LEGAL NOTES VOL 7/2023

Compiled by: Matthew Klein

INDEX [1]

SOUTH AFRICAN LAW REPORTS JULY 2023

AFRIFORUM NPC v NELSON MANDELA FOUNDATION TRUST AND OTHERS 2023 (4) SA 1 (SCA)

Equality legislation — Hate speech — Public display of old South African flag — Such display constituting hate speech, unfair discrimination and harassment — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, ss 7, 10 – 12.

Appellant (AfriForum) had organised certain protests, and at one of these and without its sanction, some protestors had displayed the old South African flag (see [2]). This caused first respondent (the Nelson Mandela Foundation Trust) to apply to the High Court, sitting as an Equality Court, for a declarator that gratuitous display of the old flag constituted hate speech, unfair discrimination and harassment under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (see [10]). AfriForum opposed the application on the basis that such a wide ban of public display would infringe the right to freedom of expression (see [12]).

The High Court, however, upheld the application and declared that subject to the proviso in s 12, any display of the old flag constituted hate speech (s 10); unfair discrimination based on race (s 7); and harassment (s 11) (see [16]).

Here AfriForum, with the Supreme Court of Appeal's leave, appealed to it (see [4]).

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2023 SACR, you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

The first issue was whether the High Court was correct in finding that the requirements of hate speech were satisfied. In this regard the prohibition on hate speech (s 10) provides that:

'(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.'

Held, that gratuitous public display of the old flag constituted publication, propagation and advocacy of a 'message' (see [38]); that the message had at its core race (see [39]); that such display was calculated to be harmful (it resulted inter alia in emotional harm), and could also incite harm (exclusion, hostility, and more) (see [50]). Furthermore, such display both promoted and propagated hatred (see [51], [53] and [56]).

Accordingly, the High Court had been correct in its findings, as also in the caveat to its order — accommodating the proviso (s 12) to the prohibition (s 10) — that display of the old flag for artistic, academic or journalistic purposes was not prohibited (see [57]).

The second issue was whether gratuitous public display constituted unfair discrimination (s 7) as the High Court had found.

Section 7*(a)* provides to this end that:

'Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including —

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence; . . . .'

Held, that the High Court's finding was unassailable (see [63] – [64]).

The third issue was the High Court's finding of harassment (s 11).

In this regard s 11 states that '(n)o person may subject any person to harassment'.

Held, once again, that the High Court's finding could not be faulted: gratuitous public display 'demeane[d], humiliate[d] and create[d] a hostile and intimidating environment for victims of apartheid, particularly black people' (see [67]).

The fourth issue was the propriety of the High Court's declaration that private displays of the old flag contravened the Act.
Held, that the High Court had erred: this had not been the Foundation's case, and the issue had not been adequately argued (see [70] – [71]).
Ordered, that the High Court's order be set aside in part, and that part replaced with an order that subject to s 12's proviso, gratuitous public display of the old flag constituted hate speech, unfair discrimination on the basis of race, and harassment. Save in these regards, the appeal was dismissed (see [75]).

BESTBIER AND OTHERS NNO v NEDBANK LTD 2023 (4) SA 25 (SCA)
Mortgage — Foreclosure — Judicial execution — Primary residence — Compliance with rule 46A of Uniform Rules of Court — Whether rule 46A applied where property sought to be declared executable owned by trust and was primary residence of trust beneficiaries and their employees — Depending on whether constitutional right to housing implicated — Constitution, s 26(1); Uniform Rule 46A.

The High Court had granted judgment in favour of the respondent, Nedbank Ltd, against the first to fourth appellants, in their official capacities as trustees of Goede Hoop Trust (the trust) for payment of an undisputed debt, settled by agreement, inter alia, consenting to judgment. It also declared Goede Hoop Wine Estate (the property) executable and entered judgment directly against the first appellant, Mr Bestbier, in his personal capacity based on a suretyship agreement.
Uniform Rule 46A requires judicial oversight and consideration, by a court, of various factors when a creditor seeks to execute against 'the residential immovable property of a judgment debtor'. In declaring the property executable, the High Court had found that the appellants' rights to adequate housing were not engaged or compromised, so that rule 46A was not applicable.
In this appeal to the Supreme Court of Appeal, the main issue was the applicability of rule 46A of the Uniform Rules of Court (the rules) and High Court practice directive 33A, where the property sought to be declared executable was owned by a trust and was a primary residence of the trust beneficiaries, as well as the trust employees and their families (the farmworkers).

Held

Section 26(1) of the Constitution was not compromised in every case where execution was levied against immovable property. The sole purpose of judicial oversight in all cases of execution against immovable property was to ensure that the orders being granted did not violate s 26(1) of the Constitution, that the judgment debtor was not likely to be left homeless as a result of the execution. The only way to determine whether the right to adequate housing had been compromised was to require judicial oversight in all cases of execution against the immovable property on a case-by-case basis. The appellants failed to show how their constitutional rights to adequate housing might be impacted: they did not show that as a result of indigence, the beneficiaries would be left vulnerable to homelessness if the farm in question was sold in execution. (See [19], [22], [24], [31], [32].)

There was no reason that a person occupying the trust's immovable property as a primary residence — and thus likely to be affected by the order declaring the immovable property specially executable — should be barred from the protection of rule 46A merely because the property in question was owned by a trust. A creditor seeking to execute against immovable property owned by a trust would have to establish whether beneficiaries of that trust occupied the immovable property in question. Due regard must be had to the impact that the sale in execution would likely have on vulnerable and poor beneficiaries who were occupying the immovable property owned by the judgment debtor and who were at risk of losing their only homes. Where that has been established, rule 46A was applicable, despite the judgment debtor being a trust, and would have to be followed (and, consequently, also rule 33 of the practice directive). (See [24] – [25], [27], [32].)

There was nothing to show that if rule 46A was applied, default judgment and an order declaring the immovable property specially executable would not have been granted, and accordingly the appeal would be dismissed (see [32]).

CLOSE-UP MINING AND OTHERS v BORUCHOWITZ NO AND ANOTHER 2023 (4) SA 38 (SCA)

Arbitration — Arbitrator — Powers — Whether rule of law that arbitrators may only decide issues set out in pleadings.

In this matter second respondent (the Lutzkie Group) brought a dispute with first to third appellants (Close-Up Mining) before an arbitrator (the first respondent) for his determination, and in the course of the proceedings Close-Up raised a defence that it had not pleaded (see [1] – [2]). The arbitrator's response, predicated on his understanding that an arbitrator lacked any competence to consider a matter not pleaded, was to decline to hear it (see [3] and [6]).

Later on, aggrieved by the arbitrator's award, Close-Up brought proceedings for its review, asserting that the arbitrator had failed to appreciate that an arbitrator could consider a matter, notwithstanding its not being pleaded. That is, that an arbitrator had a discretion (see [3]).

The High Court, however, aligned with the arbitrator and dismissed Close-Up's application, but did grant leave to it to appeal to the Supreme Court of Appeal (see [4]). There, the issue was whether there was indeed a rule of law that an arbitrator may only determine a matter set out in the pleadings (see [5]).

Held, that there was no such rule — all was dependent on what the parties had agreed. They might confer a discretion of the form Close-Up contended for, or confine the arbitrator's competence to issues that were pleaded (see [9], [12] and [15]).

The second issue was whether the arbitration agreement gave the arbitrator the power to decide matters that had not been pleaded (see [16]).

To this end, the agreement stipulated that disputes would be determined under the rules of the Arbitration Foundation of South Africa, and the issue accordingly narrowed to whether those rules, and in particular art 11.1, granted an arbitrator the discretion concerned (see [19] – [21]).

Held, on interpretation of the rules, that they did not (see [23] and [36]).

Appeal dismissed (see [42]).

DART INDUSTRIES INC AND ANOTHER v BOTLE BUHLE BRANDS (PTY) LTD AND ANOTHER 2023 (4) SA 48 (SCA)

Competition — Unlawful competition — Passing-off — Likelihood of confusion — Similarity in general get-up of products compounded by similarity of online marketing strategy — Potential customers would see products next to each other and conclude they were of same provenance, enabling newcomer to trade on original vendor's reputation — Damage to original vendor inevitable — Passing-off established.

Intellectual property — Trademark — Distinctiveness — Acquired distinctiveness — Three main tests having emerged: recognition-association (low barrier); perception (medium barrier); and reliance (high barrier) — Local and foreign authorities discussed.

Intellectual property — Trademark — Distinctiveness — Shape or container mark — Public perception crucial to determine inherent distinctiveness — Container shape not usually perceived as source indicator — Must depart significantly from norm or custom of sector — Contested water-bottle mark (i) not differing sufficiently from norm or custom of sector for inherent distinctiveness; and (ii) failing even low-threshold recognition-and-association test for acquired distinctiveness — High Court's cancellation of mark in order.

This was a trademark and passing-off dispute about the similarity between the parties' hourglass-shaped plastic water bottles. The appellants (collectively, Tupperware) were part of the Tupperware group of companies. The first appellant was the registered owner of the ECO BOTTLE shape/container mark in South Africa. When the first respondent (Buhle) started selling a similar bottle, Tupperware asked the High Court for an order restraining Buhle's alleged infringement and passing-off. In response, Buhle asked for the cancellation of the ECO BOTTLE mark on the ground that it was not capable of distinguishing Tupperware goods from those of other traders as intended in s 10(2)*(a)* of the Trade Marks Act 194 of 1993. Tupperware in turn contended that its Eco bottle's shape departed 'significantly' from the shape of other water bottles in the market and that the hourglass shape was unique in the South African market when it introduced the Eco 10 bottle in 2011. Both bottles were sold online, often by the same marketers.

The High Court, invoking s 9(2) of the Act, found that the mark was neither inherently distinctive nor had it acquired it by use to date. Consequently, it dismissed Tupperware's application and granted Buhle's counter-application for cancellation. The High Court ruled that although the bottles were virtually identical, there was no passing-off because Tupperware's direct selling strategy (via salespersons performing home demonstrations at 'Tupperware parties') meant that customers would know the Eco bottle was a Tupperware product, minimising the likelihood of confusion.

In an appeal to the Supreme Court of Appeal, the SCA dealt first with the issue whether the Eco bottle shape mark had to be cancelled under s 10(2)*(a)* for being incapable of distinguishing within the meaning of s 9(2). The SCA pointed out that, for a shape mark to be inherently distinctive, public perception was crucial: it was only when the public relied on the distinctiveness of a shape as an indicator of the source of goods that it fulfilled a trademark function. To do so, containers, which were generally perceived to be utilitarian, had to differ significantly from the norm or customs of the sector, and even that might not be enough since a fancy container might be perceived to be just another vessel and not a badge of origin. The SCA concluded that the High Court's finding that the Eco bottle did not have an inherently distinctive character was correct: the average consumer would see it as nothing more than a fancy water bottle and would not distinguish it from other water bottles in the trademark sense. (See [12] – [19].)

As to the acquisition of distinctiveness through prior use, the question was how an inherently non-distinctive shape mark acquired sufficient distinctiveness to function as a trademark. Three tests were used by local and international courts, being (from loosest to strictest) the 'recognition-association' test (consumers recognised the mark and associated it with the trademark claimant's goods); the 'perception' test (consumers perceived that goods designated by the mark had a particular source); and the 'reliance' test (consumers relied on the mark as an indicator of the source of the goods). (See [20] – [30].)

In the case of the Eco bottle, its apparent popularity was likely more due to its being part of the Tupperware range of goods than its shape. Where a mark was used in conjunction with another mark (the TUPPERWARE mark was embossed on the side of the bottle), establishing acquired distinctiveness was more difficult. But the fact that Tupperware embossed its logo on the Eco bottle meant that it recognised that consumers either did not rely on the shape in a trademark sense or did not trust it to

identify the trade source. In the end, the shape of the Eco bottle as a trademark faltered even in the low-threshold recognition and association test. As to the reliance test, there was no evidence that purchasers of the Eco bottle relied on its shape to confirm its origin or authenticity. The SCA concluded that Tupperware's Eco bottle was not distinctive, and the High Court correctly cancelled it. (See [31] – [35].)

As to passing-off, the SCA reasoned that while the High Court's findings, that Tupperware had shown (i) that it had acquired goodwill deriving from the reputation it had built in respect of its Eco bottle since 2011 and (ii) that its get-up as a whole was distinctive of Tupperware's goods, were correct, it was wrong on (iii), the likelihood of confusion. While Tupperware-party attendees would indeed know that the Eco bottle was a Tupperware product, Buhle's had, by its adoption of Tupperware's online marketing strategy, associated its product in every respect with Tupperware's, enabling it to benefit from the reputation of the Eco bottle, with inevitable damage to Tupperware. In the result, Tupperware's passing-off application should have succeeded. (See [36] – [52].)

In the result, Tupperware would lose the trademark appeal, but win the passing-off appeal. So ordered.

GIFTWRAP TRADING (PTY) LTD v VODACOM (PTY) LTD AND OTHERS 2023 (4) SA 68 (SCA)

Telecommunication — Service providers — Customer information — Disclosure of — Whether service provider may release customer information to third party who requires it with view to instituting legal proceedings against customers concerned — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, s 42(1)*(c)*.

Consumer protection — Disclosure of consumer information — By telecommunication service provider (mobile network operator) — Whether service provider may release customer information to third party who requires it with view to instituting legal proceedings against customers concerned — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, s 42(1)*(c)*.

Applicant (Giftwrap), an online retailer, marketed its products through advertisements on online platforms provided by a third party. This for a fee calculated on the basis of the number of visits — or 'clicks' — the advertisement received (see [2]).

For some years, however, Giftwrap had been the victim of click fraud, a species of fraud where a wrongdoer repeatedly clicks on an advertisement with the intention of driving up the costs of the advertisement for the advertiser (see [3]). Of late, though, and through investigation, Giftwrap had come into possession of IP addresses of devices used by the wrongdoer, as well as the identity of the internet service provider that each device used. The service providers were the respondents (see [1] and [4]). Giftwrap had then requested the customer information associated with each IP address, in order for it to take legal action against the customers concerned. But the respondents had refused to provide it (see [6]).

Giftwrap thereon applied to the High Court for the information's disclosure, basing its application on s 42(1)*(c)* of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, which provides that:

'No person may disclose any information which he . . . obtained in the performance of his . . . duties in terms of the Act, except . . . information which is required . . . as evidence in any court of law' (see [21]).

(Service providers such as the respondents are obliged under the Act to obtain and store prescribed customer information (see [14] – [15]).

The High Court dismissed the application, reasoning that the Act did not permit disclosure of customer information to requesting parties, in order for those parties to identify wrongdoers (see [7]).

Here, with the Supreme Court of Appeal's leave, Giftwrap appealed to it (see [7]).

The issue was whether s 42(1)*(c)* permitted service providers to disclose information to a third party that that party required in order to make investigations and identify wrongdoers. This with an eye to instituting legal proceedings against them (see [23]). (This as opposed to providing information which was required as evidence in pending legal proceedings (see [24]).

Held, on interpretation of the section, that it does not permit the disclosure of information that is required in order to investigate whether legal proceedings can be instituted (see [24] and [27]).

Appeal dismissed (see [28]).

RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD (IN BUSINESS RESCUE) AND OTHERS 2023 (4) SA 78 (SCA)

Company — Business rescue — Business rescue plan — Right to vote on — Company A in business rescue creditor of company B in business rescue — Whether company A's business rescue practitioners or company A's directors having right to vote on company B's business rescue plan — Companies Act 71 of 2008, s 140(1)*(a)*.

In this matter fifth respondent (Tegeta) was a company in business rescue and sixth and seventh respondents were its business rescue practitioners (see [2]). Appellants were its directors (see [4]).

Tegeta was a creditor of first respondent (Optimum), a company in business rescue, whose business rescue practitioners published a business rescue plan, and notified affected parties of a meeting to vote on it (see [3]). Tegeta's directors asserted it was their right to vote on the plan, and the business rescue practitioners that it was their right (see [4]).

A High Court found for the business rescue practitioners, and with the court's leave, the directors appealed to the Supreme Court of Appeal (see [5]).

It *held*, on interpretation of the Companies Act 71 of 2008, and in particular s 140(1)*(a)*, that the right to vote on a debtor company's business rescue plan vests in the business rescue practitioners of the creditor company and not the creditor company's directors (see [6], [13] – [14] and [25] – [26]).

Appeal dismissed (see [30]).

SOUTH AFRICAN RESERVE BANK AND ANOTHER v MADDOCKS NO AND ANOTHER 2023 (4) SA 85 (SCA)

Exchange control — Exchange control regulations — Forfeiture order — Legal consequences where obtained after winding-up of company pursuant to blocking order obtained prior to winding-up — Blocking order not invalidated by winding-up — Issuance of blocking and forfeiture orders not rendering South African Reserve Bank creditor of insolvent company — Forfeiture order competent — Currency and Exchanges Act 9 of 1933, s 9, read with Exchange Control Regulations of Currency and Exchanges Act,1933, reg 22B.

The appellant, South African Reserve Bank (the Reserve Bank), issued three forfeiture orders — under reg 22B of the Exchange Control Regulations, issued under s 9 of the Currency and Exchanges Act 9 of 1933 — against two companies in liquidation, pursuant to obtaining blocking orders against them before they were wound up. The two respondents were the joint liquidators of the companies. Upon their appointment, they demanded that the forfeited money be paid to them to be administered under insolvency laws. They asserted that by virtue of the winding-up and the establishment of the concurus creditorum on 13 February 2017, the moneys held in the bank accounts to the credit of the companies fell into the insolvent estates and were subject to the provisions of s 391 and s 342 of the Companies Act 61 of 1973. In representations made to the Reserve Bank as to why the forfeiture order should not be issued, the liquidators contended that forfeiture could not validly take place after the winding-up of the companies (see [17 – [18]).

The Reserve Bank refused to accede to the demand, contending that the forfeiture orders were validly made pursuant to blocking orders made prior to the liquidation of the companies. The liquidators then successfully brought a High Court application for an order declaring the forfeiture orders null and void and directing the National Revenue Fund to pay the forfeited moneys into the liquidators' bank account.

In the High Court the Reserve Bank contended that, notwithstanding the commencement of the winding-up of the two companies, the blocking orders remained in force, and that the liquidators could not, by reason of the liquidation, acquire any greater rights to claim payment of the funds standing to the credit of the banking accounts than the companies themselves had immediately prior to the commencement of the winding-up. The thrust of the liquidators' case was that the Reserve Bank, after issuing the blocking orders in respect of the moneys standing to the credit of the companies, became their creditor and was required to participate in the concurus creditorum. It could therefore not validly deal with the assets of the companies in liquidation by the issue of forfeiture orders, which prejudiced other creditors. (See [19] and [22].)

The present case concerned the Reserve Bank's appeal against the High Court's order to the Supreme Court of Appeal. The primary issue was the legal consequences of the forfeiture orders made by the Reserve Bank after the liquidation of the two companies.

Held

The operation of the blocking orders did not result in the creation of a debtor – creditor relationship between the companies and the Reserve Bank. The Currency and Exchanges Act 9 of 1933 and the Regulations must be interpreted purposively. Having regard to the context and purpose of the Regulations, the liquidation of the two companies did not nullify the blocking order, which was in existence at the time. As the blocking order was not nullified, it was competent for the Reserve Bank after the liquidation of the companies to issue the forfeiture orders which made it mandatory for the banks which held the accounts in which moneys were kept, to pay such moneys into the National Revenue Fund. The forfeiture orders issued after the liquidation of the companies were not affected by the liquidation; the moneys which were declared forfeited to the state did not fall into the estates of the insolvent companies. The liquidators were therefore not entitled to demand that the funds be paid out to them for distribution. In the result, the appeal would succeed. (See [31] – [36].)

SOUTHERN SKY HOTEL AND LEISURE (PTY) LTD t/a HANS MERENSKY HOTEL AND SPA (IN LIQ) AND OTHERS v SOUTHERN SKY FOOD ENTERPRISES (PTY) LTD 2023 (4) SA 99 (SCA)

Company — Business rescue — Liquidation proceedings already initiated — Liquidation proceedings 'suspended' by making of business rescue application — While application's adjudication pending, liquidators concluding sale of company's property — Whether s 131(6) invalidating sale — Companies Act 71 of 2008, s 131(6).

In this matter creditors obtained a final liquidation order against first-appellant company in liquidation, and liquidators were appointed (see [9] – [10]). A third party then applied for an order placing the company in business rescue (see [11], [14] and [21]), and with the business rescue application's adjudication still pending, the liquidators (second to fifth appellants) put the company's property up for sale on auction and a sale agreement was concluded with a buyer (respondent). The agreement envisaged the situation of liquidation proceedings being interrupted by a business rescue application, and made the sale conditional on the application's dismissal (see [23]).

Respondent buyer thereafter applied for an order invalidating the agreement, on the apparent basis that it had been made while the liquidation proceedings were 'suspended' by s 131(6) of the Companies Act 71 of 2008 (see [18] – [19]).

The section provides that 'if liquidation proceedings have already been commenced by or against the company at the time [a business rescue] is made in terms of subsection (1), the application will suspend those liquidation proceedings until [inter alia] the court has adjudicated upon the application'.
The High Court granted the order and thereafter gave leave to appeal to the Supreme Court of Appeal (see [18]).
The issue there was: did s 131(6) invalidate the agreement (see [23])?
Held, on interpretation of the provision's text, context and purpose, that it did not — a conclusion consonant with the provision's non-suspension of the liquidators' powers which they were accordingly free to exercise, subject to lifting of the suspension (see [24]).
The result was that the agreement was valid, and respondent's application to invalidate it ought to have been dismissed (see [24]).
Appeal upheld, the High Court's order set aside, and replaced with an order dismissing respondent's application (see [28]).

THOMAS AND ANOTHER v THOMAS 2023 (4) SA 107 (SCA)

Insolvency — Property passing to trustee — Right of action — Trustees abandoning right — Effect.

In this matter respondent was the holder of a right of action. Respondent was later sequestrated and the right came to vest in the trustees of his insolvent estate. They abandoned the right (see [4] – [5] and [10]). Some years later respondent was rehabilitated, and respondent approached a High Court for a declarator that owing to the abandonment the right was not a part of the insolvent estate. Respondent posited further that the right remained alive after its abandonment, and could be employed by him. The High Court agreed (see [9] and [11]).
On appeal to the Supreme Court of Appeal, the issue was the effect of the abandonment (see [17]).
Held, that the right of action, as movable property, vested, by virtue of the Insolvency Act 24 of 1936, in the trustees, on grant of the sequestration order, and that their abandonment of it — as in the position of a lawyer informing that a right of action has been abandoned — was to extinguish the right (see [16], [18] and [20]).

Appeal upheld, the order of the High Court set aside, and substituted with an order dismissing respondent's application (see [22]).

WALLAGE v WILLIAMS-ASHMAN NO AND OTHERS 2023 (4) SA 113 (SCA)

Will — Divorce — Effect — Spouse A executing will before divorce from spouse B — Spouse A dying fewer than three months after divorce — Section providing that will to be implemented as if spouse B had died before divorce — This unless it appeared from will that spouse A's intention was to benefit spouse B, notwithstanding divorce — Whether proviso, in limiting recourse solely to will, in order to demonstrate testatrix's intention, was unconstitutional — Wills Act 7 of 1953, s 2B.

Appellant and N had been married and N had executed a will making appellant the beneficiary of her estate. Appellant and N had later divorced and about six weeks later N had died (see [1]). Accordingly, appellant and N's situation was caught by s 2B of the Wills Act 7 of 1953. It provides that where a spouse (spouse A) has executed a will before divorce and then died shortly after divorce (within three months of it), erstwhile spouse B will not inherit under the will (see [2] and [19]). This 'unless it appears from the will that the [testatrix] intended to benefit [her] previous spouse notwithstanding the dissolution of [her] marriage'.

Appellant challenged the constitutionality of s 2B, but was unsuccessful in the High Court, and with its leave, appealed to the Supreme Court of Appeal (see [7]).

His assertion was that the proviso, in allowing recourse solely to the will in order to demonstrate a testatrix's intention, was too narrow; that it ought also to allow extraneous evidence of intention; and that the consequence of not allowing for such evidence was to arbitrarily deprive of property, the right to inherit (see [15] – [16], [21] and [23] – [24]).

Held, to the contrary: there was a reasoned basis for the narrowness (it forestalled dispute as to a testatrix's intention), and for the same reason it was procedurally fair (see [27] – [28] and [32]).

Appeal dismissed (see [36]).

EW v VH 2023 (4) SA 123 (WCC)

Partnership — Life partnership — Opposite-sex life partners — Duty of support — Maintenance — Claim for development of common law to recognise that partners in

life partnerships in which they had, during existence of life partnership, undertaken to each other reciprocal duties of support, alternatively factually reciprocally supported each other, were entitled to claim maintenance from one another after termination of life partnership — Relief sought in proceedings in which applicant claiming interim maintenance from respondent, with whom applicant had been involved in long romantic relationship, which since terminated — Court declining to develop common law, in light of absence of evidence pertaining to current legislative reform, and given that applicant already had common-law remedy at disposal.

The applicant and the respondent were previously involved in a romantic relationship for a period of around nine years, which ended in April 2022 when the respondent vacated the common home. Three children, presently minors, were born of the relationship. The applicant contended that the respondent took care of all her and the children's maintenance needs and they were entirely financially dependent on the respondent. The applicant launched an action on 25 July 2022 in the Western Cape High Court — these proceedings were pending — in which she sought an order declaring that the parties were in a permanent life partnership in terms whereof they had undertaken reciprocal duties of support towards each other, and directing the respondent to maintain her for a period of 10 years or until her death or remarriage, whichever occurred first (see relief set out in [2]). The present matter concerned an application the applicant brought to the Western Cape High Court to claim from the respondent *interim maintenance* — without which, the applicant claimed, she would be destitute — as well as a contribution towards legal costs. As a precondition for success in her maintenance claim, she considered it necessary that the common law be developed to recognise —

'that partners, in life-partnerships in which the partners had, during the existence of the life-partnership, undertaken to each other reciprocal duties of support, alternatively factually reciprocally supported each other, are entitled to claim maintenance from one another, following upon the termination of the life-partnership'. (See [10].)

Therefore, the applicant also sought, as final relief, the development of the common law in the above terms. The applicant argued, in support thereof, that the present lack of legal recourse for life partners to claim maintenance from one another following the termination of their partnership was constitutionally unacceptable since it

discriminated on the basis of, inter alia, marital status and gender and constituted unequal protection before the law.

The court, per the majority constituted by Cloete J and Slingers J (the court), held that it had not been placed in a position to make a properly informed decision about whether the common law ought to be developed in the manner sought by the applicant (see [40]): In this regard, the court noted that constitutional authorities had cautioned judges exercising their authority to develop the law to be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary (see [25] and [32]). The legislature, the court noted, had indeed embarked on a process of legislative reform aimed at providing protection to vulnerable life partners upon the termination of their relationships. A draft Domestic Partnership Bill was published in 2008, and since then the South African Law Reform Commission had been engaged in researching, receiving submissions and developing proposals for legislative reform to regulate all domestic partnerships. As recently as January 2021, the SALC had issued a discussion paper, wherein it had proposed the legislative recognition of life partnerships, defined as 'any life partnership where the parties cohabit and have assumed permanent responsibility for supporting each other', and had included two bills as options for discussion. (See [26] – [29] and [32].) The court noted that the applicant had nevertheless failed to obtain evidence from, or join, the Minister responsible for the work of the SALC, namely the Minister of Justice and Constitutional Development. The Minister could have explained the proposed legislative scheme, and how much longer it was likely to take for it to be implemented, as well as offering his views concerning the appropriateness of the applicant's proposed development of the common law. (See [31] – [33].) The Minister could also have provided evidence as to the wider consequences of the proposed common-law development (see [30] and [33]), a factor which a court had to take into account in developing the common law (see [24] and [30]).

The court further held that, in any case, the development of the common law as proposed by the applicant was unnecessary (see [36] and [40]): This was because the applicant already had a common-law remedy on which her entitlement or otherwise to maintenance squarely rested (see [41]). In explanation the court cited the recent constitutional decision of *Bwanya v The Master of the High Court and Others*. There, the Constitutional Court developed the common law to recognise that a legally enforceable duty of support may arise out of a permanent life partnership, *as long as*

it could be established that factually there existed a duty of support, and that it existed in a familial setting. (See [36] – [38] and [41].) (The court held that the pending action, where the fundamental dispute would be whether or not, factually, a permanent life partnership existed, would afford the applicant with the perfect opportunity to make use of such remedy, and the trial court would be ideally placed to adjudicate on it (see [41]).)

Accordingly, the court declined to develop the common law. It rejected the applicant's claim for interim relief for maintenance and a contribution towards costs, such relief being squarely based on a finding in her favour for final declaratory relief concerning the development of the common law. (See [43].) The court dismissed the application, with no order as to costs (see [53]).

Wille J dissented from the majority of the court. He held that there was indeed a need to develop the common law, because currently, in failing to recognise a legal duty of support between life partners during the subsistence of the life partnership, and the right of a life partner, in the absence of an agreement between the parties regarding maintenance, to claim maintenance following the termination of the partnership, it was unconstitutional, being discriminatory on the grounds of marital status. (See [89] – [92].) He held that he would have granted an order declaring 'that partners in life partnerships in which the partners had, during the existence of the life partnership, undertaken to each other reciprocal duties of support, alternatively factually reciprocally supported each other, are entitled to claim interim financial relief from one another, following upon the termination of the life partnership' (see [114]). He would further have granted an order directing the respondent to pay her interim maintenance, and contribute to her legal costs (see details of order at [114]).

HAWARDEN v EDWARD NATHAN SONNENBERGS INC 2023 (4) SA 152 (GJ)

Delict — Elements — Wrongfulness — Omissions — Conveyancer failing to warn buyer that email was insecure means of transfer of information.

Plaintiff was the buyer in a property sale transaction and defendant the conveyancer appointed by the seller. Defendant emailed plaintiff its bank details for plaintiff to pay the purchase price to defendant; plaintiff's email account was hacked by a third party and the third party intercepted defendant's email and altered the bank details; plaintiff

paid the purchase price into the account detailed; and the moneys were misappropriated (see [6], [11] – [15], [18] and [87]).

Plaintiff then instituted proceedings against defendant, claiming damages in the extent of the purchase price on the basis of what plaintiff asserted was defendant's negligent omission to warn it of the danger of 'business email compromise', such as occurred (see [1] – [4]).

The first issue was whether the omission was wrongful: whether it would be reasonable to impose liability for the failure to warn (see [102] and [107]).

Held, that it would be (see [126] and [131]). Considerations supporting this conclusion were the determinacy of liability, confined as it was to the plaintiff and the quantum of the purchase price (see [106] and [130]); the plaintiff's vulnerability, owing to her commercial inexperience, ignorance of the risk of email compromise, and inability to contractually protect herself vis-à-vis defendant, with whom she had no contractual link (see [114] and [117]).

The second issue was whether defendant's omission had been negligent, with the court holding that defendant was aware of the danger and indeed created the risk by the means it employed to convey its banking details, where inexpensive and easy steps could have been taken by it to mitigate the danger (see [120], [122], [126] – [128]).

The third and fourth issues were factual and legal causation, which the court found to have been established: as to the former, but for the omission, the loss would not have occurred; and as to the latter, the loss was foreseeable and thus not too remote to be actionable (see [129]).

Ordered accordingly that defendant pay plaintiff damages in the quantum of the purchase price (see [134]).

KINGSHAVEN HOMEOWNERS' ASSOCIATION v BOTHA AND OTHERS 2023 (4) SA 187 (WCC)

Housing — Consumer protection — Community Schemes Ombud — Appeal against adjudicator's order — Nature of appeal — Appropriate procedure — Community Schemes Ombud Service Act 9 of 2011, s 57.

Applicant was a homeowners' association whose members were residents of a housing estate. It was a 'community scheme' in the terms of the Community Schemes Ombud Service Act 9 of 2011. First respondent was a homeowner and member of the

association, second respondent was the Community Schemes Ombud Service, and third respondent was the adjudicator to whom applicant and respondents' dispute had been referred by the local ombud (see [1] – [4]).

The facts were that first respondent had repeatedly contravened the association's conduct rule which required residents to park their vehicles within the boundary of their property, and prohibited them parking in visitors' bays (see [27] – [28]). Members of the association had then complained to the association's trustees and they had attempted fruitlessly to persuade first respondent to comply (see [30] – [31]).

The trustees then caused the association to apply to the Ombud Service for an order under the Act prohibiting first respondent parking in visitors' bays and beyond his property's boundaries, and the Ombud Service referred the dispute to the third respondent to adjudicate (see [32]).

The third respondent, however, refused to grant the order, reasoning that s 39 of the Act, which lists the orders the Ombud Service may make, failed to provide for an order to comply with the rules of a community scheme. She also opined obiter that the association did not have jurisdiction over the visitors' parking bays (see [7]).

The trustees then caused the association to bring proceedings on motion in the High Court, (1) to appeal the adjudicator's refusal to grant the order — an appeal provided by s 57 of the Act; alternatively, (2) to review and set aside the adjudicator's decision; and in either case, (3) for an interdict of first respondent parking beyond his boundaries and in visitors' bays (see [1] and [6]).

As to (1), it was common cause that the prohibitory order was not provided by the Act as a remedy that the Ombud Service could grant, and accordingly the adjudicator's refusal to order the relief was unimpeachable (see [33]).

As to (2), the association's review was directed at the adjudicator's obiter finding that the association did not have jurisdiction over the visitors parking bays, a challenge that fell to be dismissed on the ground that the finding was not the adjudicator's decision — that was the refusal to grant the prohibitory order — but rather a reason for the decision, and as such not administrative action within the terms of the Promotion of Administrative Justice Act 3 of 2000, and insusceptible to review. (Concomitantly, the obiter finding, not being a decision, was not susceptible to appeal.) (See [35].)

As to (3), first respondent's defence to the association's prayer for an interdict, was tripartite.

Firstly, that the trustees had failed to authorise the institution of the proceedings — a defence that was undermined by facts pointing to the contrary (see [37] – [38] and [44]).

Secondly, that the association had waived compliance with the parking rules, a contention which was defeated by the association's constitution, which gave no power to the trustees to waive compliance with the conduct rules, and by trustee conduct pointing away from waiver (see [45] and [47] – [48]).

Thirdly, that the association's right to enforce compliance against first respondent was conditional on it enforcing that right against third parties, with the association's failure to perform that — on first respondent's characterisation — reciprocal obligation justifying first respondent not performing its obligation (see [50] – [51]).

This was confuted by authority in the context of a shareblock company's contract with shareblock owners, that failure by the company to enforce a breach of contract by one owner would have no impact on its enforcement of a breach by another (see [52]).

Then, in passing, there was considered a difference of characterisation of the s 57 appeal and an associated difference of opinion on the procedure for the bringing of the appeal (see [8]).

In the Western Cape Division, and followed by the KwaZulu-Natal Division, the appeal was characterised as a limited rehearing to determine only whether the arbiters had exercised their discretion properly, while in the Gauteng Division it was characterised as a complete rehearing and redetermination of the merits going toward whether the decision was right or wrong, with the caveat that the appeal was limited to an appeal on a question of law (see [9] – [11] and [13]).

As to procedure, the Western Cape and KwaZulu-Natal Divisions required the appeal to be brought on notice of motion; while the Gauteng Division stipulated a notice of appeal succinctly setting out the grounds of appeal — a procedure entailing some difficulties (see [16] – [17]).

Firstly, it could be difficult to distinguish factual questions from legal questions and there was no requirement that the legal questions be spelt out (see [18] – [19]).

Secondly, it might be necessary for the court to decide issues of fact not determined by the tribunal in order to answer the question of law, and identification of such factual matters was better facilitated by exchange of affidavits (see [20]).

Thirdly, the decision concerned might as here be subject to a s 57 appeal and alternatively a review, which entailed that separate appeal and application procedures

would need to be followed. This was avoided on the Western Cape approach, which had the further advantage of informing respondents what they were required to do and by when in order to oppose the appeal (see [23] – [24]).

Appeal dismissed and interdict granted, prohibiting first respondent parking his vehicles anywhere beyond the boundary of his property (see [54]).

PUBLIC PROTECTOR OF SOUTH AFRICA v SPEAKER, NATIONAL ASSEMBLY AND OTHERS 2023 (4) SA 205 (WCC)

Appeal — Execution of judgment pending appeal — Judgment declaring decision by President to suspend Public Protector to be constitutionally invalid — Having no force until confirmed by Constitutional Court — Such judgment not capable of being immediately executed under s 18(1) and (3) of Superior Courts Act — Section 18 of Superior Courts Act not applicable — Fact that steps taken by respondents to appeal judgment under s 172(2)*(d)* of Constitution irrelevant — Constitution, s 172(2)*(a)* and *(d)*; Superior Courts Act 10 of 2013, s 18(1) and (3).

The present matter concerned the executability under s 18(1) and (3) of the Superior Courts Act 10 of 2013 (the SC Act) of orders envisaged in s 172(2)*(a)* of the Constitution, concerning the constitutional validity of conduct of the President. On 9 September 2022 the Public Protector of South Africa (the PP) obtained an order on an urgent basis in the Western Cape High Court declaring the decision of the President to suspend her as invalid, and setting it aside. The course of action taken by a respondent, the Democratic Alliance (the DA), in response was to file a notice of appeal directly to the Constitutional Court (the CC), along with a conditional application for leave to appeal directly to the CC in case it should be found it had no automatic right of appeal. Similarly, the President, another respondent, filed an application to appeal directly to the CC, along with a conditional appeal to the SCA. For its part, the PP launched the present extremely urgent application in the Western Cape High Court. The PP was supported by various political parties (the 10th, 11th and 16th respondents — the supporting respondents). The PP sought, in terms of s 18(1) and 18(3) of the SC Act, an order rendering immediately executable parts 187.5 and 187.6 of the order, which respectively read '*The decision of the President to suspend the applicant is declared invalid*; and '*The suspension of the applicant is set aside effectively from the date of this order*'.

The DA and the President opposed the relief. They argued that s 18 of the SC Act could not be employed to enforce and execute the judgment in question. They explained that the judgment concerned *the constitutional validity* of *'conduct of the President'*, and, accordingly, in terms of s 172(2)*(a)*, read with s 167(5), of the Constitution, it had to be confirmed by the CC. Until such time as the CC had done so, *it could have no force and effect*. Therefore, they argued, the court had no jurisdiction to grant the relief sought by the PP.

The PP, in support of the relief it sought, argued that items 187.5 and 187.6 had to be read disjunctively: they were each separate, self-standing orders. And both of them, it argued, *did not qualify* as orders made in terms s 172(2)*(a)* of the Constitution and accordingly *were not subject to confirmation by the CC*: Order 187.5 was an order invalidating not '*conduct*' of the President, but rather his '*decision*'. Order 187.6 was simply an 'ordinary order' based on findings of actual and/or reasonably apprehended bias in terms of the common law. The PP argued therefore that the orders were in general terms executable in the interim, provided that a successful application was made in terms of s 18(1) and (3) of the SC Act. It expressed the view that it met the requirements set out in those sections. The PP added that, even if s 172(2)*(a)* applied, it did not follow that s 18 of the SC Act did not, for various reasons: It noted that s 18 of the SC Act applied to a decision that *was the subject of an application for leave to appeal or of an appeal*: that requirement was met here, it asserted, because the DA and the President had indeed lodged appeals; they had done so in terms of s 172(2)*(d)* of the Constitution.

The supporting respondents, like the PP, argued that items 187.5 and 187.6 were separate orders. Order 187.5, they argued, did indeed amount to an order declaring conduct by the President to be constitutionally invalid and requiring confirmation by the CC. But, it added, the court then limited the order of invalidity to operate prospectively and the 187.6 order was granted as a just and equitable order in terms of s 172(1)*(b)*, that was *interlocutory*, and which, in terms of s 18(2) of the SC Act, was not suspended. It was not an order of constitutional invalidity. It was not subject to confirmation because it was granted to mitigate the effects of an order of constitutional invalidity granted under s 172(1)*(a)* pending confirmation of that order by the Constitutional Court. In the alternative, the supporting respondents argued that the 187.6 order constituted 'other temporary relief' envisaged in s 172(2)*(b)* of the Constitution which the court making the order of constitutional invalidity had a

discretion to grant, even of its own accord, in order to mitigate the effects of the unconstitutional suspension of the applicant.

The court held that the order granted on 9 September 2022 was a composite one, in which orders 187.5 and 187.6 had to be read conjunctively (see [68], [69] and [73]). In terms thereof, it held, the court had granted an order, envisaged in s 172(2)*(a)* of the Constitution, declaring 'conduct' of the President to be constitutionally invalid. This was reflected in 187.5. (See [66] – [69] and [89].) Ancillary and consequential thereto, the court granted further 'just and equitable' order envisaged in s 172(1)*(b)*, reflected in order 187.6 (see [68]). The court rejected the distinction the applicant sought to draw between a 'decision' and 'conduct', and in support thereof noted the fact that the CC had on a number of occasions characterised a 'decision' of the President as constituting 'conduct' of the President. (See [65] and [89.1].) The court further rejected as unfounded the contention that the court's order declaring the President's conduct to be invalid was rooted in common law: when suspending the applicant, the President was exercising a public power conferred on him by the Constitution (see [66]), and the court's finding was based on the principle of legality and the President's breach of a constitutional duty not to involve himself in a decision where there may be a conflict of interest (see [67]).

The court held that, given the above, in terms of s 172(2)*(a)* of the Constitution, the declaration of constitutional invalidity had to be referred to the CC for confirmation, and before such confirmation by the CC, *it had no force and effect*. (See [89.2] and [74].) The court held that, before confirmation, such an *order could not be operationalised or executed under s 18 of the SC* Act. This was because, simply put, there would be nothing that could operate, or upon which execution could be levied (see [74]). Further, it held, such a conclusion followed from a textual interpretation of s 18: to hold that s 18 did apply to an order of constitutional invalidity under s 172(2)*(a)* would mean that such order, having regard to ss (1), could have immediate effect, should no appeal be lodged. This would fly in the face of constitutional authority to the contrary, and would also be destructive of, and undermine, the supervisory role of the Constitutional Court in matters dealing with presidential conduct (see [77]).

The court further rejected the argument that s 18 of the SC Act would still apply in this matter in any case, given that the DA and the President had lodged appeals and conditional applications for leave to appeal. It held that the referral under s 172(2)*(a)* was independent of any appeals that may be lodged. The DA and the

President's appeals under s 172(2)*(d)* amounted merely to an indication of their intention to oppose the confirmation of the order of constitutional invalidity; they could not have the effect of rendering final and binding a decision that, by operation of law, was not. (See [81] and [89.2].)

The court further rejected the arguments that s 172(2)*(b)* was applicable to the court's judgment, or that the order relating to just and equitable relief was not suspended, as it qualified as an order contemplated in s 18(2) of the SC Act: the order simply was not intended to be a temporary or interlocutory order. (See [72], [82] – [84] and [89].)

The court accordingly concluded that the applicant's application ought to be dismissed (see [93]).

RC v HSC 2023 (4) SA 231 (GJ)

Children — Joint guardianship — Non-parent — Assignment of guardianship to non-parent — Quaere: Whether non-parent applicant had to show non-suitability of existing guardian.

Children — Contact and care — Assignment of contact and care to interested person — Absence of biological link with child was not bar to application in terms of s 23 of Children's Act — Children's Act 38 of 2005, s 23.

Children — Contact and care — Assignment of contact and care to interested person — 'Interested person' — Person with some tangible and clearly demonstrable interest and connection to child — Children's Act 38 of 2005, s 23

The present appeal concerned whether a person may have guardianship of, and rights of contact with, a child to whom they had no biological link, and who already had a natural guardian. The appellant, 52, and the respondent, 31, entered into a romantic relationship after meeting through the dating app *Tinder*. They moved in together in around December 2018. For the next two and a half years until the parties separated in around June 2021, the appellant, the respondent, and the latter's two biological children from her previous relationships — 'Brad', currently 6, and 'Dennis', currently 13 — lived together as a family unit. During this period the appellant, who had no children of his own, formed a strong bond with Brad, with whom the respondent had been pregnant when the parties met. On their separation, the parties entered into an informal contact agreement in terms of which the appellant was allowed regular contact with Brad. However, nine months later, the respondent revoked consent. That

prompted the appellant to bring an application to a single judge of the court a quo, the Johannesburg High Court. He sought relief in two parts: In part A the appellant requested that a clinical psychologist be appointed to conduct an assessment and provide a recommendation as to whether it would be in the best interests of Brad that the appellant be awarded rights of *contact with, and care of, Brad* in terms of s 23 of the Children's Act 38 of 2005 (the Children's Act). The appellant also sought interim contact with Brad, pending finalisation of part B. In part B the appellant, once the expert's report was obtained, would apply for an order that he be granted joint guardianship of, and contact with, Brad. The respondent initially did not oppose the part A relief, but shortly before the hearing reversed her position. The court a quo dismissed part A. The present matter concerned the appellant's appeal against that decision to the full court of the Johannesburg High Court. Key findings of the court a quo forming the subject of the present appeal were the following:

- Firstly, that the appellant had, as a matter of law, no locus standi. In reaching this conclusion, the court a quo considered the final relief that was sought, of the awarding of 'parental rights' to the applicant. Part A, the court a quo held, served merely as the means to this end. And, in respect of co-guardianship, the court a quo held, the appellant had failed to show the non-suitability of the existing guardian, which was, it asserted, a jurisdictional fact needed for the court to entertain the application. Hence, the lack of standing in the present application.
- Secondly, that, in any case, it was not in Brad's interests, then or ever, to have any form of contact with the appellant. In this regard, the court accepted the respondent's allegations that the appellant's close relationship with Brad had a harmful psychological effect on Dennis, and harmed the respondent's relationship with Brad.

Proper approach

The full court considered the proper approach that ought to have been adopted by the court a quo in assessing the facts of the application before it. Ordinarily speaking, the full court held, given the interim nature of proceedings, the test set out in *Webster v Mitchell* ought to have been applied. Applying such test, the court a quo ought to have considered the appellant's version if there were no inherent improbabilities therein, and, unless serious doubt was cast upon it by the respondent, that version should have been sufficient to carry the day. (See [16].) The full court held there were additional considerations, given that the welfare of a child was at stake. A child-centred approach was called for (see [37].) Further, in such a case, a court should be very

slow to determine facts by way of the usual opposed motion approach; that approach was not appropriate if it left serious disputed issues of fact relevant to the child's welfare unresolved (see [37]). Further, litigation such as the present was not of the ordinary civil kind; it was not adversarial; and should not be approached in a formalistic manner (see [37] and [38]).

Standing

The full court held that *the view that, in order for a court to entertain an application for joint guardianship, the non-suitability of the existing guardian had to be shown, was at best for the respondent uncertain in law, and at worst for her wrong*. The latter *was most likely the case*, considering that, amongst others, the High Court could, as upper guardian of all children and in the best interests of a child, grant joint guardianship without finding that the existing guardian was unsuitable. Nevertheless, it was clear that the appellant at least had an arguable case that he need not demonstrate that the respondent was an unfit guardian in order to be so appointed as joint guardian. (See [26].)

The full court held that, in any case, the appellant had sought not only guardianship in parts A and B; but also 'contact' in terms of s 23 of the Children's Act (see [29] and [31]). In this regard, it was settled law that the absence of a biological link with a child was not a bar to an application in terms of s 23 of the Children's Act, subject of course to the best interests of the child standard (see [32]). The appellant crossed the bar for qualification as an 'interested person' as that phrase was described in recent binding case authority, possessing as he did 'some tangible and clearly demonstrable interest and connection to the child' (see [33] – [34]). Accordingly, the court a quo erred in finding, in law, that the appellant was not an interested person for purposes of part A or part B insofar as the appellant sought contact with Brad (see [34].)

Merits

The full court held that the court a quo erred on the merits in finding that the appellant had failed to establish that the best interests of Brad would be served by granting the appellant any legal rights. Because, in doing so:

- The court a quo erroneously applied the test applicable to final relief, ie the *Plascon Evans* test, accepting as it did the version of the respondent on all disputed facts, this when, in these interim proceedings, all the available evidence 'was not yet in', in circumstances in which the procedure chosen by the appellant catered for a full and proper ventilation of the facts. (See [39].)

- The court a quo adopted an adversarial weighing-up of the pros and cons focused on the rights of the adults, whereas the enquiry ought to have been a child-centred one, ie the interests of Brad should have been the primary focus (see [40]).
- The court a quo, failing to give adequate consideration to the best-interests-of-the-child principle, did not consider the self-evident fact Brad would suffer detrimental effects, should he be alienated from the appellant, whom Brad perceived as a father figure. The court instead, to the exclusion of Brad, focused on the impacts on Dennis. (See [47].)

The full court accordingly upheld the appeal, and granted an order calling for a clinical psychologist to conduct a thorough investigation of the parties, as well as Brad and Dennis, and to provide a recommendation as to whether it would be in the best interests of Brad that the appellant be granted rights of contact and care in him. The full court further granted the appellant, pending the finalisation of the investigation, the rights of contact. (See [2].)

SCALABRINI CENTRE AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS 2023 (4) SA 249 (WCC)

Constitutional law — Legislation — Validity — Refugees Act 130 of 1998, s 22(12) and (13) and associated regulations — Asylum seekers who fail to renew their visas within one month of their expiry deemed to have 'abandoned' their visa applications — Unconstitutionally depriving them of their right to non-refoulement — State ordered to amend offending provisions without delay — Declaration of invalidity referred to Constitutional Court for confirmation.

Immigration — Refugee — Asylum seeker — Non-refoulement — Refugees Act 130 of 1998, s 22(12) and (13) and associated regulations providing that asylum seekers who fail to renew their visas within one month of their expiry deemed to have 'abandoned' their visa applications — Provision unconstitutionally depriving asylum seekers of right to non-refoulement — State ordered to amend offending provisions without delay — Declaration of invalidity referred to Constitutional Court for confirmation.

Under s 22(12) – (13) of the Refugees Act (read with reg 9 and Form 3 of the Act's regulations) asylum seekers who fail to renew their visas within one month of their expiry are considered to have 'abandoned' their applications, thereby exposing them to deportation (the abandonment rule).

The applicants, an NGO concerned with refugees and its trustees, launched a constitutional challenge to these provisions. They argued that the abandonment rule they embodied was unconstitutional, being arbitrary and contrary to the principle of non-refoulement, * which was binding on South Africa by virtue of international agreements and treaties to which the country was party. Among them was the 1951 Geneva Convention Relating to the Status of Refugees (the 1951 Convention), which in art 33(1) specially prohibited refoulement where the life or freedom of a refugee would be threatened. In addition, s 2 of the Refugees Act itself codified the right of non-refoulement by stating that '(n)otwithsanding any provision of this Act or any other law to the contrary, no person may be . . . expelled, extradited or returned to any other country . . . if . . . he or she may be subjected to persecution . . . or his or her life, physical safety or freedom would be threatened'.

The amicus, another refugee NGO, stressed the abandonment rule's unconstitutionally deleterious effects on the children of refugees. The applicants and the amicus argued that the abandonment rule was also irrational in that there was a disconnect between the rule's intended purpose and its actual impact. They claimed that there were less restrictive measures that would better address the problem of backlogs.

The state, represented by the respondents, argued that the impugned provisions served the legitimate government purpose of addressing the backlog of inactive asylum applications by incentivising applicants to take an interest in completing their applications.

Held

The Refugees Act was specifically aimed at giving effect to the country's international obligations to refugees, in particular the right to non-refoulement, which was given exceptionally strong protection. But it was evident that the impugned provisions severely limited asylum seekers' right to non-refoulement and deprived them of the protections of the asylum system. There was no defensible and logical connection between this limitation and the alleged purpose of reducing backlogs at home affairs. And even if there was, the sanction imposed was grossly disproportionate since deported refugees could face torture or death just for being late in renewing their visas. (See [57] – [61].)

The abandonment rule was, in addition, arbitrary: asylum seekers would not be deported based solely on the merits of their claims, but on external circumstances

such as the location of the nearest Refugee Reception Office or the workload of home affairs officials on the day. (See [62].)

At the heart of the respondents' justification was an unlawful and indiscriminate prejudgment, namely that most asylum seekers did not have valid claims to asylum and no interest in pursuing them. This went against the core principle of refugee law that all asylum seekers had to be treated as presumptive refugees, with all the protections that entailed, until the merits of their claims were determined through a proper process. (See [63] – [64].)

Moreover, the abandonment rule violated the fundamental rights of refugees' children for the sake of alleged administrative convenience. Their rights could not be sacrificed in this way, without individualised determination. (See [65].)

In summary, the applicants had demonstrated that the impugned provisions infringed on the right to protection under refugee laws as enunciated in article 33 of the 1951 Convention as well as the Refugees Act itself. They were unconstitutional and invalid, and the state would be directed to amend them without delay. (See [68].)

The declaration of invalidity would be referred to the Constitutional Court for confirmation.

TRUSTEES, ALESSIO BODY CORPORATE v COTTLE AND OTHERS 2023 (4) SA 274 (WCC)

Housing — Consumer protection — Community Schemes Ombud — Appeal against adjudicator's order — Appropriate procedure — Community Schemes Ombud Service Act 9 of 2011, s 57.

Appellant was the body corporate of a sectional title scheme and respondent (Cottle) was a section owner (see [2]). The trustees of the scheme resolved to raise a special levy, and Cottle objected to its application to him. The trustees disagreed (see [3], [5] and [7]). Cottle then referred the dispute to the Community Schemes Ombud Service and the Ombud referred it to its adjudicator. The adjudicator found for Cottle (see [9] – [10]).

The body corporate then employed s 57(1) of the Community Schemes Ombud Service Act 9 of 2011 to appeal the adjudicator's decision to the High Court. It brought the appeal by way of notice of appeal (see [1] and [13]).

At the hearing the court posed the question — in view of Western Cape authority — whether it ought to have been brought on notice of motion, and answered the question, concurring with the authority, in the affirmative (see [12], [17] and [21]).
The court accordingly struck the appeal from the roll (see [24]).

UJ AND ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER 2023 (4) SA 279 (ECGq)

Births and deaths — Birth — Registration — Births and Deaths Registration Act 51 of 1992, reg 12(2)*(c)* — Invalid and unconstitutional to extent that it does not allow father who was foreigner to be identified as father of child born outside of wedlock on child's birth certificate, unless that father was legally in South Africa.
Constitutional law — Legislation — Validity — Births and Deaths Registration Act 51 of 1992, reg 12(2)*(c)* — Invalid and unconstitutional to extent that it does not allow father who was foreigner to be identified as father of child born outside of wedlock on child's birth certificate, unless that father was legally in South Africa.

Section 11(4) of the Births and Deaths Registration Act 51 of 1992 allowed for a person wishing to acknowledge himself to be the father of a child born out of wedlock to apply to the Director-General in the Department of Home Affairs to amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child. The present application, heard before the Gqeberha High Court, concerned the constitutionality of reg 12(2)*(c)* of the Regulations on the Registration of Births and Deaths, 2014, prescribing the manner, inter alia, in which such an application by *a non-South African* citizen ought to take place. It read:

'(2) The person who acknowledges that he is the father of the child born out of wedlock must . . . have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's identity document or refugee identity document.'

The first and second applicants were, respectively, the mother and father of a minor child. They were unmarried, yet for all intents and purposes lived together as man and wife. The first applicant was a South African citizen. The second applicant, however, was a citizen of Bulgaria. At some point after the birth of their child, the applicants had

attempted to register the second applicant as the father of the child at the Gqeberha office of the Department of Home Affairs. The officials attending to the matter refused to make the necessary entries in the relevant records to reflect the fact that the second applicant was the biological father of the child and to issue to the applicants an unabridged birth certificate of the child. The purported reason for this refusal was that the second applicant was unlawfully present in South Africa — the visa on which the second applicant had come to South Africa had expired — *meaning the requirements of s 12(2)(c) had not been met*. The applicants were further advised by officials that a paternity test establishing that the second applicant was the father was required, as well as a court order declaring the second applicant as the father of the child. This advice was what prompted the applicants to launch the instant proceedings. The Minister of Home Affairs and the head of the office of the local Department of Home Affairs in Gqeberha were cited nomine officio as first and second respondent, respectively.

The applicants sought various relief, including an order declaring reg 12(2)*(c)* of the Regulations to be unconstitutional. In this regard they argued that the effect of the provision was that a father who was a foreigner may not be identified as the father of a child born outside of the bonds of marriage on the child's birth certificate, unless that father was legally in South Africa. The regulation, they argued, discriminated against the child, as well as many other similar children in the country. (See [24].)

The respondents' stance changed radically during the course of proceedings: Initially they opposed the relief sought on the basis that reg 12(2)*(c)* operated to preclude the granting of the recordal applied for. They held this stance until the hearing when they filed supplementary heads in terms of which they conceded the *main relief* sought, now claiming that reg 12(2)*(c)* was not even applicable, and agreeing that the child should have the details of his father entered into the records of the Department. The question that this gave rise to was whether the court should still pronounce on the constitutionality of reg 12(2)*(c)*. The respondents argued, relying on the principles concerning ripeness and mootness, that their concession on the main relief meant there was now no legal basis for this court to consider this question. To do so, they argued, would be contrary to the principle of the separation of powers.

The court, however, held that the issue of the constitutionality of reg 12(2)*(c)* was justiciable, being neither moot not ripe (see [22]): The court held that it was obliged to determine the issue, this in circumstances, inter alia, where the matter had been fully

canvassed in the papers; the respondents had never in fact conceded the question of the constitutionality of the provision; and having regard to the fact that there were many other children in similar circumstances to those of the applicants' child, ie whose fathers were in the country illegally, and therefore subject to the regulation in question, whose rights were potentially being infringed and who would be impacted by a judgment on the question. (See [14] – [17], [20] and [22].)

The court proceeded to consider the constitutionality of reg 12(2)*(c)*. It held that it amounted to discrimination against children who were born out of wedlock and whose fathers were illegal foreigners, or undocumented foreign nationals, or who may not be in South Africa at the time of the child's birth, or who may not be willing to come to South Africa. It held that there was no cogent justification for the discrimination. (See [24] and [25].) The discrimination was irrational, the court held. By way of example, the court referred to the illogicality of a child who was born out of wedlock not being allowed to have a birth certificate reflecting the details of their foreign father merely because of the lapsing of the father's visa, something having nothing to do with the child (see [26]). This was especially so, the court added, given that there were lawful means of addressing the father's unlawful presence in the country without infringing on the rights of the child (see [28]). The court concluded that the regulation ought to be declared unconstitutional to the extent that it imposed discriminatory conditions on the recordal of fathers who were unmarried, and who may be illegal foreigners, on the children's registration of births, or who may not be present in this country or even be willing to come to this country (see [34]).

As to costs, the court found that a punitive costs order against the respondents was appropriate in circumstances in which the respondents had insisted the applicants approach the court to obtain a court order, then opposing the granting of the court order only to concede at the eleventh hour that they were wrong from the outset in refusing to enter the second applicant as the child's father. (See [36] – [37].)

VAN DEN HEEVER NO AND OTHERS v WORLD MARINE ENERGY (PTY) LTD (IN LIQ) AND ANOTHER AND A RELATED MATTER 2023 (4) SA 296 (WCC)

Company — Winding-up — Voluntary winding-up — Members' voluntary winding-up — Application for conversion into compulsory winding-up — Discretion of court — Commercial morality and public interest — Factors in favour of conversion — Voluntary winding-up concluded to avoid accountability for mismanagement and

prevent statutory enquiry into affairs of company — Companies Act 61 of 1973, s 346(1)*(e)*, s 347(4)*(a)* and s 354(1).

Company — Winding-up — Setting-aside — Application — Must be in name of creditor, not its agent — Agent may apply only if expressly authorised by creditor.

Company — Winding-up — Application — Opposition to — Must be in name of creditor, not its agent — Agent may oppose only if expressly authorised by creditor.

The question before court was whether the respondent, WME, a company in members' voluntary winding-up * since August 2021, had to be placed in compulsory liquidation at the instance of the liquidators of BS, a former creditor. † The application for compulsory liquidation (the main application), which was initially lodged on 19 August 2020, a year before the lodging of WME's members' resolution for voluntary winding-up, was not opposed by WME's liquidators, who asked only that if the court should grant the main application, it confirm the steps already taken in the voluntary winding-up.

The main application was, however, opposed by a third entity, PIC, which was granted leave to intervene in March 2022 and which then launched a separate application for the setting-aside of the voluntary winding-up. PIC had on 15 July 2021 obtained an order granting it leave to perfect a notarial covering bond over WME's movables which, it claimed, made it a secured creditor with the power to dictate whether WME should be wound up or not. (PIC claimed it was at this time unaware of either the voluntary winding-up or the pending main application.) WME's liquidators argued that PIC's sole objectives were to free WME from the liquidation process in order to lay claim to its residual movable assets to the exclusion of other creditors, and to prevent the holding of a statutory enquiry into WME's affairs. To achieve this PIC had to succeed in both setting aside the voluntary liquidation and fending off the compulsory liquidation.

Relevant to the issues before court was s 346(1)*(e)* of the Companies Act 61 of 1973, which provided that an application for the compulsory winding-up of a company which was in the process of being voluntarily wound up could be made by the Master or *any creditor* of the company. According to precedent the existence of a voluntary members' winding-up was no bar to the granting of a compulsory creditors' winding-up, and it was not necessary to first set aside the voluntary winding-up.

Also relevant was s 354(1), which provided that a court could at any time after the commencement of winding-up proceedings make an order staying or setting aside

such proceedings. It had to be read with s 347(4)*(a)*, which provided that if a court made an order for the compulsory winding-up of a company at the instance of a creditor in terms of s 346(1)*(e)*, ie where the company was *already subject to a voluntary winding-up order*, it could confirm all or any of the proceedings in the voluntary winding-up.

The liquidators argued that if the court decided to discharge the voluntary winding-up and place WME under compulsory winding-up, then it should, in view of how long the company had been under provisional liquidation, make an order placing it directly into a state of final liquidation/winding-up.

Held

The PIC faced several insurmountable hurdles with both its applications. It was not a creditor of WME, so in the absence of express authorisation by WME it lacked standing to oppose the main application or to apply for the setting-aside of the voluntary winding-up. (A liquidation application had to be brought in the name of a creditor, not its agent, and the same had to hold true for an application for the setting-aside of a liquidation or an opposition to an application for liquidation.) Even if it were conceded that PIC had standing in respect of both applications, it was unable to deny WME's indebtedness to BS or show that it was disputed on bona fide grounds.

As a result, both PIC's application for an order setting aside the voluntary winding-up and its opposition to the main application had to fail. (See [28] – [40].)

As to the main application, the following considerations militated in favour of an order under s 354(1) discharging the voluntary winding-up and placing WME under compulsory winding-up (see [45]):

- the voluntary winding-up was in breach of WME's obligations under a loan agreement and setting aside the voluntary winding-up would give effect to the principle that parties should be held to their contracts;
- the voluntary winding-up may not have been validly implemented;
- the voluntary winding-up was implemented in order to avoid exposure of mismanagement at an insolvency enquiry conducted under the Act;
- there were clear indications of numerous material irregularities in the management of WME and its funds by its directors;
- discharging WME from provisional voluntary winding-up and placing it in compulsory winding-up would mean that the date of commencement of the winding-

up would be extended to 19 August 2020, allowing the liquidators to challenge any voidable dispositions or impeachable transactions made after that date; and

• WME's liquidators did not contest the application to place the company in compulsory winding-up.

As to the liquidators' argument that the court should proceed straight to final liquidation, that even where the making of a provisional order appeared to serve no practical purpose it would, save in exceptional circumstances, be fundamentally unsound to deviate from the accepted practice of first placing the company in provisional liquidation/winding-up. It would be unjust to the company, its members and its creditors to wind it up finally without affording them an opportunity to contest the process. (See [46].)

The court accordingly (i) dismissed PIC's application to set aside the voluntary winding-up of WME; (ii) made an order provisionally winding WME up; (iii) issued a rule nisi calling on all interested parties to show cause why WME should not be placed under final liquidation; and (iv) set aside the voluntary winding-up of WME (see [52]).

VARNARDO INVESTMENTS (PTY) LTD AND ANOTHER v K2012150042 (PTY) LTD 2023 (4) SA 314 (WCC)

Appeal — Suspension of judgment pending appeal — When commencing — Judgment appealed against automatically suspended when application for leave to appeal 'lodged with the registrar in terms of the rules' of appeal court — Supreme Court of Appeal rules indicating that leave application 'lodged' when presented to registrar, even if incomplete in sense that not all required annexures attached — Judgment appealed against simultaneously suspended — Superior Courts Act 10 of 2013, s 18(1) read with s 18(5); Supreme Court of Appeal rules 4 and 6.

Appeal — To Supreme Court of Appeal — Lodging of application — Application 'lodged' when presented to registrar, even if incomplete in sense that not all required annexures attached — Judgment appealed against simultaneously suspended — Superior Courts Act 10 of 2013, s 18(1) read with s 18(5); Supreme Court of Appeal rules 4 and 6.

In this judgment the court ordered the stay of the execution of a court order and the restoration of the *status quo ante* pending the outcome of the applicants' application for leave to appeal to the Supreme Court of Appeal (the leave application) after Mangcu-Lockwood J of the Western Cape High Court refused leave to appeal against

her orders in the main application for (i) the cancellation of a lease agreement between the respondent (landlord) and the first applicant (tenant); (ii) the payment of arrear rentals; and (iii) ejecting the first applicant from the leased premises.

The leave application went as follows: The applicants' correspondent attorneys in Bloemfontein presented it to the registrar of the SCA at 12h00 on Friday 18 November 2022. Since it was not accompanied, as required by rule 6(2)*(d)* of the SCA rules, by Mangcu-Lockwood J's judgment refusing leave to appeal (which was not yet available), the registrar declined to stamp it and instead issued a directive under SCA rule 6(8) (see below) requesting Mangcu-Lockwood J to affirm in writing that she had refused leave to appeal. The registrar received Mangcu-Lockwood J's affirmation on the following Monday, 21 November 2022, and date-stamped the leave application with that date.

Meanwhile, the respondent had, between 12h17 and 14h09 on Friday 18 November 2022 — that is, on the same day the leave application was delivered to the registrar at the SCA — proceeded to execute on Mangcu-Lockwoord J's order in the main application by securing, via the office of the sheriff, the first applicant's eviction from the leased premises.

The issue before the present court was thus whether the leave application was 'lodged' when it was presented, in its incomplete form, to the registrar of the SCA at 12h00 on Friday 18 November 2022 — which would mean that the eviction of the first applicant had been unlawful — or on the following Monday, when the registrar stamped it.

The respondent's case was that by the time the leave application was lodged, the sheriff had already executed and that it was thus too late for the applicants to apply for a stay. The applicants' response was that the leave application was lodged *before* execution took place, that s 18(1) of the Superior Courts Act 10 of 2013 (the Act) had automatically suspended execution, and that the eviction was therefore unlawful, requiring an order restoring the *status quo ante*.

The relevant SCA rules were: rule 4(1), which empowered the registrar to refuse any document tendered for lodging if, in the registrar's opinion, it did not comply with the rules; rule 6, which allowed the registrar to extend the time for the filing of a copy of any judgment or judgments required to be annexed to a leave application for up to a month; and rule 6(8), which provided that a leave application would lapse if a party failed, (i) to comply with a direction of the registrar; or (ii) to cure defects in the leave

application within the period directed. (Crucially, this implied that if the defect was cured, the leave application would not lapse (see [56]).)

Held

The SCA rules made it clear that the registrar could accept incomplete leave applications and that they could thus be 'lodged', even if they lacked the orders or judgments required to be attached to them. Hence, the fact that the registrar had in the present matter refused to stamp the leave application when it was presented to him at 12h00 on 18 November 2022 did not mean that it was not then lodged for the purposes of s 18(1) of the Act, thereby automatically suspending the execution of Mangcu-Lockwood J's orders against the first applicant in the main application. Since the leave application was thus lodged *before* the sheriff had ejected the first applicant, the ejection had to be set aside as unlawful and the *status quo ante* restored. (See [50] – [59].)

The court pointed out that it could have grave consequences for an appellant/applicant for leave if the execution of the main order was not suspended by the presentation of a leave application to the registrar of the SCA. Prospective appellants should not be punished for failing to attach documents which they were unable to obtain through no fault of their own, thus depriving them of the automatic protection provided by s 18(1). (See [62] – [63].)

The court accordingly made an order (i) staying the execution of Mangcu-Lockwood J's order in the main application pending the outcome of the applicant's petition application to the SCA; and (ii) directing the respondents to restore complete and unfettered access to and possession of the premises.

South African Criminal Law Reports July 2023

LEDLA STRUCTURAL DEVELOPMENT (PTY) LTD AND OTHERS v SPECIAL INVESTIGATING UNIT 2023 (2) SACR 1 (CC)

Special Investigating Units — Special Tribunal — Jurisdiction of — Tribunal not court of law, but having jurisdiction to adjudicate legality reviews in terms of Act — Special Investigating Units and Special Tribunals Act 74 of 1996, s 8(2).

The applicants sought leave to appeal against a judgment and order of a Special Tribunal, leave to appeal having been refused by the Supreme Court of Appeal. The Tribunal had declared that a procurement contract for the supply of personal protective

equipment to the Gauteng Department of Health was unlawful and set it aside. It also declared the money obtained by the applicants forfeited to the state. The applicants contended that the Special Tribunal was not a court and consequently the review proceedings and forfeiture orders it had granted were a nullity, as they were premised on an incorrect assumption that the Tribunal was a court of law.

Held, that the Special Tribunal was not a court of law; however, in terms of s 8(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act), the Tribunal had jurisdiction to adjudicate upon any civil proceedings brought before it by a Special Investigating Unit emanating from the investigation by such unit. It accordingly had jurisdiction to adjudicate the legality reviews in terms of the Act. (See [64] – [65] and [70].) Leave to appeal was granted, but the appeal was dismissed. (See [75 – [76].)

S v HAGGIS AND ANOTHER 2023 (2) SACR 24 (WCC)

Appeal — Further evidence — Application to lead new evidence on appeal against sentence — When permitted — Lengthy delay between commission of offences, conviction and ultimate appeal — Changes in state of health of respective appellants and mental anguish caused by inordinate delay in finalisation of matter — Further evidence allowed, and sentences mitigated.

The two appellants applied for leave to introduce new evidence on appeal against their sentences imposed for dealing in more than 330 kilograms of cannabis. The first appellant was sentenced to six years' imprisonment, of which two years were suspended for five years. The second appellant, who was the mastermind behind the offence, was sentenced to eight years' imprisonment, of which two years were suspended for five years. The offences were committed more than 26 years ago, and it had been more than 15 years since they were sentenced. The appeals had been delayed for numerous reasons, none of which could be said to have been attributed to the appellants. As a result, the appellants applied to lead new evidence on appeal. The evidence was mostly related to the changed circumstances of the appellants, particularly their respective states of health. In respect of the first appellant, it was that he was now 54 years of age and had suffered two strokes. He was unemployed and suffered from hypertension, urinary incontinence and needed help in dressing and washing himself because of cognitive impairment. The medical prognosis was that his health would continue to deteriorate. In respect of the second appellant, he was now

a 65-year-old pensioner who had lost his wife due to Covid-19. He suffered from diabetes, high blood pressure and arthritis. He expressed remorse for his actions.

Held, in respect of the first appellant, that a custodial sentence, given his accepted inability to care for himself, considered together with his memory loss, would amount to callous disregard of the first appellant's personal circumstances, which outweighed the public interest. Further, and apart from the first appellant's changed personal and health circumstances and the delays in the matter being finalised, the first appellant was a first offender, and, albeit a serious offence which attracts direct imprisonment even for first offenders, his involvement in the offence was minimal and he did not receive any benefit for dealing. He further did not commit any further offence after he was charged in 1996. The first appellant has shown exceptional circumstances, and not to interfere would lead to an injustice. In the circumstances the sentence had to be set aside and replaced with a wholly suspended sentence. (See [26] – [29].)

Held, in respect of the second appellant, that, had it not been for the inordinate delay, there would have been no reason for the court to interfere with the sentence imposed by the court a quo. Whilst it appeared that his omission to take the appeal further contributed to the delay in the finalisation of the matter, the court could not find on the facts that he was solely responsible for the delayed process. On the issue of his relatively old age and ill health, nothing much was placed before the court to justify an interference with the sentence imposed by the court a quo. The illnesses complained about were commonplace and could be treated using medication. They did not constitute grounds for the court to interfere with his sentence as, unlike the first appellant, he was not incapacitated. However, the severely inordinate delay in the finalisation of this matter had been hanging like a proverbial sword over his head and must have caused him some mental anguish. In the circumstances, and in the light of his relatively old age, the loss of his wife and the fact that he had not been in conflict with the law since his arrest in this matter, exceptional circumstances existed to justify a reduction of his sentence to one of eight years' imprisonment, of which five years were suspended. (See [58], [64] – [65] and [67].)

S v RATAU 2023 (2) SACR 40 (MM)

Murder — Proof of — Common purpose — Two detainees simultaneously attacking and attempting to rob armed police officials of their firearms, who were conveying them in minibus — One of detainees shot and killed in course of attempted robbery — Other

detainee convicted of premeditated murder in respect of fellow detainee on basis of common purpose.

Murder — Premeditated or planned murder — What constitutes — Where causing of harm, but not death, premeditated — Restatement of principles.

The accused and the deceased had been detained by the police and were being conveyed in a police minibus. Whilst en route, the accused and deceased each attempted at the same time to rob their two guards of their service pistols. The deceased's intended victim managed to resist the attack and, in so doing, shot and killed the deceased. The accused was charged with attempted robbery and the murder of the deceased. The state relied on the doctrine of common purpose for the conviction of premeditated murder.

Held, that the aim of the accused and the deceased's attack was to rob the two police officials of their service pistols. Firearms were weapons designed and used to kill, and there was nothing in the case to suggest that either the deceased or the accused was ignorant as to the danger therof. The deceased was killed by the police official when he defended himself against the joint attack on the two officials. In launching their attack, both the deceased and accused subjectively foresaw that their attempt to rob the police officers might lead to one or both of the firearms discharging, leading to the death of one or more of the occupants of the vehicle. Yet, in the instance of the deceased, he continued with his attempt after one shot had already been fired. The accused did the same and only stopped his attack when the other police official pointed his firearm at him. There was no question that the deceased and the accused nevertheless persisted with their attacks whilst reconciling themselves with the outcome. (See [42] – [44].)

Held, further, that, because the causing of harm was premeditated, which harm led to the death of the deceased, the accused was guilty of premeditated murder, with the form of mens rea being dolus eventualis. The accused was found guilty of both counts as charged. (See [52], [55] – [57].)

S v KULA 2023 (2) SACR 52 (NWM)

Bail — Appeal against refusal of — Factors to be taken into account — Exceptional circumstances as contemplated in s 60(11)*(a)* of Criminal Procedure Act 51 of 1977 — Mere allegation by investigating officer, that murder planned or premeditated, insufficient to bring application within ambit of provision.

The appellant, a Member of Parliament, was charged with the murder of his wife. He appeared in court and applied for bail. The prosecutor treated the matter as a sch 6 offence in terms of the Criminal Procedure Act 51 of 1977 (the CPA). The application proceeded as such without demur from his legal representative. The appellant made an affidavit which was read into the record and gave oral evidence. The investigating officer made an affidavit in opposition to bail, in which he stated that witnesses had said that there had been a quarrel at the appellant's house between the appellant and the deceased, which had led to a physical fight, whereas the appellant had told the police that he was not at the house and that he discovered the deceased's body after she had been stabbed by unknown persons. He stated that the appellant was an irresponsible father who had abused his children and refused to allow them to go to school. In his affidavit in support of bail the appellant failed to disclose that an order had been issued against him in terms of the Domestic Violence Act 116 of 1998, and disclosure of the protection order only came in the oral evidence of the appellant. The charge-sheet made no reference to premeditation as the jurisdictional fact relied on by the state to bring the matter within the ambit of sch 6 of the CPA. In refusing bail, the magistrate relied heavily on the ipse dixit of the investigating officer, without questioning the source of hearsay on which the evidence was predicated.

Held, that, considered as a whole, none of the allegations constituted evidence pointing to premeditated or planned murder to have brought the bail application within the ambit of s 60(11)*(a)*. The magistrate, seized with the balancing of the evidence of the appellant and the investigating officer, was in a position to decisively find that the provision was not applicable. The hearsay evidence placed the bail application squarely within the provisions of the recently enacted s 60(11)*(c)** of the CPA, which brought into question whether the applicant had proven that the interests of justice would permit his release on bail. (See [69] – [70].)

Held, further, that there was no evidence establishing that there was a likelihood of the appellant endangering the safety of the public or any particular person, or would commit a sch 1 offence, or a likelihood that he would evade his trial, and the identity of the state witnesses was for now at best unknown to the appellant. This axiomatically excluded any interference or intimidation of witnesses until such time that a list of witnesses was provided to him. The appellant's ability to conceal or destroy evidence did not feature, resultantly was of no concern. The release of the appellant would not undermine or jeopardise the objectives or the proper functioning of the criminal-justice system, including the bail system. A conspectus of the evidence presented indicates that the appellant has passed the threshold of establishing that the interests of justice warranted his release on bail. The decision of the magistrate was clearly wrong, justifying interference. (See [72].) The appellant was granted bail on certain conditions

SANDLANA v MINISTER OF POLICE AND ANOTHER 2023 (2) SACR 84 (WCC)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Legality of — Arresting officer not aware at time of arrest what statutory provision plaintiff had contravened — Arrest not justified under section.

The appellant was arrested in 2014 on the steps of the High Court in Cape Town by a detective sergeant on a charge of intimidation under the Intimidation Act 72 of 1982 (the Act). His case was remanded for six days, and he was incarcerated pending a bail enquiry at which he was granted bail and released. The matter was struck from the roll two months later when the docket was not at court on the date of hearing. No further prosecution ensued, whereafter the plaintiff issued summons against the Minister of Police and the Director of Public Prosecutions for wrongful arrest and detention, as well as malicious prosecution. The latter claim was subsequently withdrawn. The complainant in the matter was the sister of a deceased in a murder case, an active participant in local politics, and supported a different political party which was in opposition to that of the plaintiff. The complainant complained to the police that a video had been placed on social media of her sitting at court during the murder trial, which the plaintiff allegedly authored. It was the second video that had been placed on social media. When on a later date the plaintiff was again filming the complainant, he was asked by the police what he was doing, and he falsely claimed

to be a journalist. The complainant experienced his conduct as threatening and intimidating, and laid a charge against him, which was registered as intimidation and incitement. The investigating officer made the arrest some months later. The officer stated that he believed that the complainant was scared of the plaintiff, and that he therefore had reasonable grounds to believe that he had committed the offence of intimidation. He believed that the crime of intimidation fell under sch 1 to the Criminal Procedure Act 51 of 1977 (the CPA), in that it carried a sentence in which six months' direct imprisonment could be imposed upon conviction, and considered the arrest of the plaintiff without a warrant justifiable under that schedule. The plaintiff argued that, because the Act was specifically mentioned in sch 2 part III of the CPA, it did not resort under sch 1, and that an arrest without a warrant was not sanctioned.

Held, that part III of sch 2 specifically referred to its application in respect of ss 59, 72, 185 and 189 of the CPA, which were not applicable in the present case. Consequently, an arrest for a contravention of s 1 of the Act could be effected without a warrant, provided that there had been compliance with the criteria contemplated in s 40(1)*(b)* of the CPA. (See [31] – [32].)

Held, further, that the Constitutional Court had ruled in 2020 that ss 1(1)*(b)* and 1(2) of the Act did not pass constitutional muster and were accordingly invalid. That decision was not retrospective and accordingly still applicable in 2014 when the plaintiff was arrested. (See [39].)

Held, further, that in 2014 the ambit of the Act would have been strictly interpreted and that s 1(1)*(b)* then contemplated either an actual act of violence, such as an assault, or an imminent threat of such violence, intended to induce the victim to do a particular act or to refrain from doing something. (See [44].)

Held, further, that, as the arresting officer did not know what statutory provision the plaintiff had contravened, the defendant had not established that he reasonably held the suspicion that the plaintiff had contravened that section of the Act and had accordingly failed to establish that the arrest was justified under s 40(1)*(b)* of the CPA. It followed that the arrest was unlawful. The defendant was ordered to pay damages in an amount of R300 000. (See [61] and [74].)

S v ARLOW 2023 (2) SACR 102 (MM)

Evidence — Expert evidence — Rebuttal of — Where accused leads evidence of expert, state not required to counter by calling other expert witness — Sufficient that state cross-examines witness to properly challenge evidence.

The appellant was convicted in a regional court of attempted murder and was sentenced to five years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the CPA). He appealed against both conviction and sentence. The court dismissed the appeal against conviction on the evidence and proceeded to consider the appeal against sentence. The appellant did not contend that the sentence was excessive or induced a sense of shock, but merely that the court had erred in not accepting the recommendations of the clinical psychologist who testified on his behalf that he be given a suspended sentence, and that the state had not placed the evidence of the psychologist in dispute. It appeared that the appellant, a captain in the dog unit of the South African Police Service, conducted searches of vehicles exiting from the Kruger National Park. After the complainant's vehicle had been searched and the gate opened for him by a colleague of the appellant, he exited. Almost immediately the appellant got into his police vehicle and chased after the complainant for some 50 km until he caught up with him and brought the vehicle to a stop. He alighted and proceeded to the complainant's car armed with a firearm, which he discharged while it was in his hand. A bullet struck the complainant's motor vehicle on the driver's door, penetrating the door and hitting the complainant's leg in the ankle while he was seated on the driver's seat. When people in the vicinity started shouting and questioning why the appellant had shot the complainant, the appellant walked back to his car and drove away.

Held, that it was not clear what the appellant meant by the submission that evidence by the clinical psychologist was not placed in dispute. The cross-examination of the witness by the public prosecutor reflected that the state indeed placed in dispute the conclusions reached by the psychologist. (See [33].)

Held, further, that it was wrong to conclude that, if the state wished to dispute evidence by the clinical psychologist or any expert, this could only be achieved by calling another expert witness to counter it. The state could place in dispute such evidence and conclusions reached through cross-examination, as was done in the present case. To expect the state to always counter expert evidence through another expert witness might be unnecessarily expensive, resulting in lengthy trials and sometimes be impractical and defeating the purpose thereof. (See [34].)

Held, further, that, whereas the appellant was charged with a crime of attempted murder read with the provisions of s 51(2) of Act 105 of 1997, nothing was made of this throughout the trial, including the sentencing stage. In terms of that provision a

person convicted of an offence involving an assault, where a dangerous wound was inflicted with a firearm, should be sentenced to a minimum sentence of five years' imprisonment if he was a first offender. The failure to do so, however, did not result in any misdirection, as the accused was not sentenced in terms of that Act. There was no basis on which to interfere with the sentence imposed by the trial court. (See [37] – [39].) The appeal was dismissed.

All SOUTH AFRICAN LAW REPORTS JULY 2023

Afriforum NPC v Nelson Mandela Foundation Trust and others (Johannesburg Pride NPC and another as *amici curiae*) [2023] 3 All SA 1 (SCA)

Constitutional and Administrative Law – Freedom of expression guaranteed in section 16(1) of Constitution – Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2K000 proscribes certain types of expression as hate speech – Whether ban on public displays of old South African flag constituted an unconstitutional infringement of the right to freedom of expression – Gratuitous public displays of old South African flag conveys affinity for apartheid and satisfied the requirement of promoting and propagating hatred and unfair discrimination.

A complaint was lodged in the High Court against the appellant ("Afriforum") by the first respondent, the Nelson Mandela Foundation Trust ("NMF"), that public displays of the old South African flag at certain protests in which Afriforum had played a leading role was a contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the "Act"). The High Court interpreted section 10(1) of the Act broadly and purposively in the light of the objects of the Act, namely that the prohibition of hate speech includes any expression of ideas, whether by words or conduct. The court determined that the display of the old flag at the protests constituted hate speech, unfair discrimination and harassment, within the meaning of sections 10(1), 7 and 11 of the Act. Afriforum appealed. Its argument in the High Court was that a wide-reaching ban on public displays of the old flag would be an unconstitutional infringement of the right to freedom of expression. It contended that section 10(1) of the Act regulated only words and not other forms of expression such as symbols.

Held – Afriforum failed to make out a case as to why a prohibition of gratuitous displays of the old flag violated the rights to dignity and freedom of assembly, as alleged by it. Those rights were held not to be implicated at all.

The Court dismissed Afriforum's contentions that the Equality Court had no power to grant the declaratory order that it did, and that the matter was not ripe for hearing. The Equality Court was obliged, under section 21(1) of the Act, to determine whether the NMF's complaint that the displays of the old flag at the protests, constituted hate speech, unfair discrimination or harassment. Having decided that it was, the Equality Court was empowered to issue the declaratory order in terms of section 21(2) of the Act.

The Court undertook an analysis of the meaning and effect of section 10(1) of the Act, which was linked to the rights to freedom of expression, equality and dignity. Section 16(1) of the Constitution guarantees the right of freedom of expression. Freedom of expression is fundamental to most other rights and freedoms, and quintessential of democracy. However, expression can, and often does, infringe upon the rights and interests of others. This is recognised in section 16(2) of the Constitution, which excludes hate speech from the right to freedom of expression. The prohibition of hate speech in section 10(1) when read with the proviso in section 12 proscribes certain types of expression. The old flag is an icon of *apartheid*, and represents hate, pain and trauma for most people, particularly Black South Africans. The gratuitous public displays of the old flag conveyed affinity for *apartheid* and satisfied the requirement of promoting and propagating hatred and unfair discrimination. The Court set aside the order prohibiting "any"' display of the old flag and replaced it with an order prohibiting "gratuitous public displays" thereof, subject to the proviso in section 12 of the Act.

The appeal was otherwise dismissed.

Director of Public Prosecutions Gauteng Division (Pretoria) v DMS and another [2023] 3 All SA 24 (SCA)

Criminal Law and Procedure – Appeal by State against sentences imposed for murder and rape on grounds of leniency – Test on appeal is whether the sentence was vitiated by an irregularity, a material misdirection or was disturbingly inappropriate – Sentencing court's finding of substantial and compelling circumstances warranting a

deviation from the applicable minimum sentences of life imprisonment constituting a misdirection – Where an accused, despite being a minor, displayed characteristics that required his being removed from society for a lengthy period, court is entitled to impose such sentence subject to maximum custodial sentence of 25 years' imprisonment.

The first respondent, a 21-year-old female and second respondent, a 17-year-old male, were convicted of murder, defeating the ends of justice and rape. An effective sentence of 15 years' imprisonment was imposed on the first respondent and one of 12 years' imprisonment was imposed on the second respondent. The Director of Public Prosecutions brought an appeal, in terms of section 316B of the Criminal Procedure Act 51 of 1977, against the sentences on the grounds that they were too lenient and induced a sense of shock. According to the DPP, the sentencing discretion of the trial court was not properly exercised. It was also averred that the trial court had over-emphasised the personal circumstances advanced on behalf of both respondents and failed to take proper account of the seriousness of the offences they had committed and the interests of the community. It was also contended that the trial court had paid insufficient regard to the absence of contrition on the part of both respondents.

In respect of the first respondent, the issue was whether the trial court should have found that substantial and compelling circumstances existed, justifying a departure from the mandatory minimum sentence of life imprisonment. That was a factual enquiry. In respect of the second respondent, the trial court was precluded from imposing the applicable minimum sentence of life imprisonment on account of him being a minor at the time of commission of the offence.

Held – Punishment is pre-eminently a matter for the trial court's discretion. Thus, a court of appeal should be careful not to erode that discretion. Interference is only warranted if it is shown that discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by an irregularity, a material misdirection or is disturbingly inappropriate. The crucial question in the enquiry is whether there was a proper and reasonable exercise of the sentencing discretion bestowed on the court imposing sentence.

The Court first considered the sentence of the first respondent. The brutal attack on the 12-year-old victim was an overwhelming aggravating factor. The trial court was found to have committed a misdirection in finding that substantial and compelling circumstances existed warranting a deviation from the applicable minimum sentences of life imprisonment in respect of the counts of murder and rape. That material misdirection warranted the setting aside of the sentences imposed by the trial court. The present Court was therefore at large to consider the first respondent's sentences afresh. Sentences of life imprisonment were imposed for the counts of murder and rape.

The second respondent, despite being a minor, displayed characteristics that required his being removed from society for a lengthy period. Given the provisions of section 77(4) of the Child Justice Act 75 of 2008, the maximum custodial sentence that could be imposed on the second respondent was 25 years' imprisonment. Section 77(5) of that Act stipulated that a child justice court imposing sentence on such an offender must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed. The Court replaced the sentences on the counts of murder and rape with sentences of 23 years' imprisonment (to run concurrently).

The Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust
[2023] 3 All SA 40 (SCA)

Corporate and Commercial – Commercial lease – Claim for remission of rent – Entitlement to remission of rent when property is not placed at the disposal of the lessee, either by the lessor or because of an intervening circumstance – Loss by sub-tenant of use and enjoyment of leased premises – While lease agreement not precluding a claim for remission of rent arising from a vis major event, lessee not having a claim, in law, for loss of use and enjoyment of the premises suffered by sub-lessee – Remedy of lifting the corporate veil not applicable where there had been no abuse of corporate personality.

Having leased premises from a trust, the appellant (the "Butcher Shop") sub-leased the premises to a related company ("Apoldo"). The imposition of restrictions during the

national state of disaster caused by the Covid-19 pandemic led to the appellant withholding payment of rent due. It claimed that it was denied beneficial use of the premises because of the restrictions, and was thus not obliged to make payment of the full amount of rent due in terms of the lease. In a counter-application to the trust's claim for payment in the High Court, the Butcher Shop sought a declaration that it was entitled to remission of the base rental payable. The Court dismissed the counter-application, leading to an appeal.

Held – The appeal raised four issues. The first was whether the lease agreement excluded the claim for remission of rent raised by the Butcher Shop. If the answer was in the affirmative, it would dispose of the appeal. If not, the further issues required consideration. The second question was whether the Butcher Shop, a tenant, could claim remission of rental in circumstances where the loss of use and enjoyment of the property was suffered by its sub-tenant. Thirdly, it had to be decided whether, on the facts, the Court should disregard the separate legal personality of Apoldo, to allow the Butcher Shop to raise as a defence to the Trust's claim for payment of rent, a defence that Apoldo would be entitled to raise against it. The fourth issue arose if the answer to the third was negative. In that event, the Butcher Shop contended that the common law ought to be developed to permit the court to disregard the corporate personality of Apoldo in the present circumstances.

Turning to the entitlement to remission of rent when property is not placed at the disposal of the lessee, either by the lessor or because of an intervening circumstance, the court confirmed that parties may limit or exclude the right to claim remission of rent in circumstances of *vis major.* The lease agreement was found not to have precluded a claim for remission of rent arising from a *vis major* event in this case. However, the Butcher Shop did not have a claim, in law, for the loss of use and enjoyment of the premises suffered by Apoldo as sub-lessee. The remedy of lifting the corporate veil was not applicable where there had been no abuse of a corporate personality. The court could not ignore the separate personality of Apoldo, which was not a party to the litigation, so that the Butcher Shop could raise Apoldo's loss as a defence to the rent claim, as if it was its own loss. The development of the common law sought by the appellant was not justified on the facts.

The appeal was consequently dismissed.

African Transformation Movement v Speaker of the National Assembly and others
[2023] 3 All SA 58 (WCC)

Constitutional and Administrative Law – Voting on motion tabled in National Assembly – Request for vote by secret ballot – Lawfulness of decision by Speaker of National Assembly to decline request – Whether application for review of decision was tainted by mootness – Where application was not brought at the material time, and circumstances had since changed, there was no longer an existing or live controversy and the issue was moot.

In 2020, the first respondent (the "Speaker") declined a request by the applicant ("ATM") for vote by secret ballot in a motion tabled in the National Assembly. ATM's application to set aside the Speaker's decision ended up before the Supreme Court of Appeal ("SCA") where the court held that the Speaker had laboured under a misconception that a party requesting a secret ballot bore an onus to establish that secret ballot would be appropriate. It set aside the Speaker's decision. When ATM reinstated its motion of no confidence, the Speaker reconsidered the renewed request but again decided to decline it. In the first of two applications before the present Court, ATM challenged the constitutionality of the Speaker's decision, and sought to have it reviewed and set aside. The second application concerned the lawfulness of the Speaker's decision to decline ATM's request for a secret ballot procedure in respect of the National Assembly's consideration of a report regarding a motion initiated by the ATM for the removal of the President from office. The two main issues for determination in both applications were whether the Speaker's decisions stood to be vitiated on account of procedural and/or substantive irrationality; and, if they were, whether the court ought to substitute the decisions with an order requiring a secret ballot for both the motion of no confidence and impeachment proceedings against the President. It first had to be decided whether the first issue might be moot.

Held – The High Court does not have jurisdiction to decide matters that no longer present an existing or live controversy. Mootness was an issue in the first application because ATM's motion of no confidence tabled for decision at a sitting at the end of March 2022 was not moved by ATM because the vote would be an open one. A

determination, one year later, regarding the Speaker's decision that the vote should be an open one, would in the circumstances be of no practical effect. If ATM were to have their motion reinstated one year after it was first scheduled to be debated and to request the Speaker to determine the issue of a secret vote, she would have to consider the request in the light of current circumstances, not those that prevailed when she made the impugned decision. It has been established in case law that decisions on whether a vote of no confidence should be by open or secret ballot fall to be made with regard to the surrounding circumstances immediately prevailing when the National Assembly is scheduled to vote on the motion. Consequently, if a court is called upon to pronounce on the legality of the decision determining the method of voting, that must be done urgently. If it is not done, the circumstances to be taken into account will have changed. The issue of whether the Speaker should have determined that the vote scheduled for 30 March 2022 should be by secret ballot became moot when the motion was not put to the vote then.

In respect of the second application, unless the resolution adopted by the National Assembly by the open voting process was void because of the Speaker having declined the ATM's request, it would be academic for the court at the present stage to pronounce on the Speaker's decision. ATM's prayer for the setting aside of the resolution was predicated solely on the alleged illegality of the Speaker's determination that it be voted on by open ballot. To impugn a resolution of the National Assembly adopted in an open vote it would have to be demonstrated that the members' voting rights were not exercised in the manner contemplated by the Constitution. The validity of the votes exercised by the members of the National Assembly is not dependent on the Speaker's decision whether the ballot should be open or secret. The Court found no basis on which to set aside the resolution.

The applications were dismissed.

BCB Cable Jointing CC v Ampcor Khanyisa (Pty) Ltd and others
[2023] 3 All SA 81 (WCC)

Constitutional and Administrative Law – Procurement – Application for setting aside of award of tender – Delay rule – An applicant for judicial review is in terms of section 7(1)(a) of the Promotion of Administrative Justice Act 3 of 2000, required to seek review without unreasonable delay and not later than 180 days after exhausting its

internal appeal – For condonation of delay to be granted, full and reasonable explanation for the entire period of delay must be furnished and the court must be satisfied that condonation was in the interests of justice.

The applicant ("BCB") sought the setting aside of the award of a tender by the second respondent (the "City") to the first respondent ("Ampcor"). BCB had previously been the contractor and service provider to the City for the electrical work underpinning the tender for 12 years. During 2019, the City advertised the tender in question. Bidders would be scored based on a competitive assessment of their quoted prices, with up to 20 preference points based on their contribution level in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003. Both BCB and Ampcor were found to have submitted responsive bids, offered reasonable and acceptable rates, had sufficient experience, and offered adequate resources and staff to complete the work. However, as BCB acknowledged in its bid that it was a non-compliant contributor in terms of Broad-Based Black Economic Empowerment ("B-BBEE"), it scored 0/20 possible preference points in that regard, while Ampcor scored the full points allocated. Ampcor was thus appointed as the main contractor, and BCB as the alternative contractor.

BCB, having based its application on the Promotion of Administrative Justice Act 3 of 2000, was, in terms of section 7(1)(a), required to seek review without unreasonable delay and not later than 180 days after exhausting its internal appeal. The respondents raised the issue of delay, as the review application was brought eight months out of time. They contended that BCB provided no reasonable justification for the delay in instituting the review relief and took issue with BCB's attitude that there was no need to seek condonation for the delay.

Held – It has been established in case law that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors relevant to the enquiry include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised, and the prospects of success. A full and reasonable explanation

for the entire period of delay must be furnished. Once the 180-day period has passed, the delay is deemed to be unreasonable, and the court may only extend the period if the interest of justice dictates an extension in terms of section 9 of the Promotion of Administrative Justice Act. BCB had failed to bring a substantive application for extension of the 180-day period, and the court was not in a position to determine whether or not the delay was reasonable. The most prominent factor militating against condonation was the combination of the unexplained delay of 4 months and the wholly inadequate explanation for delay during the balance of the 8-month period. However, a further obstacle was that the contract period for the tender was set to expire just over three months after the matter was heard, rendering the relief sought moot. Condonation was refused and the application was dismissed on that ground alone. Nevertheless, the Court proceeded to address the merits. It found none of the rounds on which BCB relied to be sustainable.

The application was dismissed.

Bester NO and others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI and others
[2023] 3 All SA 101 (WCC)

Civil Procedure – Non-joinder – General rule that parties with a direct and substantial interest should be joined in court proceedings, that rule may be departed from in exceptional circumstances – Where the interests of a large and indeterminable number of persons may be affected by the order sought, a pragmatic approach has to be adopted in identifying who needs to be joined as a necessary party.

Consumer – Cryptocurrency – Whether cryptocurrency fell within the definition of property in the context of the Insolvency Act 24 of 1936 – Cryptocurrency, like money, is movable property for the purpose of the definition of "property" in section 2 of the Insolvency Act.

Consumer – Pyramid scheme – Section 43(2) of the Consumer Protection Act 68 of 2008 prohibits pyramid schemes – Even persons who unknowingly join, enter or participate in a pyramid scheme, will not be entitled to enforce an agreement between themselves and the illegal scheme – All agreements concluded under scheme are unlawful and void ab initio.

As joint final liquidators of the first respondent ("MTI"), the applicants sought declaratory relief that, *inter alia*, the business model of MTI was an illegal and/or unlawful scheme; that all agreements concluded between MTI and its investors in respect of the trading, management, and investment of bitcoin for the purported benefit of the investors were unlawful and void *ab initio*.

A counter-application was filed by the second respondent ("Marks"), in his capacity as a prospective creditor or shareholder, in terms of rule 6(12)(c) requesting a reconsideration of the provisional winding-up order granted against MTI.

Held – The mechanism provided for in terms of rule 6(12)(c) is to redress imbalances, injustices and/or oppression which may flow from an order granted in an urgent matter in a party's absence. As such, all available information properly before court at the time of reconsideration should be considered. In this case, no case for reconsideration was established and the counter-application was dismissed.

In a preliminary point, Marks raised the issue of non-joinder, contending that the applicants were obliged to join all members and investors of MTI to the proceedings and that the application should be dismissed as a result of such non-joinder. Although, generally, parties with a direct and substantial interest should be joined as parties in court proceedings, that rule may be departed from in exceptional circumstances. Where the interests of a very large and indeterminable number of persons may be affected by the order sought, it would be impracticable to require that they should all be joined, and a pragmatic approach has to be adopted in such cases in identifying who needs to be joined as a necessary party. The non-joinder objection failed.

The ground on which the respondents opposed the relief sought by the applicants raised the question of whether bitcoin (cryptocurrency) fell within the definition of property in the context of the Insolvency Act 24 of 1936, and whether the present Court had jurisdiction in respect of cryptocurrency. The court found that even on the strictest interpretation of the meaning of property, cryptocurrency, like money, is movable property for the purpose of the definition of "property" in section 2 of the Insolvency Act. Investors owned bitcoin and on transferring it to MTI's platform, lost such ownership whilst acquiring personal rights against MTI.

Based on the evidence adduced, the court found on a balance of probabilities that the business of MTI was shown to be fraudulent. The identified fraud was not isolated

but related to fundamental aspects of the structure of the business and as such tainted the business operations of MTI as a whole. The applicants succeeded in showing that MTI's business amounted to an unlawful and fraudulent pyramid scheme.

The applicants sought a declaration that all agreements between MTI and investors formed part of the unlawful business of MTI and were therefore void *ab initio* with the result that investors had no contractual right to share in any profits of MTI. Section 43(2) of the Consumer Protection Act 68 of 2008 prohibits pyramid schemes. Even persons who unknowingly join, enter or participate in a pyramid scheme, will not be entitled to enforce an agreement between themselves and the illegal scheme. The agreements were consequently declared void *ab initio*.

Body Corporate of the Six Sectional Title Scheme No SS 433/09 v City of Cape Town
[2023] 3 All SA 136 (WCC)

Local Government – Interdictory relief against municipality for nuisance emanating from property – Occupations of property and activities conducted thereon contravening municipal by-laws – City's failure to enforce its own by-laws neither rational nor excusable, warranting interdict aimed at suitable remedial steps being taken.

The applicant was the body corporate of a sectional title scheme, and the respondent (the "City") was the registered owner of seven neighbouring undeveloped erven forming a large open field as well as a parking lot. Although the erven had been awarded to claimants in land restitution claims, in 22 years, transfer of the properties had still not taken place. According to the applicant, the site in its current state, and the activities being conducted thereon by various persons, including the homeless, constituted a societal health, environmental and safety risk. It sought a final interdict against the City directing it to take all steps reasonably necessary to clear the site of the illegal occupants and illegal structures and debris. Further related relief was also sought. It was contended that the nuisance generated from the site would continue until the land was redistributed as planned, but that such redistribution could not occur while the nuisance continued. The applicant therefore sought to compel the City to take more permanent steps to deal with the issue.

Held – Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing, and that the environment is to be protected through reasonable legislative and other measures. The applicant maintained that the City was in breach of section 24 and certain of its by-laws due to its failure to take proper steps to prevent the activities on the site. The Court agreed with the applicant that the City had contravened its municipal planning by-law which regulated the management and use of land within the jurisdiction of the City. The use of land other than in accordance with the development management scheme of the by-law constituted an offence. The activities on the site did not comply with the permitted zoning uses. The City's failure to properly enforce its own by-law was neither rational nor excusable.

The City also had an obligation under section 152 of the Constitution to strive to promote a safe and healthy environment. The environmental health by-law prohibited and regulated health nuisances. The City wrongly failed to maintain the property and did not explain what steps it took to prevent the accumulation of rubbish, refuse and the like on its site. It further failed to comply with its community fire safety by-law, its street, public places and prevention of noise nuisances by-law, and its integrated waste management by-law.

The Court was driven to the conclusion that the activities complained of gave rise to a nuisance that the applicants could not reasonably be expected to tolerate. The requirements for final interdictory relief were found to have been met, but the applicant acknowledged that the most appropriate remedy would be a structural interdict. That would afford a reasonable opportunity for the City to determine and take appropriate remedial steps in line with the order issued by the Court.

I-Cat International Consulting (Pty) Ltd v Commissioner for the South African Revenue Services
[2023] 3 All SA 154 (GP)

Civil Procedure – Judicial review – Delay in seeking review – Condonation – Section 9 of the Promotion of Administrative Justice Act 3 of 2000 allowing court to extend period in which review may be sought where the interests of justice so require.

Tax – Income Tax – Refusal of request for reduced assessment in terms of section 93 of the Tax Administration Act 28 of 2011 on ground that assessment had become

prescribed in terms of section 99 – Section 99(1)(a) precluded an assessment being made three years after the date of assessment, but section 99(2)(d)(i) provided the three-year period stipulated.

A request by the applicant ("I-Cat") for a reduced assessment in terms of section 93 of the Tax Administration Act 28 of 2011 in respect of its 2015 tax assessment was declined by the respondent (SARS) on the ground that the 2015 assessment had become prescribed in terms of section 99 of the Act. I-Cat applied for the review of the decision, and the Court called for submissions on whether the provisions of sections 99(2)(d)(i) and 150 (read with the definition of "settlement" in section 142) were applicable and relevant.

I-Cat's application for review was 25 days outside the 180-day prescribed period in terms of the Promotion of Administrative Justice Act 3 of 2000 and condonation was consequently sought.

Held – There was no indication that I-Cat did not at all relevant times act expeditiously in the institution of the review application. Section 9 of the Promotion of Administrative Justice Act allowed the court to extend the period in which review may be sought where the interests of justice so require. The standard to be applied in assessing the delay is whether the delay was unreasonable. Factors to be considered when granting condonation are the nature of the relief sought in the review application; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. The Court deemed it in the interests of justice to grant I-Cat condonation for the late filing of the review application.

On the merits, the court confirmed that section 99(1)(a) of the Act precludes an assessment being made three years after the date of assessment. Consequently, the right to assess in respect of I-Cat's 2015 assessment had become prescribed unless any of the exclusions to the prescription period as provided for under section 99(2) applied to the facts in the present matter. I-Cat argued that section 99(2)(d)(i) and 99(2)(d)(iii) were applicable. The Court upheld the argument in respect of the applicability of section 99(2)(d)(i), which provides that the three-year period stipulated

in section 99(1) will not apply to the extent that it is necessary to give effect to the resolution of the dispute under Chapter 9. It was found to have been in the parties' contemplation in a settlement agreement they had reached and a subsequent compromise, that I-Cat could approach SARS in terms of section 93 of the Tax Administration Act in respect of its 2015 year of assessment with an application for a reduced assessment. That was part and parcel of their resolution of the dispute which they had dealt with under Chapter 9 of the Act. That would, however, only be possible if the 3-year prescription period as provided for in section 99(1) was not applicable. As such, the three-year prescription period as provided in section 99(1) could not apply. In the premises SARS' finding that the 2015 assessment had prescribed in terms of section 99 had to be reviewed and set aside.

Kamupungu v Road Accident Fund and a related matter
[2023] 3 All SA 176 (ECG)

Civil Procedure – Courts – Transfer of civil proceedings to and from the circuit court – Interpretation of Superior Courts Act 10 of 2013, section 27(1)(b)(i) – All courts must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution, which provides for a single High Court of South Africa – A party who brings an application for transfer to another court is required to prove that the matter would be more conveniently and appropriately determined elsewhere.

The applicants sought an order transferring their actions for damages against the Road Accident Fund ("RAF") from the seat of the Eastern Cape Division of the High Court in Makhanda, to the East London Circuit Court. The applications were based on section 27(1)(b) of the Superior Courts Act 10 of 2013 (the "Act"), it being contended by the applicants that it would be convenient and cost-effective to remove the proceedings from this court to the East London Circuit Court.

Held – The primary question for decision, in both applications, was whether a circuit court is a seat of a division of the High Court for purposes of section 27(1)(b). Section 27 of the Act gives the High Court the authority to order, upon application by a party to civil proceedings before it, that the proceedings be removed from one division to another division, or from one seat to another seat in the same division. Section 27(1)(b)(i) states that "If any proceedings have been instituted in a Division or at a seat

of a Division, and it appears to the court that such proceedings would be more conveniently or more appropriately heard or determined at another seat of that Division", an order to that effect may be made.

The issue raised by the applications was whether section 27(1)(b) gives the High Court the discretionary power to order the transfer of civil proceedings from a seat of the division to a circuit court of that division for reasons of convenience, and if so, whether the present court, on the facts placed before it, and in the exercise of its discretion, had to order the transfer of the applicants' actions against the RAF to the East London Circuit Court. The question was one of interpretation. It essentially required a determination of the meaning and effect of the words "at another seat of that Division" in section 27(1)(b) of the Act. A "seat" was not defined in the Act. The court had to determine whether a seat of the division had to be confined to a main or local seat as established for a division by the Minister in terms of section 6(3)(a) of the Act, or whether it had to be given the wider meaning of the statutorily determined location where a court of a division exercises the jurisdiction of that division as determined by the Act. In interpreting the provisions, context and the language used had to be considered together. Referring to the established rules of interpretation, the court favoured an interpretation in line with the constitutional imperative that all courts, including their structure composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution, which provides for a single High Court of South Africa.

Confirming the authority of a court of a division to transfer civil proceedings to and from the circuit court, the Court pointed out that a party who brings such an application had to prove that the matter would be more conveniently and appropriately determined elsewhere. The Court was not satisfied that the requirements of section 27(1)(b) of the Act had been met, and the applications for the removal of the two actions to the East London Circuit Court were refused.

Khama v Director of Public Prosecutions, Gauteng Local Division, Johannesburg and others
[2023] 3 All SA 193 (GJ)

Criminal Law and Procedure – Extradition – Whether person subject to extradition may be afforded an opportunity to submit representations to magistrate before any warrant

for his arrest under section 5(1)(b) of the Extradition Act 67 of 1962 was issued – Interpretation of section 5(1)(b) of Extradition Act establishing that magistrate lacked power to receive submissions before granting warrant – Section 5(1)(b) is legally and constitutionally defensible.

The applicant was Mr Seretse Khama Ian Khama, the former President of Botswana. He was presently lawfully residing in South Africa, having arrived in the country in November 2021. He claimed that he was exiled in South Africa as he had to leave Botswana in fear for his life, because he was the target of a co-ordinated, State sponsored attack by the incumbent president of Botswana for expressing his opposition to what he viewed as authoritarian policies and decisions. On 22 June 2022, the applicant's attorneys wrote to the respondents (the relevant South African authorities), stating that South Africa might receive a request from Botswana for the applicant's extradition. Explaining that the applicant would cooperate fully with all future extradition proceedings that might be instituted, it was stated that any efforts to arrest and detain the applicant would be inappropriate, unreasonable, unlawful, and unconstitutional. The applicant's attorneys requested that he be afforded an opportunity to submit representations to the appointed magistrate before any warrant for his arrest under section 5(1)(b) of the Extradition Act 67 of 1962 was issued. That request was declined by the second respondent (the "DPP") on the ground that the Extradition Act did not permit a magistrate to receive representations prior to the issuance of a warrant of arrest. The applicant consequently sought a declaratory order to the effect that, properly interpreted, section 5(1)(b) permitted a magistrate seized with an application for an arrest warrant under that section, in appropriate circumstances, to consider representations by a person whose arrest was sought before the issuing of the warrant. In the alternative, an order was sought declaring section 5(1)(b) unconstitutional to the extent that such authorisation was not implicit in the provision.

Held – The magistrate must bring her own independent mind to bear on whether there were reasonable grounds to suspect that the person sought to be extradited had committed the offence identified in the extradition and warrant request. That particular feature of section 5(1)(b) lay at the heart of the applicant's case. Even if a magistrate

issued a warrant of arrest under section 5, the Minister had the power to cancel the warrant for any reason he might deem fit under section 8. In such event, the extradition process would go no further. If the warrant was not cancelled by the Minister, the person whose extradition was sought would be subject to a section 10 inquiry. The magistrate had the power to release him on bail pending that enquiry. The outcome of the section 10 enquiry did not automatically result in the surrender of the affected person to the requesting state as an appeal is provided for in section 13, and because the Minister may, on broad considerations of good faith, justice and fairness, direct that he may not be surrendered. Moreover, the Minister had the further power to cancel a warrant and discharge a person from custody if the offence was one of a political character under section 15.

Turning to whether the applicant's interpretation of section 5(1)(b) was legally and constitutionally sustainable, the Court found that the applicant's interpretation stretched section 5(1)(b) beyond its reasonably capable meaning. Not only did the section in its plain terms not provide for a right to make representations before a magistrate issued a warrant of arrest, but the context and purpose of the Act supported the same conclusion. Highlighting the discrete role and powers of the magistrate, on the one hand, and the Minister, on the other, the court held that the magistrate did not have the power to do what the applicant requested. The applicant's alternative challenge to the constitutionality of section 5(1)(b) could also not be sustained, as the statutory scheme met the constitutional imperatives relied on by the applicant.

The application was accordingly dismissed.

Kula v S
[2023] 3 All SA 218 (NWM)

Criminal Law and Procedure – Bail application – Appeal against refusal of bail – Section 59 of the Criminal Procedure Act 51 of 1977 as amended by section 2 of the Criminal and Related Matters Amendment Act 12 of 2021 provides that an accused in custody may be released on bail before his first appearance in a lower court unless the offence he is facing is one referred to in section 59(1)(a)(ii) and (iii) – Accused bearing onus of adducing evidence that exceptional circumstances existed which in the interest of justice permitted his release on bail.

The appellant, who was charged with the murder of his wife, appealed against the refusal of his application for release on bail. The gist of the numerous grounds of appeal was essentially that the magistrate had misconstrued the schedule to the Criminal Procedure Act 51 of 1977, under which the charge of murder against the appellant resorted, wrongly placing the onus on the appellant, in terms of section 60(11)(a) and Schedule 6 to the Act, to prove exceptional circumstances warranting his release on bail. It was contended further that the magistrate had erred in the consideration of the provisions of sections 60(4)(a)-(e) read with section 60(5) to (8A) of the Act. The classification of the schedule was central to the determination of the appeal.

Held – In terms of the peremptory provisions of section 65(4), the bail decision of the magistrate could not be set aside unless it was wrong, but if the appeal court was satisfied that the decision was wrong, it had to give the decision which in its opinion the magistrate should have given.

Section 35(1)(f) of the Constitution entrenches the right of an accused to be released from detention if the interests of justice permit, subject to reasonable conditions. Deciding whether the interests of justice permit such release, and determining appropriate conditions, is an exercise to be performed judicially in accordance with the procedure laid down in section 60. The relevant circumstances must be ascertained by using as a guide the check-list of relevant factors against the grant of bail provided in section 60(4), as particularised in section 60(5) to (8A), and factors relevant for the grant of bail as provided in section 60(9). Having established all relevant factors, the court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using appropriate conditions to minimise possible risks.

With effect from 5 August 2022, the Criminal and Related Matters Amendment Act 12 of 2021 introduced drastic changes which affected the appellant's grounds of appeal in the present matter. Section 59 of the Criminal Procedure Act as amended by section 2 of the Criminal and Related Matters Amendment Act provides that an accused in custody may be released on bail before his first appearance in a lower court unless the offence he is facing is one referred to in section 59(1)(a)(ii) and (iii). The offences referred to in the latter section related to domestic violence. In terms of the newly introduced section 60(11)(c), where an accused is charged with one of the

said offences, the court must order that he be detained in custody until he is dealt with in accordance with the law, unless, having been given a reasonable opportunity to do so, he adduces evidence which satisfies the court that the interests of justice permit his release. The introduction of the above provisions effectively means that murder under Schedule 5 no longer applies to murders alleged to have been perpetrated if the jurisdictional fact in section 59(1)(a)(ii) is present. In the bail proceedings *in casu*, consideration was not given to the rule that in the ordinary course of an application for bail, a timeous ruling should be made on the applicable schedule or section, whether placed in dispute or not. The procedure followed by the magistrate was unacceptable. The Court highlighted the procedural irregularities in the conduct of the bail application by the magistrate, and considered the impact thereof. It was found that whether Schedule 5 or 6 applied, the appellant still bore the onus of adducing evidence, either that exceptional circumstances exist which in the interest of justice permitted his release on bail or that on a balance of probabilities, the interest of justice permitted his release on bail.

The appellant's version was a bare denial of any involvement in the death of his wife. None of the allegations against him brought the bail application within the ambit of section 60(11)(a). Instead, section 60(11)(c) applied. The Court went on to conclude that the interests of justice as envisaged in section 60(11)(c) justified the release of the appellant on bail with strict bail conditions.

Roux v University of Stellenbosch and others and a related matter
[2023] 3 All SA 248 (WCC)

Arbitration – Application to make arbitration awards order of court – Counter-application to review and set aside awards – Section 33(1)(b) of the Arbitration Act 42 of 1965 – Whether arbitrator and appeal tribunal had committed a gross irregularity in the conduct of the arbitration proceedings – In absence of reviewable irregularity and where fairness was complied with, awards not susceptible to review and were made orders of court.

In 2015, the University of Stellenbosch sued a former director ("Mr Roux") for damages arising from breaches of his employment contract with the university. The parties agreed to have the matter referred to arbitration. In terms of the arbitration award issued, Mr Roux was found to have unlawfully transferred in excess of R35 million from the unrestricted reserves of the university, into four accounts under his control in its rugby club, over an extended period of ten years whilst employed in the finance department. Mr Roux was ordered to repay a total amount of R37 116 402 as damages to the university for his unlawful expenditure of the funds. His appeal was dismissed.

The university applied to court for an order that the final arbitration award and arbitration appeal award granted in its favour be made orders of court. In response, Mr Roux sought the review and setting aside of the arbitration awards in terms of section 33 of the Arbitration Act 42 of 1965, alleging that the arbitrators had committed gross irregularities in the conduct of the proceedings. In resisting the university's claims against him, Mr Roux alleged that the impugned and admittedly

unauthorised allocations and expenditure were incurred in the scope of the university's business and for its benefit. That being so, it was contended that in the absence of the university disproving the alleged benefits or value received by it, it had failed to prove that it suffered any loss.

Held – It was necessary to consider what exactly were the factual findings of the arbitrators regarding whether the university had obtained any benefit as a result of the unlawful conduct of Mr Roux and whether such expenditure was legitimate and in the scope of the business of the university. The arbitration appeal tribunal had clearly concluded that the misapplication of the university's unrestricted reserves for purposes other than that budgeted for was unauthorised and unlawful.

Mr Roux, in seeking review, relied mainly on section 33(1)(b) of the Arbitration Act, which led to a consideration of whether the arbitrator and the appeal tribunal had committed a gross irregularity in the conduct of the proceedings. Central to that determination was the question of fairness. Mr Roux relied principally on the contention that the arbitrators had misconceived the nature of the enquiry before them by not requiring the university to plead special damages and by not placing the onus on the university to show a compensating benefit. The Court however, rejected those submissions. Central to the determination as to whether the arbitration proceedings were tainted by a gross irregularity was the question of fairness. Mr Roux was given a fair trial and the application by the arbitrators of the common law on either the onus or the special damages challenge did not detract from that.

The Court also rejected Mr Roux's contention that the arbitrator and the appeal tribunal had failed to consider the development of the common law and therefore committed what amounted to a gross irregularity in the proceedings. It was held that the facts of the matter did not give rise to a consideration of the development of the common law and neither was the failure of the arbitrators to have done so a reviewable gross irregularity.

Mr Roux's application failed and the university's application to make the awards an order of court succeeded. Mr Roux was ordered to pay the university the amount of R37 116 402 plus interest.

Roux v University of Stellenbosch and others and a related matter [2023] 3 All SA 248 (WCC)

Arbitration – Application to make arbitration awards order of court – Counter-application to review and set aside awards – Section 33(1)(b) of the Arbitration Act 42 of 1965 – Whether arbitrator and appeal tribunal had committed a gross irregularity in the conduct of the arbitration proceedings – In absence of reviewable irregularity and where fairness was complied with, awards not susceptible to review and were made orders of court.

In 2015, the University of Stellenbosch sued a former director ("Mr Roux") for damages arising from breaches of his employment contract with the university. The parties agreed to have the matter referred to arbitration. In terms of the arbitration award issued, Mr Roux was found to have unlawfully transferred in excess of R35 million from the unrestricted reserves of the university, into four accounts under his control in its rugby club, over an extended period of ten years whilst employed in the finance department. Mr Roux was ordered to repay a total amount of R37 116 402 as damages to the university for his unlawful expenditure of the funds. His appeal was dismissed.

The university applied to court for an order that the final arbitration award and arbitration appeal award granted in its favour be made orders of court. In response, Mr Roux sought the review and setting aside of the arbitration awards in terms of section 33 of the Arbitration Act 42 of 1965, alleging that the arbitrators had committed gross irregularities in the conduct of the proceedings. In resisting the university's claims against him, Mr Roux alleged that the impugned and admittedly unauthorised allocations and expenditure were incurred in the scope of the university's business and for its benefit. That being so, it was contended that in the absence of the university disproving the alleged benefits or value received by it, it had failed to prove that it suffered any loss.

Held – It was necessary to consider what exactly were the factual findings of the arbitrators regarding whether the university had obtained any benefit as a result of the unlawful conduct of Mr Roux and whether such expenditure was legitimate and in the scope of the business of the university. The arbitration appeal tribunal had clearly concluded that the misapplication of the university's unrestricted reserves for purposes other than that budgeted for was unauthorised and unlawful.

Mr Roux, in seeking review, relied mainly on section 33(1)(b) of the Arbitration Act, which led to a consideration of whether the arbitrator and the appeal tribunal had committed a gross irregularity in the conduct of the proceedings. Central to that determination was the question of fairness. Mr Roux relied principally on the contention that the arbitrators had misconceived the nature of the enquiry before them by not requiring the university to plead special damages and by not placing the onus on the university to show a compensating benefit. The Court however, rejected those submissions. Central to the determination as to whether the arbitration proceedings were tainted by a gross irregularity was the question of fairness. Mr Roux was given a fair trial and the application by the arbitrators of the common law on either the onus or the special damages challenge did not detract from that.

The Court also rejected Mr Roux's contention that the arbitrator and the appeal tribunal had failed to consider the development of the common law and therefore committed what amounted to a gross irregularity in the proceedings. It was held that the facts of the matter did not give rise to a consideration of the development of the

common law and neither was the failure of the arbitrators to have done so a reviewable gross irregularity.

Mr Roux's application failed and the university's application to make the awards an order of court succeeded. Mr Roux was ordered to pay the university the amount of R37 116 402 plus interest.

Van Basten v Odendaal
[2023] 3 All SA 289 (FB)

Contract – Lease agreement – Validity of cancellation of agreement based on breach by lessor – Whether letter of demand preceding cancellation complied with requirements of lease agreement – Where letter of demand was not sent by proper person designated in agreement, and service was not effected upon agreed domicilium, demand was not valid under the agreement and cancellation pursuant thereto was also invalid.

The plaintiff owned two farms which she inherited from her father. In terms of a lease agreement entered into in 2016 between her father and her brother (the defendant), the farm was leased to the defendant for five years, with the option to renew. The plaintiff alleged that the defendant had failed to comply with the terms of the lease agreement, which failure constituted a material breach. The agreement provided for the lessor to give the lessee seven days' notice to remedy in the circumstances, and if the breach was not then remedied, the lessor was entitled to cancel the agreement. According to the plaintiff, despite demand having been made to the defendant, he failed to comply with the agreement, and plaintiff cancelled the lease on 30 July 2019. However, despite demand the defendant failed to vacate the farms. The plaintiff consequently sought an order confirming the cancellation of the lease agreement, and for ejectment of the defendant from the farms. That was met by the defendant's plea that no notice of breach and notice to comply had been issued. An email sent to the defendant by the plaintiff was relied on by her as proof of demand of compliance with the agreement.

Held – The determination of the issue of whether proper demand was made in terms of the lease agreement was separated from the other issues in the trial and was to be determined before further evidence was presented.

A party suing on a contract cannot cancel the contract for non-performance of its obligations in terms of the contract, unless the guilty party is *in mora*. At the date of the alleged letter of demand, the farms had not yet been registered in the plaintiff's name and the executrix stood in the shoes of the lessor. The deceased estate, which included the farms, vested in the executrix in her capacity as such. The plaintiff, at the time, had no *locus standi* in relation to the farms. On being requested by the plaintiff to demand compliance by the defendant with the terms of the lease, the executrix merely forwarded the plaintiff's letter by means of an e-mail, to the defendant. The executrix, herself, did not demand compliance from the defendant. Her own stance was that there were no proper grounds upon which a letter of demand could be addressed to the defendant, and that she was not willing to cancel the lease agreement. The lease agreement specifically provided when, how and by whom the letter of demand was to be given to the lessee. A further instance of non-compliance in respect of the letter of demand related to the requirement of service upon the agreed *domicilium*.

The alleged letter of demand on which the plaintiff relied therefore did not constitute a proper and valid letter of demand in terms of the lease agreement. Consequently, the plaintiff was not entitled to have cancelled the lease agreement. Her action against the defendant was thus dismissed.

Van Staden v Van Staden NO and others
[2023] 3 All SA 307 (WCC)

Civil Procedure – Pleadings – Exceptions to particulars of claim – Principles relating to exceptions – Excipiable nature of averments regarding entitlement to withhold payment based on tacit term, exceptio non adimpleti contractus, and alleged interference with use of property.

Seeking declaratory relief against a trust in consequence of an agreement relating, *inter alia*, to certain immovable property owned by the trust, the plaintiff instituted action against the first to third defendants, as trustees of the trust. The trust had purchased property and permitted the plaintiff and his family to take occupation thereof, as the plaintiff was a beneficiary of the trust. In 2021, the trust requested that the plaintiff make a financial contribution toward the purchase of the property as the property was more valuable than distributions previously made to other trust

beneficiaries and the trust wanted to ensure equity among the trust beneficiaries. Consequently, the trust and the plaintiff entered into a written agreement. In the action against the trustees, plaintiff alleged that the trust had breached the agreement by interfering with his exclusive and undisturbed use of the property from the inception of the agreement to July 2022. As a result of the breaches, the plaintiff contended that he was entitled to withhold the monthly instalments due for the period October 2021 to July 2022. He sought declaratory relief in that regard.

The defendants excepted to the particulars of claim on five separate grounds, on the basis of which they contended that the particulars of claim lacked the averments necessary to sustain the plaintiff's cause of action. The exceptions related to the plaintiff's justifying his withholding of payments by relying on an alleged tacit term to that effect in the contract, the *exceptio non adimpleti contractus*, and the trust's alleged interference with his use of the property.

Held – An exception is a legal objection intended to address a defect inherent in the other party's pleadings. The defect must appear *ex facie* the pleadings and no extraneous facts may be adduced or relied on by the excipient to show that the pleading is excipiable. The court must accept as correct the allegations in the particulars of claim, and determine whether those allegations are capable of supporting a cause of action. The pleading must be looked at as a whole. A charitable approach is applied on exception, especially in considering whether a cause of action is established. Where there is uncertainty in respect of a pleader's intention, an excipient cannot succeed unless it demonstrates that upon any construction of the pleading the claim is excipiable. An over-technical approach should be avoided because it runs counter to the purpose of the exception procedure, which is to weed out cases without any legal merit. In the context of written agreements, a commercial document executed by the parties with a clear intention that it should have commercial operation, should not lightly be held to be ineffective. While courts are reluctant to decide issues concerning the interpretation of contracts upon exception, that is not an immutable principle. Applying the relevant principles, the Court found the exceptions to be well-taken. The plaintiff's averments as objected to in the exceptions were excipiable and leave to amend the particulars of claim was granted.

END-FOR-NOW