirements for a valid sale of property by a trust to a trustee that the other trustee/s consent and that the sale be open and bona fide. The assertion was that it was not open and bona fide (see [32] – [33] and [37]).

Held, that the evidence was to the contrary (see [39]).

The third contention was of unfair differentiation: the trustees did not inform Peter of the sale, so preventing his bidding for the shares (see [42]).

Held, considering the terms of the trust deed, the aim of the restructuring of which the sale was a part, and the effect of the sale, that the differentiation was justified, and hence not unfair (see [49]).

Application for leave to appeal dismissed (see [55]).

MEC FOR LOCAL GOVERNMENT WC v MATZIKAMA LOCAL MUNICIPALITY AND OTHERS 2023 (3) SA 521 (SCA)

Local government — Municipality — Suspected maladministration — Power of MEC to initiate investigation into — Whether crimes other than fraud and corruption may be investigated — Local Government: Municipal Systems Act 32 of 2000, s 106(1)*(b)*.

In this matter a third party brought to appellant MEC's attention allegations of irregular appointments, payments and theft by first-respondent municipality's administrators.

The MEC considered the allegations, conveyed them to the municipality and gave the municipality an opportunity to make representations on them (see [3]).

The municipality provided explanations, but certain of them were unsatisfactory to the MEC, so the MEC designated investigators to investigate the allegations concerned. This the MEC did using the power given to him by s 106(1)*(b)* of the Act (see [3]).

The municipality then urgently applied to the High Court to review the municipality's decision to institute the investigation, but the municipality was unsuccessful in respect of all of the investigations initiated barring that into the theft, which the High Court set aside. This on the basis of authority that the MEC's power to investigate criminal conduct under s 106 was limited to fraud and corruption and did not extend to theft (see [4] – [8]).

The MEC then applied to the High Court for its leave to appeal to the Supreme Court of Appeal against the setting-aside of the municipality's decision to initiate the theft investigation, which leave the High Court granted (see [8]).

The issue on appeal was: could an MEC under s 106 appoint investigators to investigate crimes other than fraud and corruption? *Held*, that an MEC could. Section 106 did not say expressly that only fraud and corruption could be investigated; the terms 'maladministration' and 'serious malpractice' were wide enough to include criminal acts; narrow interpretation of s 106 would bring arbitrary results, defeat its aims, and prevent its use to investigate offences it was designed to investigate (see [2], [12] and [18] – [22]).

Appeal upheld, the High Court's order set aside, and replaced with an order dismissing the municipality's application to review the MEC's decision to appoint investigators to investigate the theft allegation (see [27]).

ABSA BANK LTD v GONTSANA AND ANOTHER 2023 (3) SA 530 (GJ)

Mortgage — Foreclosure — Judicial execution — Sale in execution — Residential property — Judicial oversight — Requirement that execution be proportionate response to alleged default — Ten-year delay between granting of order declaring property specially executable, and taking of steps to arrange sale in execution — Apparent that facts might no longer justify execution — Abuse of process — Court empowered to suspend order granting leave to execute pending provision of further

information so as to determine whether execution on original judgment remaining proportionate — Uniform Rules of Court, rules 45A and 46A.

The first and second respondents (the Gontsanas), in 2007, passed a mortgage bond over their residential property in favour of the applicant (Absa), in order to secure a principal debt of R65 000 incurred in terms of a home- loan agreement they had entered into with Absa. By February 2013 the Gontsanas had fallen behind on their monthly payments of R548,03, such that their arrears stood at R7935,85. Consequently, Absa called up the bond and sought judgment for the full accelerated amount payable, and an order declaring the property specially executable. On 14 November 2013 Mali AJ granted judgment in the amount of R60 397,37 plus interest and costs, and an order declaring the property to be specially executable. She however suspended her order for three months in order to give the Gontsanas the opportunity to bring payments on their account up to date. Subsequently, a period of almost a decade passed without Absa taking steps to execute Mali AJ's order.
The present application, instituted only on 14 December 2022, was purportedly brought in order to secure compliance with Uniform Rule 46A(9), which had only come into effect after Mali AJ's order. Absa sought an order, as first prize, directing that the property should be sold without a reserve price. The application was served on the Gontsanas and came before the present court on the unopposed roll. The court raised as a concern the decade-long delay between Mali AJ's order and the institution of this application. What could be gleaned from various affidavits filed by Absa in response to a request by the court for clarification was that a decision had been taken by Absa not to proceed on the Mali AJ order, and an arrangement was made with the Gontsanas, the details of which were unclear. It was apparent, though, that the Gontsanas continued to make payment, and that Absa accepted these payments, but not in reduction of the judgment debt, but instead as payment on the original loan account.
Because Absa's application implicated the Gontsanas' rights of access to adequate housing under s 26 of the Constitution, the court held, before granting any of the relief sought it had to be satisfied that it would be a lawful and proportionate response to the Gontsanas' alleged default (see [14]). Generally speaking, execution against a debtor's home was neither lawful nor proportionate if it amounted to an abuse of process (see [15]). The court asserted that it could think of no clearer instances of an

abuse of process in this case: Absa had advanced a loan to an impecunious family. When the Gontsanas failed to repay that loan, Absa obtained judgment and secured the right to execute. It then allowed that judgment to lie fallow for 10 years, all the while accepting payments and no doubt contributing to the impression that it was no longer interested in executing against the Gontsanas' property. Absa failed to adequately explain what happened in the 10 years during which it declined to execute, why it applied the Gontsanas' payments to their loan account, and not in reduction of the judgment debt, and why it recently decided to reverse its course and execute against their home after all. (See [16].)

The court held that in cases like the present, where there has been such a long delay between judgment and execution, and it appeared that the facts may no longer justify execution against a person's home, a court should not hesitate to exercise its discretion to suspend the execution of an order under rule 45A, on appropriate terms. (See [18].) Appropriate relief in the present case, the court concluded, would be to suspend the special execution order, pending the disclosure by Absa of information presently outstanding and necessary in order to determine conclusively whether execution against the Gontsanas' home was disproportionate or not, and further pending the affording to the Gontsanas of an opportunity to meet their obligations under the Mali AJ order. (See [20] – [25].)

AK AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER 2023 (3) SA 538 (WCC)

Immigration — Prohibited persons — Dedesignation — Good cause for dedesignation — Adverse impact on minor children — Immigration Act 13 of 2002, s 29(1)*(f)* and (2).

AK, a Russian citizen, had resided in South Africa from 2010 on study and work visas, and in 2015, by the services of an immigration consultant, had been issued with a work visa valid to 2020 (see [10] – [12]).

In parallel, in her personal life, AK in 2011 met a South African named JJ and later moved in with him. They came to have two children (second and third applicants) and they, by virtue of their birth in the country and the South African nationality of their father became South African citizens (see [13]).

Then relatedly, in 2018, during the term of the work visa procured by the consultant, AK applied to the Department of Home Affairs for a spousal visa, but her application was rejected on the ground that her work visa was fraudulent, and she was, as a concomitant, designated a 'prohibited person' in terms of s 29(1) of the Immigration Act 13 of 2002. The effect of this was that AK fell to be deported, absent a declaration on good cause shown, that she not be classified as a prohibited person (s 29(2)) (see [14] – [15], [17] and [19]).

AK then appealed the rejection of her visa application to the Director-General of the Department, who dismissed the appeal by reason of her prohibited- person designation (see [20]).

In response, AK applied for reversal of that designation, but the Director-General negatived this, citing her submission of the fraudulent visa in support of her spousal-visa application (see [21]).

Persisting, AK had this decision set aside, and it was remitted by the High Court for redecision. It was however redecided against AK, the Director-General citing a failure to demonstrate 'good cause', a conclusion he came to after rejecting AK's motivations that she was a victim of the immigration consultant's fraud and that deportation would gravely impact her minor children (see [22] – [23]).

AK then in the present application sought the High Court's review of the Director-General's refusal to dedesignate her (see [2]).

There the court's consideration went firstly to the Director-General's rejection of AK's victim-of-fraud representation which was premised on AK's being conversant with the Department's processes and so not credibly unaware that the visa was fraudulent. The court *held* that it did not follow from any conversancy with the Department's processes (which conversancy was in any case controverted by AK's evidence) that AK was complicit in the fraud (see [25] – [27]).

The court's attention fell, secondly, on the Director-General's proposition that AK's failure to pursue the consultancy was a further suggestion of her complicity — a conclusion which the court again found not to follow from its premise where in any event AK had explained that she lacked the means to pursue the matter (see [28]).

The court's attention went, thirdly, to the Director-General's rejection of AK's representation that non-alteration of her status which would result in her deportation would impact adversely on her children and that avoidance of such adverse impact would qualify as s 29(2)'s good cause. She highlighted in this connection that she was

the children's biological mother, primary caregiver, primary financial provider, and that her deportation would require her either to leave her children in South Africa or to take them with her to Russia which was in a state of war — a unique circumstance (see [34]).

This was rejected by the Director-General, who explained that were the Department required to consider minor children in its adjudication of s 29(2) applications that the Department's workload — given the volume of such applications — would be rendered unmanageable. Moreover, AK's circumstances were not unique (see [36]).

Considering this, the court noted that contra the Constitution and legislation the Director-General had failed to take into account the best interests of AK's children in adjudicating her application as those instruments required (see [37] and [44]).

Factors bearing on those interests, weighing against AK's deportation and going toward good cause for her status change, were that if AK left her children to return to Russia they might become estranged from her — there was no certainty that she would be able to return to South Africa given Russia's state of war; and that were she to return to Russia with the children they would lose their contact with their father and his family and the family unit (albeit that AK and JJ's relationship had ended) would be disrupted (see [48]). None of these factors had however featured in the Director-General's reasoning and consequently, having failed to apply his mind to the children's best interests, his decision was irrational and unreasonable (see [50] – [51]).

This raised the question of whether the decision should be remitted to the Director-General for reconsideration or taken by the court, with the court deciding to pursue the latter course. (This was on the grounds that the Director-General's persistent suspicion as to the manner in which AK acquired the visa suggested he would not bring an independent mind to the enquiry; the Director-General's assertion of inundation with applications suggested he would not be able to apply his mind; the court had all the information before it that had served before the Director-General, and more; the decision required no special expertise — the Director-General's view was that the application was unexceptional; and delay before re-adjudication would prejudice the applicants (see [53]).)

Then taking the decision, the court's view, given the soundness of AK's representations, was that her designation as a prohibited person should indeed be reversed (see [54]).

Ordered inter alia that the Director-General's dismissal of AK's s 29(2) application to reverse her prohibited-person classification should be set aside, that AK be declared not a prohibited person, and the Director-General directed to authorise AK to remain in South Africa pending her application for a status (see [57]).

BLACHER v JOSEPHSON 2023 (3) SA 555 (WCC)

Arbitration — Award — Enforcement — Of award based on compromise in respect of unlawful loan agreements under NCA — Not constituting fresh and independent causa distinct from underlying invalid agreements — Enforcing arbitral award endorsing unlawful credit agreements would subvert NCA and be against public policy — National Credit Act 34 of 2005.

Compromise — Validity — Original loans compromised by acknowledgement of debt unlawful under NCA — Whether invalidity of original causa effecting subsequent compromise.

Mr Blacher, in terms of an acknowledgement of debt (AOD) signed on 28 August 2019, declared himself 'truly and lawfully' indebted to Mr Josephson in the amount of R2,5 million, which he undertook to pay in full or in part a month later. This was the third AOD between them arising from oral loan agreements, Mr Josephson having advanced R2,5 million to Mr Blacher in five unequal instalments between February and July 2015. The first two AODs provided that the loans were repayable on 45 days' demand and attracted interest at an effective compound rate of 30% per annum. At the time that the third AOD was signed, Mr Blacher had repaid R2 121 500 to Mr Josephson. Aside from the loans, Mr Josephson had also paid over an amount of R750 000 to an entity controlled by Mr Blacher for it to be invested in a company to be formed (the Panico investment) in return for a 20% shareholding therein.

By May 2019 Mr Blacher was in default and placed on terms by Mr Josephson's attorneys. Mr Blacher denied liability in respect of the Panico investment and raised two queries in regard to the loans which had been advanced to him, viz whether the respondent had been registered as a credit provider in terms of the National Credit Act 34 of 2005 (the NCA) at the time of the conclusion of the agreements in terms of which the moneys were advanced; and whether the respondent had conducted a credit assessment of him prior thereto. In July 2019 Mr Blacher made a written offer via his attorneys to pay R2,5 million, subject to Mr Josephson acknowledging that Mr Blacher

was not liable for the Panico investment. It was against this background that the third AOD was signed. Unlike the previous AODs, the third AOD made no provision for the levying of interest. In the event, the amount of the third AOD was only paid in part, Mr Blacher paying an amount of R965 000 in November 2019.

Mr Josephson then declared a dispute in terms of a clause in the third AOD and referred it to arbitration, in which he sought payment from Mr Blacher. In response Mr Blacher instituted a High Court action for an order declaring that the various oral loan agreements, and the three AODs which gave effect to them, constituted unlawful credit agreements in terms of the NCA, and were accordingly void, and that consequently Mr Josephson be directed to repay the full amount which had been paid to him by Mr Blacher, ie R3 086 500. In his statement of defence in the arbitration Mr Blacher repeated the assertion made in his action, that the third AOD was a reckless credit agreement and that his obligations thereunder should consequently be set aside.

The arbitrator held that the third AOD was intended to be a compromise, ie a settlement of the claim in respect of the loans which had been advanced and the claim in respect of the Panico investment, and as such the provisions of the NCA did not apply to it. In the result, an arbitral award to pay was made against Mr Blacher. When no payment was forthcoming, Mr Josephson applied for the award to be made an order of court. Shortly afterwards, Mr Blacher applied to review the arbitration proceedings. The High Court, having heard the two applications together — ie both Mr Josephson's application for the enforcement of the award and Mr Blacher's application for the review of the arbitration proceedings — agreed with the arbitrator, and held that in the circumstances there was no basis to find that the third AOD's enforcement would perpetuate any unlawful prior agreements, or that it would be contrary to public policy. The present case concerned Mr Blacher's appeal to the full bench. The main issues were:

- Whether — given that the rights and obligations which the respondent sought to enforce arose directly from an arbitral award as opposed to prior underlying agreements which may have been unlawful in terms of the NCA — the award constituted a fresh and independent causa divorced from such agreements, thereby allowing for it to be enforced.
- Whether the third AOD constituted a compromise, a self-standing, substantive agreement of settlement of litigation or envisaged litigation, standing independent of the underlying causa that gave rise to it, so that it was not affected by the possible

invalidity or illegality of the original agreements as contained in the various AODs and the underlying obligations which arose from them.

Held

As a general proposition, as a matter of law a compromise was considered to be a self-standing agreement standing independent of the underlying claim or causa from which it arose, which may be contractual, ie a claim or causa which arises out of an earlier agreement. However, it was not always the case that a compromise was not affected by a defect which attached to the prior underlying claim or causa. The fact that the award was based on a compromise, which in law constituted a self-standing agreement, did not necessarily mean that it was immune to any invalidity or illegality which affected the earlier AODs, and both the arbitrator and the court a quo erred in this regard. Depending on the nature and extent of the disability (ie the invalidity/illegality) applicable, it may have infected the third AOD, and in turn the compromise on which it was based. (See [59], [72].)

The Constitutional Court had confirmed that a subsequent compromise in relation to an invalid early agreement may be upheld as valid and enforceable if it related to an enrichment claim, but not if it sought to enforce an indebtedness which was based on, and arose from, the earlier invalid agreement. The first two AODs constituted unlawful credit agreements in terms of the NCA. It was common cause that the claim which was advanced by the respondent at the time was based squarely on the alleged balance owing in terms of the AODs. It was not a restitutionary claim based on an alleged enrichment of the appellant at the expense of the respondent; it was a contractual claim under, and in terms of, the first two AODs which the parties sought to compromise, together with the claim in respect of the alleged Panico debt. In the circumstances, the bulk of the amount offered in the compromise was in respect of amounts advanced in terms of earlier, unlawful agreements. The third AOD did not transform the unlawful nature of such agreements, as embodied in the first two AODs, into 'something new and valid'. It merely constituted an agreement to repay a lesser amount than that which was claimed on the prior, existing indebtedness, and set out fresh terms as to when this was to occur. This meant that the arbitral award in turn did not serve to replace the original, underlying cause of action. In the main, it constituted a novatio necessaria, which attempted to strengthen the underlying contractual causa which was derived from the original, unlawful agreements, and it did not transform or

replace the contractual obligations arising from them. (See [76], [79] – [81], [83] – [84], [87] – [88].)

Enforcing the award would encourage credit providers not to register and would subvert the regulation and control of their activities which the NCA sought to achieve. In the circumstances, giving effect to party autonomy by enforcing an arbitral award which served to uphold and endorse credit agreements which were unlawful, and to subvert the Act and encourage non-compliance therewith by credit providers, would be against public policy. Accordingly, the judgment and order of the court a quo would be set aside. (See [91], [92].)

EKURHULENI MUNICIPALITY v NEW STAR TECHNOLOGY CC AND ANOTHER 2023 (3) SA 579 (GJ)

Environmental law — Environmental legislation — Contravention — Sanction — Final interdict appropriate where respondent evincing intention to persist with its illegal activities — National Environmental Management Act 107 of 1998, s 32.

The respondents were burning plastic waste on their property without a licence and in violation of several pieces of environmental legislation. The applicant municipality argued that respondents' conspicuous disregard for the law, even in the face of a compliance notice, constituted a clear infringement of a right that entitled it to a final interdict. When the respondents questioned the applicant's standing, it indicated that it was pursuing the matter on its own behalf and that of the public, with the intention of protecting the environment. The respondents indicated that while they were taking steps towards compliance, they intended continuing with their activities — which according to them was helping the environment by getting rid of plastic waste — until the necessary environmental authorisation was forthcoming. The respondents also highlighted the applicant's failure to pursue alternative remedies. The applicant argued that an interdict was the only appropriate remedy, since the alternative of seeking a criminal sanction was inappropriate in the light of the slowness of the procedure and respondents' penchant for flouting the law.

Held

Once an applicant proved the elements of an interdict, the latitude for refusing it was limited (see [11]). The applicant's standing derived from a community interest in, and its own statutory obligation to ensure, the protection of the environment. This was also

apparent from s 32 of the National Environmental Management Act 107 of 1998, which bestowed wide-ranging standing to enforce environmental law (see 18] – [20]). The respondents' activities were harmful to the health and wellbeing of the residents of the area. As to alternative remedies, criminal prosecution was inappropriate because it could take years and would allow the respondents to continue with their unlawful activities in the interim, which was clearly their intention. Moreover, the imposition of a fine was not an adequate deterrent where persons were benefiting financially from illegal operations and environmental pollution (see [25] – [29]). An interdict was the only appropriate remedy in the circumstances (see [30]).

JANSE VAN RENSBURG v OBIANG AND ANOTHER 2023 (3) SA 591 (WCC)

Appeal — Suspension of judgment pending appeal — Semble: suspension doctrine applying also where order appealed against was one dismissing application — Superior Courts Act 10 of 2013, s 18.
Execution — Suspension of execution of court order — Application for — Discretion of court — Interests of justice — Application granted where irreparable harm to applicant would otherwise result — Constitution, s 173; Superior Courts Act 10 of 2013, s 18; Uniform Rules of Court, rule 45A.

In June 2021 Lekhuleni J ordered the present first respondent (Obiang) to pay the present applicant (Janse van Rensburg) R40 million (the Lekhuleni order). In August 2021 Obiang obtained an interim order from Ndita J suspending the Lekhuleni order pending an application for its rescission (the Ndita order). In December 2021 Slingers J dismissed Obiang's rescission application (the rescission application/the Slingers order). In February 2022 Obiang was granted leave to appeal against the Slingers order. Meanwhile, armed with the Lekhuleni order, Janse van Rensburg moved to execute against Obiang's immovable property. Obiang viewed this as being in contempt of the Ndita order.
There were two applications before the court, one by each party. They called on the court to decide two issues: whether Janse van Rensburg was in contempt of Ndita J's suspension order when he proceeded to execute against Obiang's immovable property, and whether the Ndita order suspended the execution of the Lekhuleni order pending the outcome of *all* appeals relating to the rescission application. Janse van

Rensburg argued that Slingers J's dismissal of the rescission application discharged Ndita J's interim order, thereby opening the door to him to execute on the Lekhuleni order. * He therefore sought the court's authorisation, under rule 46A of the Uniform Rules of Court, for the sale in execution of Obiang's immovable property. Obiang disagreed, arguing that his appeal against the Slingers order revived the Ndita order.
Apart from this, the court had to consider whether the Lekhuleni order had to be suspended by virtue of Uniform Rule 45A or its inherent power under s 173 of the Constitution. Rule 45A empowered the court 'on application, [to] suspend the operation and execution of any order . . . (p)rovided that in the case of an appeal, such suspension is in compliance with section 18 of the [Superior Courts] Act'.
The relief sought by Obiang — a stay of execution and the application for contempt — was partially premised upon whether the appeal against the Slingers order was pending or had lapsed, as argued by Janse van Rensburg.

Held

As to whether the appeal against the Slingers order had lapsed, that the court could not on the papers conclude that it had (see [19] – [24]).
As to the effect of the appeal, that the court was bound by the decision of the Western Cape High Court in *Uitzig Secondary School Governing Body and Another v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC), which held that, under s 18 of the Superior Courts Act 10 of 2013, the suspension doctrine applied to appeals against all orders without distinguishing between dismissals (like the Slingers order) and confirmations. (See [30], [32] – [33], [38].)
That being the case, the court had to decide whether to suspend the Lehkuleni order pending Obiang's appeal against the Slingers order in the exercise of its discretion under rule 45A and its inherent power, under s 173 of the Constitution, to regulate its own process in the interests of justice. This power included the inherent discretion to stay the execution of *any* order. The court's discretion was a judicial one which would oblige it to stay (suspend) execution of an order if real and substantial justice demanded it or where an injustice or irreparable harm would otherwise result. †] Generally, courts would grant a stay where the underlying causa of the judgment in question was being disputed or no longer existed, or where the machinery of execution was being used for ulterior or improper purposes. But a court could, even where the underlying causa of a claim was *not* disputed, still grant a stay *where an injustice*

would otherwise result, for example, where the possibility existed that the order on which the execution was predicated was liable to be expunged. (See [39] – [44].)
If Obiang's appeal against the Slingers order were to succeed, it would have the effect of expunging the Lekhuleni order, in which case Obiang would be granted leave to defend the main action. Allowing Janse van Rensburg to proceed with the execution and sale of the property would therefore result in an injustice and expose Obiang to potentially irreparable harm because he could, in the event of ultimate success, be left without substantial remedy (save trying to recover from Janse van Rensburg). In contrast, Janse van Rensburg would suffer no such harm if a stay were granted and Obiang were to fail: the properties would still be available for execution. The interests of justice were therefore best served by suspending the operation of the Lekhuleni order pending the outcome of Obiang's appeal. With reference to the proviso to rule 45A, such an order would not offend s 18 of the Superior Courts Act. This meant that Janse van Rensburg's application to have Obiang's immovable properties declared executable under rule 46A could not be granted at the present stage and would be postponed to permit re-enrolment after the appeal. (See [49] – [51], [53] – [54], [73].)
As to contempt, the correspondence between the attorneys representing the respective parties clearly demonstrated divergent views on the executability of the Lehuleni order after the dismissal of Obiang's rescission application. Janse van Rensburg's belief that he was entitled to proceed with the execution was genuine, and it could not in these circumstances be said that he had acted mala fide in doing so. (See [65] – [66].)
The court accordingly made an order (i) suspending the execution of the Lekhuleni order pending the outcome of all appeals relating to the rescission application; (ii) finding Janse van Rensburg innocent of contempt; and (iii) postponing his rule 46A application. (See [74].)

KEYHEALTH MEDICAL SCHEME v NGOEPE NO AND OTHERS 2023 (3) SA 610 (GP)

Contract — Enforceability — Agreement purporting to curtail statutory protection of persons negotiating out of position of inequality and in whose well-being there exists public and private interest — Principle that courts will not permit such contracting-out reaffirmed.

Medicine — Medical aid — Medical aid scheme — Findings against confirmed — Wrongful utilisation of member's savings account for prescribed minimum benefit — Medical aid would first deduct any prescribed minimum benefit (PMB) from day-to-day benefits (DTD), which was in turn funded by member's savings account (MSA), and, only after MSA was depleted, would then take funds from PMB 'risk pool' — Scheme's attempt to evade regulations by artificially distinguishing between DTDs and MSA slated — Finding that this practice contrary to Medical Schemes Act upheld on appeal — Medical Schemes Act 131 of 1998.

Medicine — Medical aid — Medical aid scheme — Minimum benefits for prescribed conditions — To be funded from scheme's PMB risk pool — May not be deducted from day-to-day benefits funded by member's savings account.

A medical aid scheme must fund members' prescribed minimum benefits (PMBs) from its PMB risk pool and not from members' savings accounts (MSAs). Going the latter route is specifically prohibited by reg 10(6) regulations promulgated under the Medical Schemes Act 131 of 1998 (the Act). The appellant scheme's attempt to evade this prohibition by (artificially) distinguishing between 'day-to-day benefits' (DTDs) and MSAs and then saying that the Act did not prohibit using the former to fund PMBs, would fail, as MSAs and DTDs amounted to the same thing. In any event, even if the scheme and its own rules allowed the practice, then its conduct would fall foul of the principle — endorsed in *Council for Medical Aid Schemes and Another v Genesis Medical Scheme and Others* 2016 (1) SA 429 (SCA) ([2015] 3 All SA 688; [2015] ZASCA 161) para 42 — that courts should not permit contracting out of the provisions of an Act where it had been passed for the protection of a class of persons who negotiate from a position of inequality and in whose wellbeing there is a public, as well as a private, interest. (See [38] and [49].)

The present matter developed as follows: In 2016 the third respondent, Dr Reed, a member of the appellant scheme (KeyHealth), objected to KeyHealth paying for his cardiologist consultations with his DTD benefits, arguing that treatment of his chronic heart condition had to be funded from KeyHealth's PMB risk pool only. KeyHealth differed, arguing that its practice was to first take funds from the DTD benefits and to tap the PMB risk pool only when the patient's DTD funds were depleted. Reed complained to the Council for Medical Schemes (CMS), which ruled in favour of KeyHealth. Reed appealed to the CMS appeals committee, which again ruled for

KeyHealth, citing the absence of an express prohibition on the funding of PMB claims from DTD benefits. Reed appealed to the appeal board constituted in terms of s 50 of the Act where, for the first time, he was successful, with the board censuring KeyHealth's conduct as an attempt to escape liability for the full payment of PMB benefits out of its PMB pool. KeyHealth then unsuccessfully applied to the Gauteng Division of the High Court for the setting-aside of the appeal board's decision, which led to the present full-bench appeal by KeyHealth. The full bench, adopting the reasoning outlined above, again found for Reed, dismissing the appeal.

MA-AFRIKA HOTELS (PTY) LTD v CAPE PENINSULA UNIVERSITY OF TECHNOLOGY 2023 (3) SA 621 (WCC)

Administrative law — Administrative action — What constitutes — Cape Peninsula University of Technology procuring service provider for provision and administration of student accommodation at its property — Decisions relating thereto amounting to 'administrative action' — Promotion of Administrative Justice Act 3 of 2000, s 1.

The applicant — Ma-Afrika Hotels (Pty) Ltd — and the respondent — the Cape Peninsula University of Technology (the CPUT), a public institution of higher learning as envisioned in the Higher Education Act 101 of 1997 — were parties to an agreement in terms of which Ma-Afrika rented and administered a property owned by CPUT, and located in the District Six area of Cape Town, for the purpose of providing accommodation to students of CPUT. When the time was approaching for Ma-Afrika's lease to expire, the CPUT advertised a request for proposals in respect of the future administration of the property. Ma-Afrika submitted a proposal in response. It, along with one \@ Baobab Hospitality (Pty) Ltd, was short-listed by CPUT to submit tenders to *operate the property for student accommodation for the ensuing 10-year period*. Ma-Afrika did so. However, it was informed during September 2021 that its tender had been unsuccessful, and soon learnt that Baobab was awarded the tender. Ma-Afrika subsequently took the view, in the light of various facts, that Baobab did not meet the qualifying criteria for the tender contract, and raised such concerns with CPUT in December 2021. CPUT decided to cancel the tender on 7 March 2022: it aborted the process of concluding a contract with Baobab; it rescinded its award of the tender to that company; and decided that it would put out a fresh tender invitation. In the present application, before the Western Cape High Court, Ma-Afrika sought an order, inter alia,

reviewing and setting aside the decisions of the respondent to cancel the tender process; reviewing and setting aside the decision to not award the tender to Ma-Afrika after rescinding the award of the tender to Baobab; and substituting the decision of the respondent with a decision awarding the tender to Ma-Afrika. The relief was sought under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), on the following grounds:

(a) in terms of s 6(2)*(g)* of PAJA, in that the CPUT had failed to make a decision to award the tender to Ma-Afrika after rescinding the award to Baobab;

(b) in terms of s 6(2)*(b)* of PAJA, in that the CPUT had failed to comply with reg 13 of the Preferential Procurement Regulations, 2017. In this regard, the applicant contended that, in the context of the applicant having made an acceptable tender, the CPUT had not been entitled to cancel the tender and, upon a proper construction of the regulation, had been obliged to award it to Ma-Afrika as the only compliant tenderer;

(c) in terms of s 6(2)*(f)*(ii)*(cc)* of PAJA, in that the decision of the CPUT not to award the tender to Ma-Afrika after it rescinded the award to Baobab was not rationally related to the information before it, as Ma-Afrika's tender satisfied all the mandatory requirements in the tender invitation.

The court considered first whether the cancellation of the tender process by CPUT constituted 'administrative action' as defined in s 1 of PAJA. The court referred to case authority setting out the seven constitutive elements, namely: *(a)* a decision of an administrative nature; *(b)* by an organ of state or a natural or juristic person; *(c)* exercising a public power or performing a public function; *(d)* in terms of any legislation or an empowering provision; *(e)* that adversely affected rights; *(f)* that had a direct, external legal effect; and *(g)* that did not fall under any of the exclusions listed in the definition. (See [13].)

The CPUT, in arguing that its decisions in relation to the procurement of a new service provider for the provision and administration of student accommodation at the property *did not constitute 'administrative action'*, placed reliance on the matter of *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148 heard in the Western Cape High Court. The presiding judge in that review application had found that the procurement by the CPUT of security services did not qualify as 'administrative action' because it was a 'domestic' function of the institution, as opposed to a 'public one'. The present court criticised this

aspect of the judgment. It noted that such a finding was heavily influenced by the fact that CPUT's conduct in this regard was not expressly provided for in the HEA or any other statute by which its affairs were regulated. (See [15] and [20].) However, the present court held, the absence of an express provision in the applicable governing statute concerning the given action by the body concerned was not, of itself, determinative of whether it was administrative or executive in character. A proper assessment, the court held, required a consideration of the action in issue against the import of the statute examined in its entirety. (See [21].) The court in *Eden*, further, in reaching the conclusion it did, was influenced by the fact that the CPUT's procurement decisions were not regulated in terms of s 217 of the Constitution because it did not fall within the limited range of organs of state mentioned in ss (1) of that provision. The present court, however, warned that whether a juristic or natural person exercised a public function or power generally required consideration of a gamut of factors, none of them by itself determinative, and the weight to be given to each was dependent upon the peculiar features of the given case. (See [25].) The CPUT in the present case stressed that this court, even thought it might have some doubts about the correctness of *Eden*, was still bound to follow it according to the principle of stare decisis. The court's response was that the questions that arose in *Eden* and in this matter had to be determined on a case-by-case basis. It held that the differences between the current case and *Eden* were such that any contention, that the conclusions reached in the latter matter bound the court in the current one, was misplaced. (See [27].)

The court proceeded to consider the facts of the present case. It held that the CPUT was an institution that performed the public function of providing higher education. It was created, it held, for that purpose by the national government and its operation was substantially subsidised from the National Revenue Fund. The state's relationship with the institution was founded in s 29 of the Constitution and regulated by the HEA. The court asserted that the constitutional and statutory context left no room to doubt that the CPUT was an organ of state as defined in para *(b)* of the definition of the term in s 239 of the Constitution. The only question, it held, was whether contracting for the provision of student accommodation fell within its public functioning. (See [32].)

The court held that it did: It held that the CPUT's decision to procure a service provider for the provision of student accommodation in issue in this matter by way of a public tender process was conduct vitally connected to its governmental function of providing public access to further education. It represented a means of implementing its

constitutional and statutory role, and the consequent tender process was therefore administrative in nature. (See [33] – [34].) The court concluded that the CPUT's decision to cancel the tender was indeed 'administrative action' within the meaning of PAJA, and accordingly susceptible to being impugned in terms of s 6 of the Act (see [51]).

The court, however, concluded that the applicant had not established that the CPUT's decision was reviewable on the grounds it had relied on: As to ground *(a)*, the CPUT, contrary to its assertions, had in fact made a decision — that was (i) to not make a substitute award under the original tender; and (ii) to cancel that process (see [55]). As to ground *(b)*, the preferential procurement regulations were not applicable to the CPUT, its being neither an 'organ of state in the national, provincial or local sphere of government', nor 'any other institution identified in national legislation' (see [59]). As to ground *(c)*, the court had not been placed in a position to assess whether the decision made by the CPUT was reasonable or not, having not been provided with any evidence concerning the CPUT's reasons for making its decision (see [61] – [63]).

The court concluded that the application had to be dismissed (see [66]).

MEME-AKPTA AND ANOTHER v UNLAWFUL OCCUPIERS AT 44 NUGGET STREET AND ANOTHER 2023 (3) SA 649 (GJ)

Land — Unlawful occupation — Eviction — Procedure — Collation of procedure in Practice Manual of Division and s 4 of Act — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4.

Applicants were owners of a building who sought eviction of approximately 200 destitute individuals who occupied the property without right to do so (see [1] and [3]). The individuals fell within the category of unlawful occupiers in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and so the eviction application was required to follow the procedure provided in s 4 of the Act and the Practice Manual of the Gauteng Division (see [12]). The procedure was, however, not followed, and the application consequently dismissed (see [44] and [46]). In coming to its decision, the court collated the procedure in s 4 and the Practice Manual, as set out in [13].

SOUTH AFRICAN CRIMINAL LAW REPORTS JUNE 2023

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

Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Exclusion of interest in property from operation of order — Meaning of 'interest' in terms of s 1 of Act.
Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Exclusion of interest in property from operation of order — Ranking of competing claims for exclusion from forfeiture — To be determined according to common-law principles.
Words and phrases — 'Interest' — Meaning of in s 1 of Prevention of Organised Crime Act 121 of 1998.

The appellant (the Land Bank) and the first respondent (the Minister) made funds available for the purchase of a farm which was to be registered in the name of a trust, of which 39 identified previously disadvantaged individuals would be the beneficiaries. Because of corruption and fraud, the property was registered in the name of CPAD Farm Holdings (Pty) Ltd (the fourth respondent). The Minister paid an amount of R2,6 million and the Land Bank advanced a further R5 million secured by a first mortgage bond which was registered in the Deeds Registry. The fourth respondent defaulted on the loan and the Land Bank obtained judgment. The property was declared executable and was attached. In the meantime, the National Director of Public Prosecutions (the NDPP) instituted a criminal prosecution against a director of the fourth respondent and a former employee of the Minister. The NDPP obtained a preservation order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of the property and
provided for notice of the order to interested parties, including the Land Bank. The Land Bank's attorney engaged officials of the NDPP, and they assured him that they acknowledged the Land Bank's security consisting of the bond; that its interest in the property would be excluded from the forfeiture order; and that it was not necessary for it to enter an appearance or become involved in the application for a forfeiture order.

The High Court then granted an order declaring the property forfeited to the state. However, not only was no mention made of the interest of the Land Bank, but the order provided that the property 'be handed back' to the Minister. The Land Bank then applied for an amendment of the original order and the court ordered that the preservation order be subject to the rights of bondholders. The full court of the High Court found on further appeal that the interest in the property of both the Minister and the Land Bank should be limited to the equivalent of their capital loss without ranking in status or prior position. The Land Bank appealed against this decision to the Supreme Court of Appeal.

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

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

Held, further, therefore, that the rights of the Land Bank under the bond, judgment and attachment of the property should to their full extent have been excluded from the operation of the forfeiture order as the first charge against the proceeds of the property. The Minister's claim for the exclusion of an interest should have been disallowed, on the basis that the Minister had no such interest in law, or, at least, assuming that the Minister had such an interest, on the ground that the exclusion of such interest from

the forfeiture order would not constitute an efficacious remedy. (See [38].) The appeal was accordingly upheld.

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

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

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

Damages — Constitutional damages — Award of — When appropriate — Area searches conducted in cordoning-off operation authorised under s 13(7) of South African Police Service Act 68 of 1995 in breach of right to privacy — Granting of damages not just and equitable since more appropriate and effective alternative remedies available — Constitution, s 14.

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

The application had its origin in action taken by the South African Police Service (the SAPS), the Johannesburg Metropolitan Police Department and the Department of

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

The High Court held that paras *(a)* and *(b)* of s 13(7) were constitutionally valid and that neither of those provisions infringed the s 14 right to privacy — the power to cordon off an area was an important legislative mechanism that enabled the police to discharge their constitutional mandate effectively. Although it accepted that the three paragraphs should be read as a whole, it concluded that there was no justifiable reason to declare the entire section constitutionally invalid, when only one of its parts (para *(c)*) infringed a constitutional right. The latter paragraph infringed the right to privacy and was so sweeping that it permitted warrantless searches into private homes which included the most protected inner sanctum of the person. Section 13(7) could have achieved its ends through less damaging means and the decisions to authorise the raids had been exercised for an ulterior motive, namely the arrest of illegal immigrants, and to enable the City to survey the occupants of the buildings occupied by the applicants and audit the 'hijacked' buildings. The decisions to authorise the raids were therefore set aside in terms of the Promotion of Administrative Justice Act 3 of 2000. The court also dismissed claim for constitutional damages in the amount of R1000 for each applicant in respect of each raid, on the grounds that there was no primary evidence from each of the applicants concerning the search of their homes and how they were treated by members of the police during the search. In addition, on the evidence, not every room or floor had been searched in each building, but each applicant claimed damages. The court concluded that it would therefore not be appropriate to grant a blanket order for constitutional damages.

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

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

As to the remedy, the constitutionally repugnant part of s 13(7)*(c)* included not just the warrantless search of a person's home, as found by the High Court, but also their vehicle or person, or any receptacle or object of whatever nature and had to be replaced with lawful search-and-seizure provisions that did not divest the police of the power to conduct searches and seizures, where those might be necessary. The court

therefore read-in, on an interim basis, the following at the end of the severed portion: 'and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977'. The severance and reading-in would be of immediate effect and there was no reason for the court to suspend the declaration of invalidity. (See [73] – [76].)

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

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

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

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

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

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

The appellant was neither the driver nor the owner of the vehicle, but merely worked for the owner, a company which leased motor vehicles, but also from time to time provided a passenger service to clients — in the present instance, transporting four UK nationals from the airport in Johannesburg to a hunting lodge near Dundee in KwaZulu Natal. The vehicle was stopped whilst being driven by a different employee of the company, who had been instructed to undertake the journey, and impounded. On the following day the driver and the appellant drove down to Dundee from Johannesburg to collect the vehicle. The appellant was, however, arrested and subsequently convicted of 'the offence of contravening s 50(1) read with ss 1, 124, 126 and 127 of Act 5 of 2009'. The prosecution appeared to have been conducted without any reference to the provisions of s 332 of the Criminal Procedure Act 51 of 1977 (the CPA) which permitted liability to be visited upon a corporate body for criminal conduct by way of citing a person as representative of the corporate body. Leave to appeal was granted on petition to the Judge President.

Held

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

Further, difficulties for the state immediately became apparent in that the appellant at no stage personally operated a vehicle in breach of the Act; he was not the owner of the business; he was not the owner of the vehicle, nor was he the driver thereof. He was not even in the province of KwaZulu-Natal when the offence was allegedly committed. There was therefore no evidence to demonstrate that he personally

conducted the service that the state found offensive and contrary to the law. Furthermore, since the appellant was never charged in his capacity as a representative of the company, although he ought to have been, he personally acquired a criminal conviction. In addition, there were no ss 124, 126 and 127 in the Act and what sections were relied on by the state were therefore unknown. (See [12].) The appeal accordingly had to be allowed and the conviction and sentence set aside.

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

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

The appellant appealed against the decision of a magistrate refusing to release him on bail pursuant to a formal bail application under sch 6 to the Criminal Procedure Act 51 of 1977 (the CPA), wherein the evidence from both sides was adduced by way of affidavit. The charge against the appellant was that he had allegedly raped an 8-year-old girl.
In the bail proceedings the investigating officer did not oppose bail and further asked the court to release him if the court found him a suitable candidate for bail. The state did not expend much effort on arguing, except to submit that the appellant could be released on bail with certain conditions. On appeal, though, the state argued for the first time that the appellant had failed to adduce evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release on bail. In support of the contention that the magistrate was wrong in refusing him bail, the appellant alleged that the magistrate did so in circumstances where bail

was not opposed by the state. In her judgment, the magistrate stated that the matter was very serious because it involved an 8-year-old child and that the state had not presented its case properly as far as the seriousness of the matter was concerned. She stated that the investigating officer should have come to testify and tell the court in full why she was not opposed to bail. The court concluded nevertheless that it was not satisfied that the applicant had adduced sufficient evidence that there were exceptional circumstances which in the interests of justice permitted his release on bail.

Held, that there was a clear indication that the court a quo was placed in a difficult position, not only by the state, but also by the defence failing to fulfil its core duty in terms of s 60(11)*(a) of* the CPA when applying for bail. The investigating officer's attitude was simply that 'only if the appellant has successfully made out a case that the interests of justice permit his release, the court could then release him on bail'. It was clear that the appellant was unable to adduce evidence that satisfied the provisions of s 60(11). In the entire reading of the record, it could easily be deduced that the appellant approached its application in a nonchalant manner, which was unsuitable for an applicant faced with a high standard to meet. The applicant's reliance on the failure of the state to do anything was not helpful to his cause, as the duty remained with him, and with him alone. (See [16], [19] and [26].)

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

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

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

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

The appellant submitted that there were three questions of law that required determination: first, whether the trial court failed to properly consider and appreciate relevant evidence or erroneously approached or treated relevant evidence presented by the state against both the respondents; secondly, whether the trial court correctly appreciated and applied the legal principles relating to circumstantial evidence by not applying those legal principles under consideration to all the relevant evidence presented by the state; and thirdly, whether the trial court disregarded the established legal principles of liability, particularly the doctrine of common purpose, by not applying such principles to the relevant and proven evidence against the first respondent. Counsel on behalf of the appellant submitted that the trial court's failure to correctly consider and evaluate all the relevant evidence constituted an error of law and not of fact, whereas counsel for the respondents argued that all of the questions raised were questions of fact.

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

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

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

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

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

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

All SOUTH AFRICAN LAW REPORTS JUNE 2023

Prevance Bonds (Pty) Ltd v Voltex (Pty) Ltd and others [2023] 2 All SA 587 (SCA)

Corporate and Commercial – Contract – Rectification – Remedy of rectification of a written agreement is available to parties where a written agreement, through a common mistake, does not reflect the true intention of contracting parties – Onus is on party seeking rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended – Effect of establishment of concursus creditorum – Where document is capable of being rectified without offending concursus creditorum, rectification is permissible.

An application for credit facilities form that was presented to the first respondent ("Voltex 2") by the second respondent ("First Strut") incorrectly recorded Voltex 2's registration number. After the liquidation of First Strut, Voltex 2 submitted its claims to the liquidators, with a security cession contained in the credit facilities form securing such claims. The appellant ("Prevance") objected to the recognition of Voltex 2 as a secured creditor and Voltex 2 applied for rectification of the recordal of its registration number on the credit facilities application form and the security cession. Despite Prevance's objection, the High Court granted rectification. Prevance appealed.

Held – Two issues arose for determination on appeal. The first was whether Voltex 2 had provided sufficient evidence to sustain a claim for rectification of the security cession in motion proceedings; and the second was whether it was competent to order rectification of a document after the institution of a *concursus creditorum*.

Rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. The onus is on a party seeking rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out in the agreement. Prevance's defences were premised on the allegations that the purpose of the rectification application was to substitute a secured creditor in circumstances where the unsecured creditor's claim should not have been admitted. But, there was no factual foundation for the defences. The first issue was thus decided in Voltex 2's favour.

On the second question, the Court agreed with the High Court that a case for rectification had been established by Vortex 2. The Court emphasised the principle that a creditor, who at the date of winding-up was only a concurrent creditor, cannot by rectification of an agreement alter its position to become a preferent or secured creditor, as this would disturb the *concursus creditorum*. As the document in which the security cession was embodied was the recordal of the agreement and cession, rather than agreement and cession itself, it was capable of being rectified without offending the *concursus creditorum*. The rectification of the document would not result in any prejudice to the third party creditors and, in any event none had been established.

The appeal was dismissed with costs.

Putco (Pty) Ltd v City of Johannesburg Metropolitan Municipality and others [2023] 2 All SA 601 (SCA)

Civil Procedure – Further evidence on appeal – Requirements – There must be some reasonably sufficient explanation why the evidence sought to be adduced was not presented at the trial; there should be a prima facie likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the proceedings.

Rail and Road Transport – National Land Transportation Act 5 of 2009, sections 41 and 46(2) – Interpretation – Referral of dispute arising from contract negotiated under section 41 to mediation or arbitration in terms of section 46(2) not permissible – Section 46(2) inapplicable to negotiated contracts under section 41 due to different objectives of two sections.

At the centre of the present appeal was whether section 41 or 46 of the National Land Transportation Act 5 of 2009 applied to the dispute between the appellant ("Putco") and the City of Johannesburg Metropolitan Municipality. The main issue in the appeal concerned the meaning and effect of sections 41 and 46 of the Act. Putco contended that the dispute resolution mechanism (mediation or arbitration) in section 46(2) applied to its dispute with the City regarding its market share of the integrated public transport network being implemented by the City. The City's case was that the dispute arose from negotiations conducted under section 41 of the Act, to which section 46 was inapplicable. More specifically, the City asserted that section 46(2) applied only where a public transport operator had an existing contract with the relevant contracting authority. Putco did not have such a contract with the City. The High Court dismissed Putco's application for an interdict on the basis that it had failed to prove a *prima facie* right, as section 46(2) did not apply to the dispute. That led to an appeal by Putco.

Held – A preliminary matter which had to be addressed was Putco's application under section 19(b) of the Superior Courts Act 10 of 2013, to adduce further evidence on appeal. Further evidence on appeal is allowed only in special circumstances because it is in the public interest that there should be finality to a trial or application. The basic requirements are that there must be some reasonably sufficient explanation why the evidence sought to be adduced was not presented at the trial; there should be a *prima facie* likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the proceedings. As the further evidence sought

to be introduced by Putco was an agreement which was of no relevance to the dispute, the application to adduce such further evidence was refused.

The main issue concerned the proper construction of sections 41 and 46 of the National Land Transportation Act. The Court highlighted the clear distinction between contracts entered into in terms of section 41, and "existing contracting arrangements" to which section 46 applied. The Act assigned the responsibility for the conclusion of section 41 contracts to the municipal sphere of government. The City had no power to enter into transport contracts under section 46. That power was conferred by section 41. Section 41 was aimed at conclusion of once-off contracts for a maximum period of 12 years, after which the municipality had to invite tenders for public transport services. It made no provision for dispute resolution procedures. On the other hand, section 46 provided for the settlement of disputes concerning existing transport contracts through mediation or arbitration. The dispute between Putco and the City was regulated by a section 41 contract. It was not a dispute envisaged in section 46(2). Reading the dispute resolution mechanism in section 46(2) as applying to negotiated contracts under section 41 disregarded the different objects of the two sections and would impose a contract on parties who had not agreed to its terms.

Finding that the High Court had correctly held that the provisions of section 46 were inapplicable in this case, the Court dismissed the appeal.

Road Accident Fund v MKM obo KM and another and a related matter (Centre for Child Law as *amicus curiae*) [2023] 2 All SA 613 (SCA)

Personal Injury/Delict – Claims against Road Accident Fund – Lawfulness of settlement agreements entered into by Fund, involving contingency fee agreements between claimants and legal practitioner – Requirement of judicial oversight imposed by section 4 of the Contingency Fees Act 66 of 1997 – Whether there was an obligation on the Fund to ensure that a legal practitioner complied with section 4 before it could conclude a settlement agreement with such practitioner on behalf of a claimant – No indications in the Contingency Fees Act that the Fund bears any obligation to insist on a legal practitioner obtaining judicial oversight before it concludes a settlement agreement with such practitioner.

Two settlement agreements concluded by the Road Accident Fund ("RAF") in claims against it were declared unlawful by the High Court, as they were concluded without judicial approval as required by section 4 of the Contingency Fees Act 66 of 1997. The settlement agreements were in respect of claims for loss of support for minor children,

who, in each case, had lost a parent due to fatal injuries sustained in a motor vehicle collision. The respondents represented the minor children in those claims against the RAF. Both respondents were represented by the same firm of attorneys, in prosecuting the claims on behalf of the children. The attorneys concluded a contingency fees agreement with each of the respondents, in terms of the Contingency Fees Act.

Held – Section 4 of the Act provides for judicial oversight in respect of settlement of matters where a contingency fees agreement has been concluded between a client and a legal practitioner pursuant to the Act. A contingency fees agreement is a bilateral agreement between a legal practitioner and his client and has nothing to do with a party against whom the client has a claim – such as the RAF. It was common cause that when accepting the offers of settlement in both matters, the attorneys did not seek judicial approval in terms of section 4. The question arising was whether there was an obligation on the RAF to ensure that a legal practitioner complied with section 4 before it could conclude a settlement agreement with such practitioner on behalf of a client. A further question was whether a settlement agreement concluded without judicial approval in terms of section 4, and the RAF's payment of the capital to a legal practitioner pursuant to such a settlement agreement, were unlawful.

There were no indications in the Act that the RAF bears any obligation to insist on a legal practitioner obtaining judicial oversight before it concludes a settlement agreement with such practitioner. It was practically not clear how the RAF could force legal practitioners, who acted on behalf of its opponents, to comply with section 4 of the Contingency Fees Act. The High Court impermissibly imposed an obligation on the RAF not contemplated in the Act.

A legal practitioner's non-compliance with section 4 therefore did not affect the validity of a settlement agreement, and merely prevented the practitioner from charging a higher fee in terms of the contingency fee agreement.

The appeals were thus upheld.

Skog NO and others v Agullus and others [2023] 2 All SA 631 (SCA)

Civil Procedure – Motion proceedings – Final relief – Disputes of fact – General rule is that applicant must accept respondent's version unless the latter's allegations do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers – Exception to general rule – Where denial by respondent is not real, genuine or in good faith, the respondent did not seek to refer dispute to evidence, and the court is persuaded of

the inherent credibility of the facts asserted by applicant, the court may adjudicate the matter on the basis of the facts asserted by the applicant.

Property – Eviction application – Section 8 of the Extension of Security of Tenure Act 62 of 1997 requiring lawful termination of right of residence of occupier and notice to occupier of intention to evict – Where requirements were complied with and occupiers' misconduct rendering eviction just and equitable, eviction order granted.

The appellants appealed against the dismissal by the Land Claims Court ("LCC") of their application for eviction of the first to twenty-sixth respondents (the "occupiers") from a farm owned by the third respondent. The latter was a trust with the first two appellants its trustees. The occupiers resided in nine cottages on the farm, with each cottage being occupied by a former employee and his or her family. They had been living there before the trust took ownership of the property in 2010. Before the occupants were ordered to vacate the farm on 24 June 2011, they had all lived on the farm with the trust's consent. The employment relationship between the trust and those occupiers who were in its employ ended on 24 June 2011, and despite being ordered to vacate, none of them left the farm. That led to the trust bringing an application for eviction, based on the Extension of Security of Tenure Act 62 of 1997. The trust asserted that the lease agreements concluded with the occupiers clearly stipulated that their tenure as residents was subject to the employment relationship continuing to exist. In approaching the LCC for the respondents' eviction, the trust relied on the unacceptable way the occupiers had allegedly conducted themselves on the farm, which the trust said had led to the breakdown of the relationship between it and the occupiers. The Court declined to order the mass eviction of all the occupiers where it was not shown who exactly had been responsible for the conduct complained of.

Held – An applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the court is persuaded of the inherent credibility of the facts

asserted by an applicant, the court may adjudicate the matter on the basis of the facts asserted by the applicant.

Section 8 of the Extension of Security of Tenure Act prescribes a two-stage procedure before an eviction order may be granted. There must be termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable. The decision to terminate the right of residence must then be communicated to the occupier. As the trust had sent separate notices to all the occupiers, terminating their rights of residence and giving them notice of its intention to evict them, the only question was whether the termination of their right to reside on the farm was lawful and also whether it was, given all the circumstances, just and equitable. The Court was satisfied that the termination of the right of residence was just and equitable in this case. Once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. The relevant considerations in considering whether an eviction order is warranted include the availability of suitable alternative accommodation, the effect of an eviction on the constitutional rights of affected persons, and any hardship that an eviction may cause the occupiers. Another relevant consideration was the comparative hardship to the occupiers and the owner of the property.

An eviction order was granted and the local municipality ordered to provide suitable emergency housing for occupiers.

Strategic Partners Group (Pty) Ltd and others v Liquidators of Ilima Group (Pty) Ltd (in liquidation) and others [2023] 2 All SA 658 (SCA)

Corporate and Commercial – Company law – Liquidation of company – Liquidators' right to information – Introduction of clause in company's Memorandum of Incorporation, intended to limit rights, falling foul of section 163 of the Companies Act 71 of 2008 – Section 163 entitling shareholder or director of a company to apply to court for relief if any act or omission of the company has a result that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, the applicant.

The first respondents were liquidators of a company ("Ilima"). One of the assets of Ilima was its shareholding in the first appellant ("Strategic"). As part of their duties, the liquidators had to place a value on the shareholding in order to realise it and to distribute the proceeds. They requested a valuation from Strategic, and a dispute arose regarding what information liquidators of an insolvent shareholder in a company

are entitled to obtain from that company and the means which can be used for that purpose. The appellants approached the High Court for a declaration to the effect that the documents to which the liquidators were entitled were limited to those described in sections 26 and 31 of the Companies Act 71 of 2008 and section 113 of the Companies Act 61 of 1973. In essence, the contention was that the liquidators of a shareholder had no greater right to documents than would a shareholder itself. The liquidators brought a counter-application requesting that a clause (providing for a forced sale of the shareholding of a shareholder which had been liquidated on a certain basis) not apply to the Ilima shareholding on the basis that the introduction of the clause fell foul of section 163 of the Companies Act 71 of 2008. In terms of section 163, a shareholder or a director of a company may apply to a court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

The present appeal was against the dismissal of the main application and the granting of the counter-application.

Held – The Court was only required to address the counter-application as Strategic abandoned its contentions in respect of the main application.

In applying section 163, the High Court had to first make a determination on the facts. It had to consider whether the act of introducing the clause in question had a result which operated oppressively or unfairly prejudicially against the liquidators or which unfairly disregarded their interests. If that was found to be the case, the High Court was vested with the discretion to make an order which it saw fit. The High Court correctly found that section 163 applied and correctly directed that the offending clause would not apply to the Ilima shareholding. The introduction of the clause was designed to restrict access to information and documents and to limit the manner in which the liquidators could dispose of the shareholding, thereby undermining the performance by the liquidators of their duties. The factual finding of the High Court that the conduct of Strategic implicated section 163(1) was thus unimpeachable.

The appeal was dismissed.

City of Ekurhuleni Metropolitan Municipality v Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immovable Property Described as Farm Rietfontein 153 (and also known as Palm Ridge Extensions 10, 18–30) and others [2023] 2 All SA 670 (GJ)

Property – Land invasions involving State-owned land allocated for RDP housing – Obligation on State to secure vacant possession for beneficiaries of housing programme requiring municipality to apply to evict unlawful occupiers – Where occupier claims protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, no eviction of homeless occupier is likely to occur from State-owned land for as long as the authorities are unable to provide temporary emergency shelter – Spoliation and counter-spoliation – Forcible invasion of land cannot be viewed as occupiers having been in "peaceful and undisturbed possession" and no protection may be claimed under the Act.

Relying on two alleged land grabs on a housing project (the "RDP housing development"), by two different groups of people, the City of Ekurhuleni Metropolitan Municipality brought an urgent application against anyone attempting to occupy the development. The two groups claimed that they were unlawful occupiers as contemplated in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") and could not be lawfully evicted until the requirements of the Act were complied with.

Held – The first issue for determination regarding the first group was whether, at the time when they were allegedly removed by the City, the first respondent members were already in occupation on the development so as to qualify for protection under the Act. That issue would also include a consideration of the purpose of the occupation. A critical question was whether the group was in peaceful and undisturbed possession of land on the development and whether the City was entitled to rely on counter-spoliation to remove them. The main question regarding the second group involved their prior possession of the land.

The Court explained the effect of *Thubakgale and others v Ekurhuleni Metropolitan Municipality and others* 2022 (8) BCLR 985 (CC) as not affecting the obligation imposed by the common law on a municipality, to secure vacant possession in favour of a person who it has identified as being entitled to occupy and take transfer of an RDP house, as in the present case. While *Thubakgale* restricted the remedy available to a person allocated an RDP house to contempt of court proceedings for the enforcement of a court order against the appropriate authority, there remained an

entitlement to insist on that authority securing vacant possession and, because of its common law obligation, the authority may of its own volition bring such an application to court. However, the allocation of an RDP house by the municipality would not secure vacant possession for the beneficiary if someone who had unlawfully occupied it enjoyed protection under the Act. The effect of *Thubakgale* was that the municipality or a person who has been allocated RDP housing or other forms of subsidised housing must apply to evict the unlawful occupier. However, provided the occupier claims protection under PIE, no eviction is likely to occur from State-owned land (if the occupier is homeless) for as long as the authorities are unable to provide temporary emergency shelter.

The competing rights, interests and obligations with which the present case was concerned were identified and the Court set out the principles surrounding its approach to invasions of State-owned land. The judgment further discussed the requirements for the grant of a spoliation order and dealt with instances where the common law considers counter-spoliation to be lawful. The *mandament van spolie* is a remedy aimed at enabling a person who had possession of corporeal or incorporeal property to regain possession. It is concerned only with whether the applicant exercised possession as a fact, and not with legal entitlement. It could not be said that the first respondent group was in "peaceful and undisturbed possession" in circumstances where it had forcibly invaded the land. Interim relief was thus granted against the first group of occupiers. At the time they were allegedly removed from the development without a court order no one in the first respondent group occupied in a manner contemplated by PIE and therefore did not enjoy the protection accorded under that Act. No eviction order could be granted against the second group, which had taken possession of the land without the City taking any steps to prevent that at the material time.

DM v DM [2023] 2 All SA 736 (GJ)

Family Law and Persons – Divorce litigation – Rule 43 application – Claim for interim spousal maintenance and a contribution towards legal costs – An applicant in an application for spousal maintenance must demonstrate that the respondent owes her a duty of support, that she has a need to be maintained, and that the respondent has adequate resources to discharge that duty.

The applicant (the plaintiff in a pending divorce action between the parties) sought an order appointing a psychologist to conduct an investigation into the best interests of the parties' minor son, who was 16 years old. She also claimed interim spousal maintenance and a contribution towards her legal costs. She had instituted a divorce action against the respondent in his personal capacity and in his *nomine officio* capacity as trustee of various trusts.

Held – Restrictions imposed on parties in rule 43 applications in respect of the number of affidavits permitted and the annexures parties may attach to their affidavits points to the urgent need for reform of the rule. The limitations hinder the court's need to be made privy to all relevant supporting documentation in order to arrive at a just and equitable determination of the disputes relating to maintenance and a contribution to legal costs.

In assessing the applicant's claims in the rule 43 application, the Court delved into the parties' respective financial situations, and the luxurious lifestyle enjoyed by them during their marriage. The respondent was found to have been less than candid with the Court about his means and income. His lack of disclosure, fobbing off of critical issues and attempts at secrecy were criticised by the Court. It was patently evident that the applicant was dependent on him financially. The question was thus more about how much the applicant required as opposed to whether she was in fact entitled to maintenance. At the same time, some of the applicant's expenses were exorbitant and were justifiably criticised by the respondent.

An applicant in an application for spousal maintenance must demonstrate that the respondent owes her a duty of support, that she has a need to be maintained, and that the respondent has adequate resources to discharge this duty. Having considered the evidence, whether contested or uncontested, the court found that the applicant had discharged that duty. The only issue therefore remaining was the quantum of such maintenance contribution. A claim for a contribution towards costs in a matrimonial suit is *sui generis*. It is an incident of the duty of support which spouses owe to each other. The authorities recognise the purpose of the remedy as being to enable the party in a principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place her case before the court.

Taking all facts into account, the court appointed a psychologist to conduct an investigation into the best interests of the parties' minor son; ordered the respondent to pay the applicant a cash monthly amount of R80 000 as spousal maintenance and a first contribution towards the applicant's legal costs in the sum of R4,5 million. Other expenses to be paid by the respondent were set out in the order.

Kader v Swartz and others [2023] 2 All SA 764 (GJ)

Family Law and Persons – Divorce action – Receiver and liquidator of joint estate – Powers of receiver – Without specific authorising powers permitting liquidation of pension fund benefits, receiver unable to comply with order requiring such action – Application for order holding receiver in contempt not capable of succeeding where compliance with order was impossible.

The first respondent ("Mr Swartz") was the receiver and liquidator of the joint estate of the applicant and second respondent. In seeking payment of money allegedly due to her by the second respondent ("Mr Kader") in terms of their divorce, the applicant looked to Mr Swartz for payment. She sought an order declaring him to be in contempt of court, and sought the imposition of a penalty for the alleged contempt by way of a fine of R500 000 and that Mr Swartz be committed to prison for 90 days if he continued in such alleged contempt. She also sought that he be removed as receiver and that he forfeit the fees earned by him and the disbursements made by him in carrying out his duties as receiver. The third respondent ("Mr Lang") who held the amounts in trust for Mr Swartz as his attorney, was sought also to be subject to an order that he pay all monies belonging to the joint estate that were paid into his trust account by Mr Swartz into the trust account of applicant's attorney.

The final liquidation and distribution ("L&D") account and accompanying report were drawn on the basis that an amount of R988 764 was to be paid to a pension fund nominated by the applicant from Mr Kader's pension fund. Mr Kader indicated a preference not to liquidate his pension fund benefits but to source the money to pay the applicant elsewhere. The aim was to avoid income tax which would be payable should he make a withdrawal from his pension. However, the applicant then decided that she wished to have a different payment method. In 2019, she applied to court for a directive on the basis that she disputed the mechanism employed to calculate the Mr Swartz' fees, and an order that he realise assets of the joint estate from which to pay her the amount due in cash instead of to her pension fund. She was successful in

that application, and relied on the order issued therein in bringing the present application.

Held – As Mr Swartz could not be wilfully in contempt of an order that was impossible of compliance, it had to be considered whether it was in fact impossible to comply with the order. Mr Swartz' powers as receiver under the divorce order did not allow him to bring proceedings on behalf of either of the divorced spouses or the estate save for the purposes of vindicating assets. He also did not have *locus standi* to obtain relief under sections 7(7) and 7(8) of the Divorce Act 70 of 1979. The order was thus not competent, because even if he wanted to, Mr Swartz was simply unable to comply therewith. The order proceeded from the false premise that there were assets that were capable of being liquidated to meet the applicant's demands. To defend his actions, Mr Swartz was called on to play a role that was beyond the description of his office and he had to expend personal resources in defending the matter. There was also no case made for the relief sought against Mr Lang.

The final L&D account had been drawn on the basis of an agreement between the ex-spouses that there would not be a cash payment but a benefit transfer. The applicant had no grounds to renege on the agreement.

The application was dismissed with costs in favour of Mr Swartz and Mr Lang which costs were to borne by the joint estate on the scale as between attorney and client.

Moshe and others v Minister of Agriculture, Land Reform and Rural Development [2023] 2 All SA 776 (NWM)

Civil Procedure – Interdicts and rules nisi – Application for confirmation of interim interdict which was coupled with a rule nisi – Interim interdict which was temporary and provisional in nature and coupled with a rule nisi, could only be confirmed or discharged on return date – Granting of final prohibitory interdict not competent in circumstances.

A number of farms were purchased by the national government from existing commercial farmers and placed under the control of the first respondent (the "Minister"). The land constituting the farms was earmarked for redistribution to qualifying emerging farmers duly approved by the Minister. The redistribution programme was interrupted by certain actions of the appellants, prompting the Minister to bring an urgent application on an *ex parte* basis, in the court *a quo*. The basis of the application was that the farms which had been transferred to the Minister, could not be handed over to the lawfully approved beneficiaries whilst the appellants remained

thereon. The court *a quo* dismissed the Minister's application for a spoliatory order on the return date of the rule *nisi* which had been issued. The Court went on to find that appellants were in unlawful occupation of the land, and granted a prohibitory interdict preventing appellants from using the land for residential or commercial purposes, including grazing of animals. The appellants appealed, alleging that they were not in unlawful occupation of the farms.

Held – The central question on appeal was whether the facts or evidence set out in the founding affidavit justified a final interdict on the return date. The main grounds of appeal were that an order for final interdictory relief was incompetent in circumstances where final interdictory relief was not an issue before court; and that no case for interdictory relief was made in the founding papers of the Minister, where the founding affidavit supported a case for spoliation.

The requirements for the granting of an interim interdict are a *prima facie* right, though open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right; the balance of convenience; and the absence of any other satisfactory remedy. For a final interdict, the applicant must show a clear right; a reasonable apprehension of irreparable harm and imminent harm to the right; and no other available satisfactory remedy.

Turning to the principles applicable to and the interpretation of a court order, the court referred to applicable case authority, which confirmed that the starting point is to determine the manifest purpose of the order. The court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the established rules relating to the interpretation of documents. The judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made.

In seeking a spoliatory order on an *ex parte* basis, the Minister conflated the relief sought for a spoliatory order with further relief for an interim interdict. The interim interdict granted was coupled with a rule *nisi*. That relief was temporary and provisional. On the return date, the applicant would ordinarily move for the rule to be made final. In this matter, while the court below correctly dismissed the application for spoliatory relief, it erred in going on to consider the interdict which was sought as a

final prohibitory interdict. The Minister had at no stage sought a final interdict. What had been sought, procedurally, was confirmation of the interim interdict which was coupled with the rule *nisi*. The interim interdict was temporary and provisional by nature and being coupled with a rule *nisi* it could only be confirmed or discharged on the return date. It was thus not competent, both in law and on the facts set out in the founding affidavit, for the court *a quo* to grant the final prohibitory interdict in favour of the Minister.

The appeal was upheld with costs.

Nebavest 1 (Pty) Ltd t/a Minster Consulting v Central Plaza Investments 202 (Pty) Ltd and others [2023] 2 All SA 795 (WCC)

Corporate and Commercial – Application by shareholder to bring derivative action on behalf of company in terms of section 165(5)(b) of Companies Act 71 of 2008 – Requirements – Court may grant leave if satisfied that the applicant is acting in good faith; the proposed proceedings involve the trial of a serious question of material consequence to the company; and it is in the best interests of the company that the applicant be granted leave to commence the proceedings – Requirement of good faith in section 165(5)(b)(i) is not satisfied if it is apparent that the applicant does not honestly believe that a good cause of action exists and that it has a reasonable prospect of success.

The applicant ("Nebavest") owned 50% of the shares in the first respondent ("Central Plaza"). The second respondent ("Strydom") was the sole director of Central Plaza and a director of its other 50% shareholder ("Salt").

Having served a demand on Central Plaza in terms of section 165(2)(a) of the Companies Act 71 of 2008, Nebavest now sought to bring a derivative action on behalf of Central Plaza, for the accounting for and/or repayment of all commissions and benefits paid by an insurer ("African Unity") to persons other than Central Plaza arising from medical aid cover and other business conducted with the National Road Freight Industry Fund since 2010.

Held – In terms of section 165(5)(b), a person who has made such demand may apply to a court for leave to bring proceedings in the name and on behalf of the company, and the court may grant leave if satisfied of three requirements, *viz* that the applicant is acting in good faith; the proposed proceedings involve the trial of a serious question of material consequence to the company; and it is in the best interests of the company that the applicant be granted leave to commence the proceedings. Even if the requirements of section 165(5) are met, the court is not compelled to grant the

application. The nature of any proceedings in respect of which leave might later be sought in terms of section 165(5) to proceed derivatively must be foreshadowed in the demand in terms of section 165(2). In its demand in terms of section 165(2), Nebavest relied on the alleged breach of two agreements. The basis for the complaint was said to be the non-payment by African Unity of the full amount of the commission due to Central Plaza. The two agreements were an undated "Non-Circumvention/ Non-Disclosure Agreement" (the "NCNDA") concluded between Central Plaza and African Unity, and an alleged oral agreement concluded in 2009 between Nebavest, Salt and African Unity. Against that background, it had to be determined whether the three requirements in section 165(5)(b) had been met. The good faith requirement in section 165(5)(b)(i) is not satisfied if it is apparent that the applicant does not honestly believe that a good cause of action exists and that it has a reasonable prospect of success. The Court was unable to accept that Nebavest had a *bona fide* belief that Central Plaza enjoyed a viable claim against any of the persons identified as potential defendants in the contemplated derivative proceedings. It pointed to further indications casting doubt on Nebavest's good faith. The result was that the first requirement had not been met, and the application had to fail.

The application was dismissed with costs.

Public Protector of South Africa v Chairperson: Section 194(1) Committee and others [2023] 2 All SA 818 (WCC)

Constitutional and Administrative Law – Section 194(1) parliamentary committee enquiry convened to investigate the removal of the Public Protector from office – Application by Public Protector for review of procedural decisions made by committee – Doctrine of separation of powers requiring National Assembly to carry out its functions in relation to the Public Protector without undue interference by the judiciary – Courts are hesitant to entertain review of ongoing proceedings, including of recusal decisions, which are brought in medias res – It is only in rare cases where grave injustice might otherwise result or where justice might not by other means be attained that a court will entertain a review before the conclusion of proceedings.

The Public Protector sought the review of decisions by the first and second respondents to dismiss applications for their recusal; to dismiss an adjournment application; and not to summon, subpoena and/or recall certain witnesses to testify at a section 194(1) parliamentary committee enquiry convened to investigate the removal of the applicant from office.

The main preliminary objection raised by the respondents was that the court was precluded from determining the application *in medias res.*

Held – In terms of section 194(1) of the Constitution, the Public Protector could be removed from office only on the ground of misconduct, incapacity or incompetence; a finding to that effect by a committee of the National Assembly; and the adoption by the National Assembly of a resolution calling for such removal from office. Rule 129AD(2) of the Rules of the Committee requires that the enquiry be conducted in a reasonable and procedurally fair manner, within a reasonable time.

As Chapter 9 institutions are accountable to the National Assembly, the doctrine of separation of powers places limits on judicial authority. The doctrine exists to ensure that each arm of government concerns itself with its legislative and constitutional mandate without undue interference and without being prescriptive to others. Section 237 of the Constitution expressly requires that all constitutional obligations must be performed diligently and without delay. The National Assembly is required to hold the Public Protector accountable by scrutinising a motion for her removal and to do so diligently and without delay, and thereafter make a finding whether or not the applicant should be removed from office on the ground of misconduct, incapacity or incompetence. Those functions should not be interfered by the judiciary unless exceptional circumstances exist.

Courts are furthermore hesitant to entertain a review of ongoing proceedings, including of recusal decisions, which are brought *in medias res*. In considering whether to permit such a challenge *in medias res*, relevant considerations include the nature of the matter, the nature of the objection to the composition of the court, the prospects of success in the recusal and the length of the record in the proceedings. It is only in rare cases where grave injustice might otherwise result or where justice might not by other means be attained that a court will entertain a review before the conclusion of proceedings. Such judicial intervention *in medias res* has been said to be warranted only where there is a gross irregularity in the proceedings and in a rare case, because the perpetrators perpetuating the irregularities are those that have been entrusted with safeguarding constitutional rights. In the absence of exceptional circumstances, reviews should ordinarily be brought at the end of proceedings in order not to threaten the effectiveness of all tribunals and courts.

On the basis of *in medias res*, a piecemeal review of proceedings was not appropriate. With no exceptional circumstances demonstrated, the balance of convenience

favoured a decision to dismiss the application brought by the applicant. In the interests of completeness, the Court also addressed the issue of the applicability of the Promotion of Administrative Justice Act 3 of 2000 as contended for by the Public Protector. Parliament, in appointing the section 194 committee, exercised legislative power, and the chairperson's rulings during the enquiry are excluded from the definition of "administrative action" in the Promotion of Administrative Justice Act.

The application was dismissed with costs.

Senekal v Legal Practice Council and others [2023] 2 All SA 834 (FB)

Legal Practice – Legal Practice Council – Disciplinary enquiry against attorney – Review of decisions of Council and disciplinary committee chairman – Decisions running contrary to Rules of the Uniform Rules governing the Attorneys Profession falling to be set aside – Decision of chairman not to recuse himself also reviewable where there was a reasonable apprehension of bias.

The applicant was a practising attorney and the first respondent was the Legal Practice Council, Free State Province (the "LPC"). In 2017, the court in a matter in which the applicant was cited as third respondent ordered a referral to the Free State Law Society to determine whether the applicant had misled the court or acted in a manner inconsistent with his professional obligations to the court during that case. The second respondent ("Mr Litheko") was a practising attorney appointed to act as chairperson of the disciplinary hearing against the applicant, scheduled as a result of the referral.

Opposing the review application, the LPC filed a counter-application for an order striking the applicant's name from the roll of legal practitioners; alternatively, that the applicant be suspended from practice for such period and on such conditions as the court might deem fit. That led to the applicant seeking review of the decision to apply for his striking from the roll. In a further urgent application, the applicant successfully applied for an interdict against the LPC, contending that he should first be heard in a disciplinary enquiry before an application for the striking off of his name from the roll of attorneys could be filed. The parties subsequently entered into a settlement agreement in terms of which the applicant agreed not to proceed with his review application and that the disciplinary enquiry would be proceeded with. However, after the enquiry was set down for hearing, the applicant applied for the review and setting aside of the decision of the LPC and the chairman to continue with the enquiry with only one member of the disciplinary enquiry committee, in contravention of rule 50(1)(3) of the Uniform Rules governing the Attorneys Profession; and to hold the

enquiry via a virtual platform and/or video conference. He also sought the review of Mr Litheko's refusal to recuse himself as chairperson of the enquiry.

Held – The LPC's decision to proceed with the enquiry with only one member of the disciplinary enquiry committee was in contravention of the parties' agreement in that regard, and the peremptory provisions of rule 50(1)(3). The LPC's decision to the contrary, and the chairperson's implementation thereof, especially without having consulted the applicant, constituted an unlawful decision which fell to be reviewed and set aside.

The decision to hold the enquiry via a virtual platform and/or video conference was regulated by rule 50(17)(1) which stated that the duties, functions and powers of the disciplinary enquiry committee relating to its conduct of a formal enquiry was to be determined through its chairman. The decision was taken by the LPC, which did not have the authority to do so. It was a decision to be taken by the chairperson. The decision was consequently unlawful and was reviewed and set aside.

Mr Litheko's recusal was called for by the applicant after it emerged that he and the prosecutor appointed in respect of the disciplinary enquiry had shared an office and a laptop. The prosecutor admitted that they had discussed the applicant's matter. The test for recusal is the "reasonable apprehension of bias" test. Mr Litheko ought to have withdrawn as chairperson when the applicant requested him to do so. His failure to have done so was irrational, unfounded and arbitrary. His decision was also reviewed and set aside.

The application succeeded and the LPC's counter-application was dismissed.

Serfontein and another v ABSA Bank Ltd and others [2023] 2 All SA 851 (FB)

Consumer – Lawfulness of acknowledgment of debt and power of attorney concluded upon consumer's breach of credit agreement – Prohibition in section 91(2) of National Credit Act 34 of 2005 against credit provider requiring consumer to enter into a supplementary agreement containing a provision that would be unlawful if it were included in a credit agreement – Acknowledgment of debt and power of attorney constituting a supplementary agreement void where it contained various clauses contravening section 90 of the Act.

An overdraft credit agreement entered into between the first applicant and the first respondent bank in July 2014 required R2 000 000 to be paid back by the first applicant by 25 July 2015. The second respondent bound himself as surety and co-principal debtor to be jointly and severally liable towards the bank for the due fulfilment

of the obligations of the first applicant. The first applicant failed to pay the R2 000 000 when required and the outstanding overdraft amount escalated. The bank referred the overdraft account to its Legal Recoveries Division, and mandated its attorney to engage with the applicants regarding the overdraft account. That culminated in the signing of an acknowledgment of debt ("AOD"), which incorporated a Power of Attorney ("POA") authorising the bank to sell the first applicant's property. That agreement formed the subject matter of the present application.

On the strength of the AOD/ POA, an agreement of sale pertaining to the property of the first applicant was entered into with a trust in which second and third respondents were trustees. A representative of the bank concluded and signed the agreement of sale on behalf of the first applicant. The applicants then applied for an order declaring the AOD/POA and the agreement of sale of the property void. The main contention was that the AOD/POA was unlawful and accordingly void in that it constituted a supplementary agreement as forbidden by section 89 of the National Credit Act 34 of 2005.

Held – The AOD/POA dealt with the same subject matter as the main agreement and was clearly a supplementary agreement. In terms of section 89(2)(c) of the National Credit Act, a credit agreement is unlawful if it is a supplementary agreement or document prohibited by section 91(2). The latter section provides that "A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement". The question therefore was whether the AOD/POA was a supplementary agreement containing a provision that would be unlawful if it were included in a credit agreement. In terms of section 90(2)(a) and (b), a provision of a credit agreement is unlawful, *inter alia*, if its general purpose or effect is to defeat the purposes or policies of the Act.

Insofar as the AOD/POA expressly excluded the applicability of the Act, it constituted a flagrant transgression of section 90(2)(a) and (b) and fell squarely within the provisions of section 89(2)(c). While deeming it not necessary to deal with every clause of the AOD/POA, the Court highlighted various clauses in the agreement which were in direct breach of the Act. A clause in the AOD preventing the applicants from relying on any warranties or representations made by or attributable to the bank was

prohibited by section 90(2)(h)(i). A consent to jurisdiction clause contravened section 90(2)(k)(vi)(bb) of the Act which prohibits a provision in a credit agreement which constitutes consent to the jurisdiction of “any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept”. The agreement also contained a clause entitling the bank to resort to *parate executie*, allowing it to sell the immovable property without having to go through the court processes.

A *parate executie* clause in a mortgage bond permitting the bondholder to execute without recourse to the court by taking possession of the property and selling it, is void. The POA was also unlawful in that it contravened section 90(2)(k)(ii) by granting to the bank a power of attorney in advance. The AOD/POA was therefore unlawful and void *ab initio*.

The relief sought by the applicants was accordingly granted.

END-FOR NOW