LEGAL NOTES VOL 8/2023

Compiled by: Matthew Klein

INDEX [1]

South African Law Reports August 2023

ESKOM HOLDINGS SOC LTD v VAAL RIVER DEVELOPMENT ASSOCIATION (PTY) LTD AND OTHERS 2023 (4) SA 325 (CC)

Electricity — Supply — Eskom — Prima facie right of residents of municipality — Whether established for purposes of obtaining interim interdict directing Eskom to reverse its decision to reduce bulk supply of electricity to municipality, such to operate pending review under PAJA of decision — Harm to residents' businesses; drinking-water supply and sewage disposal compromised; hospitals, schools and old-age homes were adversely affected — Breach of fundamental rights to dignity, to life, of access to healthcare services, of access to sufficient water, to an environment that was not harmful to health or wellbeing, and to basic education — Prima facie right to review decision established — Interim interdict granted.

Interdict — Interim interdict — Legal issues in dispute — In interim proceedings, court must definitively decide legal questions that are capable of such resolution — May nevertheless be circumstances where judge not in position to reach definitive decision on legal question — In such circumstances, there was no legal impediment to judge reaching conclusion that says prima facie there was enough pointing to determination of legal question in applicant's favour in envisaged later proceedings.

[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!**

Constitutional law — Organ of state — Duties — Eskom — To respect rights in Bill of Rights by refraining from acting in manner that would result in their infringement — Nature and implication of such duty — Constitution, s 7(2).

Interdict — Interim interdict — Requirements — Balance of convenience — Determination — Considerations — Intrusion into policy-laden or polycentric executive decision — Where harm apprehended amounting to breach of number of constitutional rights — Discussion.

Administrative law — Administrative action — Review — Duty to exhaust internal remedies before instituting legal proceedings — Whether such requirement must be met in order for applicant to succeed in application for interim interdict pending PAJA review — Discussion — Promotion of Administrative Justice Act 3 of 2000, s 7(2).

The present application for leave to appeal to the Constitutional Court stemmed from urgent applications brought to the Pretoria High Court by, on the one hand, the Vaal River Development Association (Pty) Ltd, representing the interests of residents of the Ngwathe Local Municipality, and, on the other hand, the Lekwa Ratepayers Association, representing the interests of residents of the Lekwa Municipality, * against, inter alia, Eskom Holdings SOC Ltd. What prompted the associations to approach the High Court were decisions taken by Eskom, under s 21(5) of the Electricity Regulation Act 4 of 2006 (the ERA), to reduce the bulk electricity it supplied under contract to the municipalities, to previously agreed Notified Maximum Demand (NMD) levels: for many years Eskom had been supplying a level of bulk electricity in excess of the NMD to meet additional energy demands; but, owing to prolonged non-payment, it decided to stop doing so. The residents, whom the municipalities on-supplied with electricity, did not receive notice of Eskom's decisions. So, acting through the associations, they urgently sought from the High Court interim interdicts directing Eskom to restore its former bulk electricity supply to the municipalities, pending the final adjudication of applications brought by the associations under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review the decisions. The relief they sought was predicated on their prima facie right to review the reduction decisions. The High Court granted the applicants an interim interdict in the terms they sought. Eskom, after failing to succeed in an appeal to the Supreme Court of Appeal, applied to the Constitutional Court for leave to appeal, which was granted.

Majority decision

The key issue addressed by the majority ('the court') was whether the associations had met the requirements for the granting of an interim interdict against Eskom. Other preliminary issues it addressed included whether, *as the minority judgment had insisted (a)* the associations were precluded from obtaining the interim relief they sought, given that they had failed to comply with s 7(2)*(a)* of PAJA, that is, they had failed to first exhaust internal remedies, in this case those provided in s 30 of the ERA, the comprehensive piece of legislation regulating the generation, transmission and distribution of electricity; or *(b)* the principle of subsidiarity precluded the residents from impugning the reduction decision by seeking its review under PAJA, instead requiring them to seek redress under the ERA.

Whether requirements for interim interdict met

The court found that Eskom's decision to suddenly decrease the electricity supply to NMD levels had directly resulted in the following adverse consequences for the health and wellbeing of the residents: a flow of faecal matter into the Vaal River; the breakdown of water purification systems; the loss of electricity supply to schools and old age homes; and a reduction in economic activity. (See [256] – [258].) Said consequences, the court held, amounted to infringements of the residents' rights to dignity, to life, of access to healthcare services, of access to sufficient water, to an environment that was not harmful to health or wellbeing, and to basic education. (See [260].) In such circumstances, where Eskom had made its decision *without any notice to the residents*, a viable case had been established for a review under PAJA founded in particular on s 6(2)*(c)*, read with s 4(1), in that: there had been a decision taken by an organ of state, in the exercise of public power, that had materially and adversely affected the rights of the residents, and that was procedurally unfair. (See [195], [197], [204], [209], [263], [272], [279], [280], [282] – [284], [289].) Having established this, the associations had satisfied the first requirement for an interim interdict, namely that they had a prima facie right, though open some doubt (see [293]). (The court further, in dealing with the question of whether a prima facie right was established, directly addressed the applicability of s 7(2) of the Constitution, which decreed that '(t)he state must respect, protect, promote and fulfil the rights in the Bill of Rights'. It held that the minority was mistaken in its view that Eskom bore no duty under its provisions. It held that s 7(2) in fact imposed an obligation on Eskom, as an organ of state, to respect

the rights in the Bill of Rights, which entails that it must refrain from unreasonable conduct that resulted in their infringement. (See [198] – [200], [266] – [267].))

The court found that the further requirements for the granting of an interim interdict had been met too: One, there was a reasonable apprehension of irreparable and imminent harm to the right if an interdict was not granted (see [297] – [298]). Two, the balance of convenience favoured the granting of an interdict (see [305]). In this regard, the court acknowledged constitutional court authority to the effect that a court faced with the balance-of- convenience enquiry should exercise caution in granting a temporary interdict where to do so would probably intrude into a policy-laden or polycentric executive decision. At the same time, however, the court stressed, a consideration favouring the granting of an interim interdict was where the harm apprehended amounted to a breach of one or more fundamental rights warranted by the Bill of Rights. Ultimately, it was a balancing exercise. (See [299] – [303].) In this case, the court asserted, where the harm apprehended amounted to a grievous breach of several fundamental human rights, the balance of convenience clearly favoured the associations (see [305]). Finally, it found that there was no other available satisfactory remedy (see [308]).

Preliminary points

As to the first preliminary point, the court expressed favour for the view that ss 7(2)*(a)* of PAJA in fact played no role in proceedings such as the present, that is, an application for an interim interdict, pending a PAJA review. This was for the reason, amongst others, that it was not actually a 'review' for the purposes of PAJA (see [216] and [219] – [226]). The court, however, ultimately decided this preliminary point on the basis that the High Court had in fact found that there existed *no other satisfactory remedy available to the associations*. Given this finding, a factual one and one that was not the subject of appeal, the present court was precluded from now holding that the associations ought to have followed ERA internal remedial processes. (See [227] – [229].)

As to the second preliminary point, the court held that the principle of subsidiarity ought not to preclude the interim relief the associations sought. This was because ERA was not legislation that gave effect to any constitutional rights. (See [241] – [242].) The court acknowledged there was legal opinion that the principle could indeed still apply in instances involving legislation that did not give effect to a constitutional right (see [243]). However, at this point in proceedings, at worst for the residents, the existence

of such opinion would no more than cast some doubt on their prima facie right. A definitive holding on this legal question, the court held, had to be left for the reviewing court. (See [244].) *The court asserted that its approach in this regard was in line with the law*: In interim proceedings a court must indeed definitively decide legal questions that were capable of such resolution. There may, nevertheless, also be those circumstances, as here, where — for a host of reasons that may include the complexity of the legal question, its novelty, little or no assistance from the litigants' argument, the speed with which the outcome was required and lack of sufficient time for the judge to consider the matter as best they can — the judge may not be in a position to reach a definitive decision on a legal question. In such circumstances, there was no legal impediment to a judge reaching a conclusion that says prima facie there was enough pointing to the determination of the legal question in the applicant's favour in the envisaged later proceedings. (See [247] – [252].)

The court accordingly dismissed the appeal (see [309]).

Minority judgment

The minority held that it would have upheld the appeal, on the basis that the associations had failed to establish a prima facie right to review the judicial decision. This was because, the court held, the review had no prospects of success. (See [53], [66] and [186].) The minority explained its position as follows:

The associations had sought to establish their right to review on the basis that, inter alia, they had a right to a supply of electricity from Eskom (see [63]). In doing so they invoked various fundamental rights in the Bill of Rights, including, inter alia, the right to water, education and a healthy environment (see [59]). However, they failed to establish in any way that these rights' *content* included a claim by residents to *the supply of electricity from Eskom*. As such, the associations could not claim as of right from Eskom the supply of electricity when that formed no part of the content of the rights they invoked. (See [99] – [100], [123], [127], [139], [169], [171] and [186].) Furthermore, and following on from this finding, no reliance could be placed on the duty of organs of state under s 7(2) of the Constitution to respect rights in the Bill of Rights, when it had not been established that there was any right to electricity located in the Bill of Rights (see [123]).

Furthermore, the associations did not seek relief they had under the regulatory scheme created by ERA. The principles of subsidiarity, as well as s 7(2) of PAJA, obliged them to do so. (See [147] – [157], [158] – [165] and [186].)

MUNICIPAL MANAGER, OR TAMBO MUNICIPALITY AND ANOTHER v NDABENI 2023 (4) SA 421 (CC)

Contempt of court — Disobedience of court order — Nullity of court order alleged — Court orders, including flawed ones, cannot be disregarded with impunity — Binding until set aside.

Ms Ndabeni, the respondent, secured a High Court order (per Mjali J) which declared her to be a permanent employee of the second respondent municipality, of which the first respondent was the manager (the municipal parties). This after the municipal parties failed to convert her fixed-term annual contract into a permanent position, in line with a municipal resolution to convert all contract employees to permanent employees. The High Court, in para 2 of its order, also declared the post previously occupied by the applicant a permanent post. Leave to appeal was refused and the municipal parties belatedly and unsuccessfully petitioned the Supreme Court of Appeal, and thereafter (in January 2019) abandoned their further application for leave to appeal to the Constitutional Court.

On 1 February 2019 Ms Ndabeni applied to the High Court for orders holding the municipal parties in contempt of the Mjali J order (and to have first respondent imprisoned, relief which she later abandoned). The municipal parties' defence was that the Mjali J order was a nullity that could be disregarded with impunity. They contended that this was so because implementing the order when there was no position on the staff establishment would result in first respondent being held personally liable for irregular and wasteful expenditure in terms of s 66(5) of the Local Government: Municipal Systems Act 32 of 2000. The High Court issued a rule nisi for the municipal parties to show why they should not be held in contempt. It upheld the nullity defence on the basis the court was not empowered to have granted such an order, and held further that the municipal parties' non-compliance was neither wilful nor mala fide, and ordered the rule nisi discharged.

Leave was granted to appeal to the Supreme Court of Appeal, which upheld the appeal in Ms Ndabeni's favour. The majority, describing the municipal parties' reliance on s 65 as a 'ruse', held the municipal parties to be in contempt of the Mjali J order and ordered them to purge their contempt. It confirmed all but para 2 of the Mjali J order, holding that it was overbroad to the extent that it in effect created a permanent post in

the municipality's staff establishment, when the power to do so was the exclusive preserve of the municipal council.

The present case concerned the municipal parties' application for leave to appeal to the Constitutional Court. The issues were whether the municipal parties were in contempt of the Mjali J order, and, if so, they should be required to purge such contempt; and whether they should be compelled to comply with the Mjali J order, which depended on whether the Mjali J order was a nullity and therefore unenforceable.

Held

The SCA could not refute the High Court's factual finding that the non-compliance was neither wilful nor mala fide, and so could not have declared the municipal parties to be in contempt. Consequently, the appeal against the SCA's order holding the municipal parties in contempt of the Mjali J order, and directing them to purge such contempt, would succeed, and this order be set aside. (See [21] – [22].)

While a court would not compel compliance with an order if that would be patently at odds with the rule of law, no one should be left with the impression that court orders — including flawed court orders — were not binding, or that they can be flouted with impunity. (See [23].)

The effect of the Mjali J order was to declare Ms Ndabeni to be employed permanently by virtue of the resolution. The municipal parties' subsequent explanation about the absence of a post for Ms Ndabeni was irrelevant for determining the lawfulness of the Mjali J order. Consequently, it was not apparent from the judgment of Mjali J that the declaration of Ms Ndabeni as a permanent employee was null and void under s 66(3). Manifestly, the Mjali J order was not a nullity; it was a lawful order issued by a properly constituted court having jurisdiction. It remained extant and must be complied with. If there were collateral consequences, they arose not from the implementation of the order, but rather from the municipal parties' failure to defend themselves against the granting of the order. To give effect to the Mjali J order, the remaining grounds of appeal against the order of the Supreme Court of Appeal would be dismissed. (See [32] – [34], [37].)

MINISTER OF WATER AND SANITATION AND OTHERS v LöTTER NO AND TWO SIMILAR CASES 2023 (4) SA 434 (CC)

Water — Water rights — Transfer of water use authorisations — Whether use of water by person other than holder of water use entitlement permitted — Whether only holder of water use entitlement may apply for surrender of water rights — Whether charging of fee in respect of transactions involving water use entitlements permitted — National Water Act 36 of 1998, s 25(1) and (2).

Section 25(1) of the National Water Act 36 of 1998 (the NWA) provides in part that a 'water management institution may, at the request of a person authorised to use water for irrigation under the Act, allow that person on a temporary basis and on such conditions as the water management institution may determine . . . the use of some or all of that water on another property in the same vicinity for the same or similar purpose'. And s 25(2) provides that a person holding a water use entitlement 'may surrender' it or part of it, '*(a)* in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and *(b)* on condition that the surrender only becomes effective if and when such application is granted'.

In three separate cases, heard together by a High Court full bench, the same issue arose: whether it was competent for a person holding a water use entitlement to contractually undertake to surrender the entitlement — for consideration — in favour of another contracting party so that the latter could apply for a licence in respect of the entitlement.

In two of the cases prospective holders of water use entitlements so surrendered, sought to set aside the refusal by the Director-General of the Department of Water and Sanitation of their applications, and declaratory orders were sought as to the correct interpretation of s 25 of the NWA. In the third case, only the said declaratory order was sought. The Director-General's refusal was based, inter alia, on the view that s 25(2) of the NWA did not allow for the transfer of water use entitlements from one person to another and did not permit trading in water rights. (See [2] – [4].)

The High Court dismissed all three applications, reasoning that on a proper reading of s 25 of the NWA, trading in water use entitlements was not allowed, as it would be at variance with the purpose of the NWA as set out in s 2.

On appeal, the Supreme Court of Appeal reversed the High Court's order, holding that s 25(1) and (2) of the NWA did permit the temporary or permanent transfer of water use entitlements from a holder to a third party. (See [6].)

The present case concerned an application by the Minister of Water and Sanitation (and other state functionaries set out in n8) for leave to appeal against the SCA's order to the Constitutional Court (the CC). The applicants contended that s 25(1) of the NWA contemplated the temporary use of water for the same or similar purpose on another property in the same vicinity by the holder — not a third party — and did not allow for the charging of a fee, as trading in water rights would perpetuate imbalances of the past and infringe the right to equality (see [9] and [14]). As to s 25(2), the applicants contended that it was meant to facilitate a licence application in terms of s 41 of the NWA by the holder of the water use entitlement, not a third party. (See [12] and [29].)

Held

Jursidiction and leave to appeal

The applicants' pleaded case raised constitutional issues, the points were arguable and of general public importance, engaging the court's general jurisdiction. Leave to appeal would be granted (see [16] – [18]).

Whether s 25(1) permitted use of water by a person other than the holder of a water use entitlement

The applicants' interpretation meant that the water-management institution may allow the holder to allow her- or himself to use some or all the water on another property in the same vicinity for the same or similar purpose. Grammatically, this was nonsensical. Section 25(1) was incapable of the interpretation contended for by the applicants. The section did permit the introduction of a third party to enjoy water use in respect of an entitlement held by another person. (See [21] – [24] and [28].)

Whether only holder of a water use entitlement may apply under s 25(2)

The applicants' interpretation of s 25(2) required the words 'by the person holding the entitlement to use water' be read into it at the end. Words could not be read into a statute by implication unless the implication was necessary. Nothing made such implication necessary, and thus the application for a licence envisaged in s 25(2) may be made by a third party. (See [29] – [30].)

Whether the NWA prohibited the charging of a fee in respect of transactions involving water use entitlements

The NWA had no provision which expressly prohibited 'trading' in water use entitlements between private individuals. Section 29(2) appeared to acknowledge that it was lawful in terms of the NWA to enter into a private transaction relating to the use of water with another person and that, when this was done, it was in order for such an arrangement to include the payment of compensation. Additionally, s 29(2) permitted a licensee's obligation to pay compensation to be made a condition of the licence. This was consonant with an interpretation that a surrender under s 25(2) may be subject to a condition that, upon the success of a licence application by a third party (the new licensee), the latter would be liable to pay a fee to the erstwhile licensee. In the absence of a clear enough proscription of trading in water use entitlements (which there was not), private persons were entitled so to trade. There was no impediment to a fee being charged for water use under the second part of s 25(1), or in respect of a surrender of a water use entitlement in terms of s 25(2) in order to facilitate a s 41 licence application by a third party. The appeal would accordingly be dismissed. (See [32], [36] – [38].)

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA v TRENSTAR (PTY) LTD 2023 (4) SA 449 (CC)

Labour law — Lock-out — Lock-out in response to strike — Employer's entitlement to use replacement labour for that of locked-out employees — Duration of entitlement — Labour Relations Act 66 of 1995, s 76(1)*(b)*.

Applicant (Numsa) was a trade union, and respondent (Trenstar) an employer of certain of its members. Numsa demanded that Trenstar pay a gratuity to the employees, Trenstar refused, and Numsa and Trenstar proceeded to conciliation, which failed. Numsa then gave Trenstar 48 hours' notice that its members would strike; the strike commenced, and lasted several weeks.

Numsa then, early on a Friday afternoon, give Trenstar notice that its members would suspend the strike as of the end of the working day, but Numsa emphasised that this was not a withdrawal of its demand. Shortly afterwards, and before the closing of the working day, Trenstar gave Numsa 48 hours' notice that it would lock out Numsa's members as of Monday morning, coupling this with a demand that Numsa drop its demand for the gratuity. Trenstar recorded further that the lock-out was 'in response' to Numsa's strike as per s 76(1)*(b)* of the Labour Relations Act 66 of 1995.

Numsa applied to the Labour Court to interdict Trenstar using replacement labour during the lock-out, but the court dismissed the application. It thereafter gave leave to appeal to the Labour Appeal Court (see [9] and [13]). Numsa then abandoned its demand for the gratuity and the lock-out ended (see [12]). The matter then came to the Labour Appeal Court, which dismissed the appeal (see [13]). Numsa applied to the Constitutional Court for its leave to appeal to it (see [1]). The CC —

Held, that where conciliation was unsuccessful and 48 hours' notice was given, an unconditional right to strike accrued to the employees concerned. Only, however, if in addition, there was a concerted withholding of labour, was there a strike. If there was a concerted withholding of labour, but employees later suspended their strike and returned to work, they were not waiving their unconditional right to strike (see [26] – [27]).

Thus here, at close of business on Friday afternoon, when Numsa's suspension and tender of services came into effect, the strike ended (see [29] – [30]).

Held, further, as to s 76(1)*(b)* and the phrase 'ín response to a strike', that it bore two possible interpretations. The first was that if there were a strike, an employer could lock out the strikers and use replacement labour, and even were the strike to end, the lock-out with use of replacement labour could continue (see [44]).

The second, and preferred, interpretation was that, in a situation of a strike, lock-out response, and use of replacement labour, the use of replacement labour was confined to the duration of the strike. (At the point the strike ended — the lock-out continuing — the employer lost the right to use replacement labour.) (See [45].)

Thus here, the strike triggered the lock-out response, but on Monday, when the lock-out began, there was no longer a strike, and so no longer any entitlement to use replacement labour (see [47]).

Leave to appeal granted and the appeal upheld. The order of the Labour Appeal Court set aside, and replaced with an order that the appeal be upheld, and the Labour Court's order substituted, to declare Trenstar disentitled to use replacement labour for that of the locked-out employees (see [50]).

CAPE TOWN CITY v COMMANDO AND OTHERS 2023 (4) SA 465 (SCA)

Constitutional law — Human rights — Socio-economic rights — Right to adequate housing — Duty of local authority to shelter evicted persons — Duty to provide temporary emergency housing — Whether constitutional obligation extends to making emergency accommodation available at specific location — No such duty imposed, having regard to legislative framework — Constitution, s 26; Housing Act 107 of 1997. **Local authority** — Housing — — Temporary emergency accommodation — Duty of local authority to shelter evicted persons — Whether constitutional obligation to provide temporary emergency housing extends to making emergency accommodation available at specific location — No such duty imposed, having regard to legislative framework — Constitution, s 26; Housing Act 107 of 1997.

A key issue in the present appeal before the Supreme Court of Appeal (the SCA) was whether the obligation imposed on a municipality by s 26 of the Constitution to provide temporary emergency accommodation to evicted persons facing the risk of homelessness, extended to making temporary emergency accommodation available at *a specific location*. The respondents (the occupiers) were occupiers of a property (the property) located in Bromwell Street in the suburb of Woodstock, in the inner-city of Cape Town. Subsequent to eviction orders being obtained against them, the respondents instituted legal proceedings in the High Court against the appellant, the City of Cape Town (the City), directing the latter to provide them with temporary emergency accommodation as near as possible to the property. Negotiations followed, as a result of which the City offered the occupiers emergency housing *not in the inner-city, where there was no such accommodation available*, but at Wolwerivier, 30 kilometres away from the property. The occupiers refused this. The occupiers subsequently amended their relief to introduce a direct constitutional challenge to the City's housing programme as set out in its Integrated Human Settlements: Five Year Plan (the Five-Year Plan), to the extent it failed to provide the occupiers and people living in Woodstock and Salt River who were at risk of homelessness with temporary emergency housing *in the specific locality of the inner-city and surrounds*. They also sought an order directing the City to provide them with emergency housing in such specific locality. This resulted in the High Court order that was the subject of the present appeal, that is, one *(a)* declaring the City's emergency housing programme

and its implementation, in relation to persons who may be rendered homeless pursuant to their eviction in the *inner-city and its surrounds, and in Woodstock and Salt River in particular,* to be unconstitutional; and *(b)* directing the City to provide the respondents with temporary emergency accommodation or 'transitional' housing in Woodstock, Salt River or the Inner-City Precinct, in a location which was as near as feasibly possible to the property.

In the present appeal to the Supreme Court of Appeal, the City argued that the above order was inappropriate. It had made a policy, it submitted, in which more permanent 'social housing' was identified as the most appropriate form of housing for the inner-city and surrounds (see [8] – [10]), and not temporary emergency accommodation, which was costly and provided elsewhere. For the court to order otherwise would amount to instructing the City to allocate its housing budget differently. It would offend the separation of powers, by trespassing into the heartland of policy-laden and polycentric matters of housing delivery. (See [8] – [9].) The occupiers, on the other hand, viewed the order as an appropriate intervention by the High Court to protect their rights (see [10]).

In addressing the appropriateness of the court a quo's order, the SCA first set out the relevant legislative framework (see [30] – [37]). The court referred to s 26 of the Constitution, which provided that '(e)veryone [had] the right to have access to adequate housing', and the state '[had to] take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. The Housing Act 107 of 1997, the court noted, was the legislation that gave effect to s 26 of the Constitution, s 9(1) of which obliged municipalities to 'take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy' to ensure that inhabitants within their area of jurisdiction had access to adequate housing on a progressive basis. The court referred too to the National Housing Code, 2009, which was developed as contemplated in s 4 of the Housing Act, and made provision for an emergency housing programme.

The SCA went on to reject the occupiers' contention that there existed a positive duty on the part of the City to provide the occupiers with temporary emergency accommodation in the immediate city centre and surrounds: The legislative measures and programmes taken by the government giving effect to s 26 of the Constitution, the court held, *did not impose a duty on the City to provide temporary emergency accommodation at a specific locality*. The SCA noted too in this regard that case

authority since *Grootboom* had not interpreted the duties flowing from s 26 as obliging the government to provide emergency housing at a specific location. (See [53] and [56].)

The court went on to consider the reasonableness of the City's emergency housing programme. It noted in this regard that a court was not at large to set aside a programme merely for the reason that there may be other measures which it considers more favourable or desirable (see [57]). The SCA noted that the City's policy did address emergency housing needs, by various means. It held that the fact that no provision was made for emergency housing needs in the inner city did not render the choices made by the City irrational or unreasonable. (See [60].) It held too that the City's emergency housing programme could not be assessed in isolation, as the High Court had, but had to be viewed in the context of the City's overall housing programme. In terms thereof, the City implemented a broad range of permanent housing solutions, which would be directly impacted by an order directing the City to make available emergency housing in the city centre and surrounding areas. (See [64].) It held further that the difference in treatment between 'social housing' and emergency accommodation, with the former offered in the city centre, and the latter not, could be seen as reasonable, given the differences between the two types of housing: for one, permanent social housing was partly subsidised, while temporary accommodation was not. (See [62].)

The SCA concluded that no case had been made out for the declaration of unconstitutionality of the City's housing programme and its implementation as sought by the occupiers, and for the provision of temporary emergency housing at a specific locality. It upheld the appeal and set aside the High Court's order. The SCA nevertheless considered itself still obliged to make a just and equitable order, so as not to render the occupiers homeless. (The eviction orders had yet to be implemented and had not been appealed against.) (See [71].) The relief the court deemed appropriate was an order directing the City to provide the occupiers with temporary emergency accommodation in a location as near as possible to the property, the occupiers' current place of residence. (See [75] – [76].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v RAPPA RESOURCES (PTY) LTD 2023 (4) SA 488 (SCA)

Revenue — Assessment — Objection and appeal against — Taxpayer may only dispute assessment by objection and appeal in terms of ss 104 – 107, unless High Court directing otherwise — Prior to making such decision, High Court having no jurisdiction and could not make order compelling delivery of record in review proceedings — Tax Administration Act 28 of 2011, s 105.

Section 105 of the Tax Administration Act 28 of 2011 (the TAA) provides that a taxpayer may only dispute an assessment by objection and appeal in terms of ss 104 – 107 of the TAA, *unless the High Court directs otherwise*.

Instead of lodging an objection in terms of s 104 of the TAA against Sars' assessments for value-added tax, the taxpayer launched an urgent High Court application to have the decision to issue the assessments, and the assessments themselves, reviewed and set aside; and the decision to issue them declared unconstitutional, unlawful and invalid for being in conflict with the constitutional principle of legality. The taxpayer also demanded that Sars disclose the record of its decision under review in terms of Uniform Rule 53(1)*(b)*, and when Sars refused it launched an application in terms of Uniform Rule 30A for an order compelling Sars to do so (the compelling application). The taxpayer did not in either application seek an order in terms of s 105 but amended its notice of motion in the compelling application to include an order in terms of s 105 'insofar as it might be necessary'.

The present case concerned Sars' appeal to the Supreme Court of Appeal, against the High Court's order in favour of the taxpayer in the compelling application. The High Court, however, postponed the issue of applicability of s 105 and whether a directive should be issued thereunder *sine die*, to be enrolled for hearing together with the main review application. Sars' contended that the right to have an objection against an assessment determined by way of review in the High Court only vested once the court so directed. Absent such direction having been made, the default position of s 105 applied — that a taxpayer may only dispute an assessment by objection and appeal in terms of ss 104 – 107 of the TAA — and the court had no jurisdiction in the review. It therefore could not have made an order compelling Sars to deliver the record of its decision.

Held

It was clear from the language, context, history and purpose of s 105 that it was a default rule that a taxpayer may only dispute an assessment by way of the objection and appeal procedure under the TAA and may not resort to the High Court, *unless* permitted to do so by order of that court in exceptional circumstances. Not having made such an order, the court a quo accordingly did not have jurisdiction in the review application, and because it did not have jurisdiction in the review it also did not have the power to issue the compelling order which was incidental to the review. An order under s 105 was not simply to be had for the asking. A case has to be made out for the High Court to authorise a departure from the default rule in the proper exercise of its discretion on a conspectus of all of the facts before it. A court must have jurisdiction for its judgment or order to be valid. The High Court appeared to have lost from sight that the time for determining whether a court had jurisdiction was at the commencement of the proceeding. Having postponed that question, the High Court was not empowered to issue the orders that it did. The appeal would accordingly be upheld. (See [17], [20], [23] – [24], [26] – [27].)

MYSTIC RIVER INVESTMENTS 45 (PTY) LTD AND ANOTHER v ZAYEED PARUK INC AND OTHERS 2023 (4) SA 500 (SCA)

Appeal — Appealability — Order that peregrinus provide security — Powers of appellate court to interfere strictly circumscribed — Discretion to order peregrinus to provide security for costs exercised on wrong legal principle — Amounting to misdirection justifying interference by appellate court — Appellate court at large to consider application afresh — Proper case for provision of security for costs established — Appeal against order to furnish security dismissed — Uniform Rule 47(1).

Practice — Intermediate proceedings — Security for costs — Court's discretion to order — No justification for exercising discretion in favour of peregrinus only sparingly — Court must consider particular circumstances of case and considerations of fairness and equity for both parties — Proper case for provision of security for costs established — Appeal against order to furnish security dismissed — Uniform Rule 47(1).

A High Court application by Mystic River Investments 45 (Pty) Ltd (Mystic River) and its sole director (Mr Mawji), for orders against Zayeed Paruk Inc and others (the respondents), was met with a notice in terms of Uniform Rule 47(1) calling for security

for costs on the basis that Mr Mawji was a peregrinus who owned no assets in South Africa. It was common cause that Mr Mawji, who was litigating in his representative and personal capacity, was a peregrinus.

The present case concerned an appeal to the Supreme Court of Appeal by Mystic River and Mr Mawji against the High Court's order that Mr Mawji furnish security for costs. This, the High Court had held, was in line with a general, but not inflexible, rule that a peregrinus was obliged to furnish security for costs. The main issue on appeal was whether the High Court correctly exercised its discretion by ordering security for costs.

Held

The extent of this court's power to interfere with the High Court's exercise of discretion depended on the nature of the discretion concerned. Only if the discretion was exercised taking into account irrelevant considerations or on wrong legal principles, would a judgment be overturned on appeal. (See [10], [12].)

The High Court adopted a predisposition that a peregrinus was obliged to furnish security for costs when demanded by an incola. That was a misdirection that justified interference by this court: a court had the discretion to order security, taking into account the particular circumstances of the case and considerations of fairness and equity for both parties; there was no justification for the principle that a court should exercise its discretion in favour of a peregrinus only sparingly. (See [13] and [14].)

This court was accordingly at large to consider the application afresh. In the final analysis, a balancing exercise was required. Mr Mawji did not plead poverty, he did not complain that an order of security would cause an injustice in the sense that it would prevent him from pursuing the main application. There was thus nothing really on his side of the scale. But if no security was ordered and there was a costs order against the second appellant (whether jointly or severally with Mystic River or not), the respondents would suffer the inconvenience, delay and additional costs involved in enforcing a costs order in a foreign jurisdiction. Fairness and equity dictated that Mr Mawji should be ordered to provide security for costs, as he involved himself in the matter in his personal capacity, when he could have simply withdrawn from the matter in order to defeat the application for security if he was indeed litigating solely for the benefit of Mystic River. It was thus fair and equitable to all the parties involved to require Mr Mawji to furnish security for the respondents' costs in the main application.

The appeal against the order to furnish security for costs would accordingly be dismissed. (See [15], [19] [21], [23].)

ROAD ACCIDENT FUND v BUSUKU 2023 (4) SA 507 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Claim form — Sufficiency of information furnished — 'Medical Report' section of claim form left blank — Submission of hospital records sufficient to remedy this — Failure of Fund to object to claim within 60 days in any event rendering claim valid in all respects — Road Accident Fund Act 56 of 1996, s 24(2)*(a)*, s 24(4)*(a)* and s 24(5).

Section 24 of the Road Accident Fund Act 56 of 1996 sets out the procedure to be followed in claims against the Fund. The claim form — called the RAF 1 form — includes a 'medical report' section which must, according to s 24(2)*(a)*, be completed by the practitioner who attended to the claimant or the superintendent of the hospital where the treatment took place (or his or her representative). To prevent the prescription of the claim, the report can be completed by another medical practitioner who had satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries.

Section 24 also has the following provisions:

- s 24(4)*(a)*: any form not completed in all its particulars shall not be acceptable as a claim under this Act; and
- s 24(5): claims not objected to within 60 days of reception are deemed valid in all respects.

The appellant (Mr Busuku) was seriously injured in a motor vehicle accident and lodged a claim against the appellant (the Fund). But on the prescribed RAF 1 claim form, the section headed 'Medical Report' was left blank, prompting a special plea of prescription from the Fund (on the ground no valid 'claim' was ever received).

The High Court, Mthatha, upheld the special plea on the basis that Mr Busuku's submission of the incomplete RAF 1 form had no legal effect. In an appeal, a full court of the Eastern Cape Division referred the matter back to the trial court on the ground that it had failed to consider whether the hospital notes, together with the subsequently submitted RAF 4 'Serious Injury Assessment Report', satisfied the requirements of s 24. The present appeal to the Supreme Court of Appeal was against the order of the full court.

Held

The trial court's ruling was wrong because the special plea was based on the Fund's acceptance that the claim was timeously lodged, the complaint being only that the medical report on the RAF 1 form was missing. However, the prescribed requirements concerning the completeness of the form were *directory* and therefore required only *substantial compliance*. Since most of the information called for in the Medical Report section of the RAF 1 form could be gleaned from the hospital records, furnishing them constituted substantial compliance with the requirements of s 24. (See [14] – [18].)

Another reason why the trial court was wrong was that the Medical Report was not the claim itself, with the result that the Fund's failure to object to the claim within 60 days converted it into one deemed under s 24(5) to be valid in all respects. This was conclusive of the issue before court. (See [19] – [20].)

The SCA therefore substituted both the High Court and the full court's orders with one dismissing the special plea with costs (see [23] – [24]).

ROAD ACCIDENT FUND v MKM OBO KM AND ANOTHER 2023 (4) SA 516 (SCA)

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — Judicial approval before conclusion of settlement agreement — Whether settlement agreement concluded without such judicial approval lawful — Contingency Fees Act 66 of 1997, s 4.

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Settlement — Whether Road Accident Fund obliged to ensure that legal practitioner obtained judicial approval for contingency fee agreement before entering into settlement agreement — Contingency Fees Act 66 of 1997, s 4; Road Accident Fund Act 24 of 1956, ss 4, 24.

The Road Accident Fund (the RAF) had made offers of settlement in respect of two litigious matters for loss of support for minor children. In one matter the children were represented by a *curator ad litem* and in the other by their natural mother. The same firm of attorneys acted for, and had concluded contingency fee agreements with, both plaintiffs. The attorneys accepted the settlement offers, but did not request the judicial

approval contemplated in s 4 of the Contingency Fees Act 66 of 1997 (the CFA). Section 4(1) of the CFA provides that once an offer of settlement is made to a claimant who has concluded a contingency fee agreement with a legal practitioner, such practitioner is not entitled to accept the offer of settlement without the approval of the court, if it is a litigious matter, or the professional controlling body, in case of a non-litigious matter.

After settlement of both matters, the attorneys prepared draft orders which recorded the terms of the settlement and made provision for payment of costs and the taxation thereof, including a declaration that the contingency fee agreement was valid. In their applications to have the draft orders made an order of court, the High Court raised a number of queries and postponed the matter. It emerged from the written replies that the attorneys had not disclosed to the RAF during settlement negotiations that both respondents had signed contingency fee agreements.

The High Court, inter alia, held that, as part of its administrative function, the RAF had a duty to see to it that the provisions of the CFA were strictly adhered to when it came to settlement; and that that non-compliance with s 4 of the CFA by the attorneys invalidated the settlement agreements concluded between the RAF and the claimants and that payment pursuant to such settlement agreement was unlawful.

The correctness of these finding was the main issue in the present case, the RAF's appeal to the Supreme Court of Appeal.

Held

As to whether the RAF had an obligation to ensure compliance with s 4 of the CFA

There was nothing in the CFA's history, statutory context and purpose to suggest that contingency fee agreements in claims against the RAF occupied the minds of those responsible for its enactment. There were no textual or contextual indications in the CFA that the RAF had any obligation to insist on a legal practitioner obtaining judicial oversight before concluding a settlement agreement with such a practitioner. There was not a single reference to road accident fund claims in the CFA. It was legislation of general application, not aimed only at contingency fee agreements in the context of claims against the RAF. It was thus impermissible for the High Court to carve out a special dispensation in respect of contingency fee agreements where claims were against the RAF. Furthermore, the RAF's powers and functions of 'investigation and settling' claims, arising from loss or damage caused by the driving of a motor vehicle,

were not subject to any judicial approval. A contingency fee agreement was a bilateral agreement between a legal practitioner and his or her client. It had nothing to do with a party against whom the client had a claim — the RAF in this instance. By its very nature, it was confidential and privileged between the client and his or her legal practitioner. Thus, ordinarily, a third party against whom a claim was prosecuted (such as the RAF), would not know about its existence, and had no right, nor an obligation, to enquire about its existence or its contents. Accordingly, there was no obligation on the RAF to ensure that a legal practitioner complied with the provisions of s 4 of the CFA before concluding a settlement agreement with them. (See [21], [23], [27], [29], [31].)

As to whether non-compliance with s 4 invalidated the settlement agreement

The High Court conflated non-compliance by the legal practitioner with s 4 of the CFA, on the one hand, and the validity of a settlement agreement, on the other. It did not follow that, because the contingency fee agreement was invalid, the underlying settlement agreement concluded between the RAF and the legal practitioner on behalf of his or her client was also invalid. The invalidity of the former did not affect the validity of the latter. The contrary holdings by the High Court could not be supported. (See [35], [37], [42].)

SHOPRITE CHECKERS (PTY) LTD v MAFATE 2023 (4) SA 537 (SCA)

Prescription — Extinctive prescription — Period of prescription — Delay in completion — Whether appointment of curator ad litem for person suffering from mental or intellectual disability, disorder or incapacity has effect that relevant impediment referred to in para *(a)* of s 13(1) ceases to exist — Prescription Act 68 of 1969, s 13(1)*(a)* and (i).

The present matter concerned the determination of a special plea of prescription raised by the appellant, Shoprite Checkers (Pty) Ltd (Shoprite Checkers), in answer to a delictual claim for damages brought against it by the respondent, Mr Mafate, in his capacity as *curator ad litem* of one Ms Mkhwanazi. The latter was severely injured on 15 October 2014 at Checkers Hyper in Meadowdale Shopping Mall, Edenvale, in the course of doing work there as a packer employed by Smollan Sales & Marketing, which rendered merchandising services to retail stores. As a consequence, she was

rendered permanently mentally incapacitated. On 1 February 2017 Mr Mafate was appointed curator in order to institute legal proceedings on Ms Mkhwanazi's behalf. He launched an action in the Johannesburg High Court, but did so against the incorrect party, which he learnt on 28 July 2017 when special pleas were raised by the cited defendant informing him of that fact. Mr Mafate subsequently withdrew the action, and instituted fresh proceedings in the Johannesburg High Court on 15 October 2018 against the correct party, Shoprite Checkers, on which the summons was served on 19 October 2018. Shoprite Checkers filed a special plea of prescription as a consequence, which, it was agreed between the parties, would be determined first as a separated issue. The High Court dismissed the special plea with costs, but granted leave to appeal to the Supreme Court of Appeal (SCA).

In arguing that the claim had prescribed, Shoprite Checkers relied on s 13(1) of the Prescription Act 68 of 1969 which provided for the circumstances in which the completion of prescription of a debt was delayed. Reliance in particular was placed on paras *(a)* and *(i)*, which, read together, provided that, where the creditor was 'a person with a mental or intellectual disability, disorder or incapacity' and 'the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph *(a)* . . . has ceased to exist', the 'period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph *(i)*'. Shoprite Checkers argued that the relevant impediment in this case, of Ms Mkhwanazi's mental incapacity, that was delaying the completion of prescription, ceased to exist on 1 February 2017 when Mr Mafate was appointed as *curator ad litem*. Accordingly, Shoprite Checkers argued, in order to avoid the loss of the claim through prescription, Mr Mafate would have had to institute proceedings before the elapsing of one year since that date. He had failed to do so. For this reason, Shoprite Checkers argued, the claim should be dismissed. Whether these claims were correct formed the focus of the SCA's attention. For his part, Mr Mafate argued that Ms Mkhwanazi, due to her permanent mental incapacity, was not capable of knowing the identity of the debtor. As such, the debt in question became due, within the meaning of s 12(3) of the Prescription Act, either on 1 February 2017 with the appointment of Mr Mafate as curator, or on 27 June 2017 when the latter learnt of the true identity of the debtor, which meant the claim had not prescribed.

The SCA, rejecting the argument of Shoprite Checkers, held that, on the text of s 13(1)*(a)*, interpreted contextually and purposively, having regard to the general scheme of the Prescription Act, the appointment of Mr Mafate as *curator ad litem* did not result in the impediment, that was preventing the completion of prescription of Ms Mkhwanazi's claim, ceasing to exist. (See [30].) The impediment would exist, the SCA stressed, for as long as she still suffered the mental incapacity, which she did. (See [31] – [35].) The SCA accordingly held that the High Court was correct in rejecting Shoprite Checkers' special plea of prescription, and it dismissed the appeal. (See [37] – [39].)

SMITH NO AND OTHERS v MASTER OF THE HIGH COURT, BLOEMFONTEIN AND ANOTHER 2023 (4) SA 554 (SCA)

Company — Winding-up — Interrogation — Who may examine witnesses — Companies Act 61 of 1973, ss 417 and 418(1)*(c)*.

The appellants were the joint liquidators of BZM Transport (Pty) Ltd (BZM), which was liquidated in August 2019 following failed business rescue proceedings. The liquidators complained that BZM's erstwhile chief executive officer, one Mr Engelbrecht, hindered fulfilment of their statutory duties, and successfully applied to the Master to convene an inquiry into BZM's business affairs under s 417 of the Companies Act 61 of 1973. Mr Engelbrecht and members of his family who were employed by BZM were summoned to appear before the inquiry.

At the inquiry, presided over by the Assistant Master, Mr Engelbrecht's legal representative objected to the proceedings on account that only the Master and no one else, also not the liquidators, was entitled to interrogate witnesses. This was on the basis that they were summoned under s 417 which only provided for interrogation by the court or the Master, and not under s 418(1)*(c)* which specifically provided for the interrogation of witnesses by or on behalf of liquidators, creditors and contributories.

The Assistant Master rejected the contention, and Mr Engelbrecht applied in the High Court to review and set aside the inquiry on the basis contended. The High Court agreed with Mr Engelbrecht, and holding that the inquiry was null and void ab initio, struck out the record of proceedings. The present case concerned the liquidators' appeal to the Supreme Court of Appeal. At issue was whether the absence in s 417 of a right to examine witnesses corresponding with that in s 418(1)*(c)* meant that s 17

was to be interpreted as restricting the interrogation to the court or the Master, to the exclusion of anyone else.

Held*

Sections 417 and 418 were not distinct, but rather complementary, provisions. They provided for a dual method for holding the enquiry and were to be read together. The sections were designed to ensure that those responsible for mismanagement of the affairs of a company, like BZM, were compelled to provide the necessary information to enable the liquidators to fulfil their statutory duty and recover assets in the interests of creditors and the public. (See [14] – [15].)

Prefixing s 417(2)*(a)* with the word 'only' before the phrase 'the Master or the Court may examine' imposed restrictive language not provided in the text; it could not be said that the phrase 'summon[ed] before him' indicated that *only* the Master may interrogate a witness or that the expression had a bearing on the nature or the conduct of the enquiry (see [15]).

Furthermore, the High Court had overlooked the effect of the 1985 amendment and the original nature of the power conferred by the section, which granted the Master the same powers as that of a court (see [16]). There was nothing in the amendment to suggest that the power extending to the Master was supposed to be any different to that which had, up to the point of the 1985 amendment, been exercised by the court, and this would include the power to permit the liquidator or a creditor to conduct the interrogation to the extent that the Master regards as appropriate (see [33]).

The absence of a corresponding provision which identified a category of persons who may be represented and interrogate witnesses in s 417 was of no moment; its presence in s 418 was consistent with the legislative intention to define the parameters of the delegation whenever an enquiry was delegated by the master to an external party (see [17]). The provision of the right in s 418(1)*(c)*, and its absence in s 417, must be seen in light of the fact that the court (or the Master after 1985) exercised an inherent discretionary power to allow the liquidators to interrogate those summoned to an enquiry in terms of s 417, so that in the absence of an express legislative provision in s 418(1)*(c)* to allow the interrogation by those mentioned in the section, the commissioner would not have the same power (see [36] – [37]).

The proceedings over which the master presided were quasi-judicial in nature; the Master determined which witnesses should be called, the manner in which evidence would be received and how to conduct the enquiry (see [29]). From a practical point

of view, it was quite understandable why a court itself or the master would not conduct the interrogation (see [38]). It made logical sense that the party in possession of the relevant information would be best placed to interrogate a particular witness (see [18]). Accordingly, the High Court erred in holding that *only* the court, but not the Master, had inherent discretion to determine who may attend the enquiry and interrogate witnesses, and the appeal would succeed. (See [17], [20] and [39].)

VANTAGE GOLDFIELDS SA (PTY) LTD AND OTHERS v ARQOMANZI (PTY) LTD 2023 (4) SA 568 (SCA)

Company — Business rescue — Business rescue plan — Amendment — Unilateral amendment of adopted business rescue plans by business rescue practitioners not permissible — Clause in adopted business rescue plans authorising unilateral amendments is against scheme of Companies Act 71 of 2008.

Three interrelated companies (the 'Vantage Companies') had been placed in business rescue. Business rescue plans had been prepared by the appointed business rescue practitioners, and had been approved by creditors. These 'adopted plans' were, however, not implemented, because the business rescue they envisioned was dependent on third-party funding that ultimately could not be secured. The practitioners subsequently invited alternative funding proposals from creditors. Arqomanzi (Pty) Ltd — the respondent in the present appeal, and a current creditor of the Vantage companies — offered one such proposal. The practitioners however expressed their clear preference for another funding proposal that involved 'reviving' the 'failed' adopted plan, an approach with which Arqomanzi disagreed. Arqomanzi, after failing to secure an undertaking that the practitioners would not implement this plan, sought and obtained an order in the High Court (the Roelofse order) directing the practitioners to consult with creditors for the purpose of proposing amendments to the adopted plans; to prepare and publish amended plans; and convene a creditors' meeting for voting on such amended plans. The practitioners, however, after publishing amended business rescue plans, declined to convene a meeting of creditors for the purpose of a discussion and a vote on them, as envisioned in the Roelofse order. Instead, they acceded to a proposal from Vantage Goldfields SA (Pty) Ltd (VGSA) — the first appellant in this matter, and a shareholder in the Vantage Companies — and Vantage Goldfields Ltd (VG Ltd) — the second appellant, and

holding company of VGSA — *to unilaterally amend the plans*. They claimed they were entitled to do so, given a clause appearing in each of the 'adopted plans' permitting the practitioners to amend the plans if an amendment would not be prejudicial to the affected persons, and if the practitioners acted reasonably (see [22] for wording of clause). Arqomanzi launched urgent proceedings in the High Court to stop the implementation of the amended plans, which proceedings were opposed by the practitioners, the Vantage companies, VGSA and VG Ltd. Arqomanzi obtained a rule nisi interdicting the practitioners from proceeding to implement the amended plans (pending final determination of the application). On the return day the High Court, in a judgment that was the subject of the present appeal, ruled in favour of Arqomanzi, inter alia confirming the rule nisi.

The SCA stressed that the only order granted by the court a quo that had actually been sought by Arqomanzi was for the confirmation of the rule nisi. The court a quo, the SCA held, in granting the *other orders* it did — which orders served only to give effect to the Roelofse order and to hold the practitioners accountable — overstepped its judicial powers. Those orders, the SCA held, could not stand. (See [15] – [19].) The key question, then, to be addressed by the SCA in the present appeal was whether the court a quo was correct in confirming the rule nisi. The crux of the appeal, the SCA held, was whether the practitioners were entitled to unilaterally amend the adopted plans by virtue of the clause appearing in each (see [20]). This, where it was common cause that there was no provision in the Companies Act for the amendment of a business rescue plan once it had finally been adopted (see [22]).

Held, that the Companies Act 71 of 2008 was clear that business rescue plans were the product of engagement between the practitioner and the creditors. In terms of s 145(1) the creditors were entitled to be informed of 'each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings' and may 'formally participate in a company's business rescue proceedings to the extent provided for in this Chapter'. Control over the rescue proceedings was to be exercised by democratic majority vote of creditors and affected parties. Accordingly, a clause in a business rescue plan that provided for the unilateral amendment of the plan by the practitioners was contrary to the scheme of the Companies Act. At most such a clause in an adopted plan would only allow for amendments of an administrative nature that did not affect the substance of the plan. (See [25].)

Held, further, that it was clear that the amendments to the business rescue plans, concerning as they did the replacement of the funder and funding model, were not merely administrative (see [27]).
Held, further, that, on the facts, Arqomanzi had established a clear right capable of protection and was entitled to an interdict. The confirmation of the rule nisi by the High Court could not be faulted.
Appeal accordingly partly dismissed and upheld (see [41]).

BREUKEL AND ANOTHER v DEPARTMENT OF HOME AFFAIRS AND ANOTHER 2023 (4) SA 583 (WCC)

Immigration — Entry — Refusal of entry to person who is not illegal foreigner — Ministerial review — Whether person held in inadmissible facility at airport may be released into South Africa pending ministerial review — While generally person being so held not necessarily entitled, without more, to be released, there was no fixed and immutable principle — Personal circumstances of detainee and their constitutionally guaranteed right to dignity and freedom must be considered — Immigration Act 13 of 2002, ss 8(2)*(b)* and 35(10).

The applicants, Ms Breukel and Ms Serrano, were life partners who had travelled from Venezuela to visit South Africa on separate flights. Ms Serrano, who was travelling on a Venezuelan passport, was denied formal entry into the Republic when immigration officials would not recognise a document extending her expired passport as valid. She was first placed in the custody of the person in charge of the airline she arrived on, to be held until escorted out of the country. When the aircraft departed from South Africa, the immigration officials of the Department of Home Affairs (the department) formally took control and custody of Ms Serrano and escorted her to at a transit facility used by airlines to accommodate passengers who were destined to be removed from South Africa (the inadmissible facility). There she was held in a holding cell under guard and under conditions that were extremely unpleasant (see [19], [35] – [37]).
Ms Serrano then filed a review under s 8(1) of the Immigration Act 31 of 2002, * which meant that she could not be removed from the Republic until such time as her request for a review had been dealt with by the Minister. She was, however, advised by immigration officials that she would not be released pending the finalisation of the

Minister's decision and would, instead, be kept in the inadmissible facility. In response, the applicants launched an application on an urgent basis (the main application), and, absent other parties, obtained an order that Ms Serrano be released from custody, and for her to be allowed into South Africa pending the Minister's decision. The court was satisfied that a case had been made out for the interim relief sought, persuaded, inter alia, by Ms Serrano's averments in her founding affidavit that she was denied entry into the Republic and was being held in a holding cell while, on the face of it, her passport appeared to be valid. The immigration officials did not even make the most basic of enquiries to ascertain the status of her passport and the extension thereof, and they did not have any regard to, or for, Ms Serrano's personal circumstances and her constitutionally guaranteed right to dignity and freedom. (See [30].)

It was this order that was the subject-matter of the present case, that is, the Department's reconsideration application in respect thereof under rule 6(12)*(c)* of the Uniform Rules (which provides that a person against whom an order was granted in his or her absence in an urgent application may set the matter down on notice for reconsideration). At issue was whether the applicants had made out a proper case for the relief sought in the main application, and whether the interim order granted was appropriate in the circumstances.

Also relevant was s 35(10) of the Act which provides 'that a person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission'.The state respondents argued that a person who was refused entry into South Africa and who was not an illegal foreigner, such as Ms Serrano, became the responsibility of the conveyance, which they claimed was the airline, and may not leave the inadmissible facility until the decision of the Minister was made. They also disputed that Ms Serrano was being 'detained', relying on case law in the same division (*Mahlekwa*, cited below) to the effect that someone who was being held in an inadmissible facility pending ministerial review, was not being detained because they were free to leave the facility and return to their country of origin or some other country where they could continue to pursue their ministerial review. (See [62].)

Held

By the time that the main application was launched, the airline had already departed, and Ms Serrano was in the custody and under the control of the department. In terms of s 35(10) of the Act, it was either the person in charge of the aircraft or the department that had custody and control over Ms Serrano; it was they who were responsible for

the conditions under which she was held, albeit during different time periods. The dictum in *Mahlekwa* relied on was incorrect. Such an approach would, inter alia, undermine an aggrieved person's right not to be removed from the Republic pending the finalisation of the Minister's decision. (See [48.4], [60] – [61], [68].)

While the courts generally confirmed that there was no automatic right to liberty while a foreigner awaited a decision on a s 8 review, those cases dealt with either prohibited persons or persons detained for the purpose of s 34(2) of the Act. The conditions under which they were kept in the inadmissible facility, the effect of the detention on their right to dignity and family life, and their right to freedom and security of the person, were not explored or considered. (See [68], [72].)

And while, as a general proposition, a person being held in an inadmissible facility at an airport pending the determination of a ministerial review was not necessarily entitled, without more, to be released into the Republic pending the Minister's decision, this was not a fixed and immutable principle since its application depended on factors such as the conditions of detention and the personal circumstances of the foreigner concerned. (See [72].)

The matter was indeed urgent, involving the liberty of Ms Serrano, who was held in a holding cell under guard and under conditions that were extremely unpleasant (see [48.1]). On a conspectus of the evidence, a case was made out for Ms Serrano's release from the inadmissible facility and her entry into South Africa pending the finalisation of the court proceedings in relation to the s 8 review application. (See [84].)

ELLIS v TRUSTEES, PALM GROVE BODY CORPORATE AND OTHERS 2023 (4) SA 608 (KZP)

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

Applicant was a trustee of first respondent body corporate and was removed from his position. The body corporate had then exercised its right under s 38 of the Community Schemes Ombud Service Act 9 of 2011 to refer a dispute between itself and the applicant to the Community Schemes Ombud Service, which had appointed an adjudicator to adjudicate it. The dispute referenced a breach of fiduciary duty on

applicant's part in the award of a contract to a third party to perform work for the body corporate.

The adjudicator found that the body corporate had suffered damages due to the breach of duty, and that applicant was to recompense the body corporate therefor (see [2]). Applicant then brought a s 57(1) appeal to the High Court against the award and sought its setting-aside (see [3]). There were two issues.

The first issue was the procedure to be followed in bringing the s 57(1) appeal:

Held, that this was the motion procedure, and subject to the requirements that the founding affidavit be no longer than 10 pages, that it succinctly state the grounds on which the adjudicator erred in law, and that it briefly relate the background facts. Any answering affidavit was to be no longer than 10 pages and a replying affidavit no longer than six pages. After filing of the affidavits the appeal was to be prosecuted in accordance with the practice directives for opposed motions (see [10] – [11]).

The second issue was the propriety of the award:

Held, that, in character, the award was one of damages, but that s 39(1), which provides the awards an adjudicator may make, did not include the power to make such an award (see [13]). Specifically, s 39(1)*(e)*, which provided for an order for the payment or repayment of a contribution or any other amount, did not, on proper interpretation, recognise an award of damages. This contra the assertion of first respondent (see [14] and [17]).

Furthermore, breaches of fiduciary duty by a trustee were governed by s 8 of the Sectional Titles Scheme Management Act 8 of 2011, and not the Community Schemes Ombud Service Act (see [15]).

Applicant's s 57(1) appeal accordingly upheld and the adjudicator's award set aside (see [18]).

GROUNDUP NEWS NPC AND OTHERS v SOUTH AFRICAN LEGAL PRACTICE COUNCIL AND OTHERS 2023 (4) SA 617 (GJ)

Legal practitioner — Misconduct — Complaint — Investigation — By investigating committee of Legal Practice Council — Dereliction of duty to investigate — Decisions to cease investigation and dismiss complaint set aside on review — Legal Practice Act 28 of 2014, s 37(1) and s 37(3).

Legal practitioner — Legal Practice Council — Investigating committee — Dereliction of duty to investigate — Decision to cease investigation and dismiss complaint set aside on review — Legal Practice Act 28 of 2014, s 37(1) and s 37(3).
Legal practitioner — Legal Practice Council — Purpose — To assist public, not protect practitioners.

The second and third applicants lodged a misconduct complaint with the Legal Practice Council (LPC) against one R, an attorney. The complaint concerned R's conduct in an application for an interdict against the first applicant, a corporate entity that was not itself a complainant against R.
The LPC, acting in terms of s 37(1) of the Legal Practice Act 28 of 2014 (the Act), referred the complaint to an investigating committee (the committee), which proceeded to dismiss it without investigation on the ground that the complainants did not provide the necessary evidence of wrongdoing by R, whose conduct 'did not necessarily warrant misconduct proceedings' as intended in s 37(3)*(b)* of the Act. The committee also found that a complainant's allegations had to be tested 'by an authority other than the LPC or be supported by reasonable and credible verification'.
The applicants approached the Johannesburg High Court under the Promotion of Administrative Justice Act 3 of 2000 for the review and setting-aside of the committee's dismissal of the complaint against R. Apart from the LPC and R, the other respondents were the chairperson of the LPC, the member of the investigating committee and the Gauteng Provincial Legal Practice Council. Only R opposed the application.
Held
If the complaint before the LPC had been a proper one, and it was required to investigate but failed to, then the dismissal of the complaint and the closing of the file — which were reviewable decisions — were unlawful. (See [28] – [30].)
Section 37(1) of the Act required the LPC to establish investigating committees 'to conduct investigations of all complaints of misconduct against legal practitioners'. *All* complaints had to be investigated, and if the committee was satisfied, on 'the available prima facie evidence', that the legal practitioner in question could be guilty of actionable misconduct, it had to refer the matter to a disciplinary committee. If not, it had to dismiss the complaint. (See [33] – [36].)
In the present case the committee had decided that its obligation to investigate ended with its finding that the complainants had not provided the necessary evidence. This

was wrong. The committee was not a court and there was no onus on a complainant — he or she simply had to bring the conduct to the committee's attention, after which it had to investigate by, if necessary, following up on the issues raised, obtaining information and interviewing witnesses. The LPC was there to assist members of the public rather than to protect legal practitioners by making it harder for members of the public to obtain redress. It was not for the committee to evaluate the probity of the evidence: it merely had to evaluate prima facie whether, if the evidence was established, a guilty finding would follow. The approach taken by the LPC in this matter was fundamentally flawed and inconsistent with not only the literal meaning of the Act, but also with its stated purpose. (See [40] – [45].)

The committee's view that outside testing of evidence was required was, in addition, inconsistent with the scheme established by the Act, under which the committee itself had to investigate rather than tell the complainants that they failed to provide sufficient evidence. By misconstruing its role, the investigating committee committed an error of law (See [47].)

The committee's decision to dismiss the complaint would therefore be set aside and the matter remitted to the LPC for a proper investigation. (See [51] – [53].)

KAMUPUNGU v ROAD ACCIDENT FUND 2023 (4) SA 627 (ECM)

Court — High Court — Circuit court — Status — Fully fledged seat of its division — Proceedings may be removed to it from another seat of that division for reasons of convenience as intended in Superior Courts Act 10 of 2013, s 27(1)*(b)*.

Court — High Court — Removal of proceedings between seats of same division or from one division to another — For reasons of convenience — Onus and discretion of court — Superior Courts Act 10 of 2013, s 27(1)*(b)*.

Words and phrases — 'Another seat of that Division' — Meaning of in Superior Courts Act 10 of 2013, s 27(1)*(b)* — Includes circuit court.

A circuit court is a fully fledged seat of its division and proceedings may on application be 'removed' to it from another seat of that division for purposes of convenience as intended in s 27(1)*(b)* of the Superior Courts Act 10 of 2013. A party bringing an application for removal must show that the matter would be more conveniently or appropriately dealt with by the other seat. In exercising its discretion, the court hearing the application must have regard to the balance of convenience of the parties, the

convenience of the court, and the general disposal of the court business. (See [24] – [27].)

In the present matter the Eastern Cape Division, Makhanda, refused applications for the removal of Road Accident Fund matters to the East London Circuit Court on the grounds that pleadings had not yet closed and that it was impossible for the court to tell from the scant information provided by the applicants — who seemed to be primarily motivated by the location of their attorneys — where the balance of convenience was. (See [30] – [32].)

MOTAUNG v ROAD ACCIDENT FUND AND TWO RELATED MATTERSMOTAUNG v RAF AND TWO RELATED MATTERS 2023 (4) SA 643 (GP)

Motor vehicle accidents — Compensation — Award — Interest on capital award for future loss of income — Delayed payment of interest — Court's discretion to order where parties agreed to it — Calculation of mora interest in event of default — Plaintiff entitled to interest only from agreed due date — No reversion to 14-day period specified in s 17(3)*(a)* of Road Accident Fund Act 56 of 1996.

Interest — A tempore morae — When commencing — Interest on capital award for future loss of income in motor vehicle accident claim — Delayed payment of interest — Court's discretion to order where parties agreed to it — Calculation of mora interest in event of default — Plaintiff entitled to interest only from agreed due date — No reversion to 14-day period specified in s 17(3)*(a)* of Road Accident Fund Act 56 of 1996.

The defendant (the RAF) had settled the three plaintiffs' claims, apart from the interest on the capital amounts agreed on and incorporated in court orders. The parties had in each case agreed that the RAF would pay within 180 days of the date of the court orders and that no interest would accrue before that. They disagreed on when mora interest would begin to run if the capital amount was not settled on the due date. The plaintiffs contended that, although they had agreed on the 180-day period and that no interest would accrue before that, on default the running of interest was determined by s 17(3)*(a)* of the Road Accident Fund Act 56 of 1996 (the Act), which provided that interest would begin running *after 14 days of the court's order.* This provision, argued

the plaintiffs, overrode the agreement, and barred the court from making an order delaying the running of interest for 180 days. They therefore asked the court to grant judgment on interest due in accordance with the Act.

Held

The plaintiffs' stance on s 17(3)*(a)* failed to take cognisance of the fact that on the parties' agreement to settle, the *lis* between the parties, as far as the initial dispute was concerned, ceased to exist. With the original dispute extinguished, the parties' agreement on the amount of the debt and the period within which payment was to be made with no interest accruing, that is, 180 days from the date of the order, prevailed. The issue of interest would then naturally arise on non-settlement of the capital amount by the agreed due date or as per the court order. (See [12].)

Under the common law, interest could not precede the date on which the parties agreed that the capital amount was due, so the plaintiffs' argument of reverting to s 17(3)*(a)* was a non-starter. Mora interest was, moreover, a form of damages for breach of contract and, therefore, if the parties agreed on an amount of debt — especially a future loss — and on the date on which it was due, then the plaintiff should not in the event of a dispute be put in a better position than he would have been had the debt been paid on the due date. Therefore, ex lege mora interest arose on *the agreed due date*, with the capital amount bearing interest only from then on. The parties would, however, have to specifically agree, as they did in the present case, that *mora ex re* interest applied. (See [14], [18] – [20].)

The plaintiffs were therefore entitled to interest on the capital amounts only from the agreed date of payment if the RAF failed to pay timeously. (See [22].)

South African Criminal Law Reports August 2023

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA v DMS AND ANOTHER 2023 (2) SACR 113 (SCA)

Murder — Sentence — Life imprisonment — When to be imposed — Youthful offenders with difficult childhoods — Two accused, woman aged 21 and her brother aged 17, convicted of brutal rape and murder of 12-year-old cousin — First respondent playing leading role in offences and deceased entrusted to her care — Despite her childhood, no substantial or compelling circumstances justifying deviation from prescribed minimum, and sentence increased from 15 years to life imprisonment —

Second respondent also having tragic childhood and, because of provisions of CJA, could not be sentenced to life imprisonment, and sentence of 12 years replaced with one of 23 years' imprisonment — Child Justice Act 75 of 2008.

The two respondents were convicted in the High Court of murder, defeating the ends of justice and rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The respondents were sister and brother, and the deceased, who was also the victim of the rape, was their 12-year-old cousin who had come to visit. The first respondent was 21 years and 8 months old at the time of the commission of the offences, and her brother was 17 years and 5 months old. The High Court found that there were substantial and compelling circumstances in respect of the first respondent that justified a lesser sentence than the compulsory minimum sentence of life imprisonment. In respect of the second respondent the court held that, as a minor at the time of the commission of the offences, the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 were not applicable to him. The court sentenced the first respondent to 15 years' imprisonment in respect of the murder; five years' imprisonment in respect of the offence of defeating the ends of justice; and 15 years in respect of the rape.

The sentences on the second and third counts were ordered to run concurrently with the sentence in respect of murder, and her effective sentence was therefore a period of 15 years' imprisonment. The second respondent was sentenced to 12 years' imprisonment in respect of the murder; five years' imprisonment in respect of the count of defeating the ends of justice; and 10 years' imprisonment in respect of the rape. The sentences in counts two and three were ordered to run concurrently with that in respect of the count of murder, and his effective sentence was accordingly 12 years' imprisonment. The appellant was granted leave to appeal against the sentences imposed on the respondents.

The rape and murder were committed in a most brutal and callous manner, which involved the deceased being hit by both respondents with a spade and a large rock that was used by the first respondent to crush the deceased's head. They then dug a hole and buried her. Both respondents were first offenders. The appellant contended that the trial court had erred in respect of the first respondent's sentence, in that it found that there were substantial and compelling circumstances warranting deviation from the minimum sentence of life imprisonment, and that, even if there were such

circumstances that warranted deviation, the sentence ultimately imposed by the court was too lenient. In respect of the second respondent, the appellant conceded that the provisions of Act 105 of 1997 were not applicable to him, but persisted with the argument that the trial court ought to have imposed a sentence of life imprisonment on the basis of the general penal jurisdiction of the court, and that the sentences imposed on both respondents induced a sense of shock, were disturbingly inappropriate, and were not proportionate to the offences committed.

Held, in respect of the first respondent, that it could not be disputed that she had had a difficult upbringing, having lost her mother when she was 11 years old, and that the conception of her first child was as a result of a rape committed on her when she was 15 years old, as a result of which she dropped out of school. Her second child was born before conclusion of the trial, and these were strong mitigating factors. However, the medico-legal reports painted a horrifying picture of a rape and murder that were accompanied by extreme brutality. (See [27] – [28].)

Held, further, while a failure to show remorse was not in and of itself an aggravating factor, it would have redounded to the first respondent's favour if she had at least shown some appreciation of the devastation of her actions, but at no stage had she shown any contrition. She had played a leading role in the commission of the offence, and the fact that she had murdered a child left in her care was a serious aggravating factor in the consideration of the matter. Despite the presence of mitigating factors, the aggravating factors far outweighed the first respondent's personal circumstances. There were no substantial and compelling circumstances warranting deviation from the applicable minimum sentences of life imprisonment in respect of counts 1 and 3. (See [33] and [37] – [39].)

Held, in respect of the second respondent, that the suggestion by the appellant, that the sentencing regime set out in the Child Justice Act 75 of 2008 (the CJA) did not apply because the second respondent was 20 years old when the trial court sentenced him, was incorrect. The trigger for the provisions of that Act remained the date of the commission of the offence. The court had to accept that, on account of his age, the second respondent had a level of immaturity at the time of the commission of the offence, even though he already had a live-in lover and was working as a gardener. The maximum custodial sentence that could be imposed on the second respondent was 25 years' imprisonment, antedated in terms of s 77(5) of the CJA by the number of days that he had spent in prison or child and youth care centre prior to the sentence

being imposed, which was two years. The second respondent was accordingly sentenced to 23 years' imprisonment on the first and third counts which were to run concurrently with the sentence on the first and second counts. (See [53] and [56] – [57].)

S v KOERIES 2023 (2) SACR 130 (WCC)

Indictment and charge — Defective charge — Correction of on review — After conviction, but before sentence — Charge-sheet headed 'culpable homicide', but averments those for statutory offence under road traffic legislation — Accused having pleaded guilty and admitted in written statement all elements of culpable homicide — No prejudice to accused if court substituted statutory offence with offence of culpable homicide where intention of accused at all times was to plead guilty to that charge — Criminal Procedure Act 51 of 1977, ss 112(2), 86, 88(1); National Road Traffic Act 93 of 1996, s 61(1).

The matter came before the court on special review at the request of the trial magistrate. The accused had been convicted of culpable homicide where the heading of the charge-sheet referred to the charge as one of culpable homicide, but the particulars of the offence referred to the averments usually required for a contravention of s 61(1) of the National Road Traffic Act 93 of 1996 (the NRT Act), and specifically referred to that section. In the written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), signed both by the accused and his legal representative, he confirmed his guilt in respect of all the elements necessary to sustain a culpable-homicide charge. After confirming that the statement had been made freely and voluntarily, and that the accused understood the contents of the statements and the consequences thereof, the court accepted it and found the accused guilty of culpable homicide. It then heard evidence in mitigation and aggravation of sentence, and adjourned the matter to consider the sentence to be imposed. It was at this stage that the matter was submitted on review.

Held, that the charge-sheet was wholly deficient insofar as the transgression of the NRT Act was concerned. Apart from alleging that the accused was the driver of the vehicle which was involved in, or contributed to, an accident in which the deceased

was killed, there were absolutely no indications in the charge-sheet of the respects in which the accused was alleged to have contravened the relevant provisions of that Act. (See [15].)

Held, further, that the provisions of ss 86 and 88(1) of the CPA could not be used to order that the charge be amended or that the defect in the charge be cured by the evidence in terms of the respective sections, as those provisions could only be applied before conviction. However, it was possible for an appellate court to amend the charge, provided that the court was satisfied that the defence would have remained the same if the charge had already contained the necessary averments, and the accused could not be prejudiced by the amendment. It appeared that the common-sense approach would be to confirm the conviction of the accused on the charge of culpable homicide, albeit that the charge-sheet referred only obliquely to that offence. There was no prejudice to the accused, as it was apparent that at all relevant times it was his intention to plead guilty to this offence, and a new trial would be a waste of time and an inconvenience. (See [20], [22], [24] and [27].) The conviction was accordingly confirmed on review.

S v GOVENDER 2023 (2) SACR 137 (SCA)

Murder — Mens rea — Common purpose — Proof of — Appellant handing firearm to co-accused before entering club where altercation occurred involving member of his group — Co-accused shooting and killing two of persons involved in altercation — Appellant knew co-accused going to use firearm to avenge assault on friend — Appellant therefore knew or foresaw possibility that co-accused intending to use firearm in club which could result in death of person, but nonetheless reconciling himself with that possibility — Sufficient to sustain convictions for murder.

The appellant appealed against his conviction on two counts of murder and the sentences of life imprisonment imposed on each count, and the dismissal by a full court of an appeal against the decisions of the trial court. The appellant contended that the trial court's findings on the facts were based on 'conjecture and speculation'. As to the decision of the full court, he contended that there was no evidence to suggest that his actions were in any way linked to those of the first accused in the case, and disputed that he had formed a common purpose with that accused. The state, relied

on direct evidence, as well as circumstantial evidence. The offences occurred at a restaurant and club where there had been an altercation between some of the patrons. The appellant's wife was feeling ill and wanted to leave. The appellant and his wife then both went downstairs to take an Uber. The appellant was armed. While they were waiting for two other passengers, one of the members of the appellant's group came out of the club with a bloody nose, followed by a man with a red bandanna. A scuffle ensued when the man attempted to restrain the appellant. The appellant had removed his firearm from its holster and was holding it in his hand. The co-accused then came down the stairs and he and the appellant returned to the club. As they were ascending the stairs the appellant handed his firearm to his co-accused. A few seconds later several shots were fired inside the club. The deceased was shot at point-blank range and died at the scene. And another tried to leave, but was followed by the co-accused. He was also shot, and the co-accused then jumped into a car with no registration plates and departed. The second man also died from his gunshot wound. The appellant did not testify.

Held, that the reason why the appellant did not proffer any resistance to the taking of his firearm and why he did not dissociate himself from the common purpose by leaving the club was clear: he knew that accused 1 was going to use the firearm to do precisely what he had intended to do from the outset, namely, to avenge the assault on his friend. The appellant therefore knew or foresaw the possibility that accused 1 was going to use the firearm in the club, which could result in the death of a person, but nonetheless reconciled himself with that possibility. The state therefore had proved the requisite intent on the part of the appellant. (See [15].)

Held, further, that if he was innocent, the appellant could have met the state's case with ease, particularly in the light of the allegation that he had been dispossessed of his firearm. Furthermore, his counsel put it to a witness that the appellant would call a witness if the need arose to testify that he had left the venue for his own safety as soon as the gunshots were fired, and that he had not seen the shooting, but the witness was never called. The court was perfectly entitled to conclude that the evidence against the appellant was sufficient to sustain a conviction. (See [22].)

Held, further, that the full court's finding, that there were no substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence, could not be faulted, and the appeal had to be dismissed. (See [25]).

SCHULTZ v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2023 (2) SACR 145 (GP)

Extradition — Request for extradition to South Africa — Representations — Right of person to be extradited to make representations to Minister of Justice and Correctional Services and Director of Public Prosecutions before submission of request — Person having no such right — National Prosecuting Authority Act 24 of 1998, s 24.
Extradition — Request for extradition to South Africa — Which authority required to make decision to request extradition — Prosecuting authority relevant authority — Extradition Act 67 of 1962.
Extradition — Request for extradition to South Africa — Which authority required to authorise extradition — Minister of Justice and Correctional Services having sole authority — Extradition Act 67 of 1962, ss 10 and 11.

The applicant applied for an order declaring that he had the right to submit representations to the Minister of Justice and Correctional Services (the Minister) and the Director of Public Prosecutions, Gauteng (the DPP), in relation to any extradition request South Africa might submit to the United States of America (the US) for his extradition before South Africa submits such requests. He also sought an order that only the Minister had the power to submit a request for his extradition. The applicant had left South Africa in 2019 and was living in the US. The DPP wished to include the applicant as an accused in a pending trial in a magistrates' court on charges of serious crimes, including the contravention of certain sections of the Prevention of Organised Crime Act 121 of 1998, contravention of sections of the Precious Metals Act 37 of 2005, theft and fraud. The DPP wanted to have the applicant extradited to South Africa for this purpose.
The applicant's attorney wrote to the respondents, stating that any request for his extradition might be unconstitutional, unlawful and invalid, and requested the identity of the official who was empowered and authorised to submit an extradition, and stated that the applicant had a right to make representations to the identified official prior to the request being submitted to the US. The respondents contended that the Minister was the relevant executive authority to submit a request to a foreign state for the surrender of a person to the Republic, but disagreed that the Minister had the legislative power to decide whether a request should be made or not. In support of

these contentions counsel contended that the power to institute and conduct criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting and conducting such proceedings, vested in the prosecuting authority.

Held, that, ss 10 and 11 of the Extradition Act 67 of 1962 (the Act) bestowed on the Minister the sole authority to authorise extradition requests from foreign states. (See [24].)

Held, further, that, although the procedure for dealing with a request for extradition by a foreign state from the Republic was dealt with in the Act, the Act did not contain similar provisions in respect of a request by the Republic to a foreign state for the extradition of a person from such state. It had been accepted, however, that it was necessarily implicit in ss 19 and 20 of the Act. (See [26] – [27].)

Held, further, that, in terms of the Extradition Treaty between the US and South Africa, * all requests for extradition had to be made through the diplomatic channel, and the documents required had to emanate in South Africa from the prosecuting authority. (See [34] – [36].)

Held, further, that the prosecuting authority was the relevant authority to take a decision to make a request for the extradition of a person from the US. (See [51].)

Held, further, that s 24 of the National Prosecuting Authority Act 32 of 1998 provided for the powers, duties and functions of directors and deputy directors, but did not confer any power on a director to consider representations by a person prior to a request for the extradition of a person from a foreign state. Absent legislative power to do so, the director was under no obligation to receive and consider such representations. (See [56] – [57].) The application was dismissed.

S v ROBERTSON 2023 (2) SACR 156 (WCC)

Murder — Sentence — Life imprisonment — Imposition of — Femicide and gender-based violence — Accused, with history of abuse of previous partners and breach of protection orders, raping and sadistically killing intimate partner — Attempting to cover up scene of crime and soliciting money from deceased's son, whilst impersonating her — Showing no remorse — Need for women to be protected against him — Accused sentenced to terms of life imprisonment for both murder and rape.

The accused was convicted on nine counts: three relating to contraventions of s 17(1)*(a)* of the Domestic Violence Act 116 of 1998 (the DVA); one of robbery with aggravating circumstances in terms of which a minimum sentence of 15 years was applicable; two relating to assault with intent to cause grievous bodily harm; one for common assault; and the final two counts were for rape and murder. In respect of the last two charges, the applicable sentences were subject to the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 and attracted a minimum sentence of life imprisonment. The complainants and the deceased were all in romantic relationships with the accused who was 32 years of age when the murder was committed and 35 years old at the time of sentencing. It appeared that he was the son of a violent and abusive father, who testified in mitigation on behalf of his son and took the blame for his son's behaviour. It further appeared that, despite protection orders granted against him under the DVA, the accused continued with his abusive and violent behaviour. In respect of the murder, he had attempted to evade arrest for nearly 48 hours after the death of the deceased and attempted to solicit money from the deceased's son, pretending to be her. He had then painstakingly cleaned up the scene of his sordid crime and gone about his day as though nothing had happened.

Held, that those actions were not the hallmarks of a person remorseful of their actions, but rather of a cold and calculated individual bent on concealing his crime. (See [27].)

Held, further, that the probation officer was of the opinion that the accused engaged in his individual capacity to commit criminal activities against vulnerable women who trusted him and attended to his physical, emotional, sexual and financial needs, but the accused had violated their trust and had continually humiliated and physically harmed and injured and degraded them. His criminal tendencies spanned over 20 years without repent or any consideration to change his behaviour, which had escalated and compounded in its gravity and intensity. (See [30].)

Held, further, that the crime committed against the deceased was brutal, violent and sadistic and, when weighed against factors such as his age and time spent awaiting trial, those aggravating circumstances far outweighed the mitigating ones. The accused was a danger to society and the women needed to be protected against him. His lack of remorse and the interests of the community were material factors in considering whether a sentence was appropriate and proportionate to the crime. It had to be noted that the accused was not a first offender, and the court could not find that there were any substantial and compelling circumstances that would justify a deviation

from the sentences imposed on counts 8 and 9. The accused was sentenced to two terms of life imprisonment on those counts, and various other sentences of imprisonment on the other counts which had to run concurrently with the sentences of life imprisonment. (See [36] – [37].)

S v KARA AND OTHERS 2023 (2) SACR 171 (WCC)

Bail — Application for — Interests of justice — Onus — Dealing in cocaine weighing 672 kg and valued at R403 million — Applicants not testifying under oath and relying on affidavits — Applicants not satisfying court that extraordinary circumstances existed — Criminal Procedure Act 51 of 1977, ss 56, 60(6)(d), 65(4) and sch 5.
Bail — Appeal against refusal of — Powers of court on appeal — Applicable principles restated.

The appellants appealed against the dismissal by the High Court of an appeal against the refusal of bail in respect of charges of dealing in 672 kg of cocaine valued at R403 million. The first appellant was arrested while driving a truck in which the cocaine was laid down between sheets of pine wood. It appeared that the second and third appellants had driven the truck from Gauteng where they were resident. The first appellant, an IT specialist, lived in Stellenbosch. The second and third appellants gave false addresses to the police. In addition, it appeared that the first appellant earned between R20 000 and R30 000 per month, whilst the second and third appellants earned R10 000 per month. All of the appellants had travelled extensively beyond the borders of South Africa the first appellant having travelled outside South Africa 15 times between 2019 and 2022; the second appellant 10 times between 2011 and 2020; and the third appellant 64 times between 2010 and 2018. The first appellant explained that a month-long trip to Turkey in 2022 was a holiday with his wife. Each of the appellants was found in possession of two cellphones at the time of their arrest. At the bail application, instead of giving oral evidence, the appellants contented themselves with evidence on affidavit. On appeal, the court, noting the onus resting on the appellants in terms of sch 5 of the Criminal Procedure Act 51 of 1977 (the CPA), and considering the test on appeal as set out in s 65(4) of the CPA,
Held, that, on the issue of the existence of 'extraordinary circumstances' within the meaning of s 60(11)*(a)* of the CPA, there was a formal onus of proof on the applicant

for bail, and the ordinary equitable test of the interests of justice, determined according to the exemplary list of considerations set out in s 60(4) – (9) of the Act, had to be applied differently. (See [13] – [14].)

Held, further, that the appellants had challenged the evidence put up by the state and asserted their innocence in relation to that evidence, but their failure to testify and merely to rely on affidavits had to be evaluated in the context of what was a fairly compelling prima facie case made against them at the time. It was axiomatic that, if they had an innocent explanation regarding their respective presence on a truck with which they had apparently no connection, they would surely have advanced it so as to discharge their onus. Given the ease with which criminals could make use of so-called 'burner phones', the appellants faced a further difficulty in discharging that onus. (See [28] and [32].)

Held, further, as to a suggestion that the appellants' passports could be surrendered and that orders be made that they be precluded from applying for new travel documents, that this was not a suitable answer to the flight- risk question, as it was a matter of public knowledge that the Department of Home Affairs (the Department) had regularly been reprimanded by the courts in relation to its tardiness and bureaucratic ineptitude. The court could not be satisfied that such an undertaking would be adequately policed by the Department and, in any event, the possibility that the appellants could procure travel documents unlawfully could also not be discounted as a possibility which was too remote in the circumstances, as it was regrettably a matter of fact that the country's borders were notoriously porous. (See [36].)

Held, further, that the appellants had failed to explain how on their meagre incomes they were able to travel so frequently outside the country and how they could afford to pay a total of R500 000 they proposed as bail. The only reasonable inference was that a third party was likely to put up the money for their bail, and, if the appellants were not putting up their own money to secure their release, the provisions of s 60(6)*(d)* of the CPA came into play. (See [46].) The appeal was dismissed.

EX PARTE R 2023 (2) SACR 190 (FB)

Trial — Mental state of accused — Application for writ of habeas corpus — Accused declared state patient in terms of ch 13 of CPA, but released by order of judge in terms of Mental Health Act — Judge not aware that accused still standing trial and had been refused bail — Fact of discharge from hospital in terms of Mental Health Act not

permitting release from custody in terms of CPA — Continued incarceration of accused lawful — Application dismissed — Mental Health Act 17 of 2002; Criminal Procedure Act 51 of 1977, ch 13.

The accused brought an application for his release in a criminal case in terms of the habeas corpus principle. The accused had been arrested and denied bail due to his previous convictions, the seriousness of the crime, his unstable family circumstances, his use of aliases, and the strength of the case against him. Some years later he was declared a state patient in terms of ch 13 of the Criminal Procedure Act 51 of 1977 (the CPA) due to his incapacity to understand the proceedings. It was ordered that he be referred to a state psychiatric complex in Bloemfontein and to be kept there until an order was granted by a judge in chambers on application. The court neglected to order the continued incarceration of the accused after his discharge from the psychiatric complex or issue a warrant that made provision for him to be transferred to a prison after his discharge. A judge subsequently made an order for the conditional release of the accused from the psychiatric complex but did not order his release from custody in terms of the CPA. The fact that the accused was in custody pending the finalisation of the trial was not brought to the attention of the judge in chambers, nor was the reason for the refusal of bail known to the judge. The accused contended that he had been unlawfully held in custody, from his discharge until the date of the hearing. *Held*, that, if those facts had been brought to the attention of the judge, the incarceration of the accused would have been ordered. Even though the administrative work was apparently not available, the accused was lawfully still in custody. The travesty of justice lay in the fact that a man, described by the investigating officer as a 'career criminal, coming from a family known for their criminal activities', was released into the community, even though he was in custody for murder and robbery with aggravating circumstances. His discharge from hospital in terms of s 47 of the Mental Health Act 17 of 2002 did not permit release from custody in terms of the CPA. The incarceration of the accused was lawful, and his release would be unlawful. (See [16] – [18].) The application was accordingly dismissed.

S v KUBAI AND ANOTHER 2023 (2) SACR 196 (LT)

Conservation — Rhino horn — Sentence — Accused convicted of hunting rhinos and found in possession of two horns — Threats to existence of rhino population emphasised — Sentence of 11 years' imprisonment in terms of s 276 of *CPA* shockingly inappropriate — Increased on appeal to direct imprisonment of 15 years — Limpopo Environmental Management Act 7 of 2003, s 31(1)*(a)* read ss 31(3), 31(4), 112, and 117 and sch 2; Criminal Procedure Act 51 of 1977, s 276.

The appellant appealed with leave of the regional court against a sentence of 11 years' imprisonment imposed for the hunting of a rhinoceros, a specially protected wild animal, in contravention of s 31(1)*(a)* read with the provisions of ss 31(3), 31(4), 112, 117 and sch 2 to the Limpopo Environmental Management Act 7 of 2003 (the LEMA). The High Court issued a directive through the registrar, directing the appellant to show cause why the court on appeal should not increase the sentence imposed by the trial court and to file heads of argument to that effect. The evidence in the regional court was that the appellant had been found in possession of a rifle and two rhino horns, which were in a black refuse bag lying where he and his co-accused were found hiding under a fallen tree at a game farm in the far north west of Limpopo, close to the borders between Zimbabwe and Botswana. The appellant admitted the possession of a licensed firearm when arrested. He did not testify in his defence, nor did he testify in mitigation of sentence. The manager of the game farm where the rhinoceros was hunted testified that the farm had lost 11 rhinos between 2010 and 2014 due to illegal hunting by poachers. Of the 11, only three cases were successfully prosecuted. In 2014 the farm had 51 rhinos that were kept and conserved as a project, and it cost R200 000 per month to deploy security force with vehicles to protect the animals. Rhino-poaching at the farm had left the owner with no option but to sell all 30 remaining animals at half their market value. The personal circumstances of the appellant were that he was a first offender at the time of the commission of the offence and had two children. The probation officer described the appellant as a person who lived a lavish lifestyle and drove luxury cars, and members of his community wondered where he acquired the money to sustain such a lifestyle. He opined that the appellant committed the offence out of greed, for he had sufficient income to sustain his family. On appeal,

Held, that, as the appellant had not led any evidence in mitigation, there was no evidence on whether he was remorseful or not, or whether he would be in a position to afford any fine, if found appropriate. His evidence in his bail application, however, was significant, in that he admitted that he had been arrested for 11 incidents of possession of rhino horn in 2008, and had assisted the police in arresting a Chinese national for having bought the horns. He stated this after having testified that he knew nothing about hunting. The appellant was clearly knowledgeable on how to poach wild animals, and, that he felt he had found his niche in rhino-poaching. He went to the game farms with full intent to hunt, having left his home over 200 km away with his rifle and silencer. (See [28] – [32].)

The court held, further, that the decimation of the rhino population in South Africa was a matter of national and international concern, and that there was an international ban trading in the horns of this animal. South Africa was fortunate in that it was the country with the largest population of these animals. It was significant that the Limpopo province had the highest number of such poaching incidents, and that, at the rate in which they were being poached, were on the verge of extinction. The appellant had committed an offence that infringed the rights of all citizens of South Africa to have the environment protected for the benefit of present and future generations. The poaching was committed out of greed by wanting to get rich quickly by selling the horns to those who traded in them for whatever reason. The interests of society demanded that premeditated and heartless criminals should not be punished too leniently, and the punishment should not only reflect the shock and indignation of interested persons and of the community at large, and as a just retribution for the crime, but should also deter others from committing similar offences. (See [37] – [42].)

On perusal of the record and considering the sentence imposed, the court was of the view that it was shockingly inappropriate. A sentence less than the prescribed maximum as envisaged in terms of the LEMA was disproportionate to the offence the appellant was convicted of. The sentence imposed had to be set aside and replaced with a sentence of 15 years' direct imprisonment. (See [48], [50] and [53].)

S v MAKGOPA AND OTHERS 2023 (2) SACR 208 (GJ)

Murder — Sentence — Life imprisonment — Imposition of — Vigilante killing — Extremely cruel with deceased ultimately burnt to death — Pretrial incarceration not constituting substantial and compelling circumstances justifying deviation from prescribed minimum — Obiter: strong argument for amending Correctional Services Act to provide for reduction of non-parole period of life sentence to reflect time spent in pretrial incarceration — Criminal Law Amendment Act 105 of 1997; Correctional Services Act 111 of 1998.

The three accused were convicted of the murder of a person who was described in the presentencing reports as a victim of 'mob justice'. The accused had each decided to detain the deceased, punch him, kick him, set him alight, and hold him down under a mattress while he burnt to death. The accused ranged in age from 24 – 37 years and had no previous convictions. The effect of the deceased's death on his family was apparently devastating. He was 25 years old when he was killed, sang in a choir, played football, and danced. The manner of his death haunted his family, and the imputation of criminality to him, and the cruelty of the violence inflicted on him, was difficult to come to terms with. The court could find no compelling and substantial circumstances that would justify a lesser sentence than life imprisonment, and the period of pre-conviction imprisonment could not on its own constitute a substantial and compelling circumstance for the purposes of the Criminal Law Amendment Act 105 of 1997. (See [32].) Trial courts were also not entitled to antedate the sentences they imposed. (See [40].) There was a strong argument for the Correctional Services Act 111 of 1998 to be amended to provide for the reduction of the non-parole period of a life sentence to reflect any time spent in pretrial incarceration, but at present there was no such provision. (See [41].) The crime was one of the worst imaginable and, in the circumstances, it would not be disproportionate to impose a life sentence on each of the accused persons. There was nothing in the presentencing reports that suggested that a life sentence would operate too harshly or that it would not appropriately respond to the offence, the circumstances of the offenders, or the needs of society. (See [43].) The accused were accordingly each sentenced to life imprisonment.

S v MABASO 2023 (2) SACR 217 (KZP)

Trial — Assessors — Absence of — Accused legally represented — No indication that presiding officer explained provisions of s 93*ter*(1) of Act relating to appointment of assessors to accused, or confirmed with accused that he understood provision and had elected to dispense with use of assessors — Proviso to section peremptory and judicial officers required to comply with it — Conviction and sentence set aside — Magistrates's Courts Act 32 of 1944, s 93*ter*(1).

In an appeal where the appellant was granted leave to appeal against his conviction in a regional court, of murder, and was sentenced to 21 years' imprisonment, the appellant raised a point of law that the court had failed to comply with the provisions of s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944. It appeared that the matter was adjourned several times and, on one occasion when the appellant appeared for a postponement, the defence indicated that 'the accused are dispensing with assessors'. The record of that particular day did not reflect that the presiding officer had explained to the accused the provisions of s 93*ter*(1), nor that she confirmed with the accused that the accused understood the proviso and that he indeed had elected to dispense with the use of assessors. The record reflected that when the trial started before a different presiding officer, no explanation of the proviso was made by the presiding officer and in fact nothing was mentioned about the use of assessors and the appellant's rights in terms thereof. He was, however, legally represented throughout by the same legal representative.

Held, that the proviso was peremptory and judicial officers were required to comply with the proviso. The court was experiencing an increased number of appeals that had to succeed purely on this technical ground, which was a serious concern, as, unfortunately, such an irregularity had the effect of vitiating the whole proceedings, something that could easily be avoided with the application of due diligence in the performance of functions by judicial officers. In the present matter the accused's legal representative simply indicated that they did not require assessors, but the wording of s 93*ter* suggested a positive action from the accused in the form of a request which had to be apparent from the record. The appellant had not waived his right to such an appointment and there was therefore no compliance with the proviso, and the conviction and sentence had to be set aside. (See [12] – [15].)

Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others [2023] 3 All SA 323 (SCA)

Constitutional and Administrative Law – Procurement by State Organs – Application for review of award of tender – Whether delay in seeking review was unreasonable and unexplained, as found by High Court – Where High Court did not exercise its discretion judicially in refusing condonation of delay, appellate court entitled to itself exercise the discretion and to overlook the delay in instituting the review proceedings.

Constitutional and Administrative Law – Procurement by State Organs – Self-review application for setting aside of irregular award of tender, based on principle of legality – Where process preceding the award of the tender did not accord with the dictates of section 217 of the Constitution, ensuing contract was constitutionally invalid and thus unlawful.

The award of a tender by the third respondent (the "Department") to a joint venture made up of the first respondent ("Simeka Group") and second respondent ("Regiments") was taken on review in the High Court, by the appellants. It was contended that the tender process was fraught with multiple material irregularities that rendered the award unconstitutional and unlawful. The appellants sought an order declaring the award constitutionally invalid and unlawful, and consequently reviewing and setting it aside. An ancillary question for determination was whether there was an inordinate delay by the Department in instituting its legality review and, if so, whether such delay was inexcusable. The High Court held that the appellants' delay in instituting the review proceedings was inordinate; the explanation proffered for the delay was woefully inadequate; and the delay itself was unreasonable. Accordingly, the Court declined to condone the delay and dismissed the review application without addressing the substantive merits.

The substantive question on appeal ultimately turned on whether the award of the tender to the joint venture by the Department was constitutionally valid. The ancillary question that required determination was whether there was an inordinate delay by the Department in instituting its legality review and, if so, whether such delay was inexcusable.

Held – The parties were in agreement that the review fell to be dealt with under the principle of legality as the Department sought to invalidate its own decision. Procurement by Organs of State is regulated by section 217 of the Constitution of the Republic of South Africa, 1996 and the Public Finance Management Act 1 of 1999, which require a competitive and fair procurement process. In awarding the tender pursuant to which the Department concluded the contract with the joint venture, the Department was exercising public power. As the Court was dealing with a self-review by a government department, the principle of legality was the only permissible avenue through which the decisions at issue could be reviewed.

There was no dispute that the process preceding the award of the tender did not accord with the dictates of section 217 of the Constitution. The Court examined the specific complaints raised by the government parties. Finding that the alleged irregularities had been established and were material, the Court concluded that the ensuing contract concluded between the Department and the joint venture was constitutionally invalid and thus unlawful.

It then had to be determined whether the admitted delay in seeking review was, as the High Court had found, both unreasonable and unexplained. Review applications must, as a general rule, be instituted without undue delay. The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case. In refusing condonation of the delay, the High Court exercised a narrow discretion. It had to be determined whether it exercised that discretion judicially. The power of an Appellate Court to interfere with the exercise of such a discretion is circumscribed. However, the High Court was found not to have exercised its discretion judicially, and the present court was entitled to itself exercise the discretion and to overlook the delay in instituting the review proceedings. The review of the award of the tender was granted.

National Brands Limited v Cape Cookies CC and another
[2023] 3 All SA 363 (SCA)

Intellectual Property – Trademarks – Opposition to trademark registration – Trademarks which may not be registered – Onus on applicant for registration to satisfy the court that there is no bar to registration – Section 10(17) of the Trade Marks Act 194 of 1993 – Test involving easily recognisable similarity between competing

marks – Registration not permissible where mark sought to be registered was likely to take unfair advantage of the distinctive character or repute of existing trademark.

Application was made by the first respondent ("Cape Cookies") for registration of the trademark SNACKCRAX under class 30, in a specification covering savoury biscuits. The application was opposed by the appellant ("National Brands"), who was the proprietor in South Africa of the trademarks SALTICRAX, SNACKTIME and VITASNACK in class 30. Cape Cookies' SNACKCRAX savoury biscuits had been on the market since August 2014 and were sold in competition with National Brands' SALTICRAX savoury biscuits. Cape Cookies also used the VITACRAX mark, registered in 2009, in relation to a crisp bread snack.

National Brands opposition was dismissed by the High Court, but leave to appeal was obtained. The opposition was based on several provisions of section 10 of the Trade Marks Act 194 of 1993, specifying which marks may not be registered as trademarks.

Held – The registration stage of trademarks is aimed at ensuring the sanctity of the Trade Mark Register, which should contain only distinctive marks. Only one ground of opposition need succeed for registration to be prohibited. There is an overall onus on the applicant for registration to satisfy the court that there is no bar to registration under the Act.

The Court considered section 10(17) of the Act, which prohibits registration of "a mark which is identical or similar to a trademark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trademark, notwithstanding the absence of deception or confusion . . .". It was not disputed that the trademark SALTICRAX was well known in South Africa and enjoyed a significant reputation and goodwill. Contrary to Cape Cookies' submission, the Court found that section 10(17) was not limited to matters involving different goods or services to those covered by the registered trademark. Similar goods and services fell squarely within its ambit. The two marks had to be compared to establish whether they were similar. That entailed an evaluation for similarity, in which deception or confusion does not have to be a factor. Section 10(17) explicitly excludes deception or confusion as an element of the enquiry. The test

postulated by the Court was that the likeness in the marks should be easy to recognise and that a connection will be made or a link established between them. In assessing similarity, the courts have regard to any dominant feature of the marks. The competing words *in casu* were both composite word marks which included the suffix CRAX. The question was whether the different prefixes achieved sufficient prominence to render SNACKCRAX dissimilar to SALTICRAX. Highlighting the conceptual similarities between the two marks, the Court concluded that the test of an easily recognisable similarity between the two marks was met. If registration was to be allowed, use of SNACKCRAX would be likely to take unfair advantage of the distinctive character or repute of SALTICRAX. Section 10(17) therefore stood in the way of registration of the mark applied for.

The appeal was upheld, and Cape Cookies was barred from registering the trademark in question.

Barendse and another v S [2023] 3 All SA 381 (WCC)

Criminal Law and Procedure – Appeal against refusal of bail – Onus on applicant for bail – Where an accused is charged with an offence referred to in Schedule 6 to the Criminal Procedure Act 51 of 1977, he shall be detained in custody until dealt with in accordance with the law, unless he adduces evidence satisfying the court that exceptional circumstances exist which in the interests of justice permit his release – In absence of exceptional circumstances, bail was correctly refused.

Having been arrested in September 2022 on charges of murder and attempted murder, the appellants applied for bail. The Magistrate's Court refused the application, leading to the present appeal.

Held – Section 60(11) of the Criminal Procedure Act 51 of 1977 provides that where an accused is charged with an offence referred to in Schedule 6, the court shall order that the accused be detained in custody until dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release. The offences in this case were Schedule 6 offences. In terms of section 65(4) of the Act, a court of appeal shall not set aside

the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong.

An aspect raised in the appellants' heads of argument was that of the right to be presumed innocent. The Court considered whether that right played any role in bail applications and concluded that it was not an overarching consideration. The presumption of innocence is merely one factor that must be considered, and must be considered in the context that it does not relieve applicants of the burden to prove exceptional circumstances that would permit their release on bail.

The first ground of appeal was that the magistrate had erred in not finding exceptional circumstances despite none of the grounds in section 60(4)(a) to (e) being present. The contention was misplaced as the magistrate had in fact found likelihoods present in terms of section 60(4)(c) and (e). In three further grounds of appeal, it was averred that the magistrate had erred in findings made regarding the possible interference with witnesses. The evidence established the contrary, as the appellant's father had attempted to interfere with witnesses. The Court held that the appellants could not merely state that the State should prove the likelihood of the factors in section 60(4). In the remaining grounds of appeal, the appellants stated that their general personal circumstances should be held to be exceptional if coupled with their alibis. Significantly, they admitted that their circumstances were ordinary, and that the only aspect that would elevate them to the level of "exceptional" would be if the court accepted their alibis. The mere fact that the appellants stated that they intended raising an alibi as a defence did not automatically convert their circumstances to exceptional circumstances. The magistrate had correctly considered whether the State had put up a *prima facie* case against the application for bail. Its findings in that regard could not be criticised.

The appellants had not succeeded in discharging the onus resting upon them as referred to above. Their appeal was thus dismissed.

Essence Lading CC v Infiniti Insurance Limited and another [2023] 3 All SA 410 (GJ)

Civil Procedure – Leave to amend – Correction of error in citation of defendant – Manner in which mistake may be corrected so as to comply with the constitutional imperative of a fair and just judicial process – Appropriate procedure, compatible with

the constitutional requirement of a fair hearing, and justice being done, and which would prevent an incurable injustice, would be for plaintiff to either apply, on proper notice to relevant party, for the joinder or substitution of such party, together with prayers for ancillary relief.

In terms of rule 28 of the Uniform Rules of Court, the plaintiff sought leave to effect an amendment to the citation of the name of the second defendant. The plaintiff had cited MEDITERRANEAN SHIPPING COMPANY ("MEDITERRANEAN") as the second defendant, instead of MSC. MSC did not react to the summons and did not enter an appearance to defend. Instead, the named defendant, MEDITERRANEAN, entered an appearance to defend and raised an exception that the particulars of claim did not disclose a cause of action against it.

Held – In a correction of a mistake in the citation of a defendant (whether that mistake be described as a misnomer or the correction of a substitution) the essential question was how the mistake could be corrected in a manner which complied with the constitutional imperative of a fair and just judicial process.

Case law on the subject of the invocation of rule 28 to effect a substitution was referred to by the court in order to determine how a substitution of a defendant by way of an amendment to the summons in terms of rule 28 may or may not lead to incurable injustice. It was found that rule 28 may only be used to effect a substitution when no prejudice or injustice would result from such procedure. That would generally be the case where through some form of agency, the party to be introduced is already represented in the action and service of the process on the agent is deemed to be service on the party to be introduced; and the correct defendant, despite the mistake in the citation, entered an appearance to defend or intervene in the action. Therefore, subject to certain exceptions, the appropriate process to substitute a defendant, which would prevent an incurable injustice, was for the plaintiff to bring an application for joinder or substitution on proper notice to the proposed new party. Once the new defendant was properly joined or substituted, and became a party to the action, it would then be open to the plaintiff to appropriately amend the summons either based on the order granted by the court, or in terms of rule 28.

One of the issues often raised in such applications was whether the amendment sought involved correction of a mere misnomer, or whether it constituted a substitution

of a party with another party. The distinction is often relied upon in matters involving prescription, but the importance thereof has diminished and has limited value in applications for amendments.

It was common cause that the plaintiff intended to sue MSC and it was accepted that a *bona fide* mistake was made in that regard. Accepting that the error involved a mere misnomer, the court stated that the problem was that MSC did not enter an appearance to defend and was not represented in the action. Consequently, the circumstances in the case did not present an opportunity to make use of rule 28 to correct the mistake in the citation fairly. The appropriate procedure, compatible with the constitutional requirement of a fair hearing, and justice being done, and which would prevent an incurable injustice, would be for the plaintiff to either apply, on proper notice to MSC, for the joinder or substitution of MSC, together with prayers for ancillary relief which might include leave to effect the appropriate amendment, or to do so in future.

The application for leave to amend was dismissed.

Fourie and another v Tropical Winter Trading (Pty) Ltd and another [2023] 3 All SA 429 (KZP)

Civil Procedure – Rescission – In terms of rule 42(1), the court is empowered to vary an order or judgment erroneously sought or erroneously granted, in the absence of any party affected thereby – A court has power to rescind a judgment obtained on default of appearance, provided that sufficient cause for rescission has been shown – In ex parte applications, all material facts must be disclosed which might influence a court in coming to a decision – Non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission.

The first respondent obtained an *ex parte* order authorising the transfer of property into its name, based on a valuation obtained, and against a purchase consideration to be paid into the Guardian's Fund, as administered by the Master of the High Court. It had indicated that the owners of the property could not be identified. The Court granted the order sought.

The property in question had in fact belonged to the first applicant's father until it devolved upon his heirs upon his death. The first applicant was the only surviving co-owner, and the second applicant was her niece. While negotiating the terms of a lease

agreement in respect of one of the farms, the second applicant discovered that all three farms had been transferred into the name of the first respondent.

The applicants sought rescission of the court order authorising such transfer. It was contended that the Court lacked jurisdiction to make such an order, and that there is no provision in any law empowering a court to authorise a transfer of immovable property through a private individual, thereby detracting from a person's real right to that property. It was submitted that what the court order amounted to was expropriation of land without compensation and without any empowering statutory authority. Since expropriation without compensation was expressly prohibited by section 25 of the Constitution, the Court was said to be in direct violation of the rights of the owners and descendants of the farms. The applicants averred further that the order should be rescinded and set aside as a result of material non-disclosure and the deliberate misleading of the court by the first respondent and its attorneys. The application was brought in terms of rule 42(1), alternatively under common law.

Held – Preliminary points relating to non-joinder of other persons related to the applicants who might have an interest in the application and to each of the applicants' *locus standi* were without merit and were dismissed.

Rule 42(1) empowers the court to vary an order or judgment erroneously sought or erroneously granted, in the absence of any party affected thereby. Once it is found that the order was erroneously sought or granted, the court should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause. A judgment is erroneously granted if at the time of its issue, the court was unaware of an existing fact which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment. An order or judgment is also erroneously granted if there was an irregularity in the proceedings; and if it was not legally competent for the court to have made such an order. Judgments may also be set aside at common law on grounds including where judgment has been granted by default. A court has power to rescind a judgment obtained on default of appearance, provided that sufficient cause for rescission has been shown. In *ex parte* applications, all material facts must be disclosed which might influence a court in coming to a decision. Non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission.

The first respondent was found not to have disclosed all material information in seeking the impugned order. The court order was also akin to expropriation of land without compensation, and was therefore in direct violation of the rights of the owners of the farms.

As the order was erroneously sought and erroneously granted in the absence of the applicants, rescission was granted.

Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd [2023] 3 All SA 458 (WCC)

Civil Procedure – Summary judgment application – Application in terms of rule 30 of Uniform Rules of Court for setting aside of summary judgment application as an irregular step – Whether Uniform Rules permit a plaintiff to simultaneously replicate in terms of rule 25(1) and apply for summary judgment in terms of rule 30(2) – Rule 32 requires plaintiff to show that its claim is clearly established and that defendant has failed to set up a bona fide defence – On a textual interpretation of rule 32, the simultaneous delivery of an application for summary judgment and a replication cannot be regarded as constituting an irregular step in the context of rule 30.

The plaintiff instituted action against the defendant to recover arrear rental due to it. After the defendant had delivered a special plea and a plea on the merits, the plaintiff replicated, and simultaneously applied for summary judgment against the defendant. In response, the defendant applied in terms of rule 30 for an order that the plaintiff's summary judgment application be set aside as an irregular step, averring that the Uniform Rules do not permit a plaintiff to simultaneously replicate in terms of rule 25(1) and apply for summary judgment in terms of rule 30(2). The defendant submitted that the Rules only permit the plaintiff to do one or the other as its next procedural step and concluded that, for those reasons, the summary judgment application fell to be set aside as an irregular step.

Held – The court in *Quattro Citrus* (*Pty*) *Ltd v F & E Distributors* (*Pty*) *Ltd t/a Cape Crops* [2021] JOL 49833 (WCC) held that a plaintiff may deliver a replication without waiving its right simultaneously to seek summary judgment, and unless the present Court concluded that *Quattro Citrus* was clearly wrong, it was bound, in terms of the doctrine of precedent, to apply it.

Rule 32, in its amended form, remains an important procedural tool with which to prevent a defendant from delaying the inevitable with a spurious defence. The onus remains on the plaintiff to show that its claim is clearly established and that the defendant has failed to set up a *bona fide* defence. Courts require strict compliance with the Rule, although technical defects in the procedure may be condoned. As pointed out by the plaintiff, rule 32 does not expressly preclude the plaintiff from delivering a replication at the same time as an application for summary judgment. It also makes no mention of any waiver of the plaintiff's right to apply for summary judgment if a further procedural step should have been taken. Not even in its original form did rule 32 contain any bar to an application for summary judgment should a further procedural step have been taken. Rule 30(2), on the other hand, does contain an express prohibition, precluding an application in terms of rule 30(1) when a further step has been taken. Litigants are prohibited from bringing an application to set aside an irregular step if the applicant has itself taken a further step in the cause with knowledge of the irregularity. Rule 30(2)(a) is intended to deal with the situation where a party has taken a further step in the cause and thereafter seeks to make application to set aside an irregular or improper step. The Court found the defendant's approach to the interpretation of rule 32, by applying the interpretive maxim *expressio unius*, *exclusio alterius*, was too narrow. The maxim is to be used with great caution, as and is only a *prima facie* indicator of what the legislator's intention is. On a textual interpretation of rule 32, the simultaneous delivery of an application for summary judgment and a replication such as in the present matter cannot be regarded as constituting an irregular step in the context of rule 30.

Confirming the purpose of rule 30, the court concluded that on the particular facts of this matter, the rule 30 application fell to be dismissed.

Maughan v Zuma (Campaign for Free Expression and others as *amici curiae*) and a related matter [2023] 3 All SA 484 (KZP)

Criminal Law and Procedure – Private prosecution – Application for setting aside of summons issued for purpose of instituting a private prosecution – Section 7(2)(a) of the Criminal Procedure Act 51 of 1977 requires that a private prosecutor must produce a nolle prosequi certificate before a summons is issued – Section 7(1)(a) requires private prosecutor to allege and prove an injury caused by accused against whom

such prosecution is aimed – Private prosecution instituted for an ulterior purpose is an abuse of court process.

In two separate applications, the respective applicants ("Ms Maughan and Mr Downer") sought the the setting aside of summons issued for the purpose of instituting a private prosecution against them by the respondent ("Mr Zuma"). Ms Maughan was a senior legal journalist who had been reporting on the criminal investigation of Mr Zuma and the numerous legal challenges and interlocutory proceedings relating to his prosecution, for almost 20 years. Mr Downer was a senior State advocate in the office of the National Prosecuting Authority, Cape Town. Mr Zuma, former President of South Africa, was the private prosecutor against both applicants.

Based on a *nolle prosequi* obtained in terms of section 7(2) of the Criminal Procedure Act 51 of 1977, Mr Zuma caused a summons in criminal cases to be issued against the applicants. Mr Downer was charged with contravening section 41(6)(a) and (b) of the National Prosecuting Act 32 of 1998. Specifically, he was accused of sanctioning the disclosure to Ms Maughan of a letter concerning his medical status and disclosing official information to another journalist ("Mr Sole"). Ms Maughan was accused of similar contraventions – and specifically disclosing to her readers and the general public the contents of the medical letter, and aiding and abetting Mr Downer.

In her application to set aside the summons, Ms Maughan contended that Mr Zuma had not obtained a *nolle prosequi* certificate from the Director of Public Prosecutions entitling him to institute the private prosecution against her; and that he lacked standing to institute such prosecution under section 7(1) of the Criminal Procedure Act 51 of 1977. Mr Downer averred that the private prosecution was unsustainable; the charge of unauthorised disclosure to Mr Sole was groundless; Mr Zuma did not satisfy the requirements for standing in terms of section 7(1)(a) of the Criminal Procedure Act; and the private prosecution was an abuse of process.

Held – The *prosequi* certificate relied on by Mr Zuma clearly referred only to Mr Downer. The certificate, when summons was issued against Ms Maughan, was not issued in respect of a criminal case against her. A second *nolle prosequi* certificate with wider ambit could not cure the absence of a *nolle prosequi* certificate pertaining to Ms Maughan at the time the summons in the private prosecution was issued as section 7(2)(a) requires that a private prosecutor must produce a *nolle*

prosequi certificate before a summons is issued. Moreover, Ms Maughan was clearly not named as an accused in the second complaint. The summons issued against Ms Maughan was therefore unlawful and was set aside.

Both applicants argued that Mr Zuma lacked standing to institute the private prosecution in terms of the provisions of section 7(1) of the Criminal Procedure Act. Section 7(1)(a) provides for private prosecution where the Director of Public Prosecutions declines to prosecute for an alleged offence committed against a "private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence". Mr Zuma failed to allege and prove an injury in the context of section 7(1)(a), and the summons in respect of both applicants was also defective on that ground.

Finally, both applicants submitted that the summons was an abuse of the court process. Where a private prosecution such as alleged in the current matter has been initiated for an ulterior purpose, it constitutes a breach of the principle of legality and amounts to an abuse of the process of the court. A prosecution which is unsustainable also constitutes an abuse of the process of court. A court is then obliged to intervene and end the abuse of process. Considering the individual grounds of alleged abuse of process, the court found Mr Zuma's private prosecution of the applicants to constitute an abuse of process as it had been instituted for an ulterior purpose. The applicants were thus entitled to the relief sought in the respective notices of motion.

Member of the Executive Council for Local Government, Environmental Affairs and Development and Development Planning, Western Cape Province v Knysna Municipality and others and a related matter [2023] 3 All SA 531 (WCC)

Local Government – Appointment of managers and acting managers directly accountable to municipal managers, in terms of section 56(1)(c) of Local Government Municipal Systems Act 32 of 2000 – Lawfulness and validity of appointments – Interpretation of section 56(1)(c) of Local Government Municipal Systems Act – A person appointed in accordance with section 56(1)(a)(ii) may only be appointed for a single period of three months, which may be extended on a single occasion for a limited period of three months and that such extension may only occur after the council, in special circumstances and on good cause shown, apply in writing to the MEC.

The Member of the Executive Council For Local Government, Environmental Affairs and Development and Development Planning, Western Cape Province ("MEC") brought an application for a declaration that the resolution by the Knysna municipal council in appointing its acting Chief Financial Officer ("CFO") was unlawful by virtue of its contravention of section 56(1)(c) of Local Government Municipal Systems Act 32 of 2000, and fell to be reviewed and set aside. In a counter-application, the municipality, its council and the CFO sought, *inter alia*, a declaration that section 56(1)(c) was unconstitutional, unlawful and invalid; that the municipal council was entitled to appoint the CFO and did not require the MEC's authorisation. In another application, the MEC sought a declaration that the resolution by the municipal council in appointing its Acting Director: Corporate Services ("DCS") was unlawful by virtue of its contravention of section 56(1)(c) and regulation 7 of the Municipal Regulations on Minimum Competency Levels, 2007, promulgated under the Local Government: Municipal Finance Management Act 56 of 2003 and was liable to be reviewed and set aside. That attracted a counter-application along the same lines as the one referred to above. The applications were consolidated.

It was common cause that the acting CFO did not meet the prescribed minimum competency requirements. The municipality argued however, that the prescribed minimum competency requirements were not applicable to the position of an acting CFO. The DCS also did not have the required minimum seven years' experience, but the municipality disputed that regulation 7 of the Competency Regulations were applicable to the position.

The MEC interpreted section 56(1)(c) to mean that a person appointed in accordance with section 56(1)(a)(ii) may only be appointed for a single period of three months, which may be extended on a single occasion for a limited period of three months and that such extension may only occur after the council, in special circumstances and on good cause shown, applied in writing to the MEC. The municipality's interpretation was that a person appointed in terms of section 56(1)(a)(ii) may be appointed and re-appointed without any limitation or restriction as long as each such appointment was for a period of three months or less. It contended that only when an acting appointment exceeded three months, was it required to apply in writing to the MEC for an extension.

Held – The interpretation of section 56(1)(c) was central to determining the validity of both appointments. The starting point would be the plain words of the section, giving them their ordinary meaning, while remaining cognisant of the fact that statutory provisions must always be interpreted purposively, be properly contextualised and must be interpreted consistently with the Constitution. The municipality's interpretation would allow the provisions of section 56(1)(c) to be circumvented and would render the section superfluous. In terms of sections 56(5) and 56(6), the MEC had a supervisory and enforcement role in respect of permanent appointments made in terms of section 156(1)(a) and was not a passive observer to the appointment process. The municipality's interpretation deprived the MEC of that role.

Section 56, which regulated the appointment of managers and acting managers directly accountable to municipal managers and section 54A, which regulated the appointment of municipal managers and acting municipal managers, were worded almost identically. The Constitutional Court's interpretation of section 54A to mean that a person may be appointed for one three-month period, which may be extended on a single occasion, upon written application to the MEC in special circumstances and on good cause shown, provided support for the interpretation of section 56(1)(c) advanced by the MEC. The MEC's applications were granted.

The municipality's constitutional challenge based on an alleged encroachment on its sphere of influence was dismissed. None of its contentions were sustainable and the counter-applications were dismissed.

Pentagon Financial Solutions (Pretoria) (Pty) Ltd and others v Basson and others [2023] 3 All SA 560 (WCC)

Civil Procedure – Discovery in terms of rule 35 of the Uniform Rules of Court – Rule 30A providing for giving of notice to defaulting party, of intention to apply for an order compelling compliance or for the claim or defence to be struck out – In terms of rule 35(12), a party who seeks such documentation has the burden of adducing evidence as to the relevance of the document, and to show that the document is not privileged and can be produced.

The issue of the fair market value of the first respondent's shares in the first to third applicants was referred to arbitration. After the publication of the penultimate award by the arbitrator, which award was not in first respondent's favour, the first respondent, suspecting the applicants of having committed fraud, launched an application for a forensic audit. An annexure to the notice of motion comprised the list of documentation which he stated was necessary for the conduct of the forensic audit. After the arbitration had been running for more than three and a half years, the first respondent indicated that he intended to avoid the consequences of the arbitration. That led to the main application in this matter, wherein the applicants sought declaratory relief.

The respondents launched an application in terms of rule 35(13) of the Uniform Rules of Court, for an order allowing the discovery of certain documentation. When the applicants failed to respond by the specified date, an application was brought in terms of rule 30A to compel a response to the rule 35(12) notice.

Held – Rule 35(12) provides that any party to a proceeding may at any time before the hearing, deliver a notice to any other party in whose pleadings reference is made to any document or tape recording, to produce such document or recording for inspection and to permit the making of a copy or transcription thereof. Alternatively, the receiving party must state within ten days whether it objects to such production and the grounds therefor. In the event of non-compliance, rule 30A provides for the giving of notice to the defaulting party, of intention to apply for an order compelling compliance or for the claim or defence to be struck out. In terms of rule 30A(1), the court must first determine whether there has been non-compliance with the rule 35(12) notice. While there did not appear to be any onus on a party in the context of a rule 30A application seeking documents in terms of rule 35(12), a party who seeks such documentation has the burden of adducing evidence as to the relevance of the document, and to show that the document is not privileged and can be produced.

The first of the two items sought by the respondents was a list of each shareholder (the "shareholders book") referred to in the founding affidavit in the main application. The applicants argued that the shareholders book was not a document but rather a concept, and was not an existing list, whether electronic or on paper. Our courts have held that electronically stored information is discoverable under rule 35 procedures. In this matter, the "books" as they existed at various relevant dates were documents for the purposes of rule 35, and could be produced.

Based on a further argument by the applicants, the next question was whether the book of clients was relevant. The primary indicator of relevance were the references to the book in various paragraphs of the founding affidavit in the main application. Regarding further documents requested, the court stated that while the incidence of the onus (in the full sense) in relation to relevance in applications under rule 35(12) has not been finally settled, a party seeking to be relieved of the obligation to produce a document to which it has referred must at least set up facts in denying relevance.

The court's discretionary power in terms of rule 35(13) to direct that all the provisions of rule 35 relating to discovery shall apply to applications, should be exercised only in exceptional circumstances. Taking the relevant factors into account, the court ruled that the nature of the main application constituted an exceptional case for the purposes of discovery at the present stage.

The rule 30A application thus succeeded.

Titan Asset Management (Pty) Ltd and others v Lanzerac Estate Investments (Pty) Ltd and another [2023] 3 All SA 589 (WCC)

Civil Procedure – Claims for cancellation or rescission of contracts allegedly induced by fraud – Burden resting on an excipient to establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable – Excipient must satisfy court that conclusion of law for which plaintiff contends cannot be supported on every interpretation that can be put upon the facts.

Civil Procedure – Claims for cancellation or rescission of contracts allegedly induced by fraud – Objection relating to non-joinder – Where pleading concerned disclosed a cause of action but also suggested that the cause of action should not be heard until an absent party has been joined, then the apparent non-joinder is not appropriately raised by exception but must be specially pleaded.

Contract – Claims for cancellation or rescission of contracts allegedly induced by fraud – Whether cancellation and rescission were precluded by the terms of the contracts – Effect of an innocent party resiling from a contract on that ground is that the agreement is regarded as being void ab initio, and the innocent party is accordingly not held bound by any of its terms.

In their action against the defendants, the plaintiffs referred to an agreement between the second plaintiff ("Wiese") and the first defendant ("Jooste"), purportedly representing a consortium of unnamed investors. In terms of the agreement, the interests of the plaintiffs in various businesses, assets and entities known as "Lanzerac" would be acquired by the consortium at their agreed combined value of R220 million in exchange for a stipulated number of shares in "Steinhoff Intl" of equivalent value. According to the plaintiffs, Jooste knew at the time that Wiese reasonably believed that the price at which the shares in Steinhoff Intl were trading fairly reflected their market value, and also knew that in actual fact Wiese was misled by the fraudulently misstated value of such shares in entering into the transactions. Jooste's representation that he was acting on behalf of a consortium was also said to have been a falsehood in that he was really acting on his own behalf to acquire Lanzarac through an indirect interest in the first defendant, of which he was at all material times the controlling mind. On the basis that the contracts had been induced by Jooste's fraud, the plaintiffs sought, *inter alia*, cancellation thereof and restitution of the assets transferred to Jooste by each plaintiff.

The present proceedings involved the adjudication of three exceptions which Jooste raised to the particulars of claim.

Held – The purposes of an exception are to weed out claims that should not proceed to trial because a cognisable claim or defence has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing. The burden rests on an excipient to establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts, no cause of action may be made out. The excipient must satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.

The first exception to be addressed was that cancellation and rescission were precluded by the terms of the contracts. However, the plaintiffs alleged that they had resiled from the contracts because they had been induced by Jooste's fraudulent non-disclosure. The effect of an innocent party resiling from a contract on that ground is that the agreement is regarded as being void *ab initio*, and the innocent party is accordingly not held bound by any of its terms. Even were the relevant contractual

terms treated as exclusion clauses, they would not be enforceable in the face of an act of cancellation by the innocent party based on fraud. The exception was dismissed.

The next exception averred that the claims for rescission and restitution were invalid because the plaintiffs on their pleaded case were unable to tender or make restitution of what they obtained in the transactions. As the plaintiffs had unmistakeably pleaded a tender, the issue was one relating to the adequacy of such tender. That was held to be an issue for trial. Jooste was entitled only to the fraud-tainted Steinhoff Intl shares given in consideration for the sellers' interests in the Lanzerac enterprise, or an appropriate substitute. If, as pleaded, the value of those shares was negligible, the pleaded tender was not obviously inadequate. The exception was similarly dismissed.

In the final exception, Jooste took the point that the plaintiffs' claims could not be competently adjudicated without one of the companies which had been a party to the sale to the defendants, being joined as a party. Non-joinder is ordinarily a matter for a dilatory plea rather than an exception. Where, as in the current matter, the pleading concerned disclosed a cause of action but also suggests that the cause of action should not be heard until an absent party has been joined, then the apparent non-joinder is not appropriately raised by exception but must be specially pleaded. The last exception was therefore also unsustainable.

END-FOR NOW