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South African Law Reports October 2023

ARENA HOLDINGS (PTY) LTD t/a FINANCIAL MAIL AND OTHERS v SOUTH AFRICAN REVENUE SERVICE AND OTHERS 2023 (5) SA 319 (CC)

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

Revenue — Tax administration — Confidentiality of taxpayer information in ss 67 and 69 of TAA and prohibition on disclosure of tax records in s 35(1) of PAIA — Amounting to absolute prohibition when less restrictive means available — Unjustifiable limitation of constitutional rights to information (s 32) and freedom of expression (s 16(1)) — Interim reading-in ordered broadening 'public-interest override' in s 46 of PAIA — Tax Administration Act 28 of 2011, ss 67 and 69; Promotion of Access to Information Act 2 of 2000, ss 35(1) and 46.

This case concerned the confidentiality of tax records, the prohibition on their disclosure and the related question of whether it was constitutionally permissible for it never to be possible to disclose such records in the public interest.

Background

Early in 2019 Mr Thompson (the third applicant), a financial journalist with the *Financial Mail*, a media house owned by first applicant (Arena), made an application to the first respondent, the South African Revenue Service (Sars) — in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) — to gain access to the tax records of ex-President Zuma, the second respondent. The application was premised on published allegations of 'credible evidence' that, while he was President, Mr Zuma was not tax- compliant. Sars refused the application, as well as a subsequent internal appeal, on the basis that Mr Zuma was entitled to confidentiality under ss 34(1) and 35(1) of PAIA and s 69(1) of the Tax Administration Act 28 of 2011 (the TAA).

The challenged provisions were:

- Section 69(1) of the TAA, which prohibits Sars officials from disclosing taxpayer information to persons who are not Sars officials, except in certain limited cases; ss 67(3) and 63(4) which reinforces the prohibition; and s 69(2) which provides for some exceptions to the general prohibition.
- Section 35(1) of PAIA, which provides that a request for information held by Sars for the purpose of enforcing legislation concerning the collection of revenue, must be refused if that information relates to a person other than the requester.
- Chapter 4 of PAIA, which contains extensive provisions that provide for the mandatory protection of various categories of information from public disclosure; and s 46 of PAIA which provides for mandatory 'public-interest override' obliging the disclosure of information that would otherwise have been the subject of protection.

In the High Court

In response to Sars' refusal, Arena and Mr Thompson, together with AmaBhungane Centre for Investigative Journalism NPC (AmaBhungane) as second applicant, launched a High Court application challenging the constitutional validity of s 35(1) of PAIA. They sought a declaration that PAIA and the TAA were unconstitutional to the extent that they did not permit access to a taxpayer's tax information under PAIA by a requester other than the taxpayer concerned, even if it was clearly in the public interest that this information should be disclosed; reading-in relief that would extend the limited public-interest exception in s 46 of PAIA; and an order granting access to Mr Zuma's tax records.

In addition to Sars and Mr Zuma, the other three respondents were the Minister of Justice and Correctional Services, the Minister of Finance and the Information Regulator. They contended that voluntary disclosure and taxpayer compliance were inextricably linked to or dependent on the taxpayer secrecy regime, and that the relief sought would be an undue limitation of taxpayers' rights to privacy.

The High Court agreed with the applicants, holding that s 35 of PAIA contained an absolute prohibitions of disclosure of taxpayer information, which together with s 69 of the TAA unjustifiably limited the right of access to information provided for in s 32 of the Constitution; and also that the right to privacy and secrecy relied on by Sars and the Ministers did not fulfil the limitation test as set out in s 36 of the Constitution. It thus declared the impugned provisions invalid and unconstitutional, and ordered the requested interim 'reading-in' to grant Parliament an opportunity to remedy the invalidity, and also the release of Mr Zuma's tax records.

The present case: the confirmation application in the Constitutional Court

This was opposed by the same respondents as in the High Court, on mainly the same grounds. At issue was whether the impugned provisions infringed the right of access to information; and if so, whether the limitation was justified in terms of s 36 of the Constitution; and if not, what the appropriate remedy was.

Held, by the minority

The first judgment — by a minority of four out of nine judges — would have dismissed the confirmation application (see [122]). It based its finding, that the impugned provisions of PAIA and the TAA passed the limitation test, on the bases, inter alia, that prohibition of access to taxpayer records in s 35(1) read with s 46 of PAIA, was not absolute (because of the exceptions found in the TAA); and that the limitation was justified because taxpayer compliance was dependent on the assurance of

confidentiality of taxpayer information, which was what the impugned provisions sought to do. (See [127].)

***Held, by the majority**[*]*

The legitimate communal interests and the rights of others must moderate the outer bounds of individual autonomy. This involved a balance to be struck between competing rights — the right to privacy in respect of taxpayer records against the communal interest and the claimed right to access those records when they provide evidence of serious criminality or a risk to public health or safety. (See [124], [134].)

The conclusion in the minority judgment that the prohibition on access to taxpayer records found in s 35(1) read with s 46 of PAIA was not absolute, was incorrect; s 35(1) was totally immunised from the s 46 override that applied to all other categories of information enjoying protection in terms of ch 4 of PAIA. The difficulty with the minority judgment's proposition that the s 35(1) PAIA prohibition was not absolute, was that it impermissibly sought to import the TAA exceptions into PAIA to support the conclusion. The TAA was not the legislation that provided for a right of access to information and did not purport to do so. The prohibitions and exceptions contained therein, particularly those reflected in s 67(3) and (4) and s 69, were primarily related to the administration of the tax system and the work of other organs of state — they were not prohibitions on any general right of access to information. The 'exceptions' in the TAA were not a partial allowance of the constitutional right that the public has of access to information held by the state; they, in fact, did not afford any public right of access to information. There was nothing in the language of the TAA that suggested that those exceptions were anything more than limited and fit-for-purpose exceptions. Given that the TAA exceptions were totally disconnected from the operation of PAIA, there could be no basis to suggest that those exceptions had the effect of rendering the prohibition on disclosure found in s 35(1) anything other than absolute. (See [125], [148], [154] – [158], [162].)

This court had confirmed that an absolute prohibition was not sustainable where less restrictive means were available to achieve the purpose of the limitation. That was precisely the effect that ss 35(1) and 46 of PAIA had; they closed the door firmly in the face of any balancing of rights when it came to taxpayer information. It must follow that the prohibition could not withstand constitutional scrutiny. An approach of absoluteness could not be reconciled with the proper constitutional approach to competing rights; it was not open to a consideration of any other means to achieve the

purpose of the limitation of the right. Taxpayer confidentiality must not be elevated to some sacrosanct place where no exception to enable public access to it was possible. There could be little justification in seeking to defend the absolute prohibition in s 35(1) in the face of the various exceptions to confidentiality found in the TAA. There was, in addition, no evidence in support of the conclusion that absolute confidentiality was a precondition for taxpayer compliance. It was difficult to conceive any reasonable basis to hold that taxpayer information could not be subject to the 'public-interest override' in circumstances where the override was potentially available to justify the disclosure of information that may relate to the life and the safety of an individual, the defence or the security interest of the country or the private information of a third party (including their medical records), all of which may happen in terms of s 46. It must therefore follow, on this basis alone, that s 35(1) could not survive constitutional scrutiny (See [165], [170] – [173], [177], [179]).

As for the minority judgment's justification of the limitation, while some limitation may be justified, no case had been advanced for an absolute limitation. PAIA contained substantive and procedural provisions relating to the prohibition on disclosure and the circumstances under which the 'public-interest override' will operate. All of these collectively increased the reliability of the system of mandatory or discretionary protection and its counterpart, mandatory disclosure; it also enhanced the likelihood of an informed and well-considered decision emerging. The s 46 override provided a mechanism that was not only less restrictive than an absolute prohibition, but was one that was narrowly constructed with substantial checks and balances. It must follow that ss 35(1) and 46 of PAIA as well as ss 67(4) and 69(2) of the TAA were unconstitutional to the extent found by the High Court. Accordingly, the High Court's order of invalidity would be confirmed. As for the appropriate remedy, the High Court's limited reading-in would serve as an adequate and constitutionally compliant legal framework in the interim. (See [146], [194] – [195], [199].)

ASHEBO v MINISTER OF HOME AFFAIRS AND OTHERS 2023 (5) SA 382 (CC)

Immigration — Refugee — Asylum seeker — Illegally entered or stayed in country — Need show good cause for illegal entry or stay as precondition to being permitted to apply for asylum — Individual may be detained in period before good cause shown

— Refugees Act 130 of 1998, s 4(1); Refugees Regulations, reg 8; Immigration Act 13 of 2002, ss 1, 23, 34 and 49(1).

Applicant, a foreign national, had entered the country illegally and lived here for a year, when he was arrested and detained by immigration officials. He then expressed a wish to apply for asylum, but was kept in detention and not taken to a Refugee Reception Office in order to make the application. This caused him to urgently apply to the High Court for interdiction of his deportation until his status was determined, and for orders that his detention was unlawful, that he had a right to remain in South Africa for 14 days to allow him to approach a Refugee Reception Office, and that he should be immediately released. He failed, though, with the High Court striking the matter from the roll for lack of urgency (see [1]).

Here he urgently applied to the Constitutional Court for its leave to appeal directly to it, which it granted (see [1], [3] – [5] and [57]). The first issue was whether delay in expressing a wish to apply for asylum barred the making of such an application.

Held, on established authority, that while delay impacted credibility, it did not disentitle the individual concerned from making the application (see [28] – [29]).

The second issue sprung from the amended legislation and regulations. Those, as amended, included s 4(1) of the Refugees Act 130 of 1998, and reg 8 of the Refugees Regulations of 2018.

Section 4(1) provides that '(an asylum seeker does not qualify for refugee status . . . if a Refugee Status Determination Officer has reason to believe he . . . *(h)* having entered the Republic, other than through a port of entry . . . fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry . . .'.

Regulation 8 states that '(a)ny person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa . . . must prior to being permitted to apply for asylum, show good cause for his . . . illegal entry or stay in the Republic . . .'. (See [34, [38].)

Considering these provisions, the court commented that their effect was that only if an illegal foreigner showed good cause for his illegal entry or stay, would he be allowed to apply for asylum, and further that this position did not offend the principle of non-refoulement (see [43] – [44]).

This then raised the issue of whether an illegal foreigner could be detained in the period before he had shown good cause (see [46]).

Held, that he could be (see [50]).
The position then was that if a detained illegal foreigner expressed a wish to apply for asylum, the state was not obliged to release him, but was required to
facilitate an opportunity for the showing of good cause, which could, practically, entail taking the individual to a Refugee Reception Office, or bringing the requisite officials to the place of detention. And in the period before such opportunity was realised, the illegal foreigner could not be deported (see [59] and [61]).
Ordered that the High Court's order be set aside and replaced with an order declaring that the applicant could not be deported until he had had an opportunity of showing good cause, and if such was shown, until his application for asylum had been finally determined. Moreover, the relevant respondents were directed to take all reasonable steps within 14 days of the order to facilitate such opportunity, failing which the applicant had to be released from detention forthwith (see [61]).

COOPER AND ANOTHER NNO v CURRO HEIGHTS PROPERTIES (PTY) LTD 2023 (5) SA 402 (SCA)

Land — Sale — Contract — Formalities — Writing — Failure to record terms of subdivision in writing.

Respondent and appellants agreed to respondent buying a block of land, and respondent and appellants signed a written agreement to this effect. Later, however, and before signature of the transfer documents, respondent realised that part of the land extended into a neighbouring development which respondent had no desire to purchase.
Respondent and appellants then orally agreed to exclude that part of the land from the sale and that they would subdivide the affected portion. Notwithstanding this, respondent failed to sign the transfer documents and ultimately appellants made demand that respondent do so by a certain time. When the specified period elapsed without respondent's performance, appellants cancelled the agreement.
Appellants then applied to the High Court for a declarator that the agreement was void for non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981 (the material

terms concerning exclusion and subdivision not being in writing as required), and for dissensus as to the merx (appellants intending to sell the whole of the property, respondent intending to buy the property less the excluded portion) (see [15]).

The court, however, disagreed, finding that there was consensus and compliance, and that appellants had not validly cancelled the contract. It gave leave to appeal to the Supreme Court of Appeal (SCA).

The SCA observed that, since the matter was brought on motion, it was obliged to adjudicate on the facts in respondent's answering affidavit, and that respondent's version was that at the time of the sale it had intended to buy only the truncated property, while appellants had intended to sell the whole. Accordingly, there had been no consensus as to what was being sold, which meant that there was never any agreement — it was null and void ab initio (see [12] – [14]).

Secondly, if appellants and respondent had orally agreed to subdivide, they had not put this in writing, where subdivision was material and so required to be in writing to comply with the Act, with non-compliance rendering an agreement void ab initio (see [15] – [17] and [20]).

Appeal upheld, the High Court's order set aside, and replaced with an order declaring the sale agreement void ab initio (see [21]).

LEGAL PRACTITIONERS FIDELITY FUND v MARSHALL 2023 (5) SA 409 (SCA)

Attorney — Fidelity Fund — Entrustment — Whether including funds deposited for safekeeping — Attorneys Act 53 of 1979, s 26*(a)*.

Marshall was a client of Spencer, an attorney. Marshall paid a sum into Spencer's trust account and later discovered that he had misappropriated it. This caused Marshall to claim the moneys from the Legal Practitioners Fidelity Fund on the premise that her situation fell within the scope of s 26*(a)* of the Attorneys Act 53 of 1979. Section 26*(a)* provides, inter alia, that 'the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of . . . theft committed by a practising practitioner . . . of any money . . . entrusted by . . . such persons to him . . . in the course of his practice . . .'.

The Fund rejected the claim on the basis that there was no 'entrustment'. This led Marshall to institute proceedings in the High Court, where she obtained an order that the moneys had to be paid to her. The Fidelity Fund responded with an application for leave to appeal, which was refused,

causing the Fund to ask the Supreme Court of Appeal for its leave to appeal to the full court, which was granted. The full court, however, dismissed the appeal, causing the Fidelity Fund to seek and obtain from the Supreme Court of Appeal its special leave to appeal to it (see [2] – [3] and [6]).

The Fidelity Fund's case there was that Marshall had paid the money into Spencer's trust account in order to hide them from creditors (ie for safekeeping) and, consequently, that this was a situation of a deposit rather than an entrustment. An ancillary contention was that a deposit was an agreement in terms of which a thing was delivered to a depository for safekeeping returnable on demand; and an entrustment was to *(a)* place in possession of a thing, *(b)* subject to a trust (which connoted that the person entrusted was bound to deal with the thing concerned for the benefit of a third party) (see [4] and [7]).

Held, with recourse to dictionaries, that the concepts of 'deposit' and 'entrustment' were not necessarily distinct and separate (see [9]); with recourse to case law, that entrustment was broader than 'impress[ing] with a trust in the technical legal sense' (see [10]); and, with reference to a textbook, that, even were the situation equated to one of a trust (ie Marshall as the trust's founder paying moneys over to Spencer as trustee), the founder was entitled to be the sole beneficiary (see [15]).

Held, further, and upholding the decision of the full bench, that 'the concept of entrustment for purposes of s 26*(a)* did not connote that the person entrusted [was] bound to deal with the property or money concerned for the benefit of others, in the sense that it does not include moneys deposited by a depositor such as the respondent' (see [11]); and, correspondingly, that Marshall's deposit was an 'entrustment' within the meaning of s 26*(a)* (see [19]).

Appeal dismissed (see [20]).

SECHOARO v KGWADI 2023 (5) SA 420 (SCA)

Contract — Consensus — Mistake — Justus error — Party A and party B concluding oral agreement and A later knowingly preparing differing written version for B's signature — B too ill to read agreement, but signing nonetheless.

Spouses PK (respondent) and IK acquired an immovable property. When they later divorced, they agreed verbally that each would be entitled to a 50% share in the value of the property, and that IK would pay over that amount to PK. IK never did so.

About 20 years later, PK was seriously injured in a motor vehicle accident and admitted to hospital. She was in constant pain and sedated. At this time IK caused an agreement to be drafted and conveyed to PK in hospital. This she assumed to be a recordal of the oral agreement and, lacking the strength to read it, signed it without doing so. Unbeknownst to her, the document in fact recorded that the property would be awarded solely to IK (see [5]).

IK later died and his executor and PK sold the property to a third party, and a while later still the conveyancing attorneys informed PK that she was not entitled to her 50% of the property's value. This on account of the agreement she had signed (see [6]).

This caused PK to challenge the agreement in the High Court, contending that her mistake in signing the agreement without reading it was reasonable, and that she should not be held to the contract (see [7] – [8]).

The High Court agreed, finding it improbable that PK could have signed with the intention to be bound, and ordering that the agreement was unenforceable and that the conveyancers were to pay PK 50% of the property's proceeds (see [10] – [11]).

RS — whom IK married after his divorce, and the respondent in the High Court — applied to the court for its leave to appeal, but this was refused, and RS then applied to the Supreme Court of Appeal for its leave to appeal to it (see [12]).

There, the issue was whether PK's mistake (error) in assenting to the agreement without reading it was reasonable (justus). This where the common law provides that a mistake induced by a misrepresentation is a reasonable one (see [16]).

Held, that the facts showed that IK had knowingly caused the document to be prepared and conveyed to PK for her signature, and that accordingly her mistake was reasonable, and she was not bound to the contract (see [16], [19] – [20] and [22]).

Leave to appeal refused (see [23]).

ELOFF LANDGOED (PTY) LTD v MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT AND OTHERS 2023 (5) SA 427 (GP)

Environmental law — Protection of environment — Environmental authorisation — Conditions — Condition attached to authorisation must be true condition, not method of procuring further information material to decision to grant authorisation — Authorisation set aside where it duplicated 'conditions' formulated by mine and included environmental impact report — National Environmental Management Act 107 of 1998, s 24.

Environmental law — Protection of environment — Environmental authorisation — Decision to issue must involve lawful and rational assessment of likely impact of authorised activities — National Environmental Management Act 107 of 1998, s 2(4)(i) and s 2(4)(ii).

Minerals and petroleum — Mine — Coal mine — Environmental authorisation — Conditions — Practitioner responsible for compiling environmental impact report softening view that approval should not be granted by setting 'conditions' — Conditions duplicated in government approvals — Approvals set aside on review for being improper and irrational.

Farm owner Eloff approached the Johannesburg High Court for the setting-aside of an environmental authorisation under s 24 of the National Environmental Management Act 107 of 1998 (NEMA) allowing an open-cast coal mine to be excavated on neighbouring land, because it was fundamentally irrational. Section 2(4)(i) of the NEMA required that the 'social, economic and environmental impacts of [the envisioned] activities . . . must be considered . . . and decisions must be appropriate in the light of such consideration'. Section 2(4)(ii) mandated a 'risk-averse and cautious approach' by decision-makers.

The practitioner who compiled the environmental impact report (EIA report) on behalf of the mine (the third respondent) initially opposed authorisation, but later reversed his stance, opting for approval, provided that certain 'conditions' suggested by the mine were adhered to. The EIA report was based on various subsidiary reports, one of which concluded that the economic impact of the mine could only be justified if the affected land was returned to premining levels of agricultural productivity once the mine closed.

Six conditions were suggested, the first of which was that an agronomic assessment should be performed. The practitioner's sentiment on authorisation nevertheless remained tepid (see [18]). But, in the event, the responsible regional manager, Department of Mineral Resources and Energy (the second respondent), granted authorisation for mining to proceed subject to the suggested conditions. The responsible Minister (the first respondent) dismissed Eloff's subsequent appeal against the authorisation.

Held on review

A decision to issue an environmental authorisation under NEMA was 'appropriate' in the sense intended in s 2(4)(i) if it involved a lawful and rational assessment of the likely impact of the envisioned activities. The imposition of conditions on the granting of an authorisation was one of the ways in which NEMA could give effect to the 'risk-averse and cautious approach' required by NEMA.

The first condition imposed in the present matter was not a true condition in the sense of something the mine had to do before it could proceed with mining activities. In constituted, instead, a further issue to be explored *before* authorisation. Since this was not picked up by either the practitioner or the regional manager, neither the regional manager nor the Minister had 'considered, assessed and evaluated' the 'social, economic and environmental impacts' of authorising the development consistently with the required 'risk-averse and cautious' approach. (See [19] – [27].)

The decisions in question were also irrational. The purpose of the first condition was not to mitigate the environmental, economic and social impact of the mine, but rather to assess what the impact of the mine might be, which was not a condition at all. Its characterisation as a condition for authorisation rather than essential material to be considered *before* authorisation was issued, fatally undercut the rationality of the regional manager and Minister's decisions. (See [28].)

Since neither decision was rationally connected to the information before either decision-maker, to the reasons that either of them gave, or to the purposes of NEMA that the decisions were meant to promote, they fell to be set aside. (See [29].)

The court therefore reversed the dismissal of the appeal against the decision to allow mining and referred the matter back to the regional manager for further consideration. (See [41].)

INGENUITY PROPERTY INVESTMENTS (PTY) LTD v IGNITE FITNESS (PTY) LTD 2023 (5) SA 439 (WCC)

Practice — Judgments and orders — Summary judgment — Time for — Under amended rules of court — Whether amended rule 32 allowed plaintiff to deliver replication simultaneously with application for summary judgment — Rule, properly interpreted, allowing it — Uniform Rules of Court, rule 32.

This was an application before the Western Cape High Court in terms of Uniform Rule 30 for an order that the summary judgment application brought by the respondent (as plaintiff) against it (as defendant) be set aside as an irregular step. The question in dispute was *whether the amended Uniform Rule 32 allowed a plaintiff to deliver a replication simultaneously with an application for summary judgment.* The plaintiff in this matter had applied for summary judgment within the prescribed time period as set out in the amended Uniform Rule 32, dealing with summary judgments, that is, within 15 days after the defendant had delivered its plea to the plaintiff's summons. *Simultaneously therewith*, however, the plaintiff had also *delivered a replication* to the defendant's plea, also within the prescribed time period in terms of the rules, ie within 15 days after the delivery of the plea (rule 25). In the present application, the defendant argued that the plaintiff's summary judgment was irregular for the following reasons: Subsequent to a defendant delivering a plea, the Uniform Rules of Court did not permit a plaintiff to replicate in terms of rule 25(1) *and* make application for summary judgment in terms of the amended rule 32. Instead, the rules only permitted the plaintiff to do one or the other as its next procedural step. Accordingly, if a plaintiff replicated after its receipt of the defendant's plea — as here — then it was consequently precluded from making application for summary judgment. The court was faced with conflicting authority: A judgment of the Pietermaritzburg Division of the KwaZulu-Natal High Court (*Arum Transport CC*), on which the defendant had relied, had held that, if a plaintiff took a further procedural step after delivery of its plea, like a replication, it waived its right to apply for summary judgment. However, a previous judgment of the Western Cape High Court (*Quattro Citrus*), also concerning a rule 30 application, had allowed an application for summary judgment that had been delivered simultaneously with a replication. The court had held that the

delivery of a replication may be effected without waiver of a plaintiff's right to apply for summary judgment, as long as both the replication and the application for summary judgment were delivered timeously and in accordance with the rules of court. The present court noted that, in line with the principles of judicial precedence, it was bound by *Quattro Citrus*, *unless it was clearly wrong* (see [10] – [11]).

The court held that the decision in *Quattro Citrus was not clearly wrong* (see [12]): Uniform Rule 32, the court held, properly interpreted, allowed the simultaneous delivery of a replication and an application for summary judgment (see [12]). In expressing preference for such an interpretation, the court had regard to the following:

- The *wording* of rule 32 in its amended form did not exclude an application for summary judgment being brought together with, or even after, delivery of a replication. That such an exclusion was not intended was strengthened by the fact that the time for the delivery of a replication, in terms of rule 25, coincided with the time period within which a summary judgment application had to be brought. The only limitation on applying for summary judgment was the time period provided for in rule 32. (See [32] and [36].)
- Having regard to the relevant *context*, the court noted that the amendments to rule 32 followed an investigation and report by the Superior Courts Task Team of the Rules Board for Courts of Law (the Task Team). Nothing in the Task Team's report suggested that a plaintiff should be non-suited if it delivered a replication simultaneously with its application for summary judgment. The Task Team's statement, that a matter in which a replication was delivered 'was probably one ill-suited to summary judgment', merely reflected its concern that the expeditious nature of the summary judgment ought not to be impeded. Obviously, whether the case in question was ill-suited for summary judgment would depend on the particular facts and circumstances. The Task Team was, however, ultimately silent on whether a plaintiff may deliver a replication and still apply for summary judgment. (See [43] and [76].)
- Having regard to the requirement that a provision ought to be interpreted in an objective and sensible manner, the court noted that rule 32(2)*(b)* required a plaintiff, in the affidavit it had to file in support of its application for summary judgment, *to explain briefly why the defence as pleaded does not raise any issue for trial* (see [45] and [46]). Effectively, a replication, serving as it did also as a response to defences raised in the plea, and explaining why they did not raise triable issues, performed

similar function to the summary judgment affidavit. As such, there was no reason why a plaintiff should be precluded from delivering its replication simultaneously with its application for summary judgment and incorporating by reference the allegations in the replication. (See [50].)

The court concluded that there was nothing irregular about the plaintiff's application for summary judgment. It accordingly found that the rule 30 application fell to be dismissed (see [116] and [117]).

MAUGHAN AND ANOTHER v ZUMA 2023 (5) SA 467 (KZP)

Abuse of process — Strategic litigation against public participation (SLAPP) — What constitutes — Private prosecution brought by criminal accused (ex- RSA President) against journalist covering criminal proceedings against him, with ulterior purpose, namely to intimidate and harass her, and prevent her from performing her duties — Such private prosecution amounting to SLAPP suit, which court duty-bound to put stop to.

Abuse of process — What constitutes — Private prosecution — Private prosecution brought by criminal accused (ex-RSA President) against lead prosecutor in case against him — Brought with ulterior purpose, namely to delay criminal proceedings against private prosecutor, and to prevent lead prosecutor from carrying out duties — Private prosecution in such case amounting to abuse of process.

Abuse of process — What constitutes — Private prosecution — Private prosecution brought by criminal accused (ex-RSA President) against journalist covering criminal proceedings against him — Brought with ulterior purpose, namely to intimidate and harass journalist, and prevent her from performing her duties — Breach of right to freedom of expression, specifically press freedom, and public's right to receive such information — Private prosecution amounting to abuse of process.

The applicants in the present two matters heard in the Pietermaritzburg High Court were William John Downer (Mr Downer) and Karyn Maughan (Ms Maughan). The respondent in each was Jacob Zuma (Mr Zuma), former president of the Republic of South Africa, and the subject of a criminal prosecution currently before the Pietermaritzburg High Court on charges of corruption, money-laundering and fraud.

Mr Downer was senior counsel and senior state advocate stationed at the offices of the National Prosecuting Authority, Cape Town, and had been the lead prosecutor since the inception of the litigation involving Mr Jacob Zuma, which culminated in his criminal prosecution. Ms Maughan was a senior legal journalist employed by News24 and had been reporting on the criminal investigation of Mr Zuma by the Scorpions, his subsequent indictment, and the numerous legal challenges and interlocutory proceedings relating to Mr Zuma's prosecution for almost 20 years. In the present applications the applicants sought, on the grounds of, inter alia, abuse of process of court, the setting-aside of the summons that Mr Jacob Zuma, in the capacity of 'private prosecutor', had caused to be issued out of the Pietermaritzburg High Court against them; as well as an order interdicting Mr Zuma from reinstituting or taking any further steps pursuant to the said private prosecution. The charges brought against Mr Downer were that he, in breach of s 41(6)*(a)* and *(b)*, read with s 41(7), of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), had sanctioned the disclosure by Advocate Andrew Breitenbach SC to Ms Maughan of a letter containing confidential medical information pertaining to Mr Zuma, written by Brigadier General (Dr) Mdutywa (Mdutywa) of the South African Military Health Service (counts 1 and 2); and that he disclosed official information

pertaining to the pending prosecution of Mr Zuma to a journalist, Mr Sam Sole (count 3). As regards Ms Maughan, the charges were that she had disclosed to News24 readers and/or the general public, without the requisite permission, the contents of the aforesaid letter written; and that she had aided Downer in contravening the NPA Act.

The court ultimately found that the summons against Mr Downer and Ms Maughan was unlawful and ought to be set aside. As far as it related to Ms Maughan, for one, Mr Zuma had not obtained a nolle prosequi certificate from the Director of Public Prosecutions, thereby failing to meet the requirements of s 7(2)*(a)* of the Criminal Procedure Act 51 of 1977 for instituting a private prosecution against Ms Maughan. (See [39] – [52].) Further, and this held in respect of both Mr Downer and Ms Maughan, Mr Zuma had failed to establish the necessary standing to institute a private prosecution, in that he had failed to prove, as required by s 7(1)*(a)* of the CPA, that he had any 'substantial and peculiar interest' arising out of an 'injury' suffered as a result of Ms Maughan obtaining and publishing the letter in question, or as a result of Mr Downer's conversation with Mr Sole. (See [53] – [63].)

However, the main ground on which the court found that the summons was unlawful and should be set aside was that it constituted an 'abuse of process' of court. This ground formed the focus of the court's attention, and the reasoning of the court follows:
Applicable legal principles: The court confirmed that a public prosecution that was brought for an 'ulterior' or 'improper' purpose, that is, for reasons *other than bringing the accused person to justice*, constituted a breach of the principle of legality, and amounted to an 'abuse of process'. A court was duty-bound in such circumstances to intervene and put an end to such abuse. (See [77], [85], [152] and [157].) In assessing whether or not a private prosecution constituted an abuse of the process, a court may have regard to the prospects of success in the prosecution (see [81]), the court held; a prosecution that was unsustainable also constituted an abuse of process of the court (see [85] and [97]).
The court also referred to recent pronouncements of the Constitutional Court to the effect that so-called SLAPP suits — that is, 'lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest . . . not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others . . . and deter that party, or other potential interested parties, from participating in public affairs' (see [173]) — were prohibited under the doctrine of abuse of process (see [172] – [184]). While such findings were made in the context of civil proceedings, the court held, they were equally applicable to criminal proceedings, and in particular private prosecutions. (See [186] – [188].) Private prosecutions employed with the goal of intimidating, harassing and silencing critics had to be protected against (see [188]). The court stressed further that journalists ought to be protected against SLAPP suits instituted against them with the view of intimidating, censoring and silencing them: such would be consistent with the provisions of s 16 of the Constitution, which guaranteed freedom of expression, including the freedom of the press and media. (See [189] – [190].)
Findings of abuse of process in respect of Mr Downer: The court held that the charges brought against him were without merit and unsustainable: As to counts 1 and 2, as had been previously found by Koen J in previous s 106 (CPA) plea proceedings brought by Mr Zuma, the medical letter was a public document neither intended to be, nor was in fact, confidential, the disclosure of which was not an actionable violation of Mr Zuma's rights (see [56], [60], [101], [107] and [109]). As to count 3, aside from the fact that the court had no jurisdiction to adjudicate on his private prosecution on this

charge (see [110]), Mr Downer' stance — that the exchange between himself and Mr Sole related merely to Mr Sole's queries about the procedure to be followed when the NPA obtains mutual legal assistance from other countries — was not disputed by Mr Zuma. (See [110] – [113].) As was apparent from the unsustainability of the charges, and having regard to the previous meritless challenges relating to his criminal prosecution stretching over a 20-year period, the private prosecution, the court held, was not brought against Mr Downer in order to bring him to justice; it was instituted with an ulterior motive, of preventing Mr Downer from carrying out his duties as prosecutor, and, forming part of a wider 'Stalingrad' tactic, of delaying the institution of proceedings against him. (See [89] – [91], [93] – [97], [101], [107], [113].) The court accordingly concluded that the private prosecution against Mr Downer amounted to an abuse of process (see [91], [96], [107], [109], [113] and [197]).

Findings of abuse of process in respect of Ms Maughan: The court found that the charges against Ms Maughan were unfounded and baseless: at the time she published the document in question, it was a public document (see [127] – [129]). The court held that it was to be inferred from this, as well as having regard to the hostile attitude towards Ms Maughan displayed by Mr Zuma in his court papers and by his supporters in social media, that Mr Zuma had instituted the private prosecution not with the intent to address any wrongdoing on the part of Ms Maughan, but with an improper purpose: that is, to intimidate and harass her, and prevent her from performing her duties as a journalist. (See [129] and [192].) The court added that the private prosecution against Ms Maughan also had all the elements of a SLAPP suit, in that it related to her obligations as a journalist to report on matters in the public interest. It infringed on her right to freedom of expression, specifically press freedom and the public's right to receive such information. (See [192].) The court concluded that the private prosecution against Ms Maughan too amounted to an abuse of process (see [197]).

In the result, the court found that Ms Maughan and Mr Downer were entitled to the relief they sought (see [197]).

MN v BN 2023 (5) SA 519 (FB)

Costs — Absolution from instance — Court's discretion — No principle that unsuccessful application for absolution should attract adverse costs order against unsuccessful defendant — Since absolution application part of trial, costs to be costs in cause, subject to court's discretion.

Costs — Postponement — Wasted costs occasioned by — Liability.

Delict — Specific forms — Misrepresentation — Fraudulent non-disclosure — When actionable — No duty on spouse to disclose extramarital affair — No action for damages for misattributed paternity in respect of child born during subsistence of marriage.

Marriage — Contract — Breach — Action for damages for misattributed paternity — Ex-husband, citing fraudulent non-disclosure, seeking damages (reimbursement of child support) from ex-wife for being misled into maintaining child, born during marriage, that was not his — No legal duty on wife to disclose extramarital affair — No fraudulent non-disclosure — Claim for refund of child support in any event immoral and contrary to public policy — Claim dismissed.

Marriage — Adultery — Action for damages for misattributed paternity — Ex-husband, citing fraudulent non-disclosure, claiming damages (reimbursement of child support) from ex-wife for being misled into maintaining child that turned out not to be his — No legal duty on wife to disclose extramarital affair — No fraudulent non-disclosure — Claim for refund of child support in any event immoral and contrary to public policy — Claim dismissed.

Marriage — Consortium — Good faith — No legal duty to disclose extramarital affair to spouse.

The plaintiff, the defendant's ex-husband, sued the defendant for the refund of R1,4 million he had paid for the maintenance of N, a child the parties had brought up as their own. The plaintiff initiated the claim after he found out — through a paternity (DNA) test conducted three years after the parties were divorced — that N, who was born in 1997, was not, biologically speaking, his daughter. This kind of claim was known as a misattributed paternity claim. The plaintiff had requested the test after the defendant was granted a 100% increase in child maintenance.

To bring it within the strictures of the law, the plaintiff based his claim on fraudulent misrepresentation (that N was his child), alternatively fraudulent non-disclosure (of an affair she had during the time N was conceived). Whichever it was, it caused him to maintain N, with the sum spent making up his damages.

The defendant did not dispute the test results, but argued that claims for the reimbursement of child support were contrary to public policy and unsustainable. She argued that she and the plaintiff had acted under the mutual impression that the

plaintiff was N's father and that she did not knowingly deceive him in this regard. She conceded, however, that she had been unfaithful as alleged.

At the end of the plaintiff's case, the trial was by agreement between the parties postponed for three months because the defendant was sick in hospital, after which the court refused an application by the defendant for absolution from the instance. There was disagreement between the parties as to who was responsible for (i) the wasted costs occasioned by the postponement; and (ii) the costs of the application for absolution.

Held

As to the claim based on fraudulent misrepresentation: To establish fraud, the plaintiff had to prove not only that the representation relied on (that N was his child) was false, but also that the defendant knew it to be false. But since the plaintiff was unable to establish either that the defendant made such a positive representation or, if she did, that she knew it to be false, he failed to prove fraudulent misrepresentation. (The court pointed out, as to the requirement of wilful falsity, that there was no evidence proving that the defendant knew that the plaintiff was not N's biological father.) (See [155] – [156].)

As to the claim based on fraudulent non-disclosure: It was established law that a duty to speak depended on the legal convictions of the community (boni mores). But since precedent was clear that there was no duty on one spouse to disclose the existence of an extramarital affair to the other, her failure to do so did not constitute a fraudulent non-disclosure as claimed by the plaintiff. (See [159] and [178].)

As to the public-policy defence: As with any matter involving children, N's interests were primary. There was ample South African and foreign precedent for the view that claims for the repayment of child support (maintenance) like the plaintiff's, were unfair to the children and offended public policy. The irreparable emotional damage the plaintiff's claim had caused N, and the damage to her relationship with the plaintiff and to the entire family structure, was clear from the evidence. As such, the claim was *contra bonos mores* and contrary to public policy, and would fail on this basis as well. (See [186], [198] – [199].)

As to costs in defendant's unsuccessful application for absolution: Costs usually followed the result, subject to the court's overriding discretion. Since applications for absolution formed part of the trial, they did not require specific costs orders, and there

was no principle that an unsuccessful applicant should be mulcted in costs. The costs in the defendant's application for absolution would follow the result. (See [214] – [217].)
As to costs in respect of the postponement: Although there was no fault on the part of the defendant, the plaintiff was ready to proceed and hence prejudiced by the delay. Accordingly, the defendant should bear the costs of the postponement. (See [225] – [226].)

MTN (PTY) LTD v MADZONGA AND OTHERS 2023 (5) SA 548 (GJ)

Constitutional law — Human rights — Right against self-incrimination — Party to civil action is entitled to refuse to discover material that may tend to incriminate it in parallel criminal proceedings arising from same facts — Constitution, s 35(3)*(j)*.

The present application was interlocutory to a civil action brought by MTN (the applicant) against a former employee, Mr Madzonga (the first respondent), as well as an attorney and her firm, respectively, Ms Nxusani (the second respondent) and Nozuko Nxusani Inc (the third respondent), in which MTN claimed that the respondents were involved in a scheme aimed at defrauding it. Presently, MTN sought an order against the respondents, compelling them to discover a range of documents in relation to that action. Ms Nxusani opposed, on the ground that the documents may, if disclosed, tend to incriminate her and her firm in parallel criminal proceedings brought against them that were based fundamentally on the same accusations of fraud underlying MTN's cause of action in this case.
The court identified the question to be addressed as follows: Did the position supported by pre-constitutional cases still stand, that is, that the privilege against self-incrimination precluded only self-incriminating *oral testimony* by an accused? Or did the privilege against self-incrimination extend into the terrain of compelling an accused person to disclose, or help generate, *documentary evidence* that might incriminate them. (See [9] and [12].)
Held
The question before the court had to be decided on an interpretation of s 35(3)*(j)* of the Constitution, 1996. That read that '(e)very accused person * has a right to a fair trial, which includes the right . . . not to be compelled to give self-incriminating evidence'. (See [18].) Given its text — the plain meaning of the words 'give self-

incriminating evidence' was co-terminous with the words 'disclose incriminating material' — and having regard to the principles of interpretation, that rights in the Bill of Rights had to be interpreted generously and purposively in their textual setting, and in the context created by the history of their denial to the vast majority of South Africans, there was little warrant to restrict the meaning of s 35(3)*(j)* to testimonial utterances made by an accused person. (See [21] – [23].) Given the long history of the abuse of police powers in our country, the starting point had always to be that an arrested or accused person was not required to assist in their own prosecution. There may be exceptions to that starting position carved out by statute over time. (See [24].) Nevertheless, having regard to the present case, there was presently no statutory limitation on the right against self-incrimination that applied in the context of civil discovery proceedings (see [25]). *Therefore*, it was a valid objection to making discovery in civil proceedings, that a party honestly believed the material sought to be discovered may incriminate them in parallel criminal proceedings arising from the same facts (see [27]).

Accordingly, the court could not allow MTN in this case to secure by means of civil discovery proceedings evidence that may clearly tend to incriminate the second and third respondents if it were produced in the criminal proceedings currently pending against them. The application would be dismissed. (See [27] – [28].)

PETERSEN NO AND OTHERS v CPLM EXPORTS CC AND ANOTHER 2023 (5) SA 555 (GJ)

Practice — Judgments and orders — Default judgment — Rescission — Order rescinding default judgment not automatic defence against subsequent summary judgment application, even where leave to defend granted.

Practice — Judgments and orders — Summary judgment — Defence — Rescission of default judgment, even where leave to defend granted, not immunising defendant against subsequent summary judgment application.

An order rescinding default judgment is not an automatic 'defence' in a subsequent summary judgment application, even where the court had granted the defendant leave to defend. While the existence of a bona fide defence is part of the 'good cause'

enquiry for rescission, it is not its primary focus and does not automatically confer a bona fide defence in a subsequent summary judgment application. (See [21] – [28].)

RABALAO v LEGAL PRACTITIONERS FIDELITY FUND AND ANOTHER 2023 (5) SA 563 (GP)

Legal practitioner — Fidelity Fund — Liability — Claim against Fund for loss after theft of funds paid into advocate's trust account to assist with transfer of property — Whether funds received in course of practice — Legal Practice Act 28 of 2014, s 34(2)*(b)*, s 55.

Section 55(1) of the Legal Practice Act 28 of 2014 (the LPA) provides that the Legal Practitioners' Fidelity Fund (the Fund) 'is liable to reimburse persons who suffer pecuniary loss . . . as a result of theft of any money or other property given in trust to a trust account practice *in the course of the practice of the attorney* or an *advocate referred to in section 34(2)(b)'.* And rule 33 of the South African Legal Practice Council Rules (made under the authority of s 95(1) of the LPA), under the heading 'Legal Services which may be rendered by an advocate in possession of a Fidelity Fund Certificate, provides that '(a)n advocate referred to in section 34(2)*(a)*(ii) . . . may render all those legal services which advocates were entitled to render before the commencement of the Act, *and may perform such functions ancillary to his or her instructions as are necessary to enable him or her to properly represent the client*'.

The applicant, Ms Rabalao, representing herself, sought to have the Fund's dismissal of her claim for reimbursement set aside on review. The General Council of the Bar was invited by the court to act as amicus. The Fund was the first respondent and its board, which made the dismissal decision, was the second respondent.

Her claim arose from the theft of moneys she had paid into the trust account of a 'trust account advocate', as referred to in s 34(2)*(b)* of the LPA, to assist her with the registration in her name of immovable property she had purchased. The Fund had dismissed her claim on the basis that the advocate, not being a conveyancer, was not in a position to register transfer, and therefore the money was not, as provided in s 55(1), 'given in trust to a trust account practice *in the course of the practice of the . . . advocate* referred to in section 34(2)*(b)*'. This, according to the Fund, meant that, even

if there were a theft of funds, such theft would not have been committed in the course and practice of an advocate holding a fidelity fund certificate.

The amicus submitted that, on a proper interpretation of s 34(2)*(b)* read with rule 33 of the rules promulgated under the LPA, it was clear that a trust- account advocate was not restricted to do only what their predecessors did, but may also perform functions ancillary to their instructions.

The main issue was whether — on a proper interpretation of s 55 of the LPA and the determination of the ambit and scope of the practice of trust-account advocates in the present factual context — the advocate received the purchase price and registration and transfer costs that were paid into his trust account, in *the course of his practice* as a trust-account advocate.

Held

Interpreting the relevant provisions of the LPA against the constitutional imperative of facilitating access to justice, and within the legislative framework through which access to justice is enhanced by providing a category of trust- account advocates, the protection afforded to members of the public — often members of vulnerable communities whom the legislature wanted to benefit from having direct access to trust-account advocates — could not be unduly limited. The scope of protection, provided to members of society who entrust money to the trust accounts of trust-account advocates, must correlate with the extent to which the legal services that may be rendered by trust account advocates have been extended to the public. (See [41].)

Where a trust-account advocate was briefed to negotiate on behalf of a client, or advise a client, regarding a sale of immovable property, one of the 'functions ancillary to his or her instructions as are necessary to enable him or her to properly represent the client' (as contemplated in rule 33) could include receiving the purchase price and registration and transfer fees into his trust account. No reason existed that would justify a finding that providing clients with advice or assistance during negotiations regarding the sale of immovable property was a function 'properly that of an attorney', and thus reserved for attorneys only. Where a purchaser paid the purchase price and transfer and registration fees into a trust-account advocate's trust-account, it was paid into the trust account within the scope of the trust-account advocate's practice, and received by them in their capacity as a legal practitioner with a trust account. (See [42] – [43].)

The second respondent's decision would accordingly be set aside and referred back to the second respondent for consideration (see [44]).

SERFONTEIN AND ANOTHER v ABSA BANK LTD AND OTHERS 2023 (5) SA 579 (FB)

Credit agreement — Consumer credit agreement — Unlawful provisions — Parate executie clause — Whether lawful for debtor, after he/she fell into default, to consent to mortgagee selling immovable property, provided fair price is realised or agreed upon — Clause to such effect unlawful, constituting provision appointing credit provider as agent for consumer, which provision prohibited by NCA — National Credit Act 34 of 2005, s 90(2)*(j)*.

Credit agreement — Consumer credit agreement — Supplementary agreement — Acknowledgment of debt — Acknowledgment of debt dealing with same debt/credit as underpinning overdraft credit agreement, and regulating repayment thereof — Acknowledgment of debt constituting supplementary agreement — National Credit Act 34 of 2005, ss 89(2)*(c)* and 91(2).

Credit agreement — Consumer credit agreement — Supplementary agreement — Whether agreement constituting supplementary agreement — Relevant considerations — Discussion — National Credit Act 34 of 2005, ss 89(2)*(c)* and 91(2).

The first applicant, Mr Serfontein, was the holder of an overdraft account with the first-respondent bank, Absa, in respect of which, from time to time, the latter extended credit to the former in terms of overdraft credit agreements entered into between those parties. In order to secure Mr Serfontein's debt arising from the account, Absa registered first to fourth covering mortgage bonds over certain property of the first applicant ('the property'). What gave rise to the present matter was Mr Serfontein's falling into arrears concerning his payment obligations in terms of the overdraft credit agreements entered between himself and Absa. As a consequence of this, Mr Serfontein signed an acknowledgment of debt (the 'AOD') in favour of Absa. This incorporated a power of attorney (the 'POA') authorising Absa to sell Mr Serfontein's property, and determining that the proceeds of such sale would be paid towards the outstanding balance due and payable to Absa. Ultimately, and after an unsuccessful attempt to impugn the relevant agreements before the Ombudsman, an agreement of sale pertaining to the property of the first applicant was entered into with the Francois Els Trust, represented by the second and third respondents as the trustees. This

prompted the first applicant, along with the second applicant, who had stood surety for the first applicant in respect of the overdraft facility, to approach the High Court, Bloemfontein. They sought an order, inter alia, declaring to be void the AOD/POA, as well as the purported deed of sale entered into with the Trust. Absa opposed the application, and brought a counter-application seeking an order declaring valid the above-mentioned agreements.

The applicants argued that the AOD/POA was an unlawful credit agreement prohibited by s 89(2)*(c)* of the National Credit Act 34 of 2005, in that it was 'a supplementary agreement . . . prohibited by s 91*(a)*', that is, in the words of s 91(2), it '[contained] provisions that would be unlawful if [they] were included in a credit agreement'. In this regard, the applicants argued that the AOD/POA contained many provisions deemed by s 90 of the NCA to be unlawful, were they included in a credit agreement. In the alternative, the applicants argued that, should it be found that the AOD was not a supplementary agreement, it was a credit agreement, and one containing numerous unlawful provisions as envisioned in s 90 of the NCA, and accordingly ought to be declared unlawful in terms of s 90(4)*(b)* of the NCA.

Absa argued that the AOD/POA did not qualify under s 89(2) or 91(2) of the NCA as a supplementary agreement: it did not describe, define and/or arrange the overdraft and/or underlining credit agreements, or add anything to the terms thereof; it was an entirely separate agreement entered after the main overdraft credit agreement had run its course, and the default in terms thereof had occurred, with the view to selling Mr Serfontein's property in order to reduce the overdraft amount. In any event, Absa added, it did not constitute a transgression of any provisions of s 90(2) of the NCA.

The court held that the AOD/POA was indeed a supplementary agreement for the purposes of the NCA (see [24] – [27] and [29]). The following, amongst others, supported such a finding: the AOD/POA dealt with the same debt/credit as the underpinning agreements, and specifically dealt with the repayment thereof; it expressly provided that it did not constitute a novation of any of the 'clients' obligations to Absa in terms of the underpinning and main agreements'; and it contained a waiver of statutory rights, which the SCA had specifically held was an example of a 'supplementary agreement' for the purposes of the NCA. (See [26] – [28].)

The court went on to address whether the AOD/POA was a supplementary agreement prohibited by s 91(2), as determined in s 89(2)*(c)*.

In terms of clauses 2.3 – 2.10 of the AOD/POA, Mr Serfontein granted a power of attorney to a representative of Absa to sell the property, the proceeds of which would be paid towards the outstanding balance (see [44] – [45]). Such clauses, the court noted, entitled Absa to resort to parate executie, which meant that Absa, as creditor, was authorised to sell the immovable property without having to go through the requisite court processes. The court noted that it was trite that a parate executie clause in a mortgage bond permitting the bondholder to execute without recourse to the court, by taking possession of the property and selling it, was void (see [47]). Nevertheless, Absa had sought to argue that it was lawful for a debtor, *after he/she fell into default*, *to consent* to the mortgagee selling the immovable property, provided a fair price was realised or agreed upon (see [48]). With this the court disagreed. The court held that the cases upon which Absa relied for such a view were distinguishable from the present matter, and were in any case decided before the coming into effect of the NCA (see [48] – [52]). Section 90(2)*(j)* thereof provided that a provision in a credit agreement was unlawful if it purported to appoint the credit provider as an agent of the consumer for any purpose (see [55]). This provision, the court held, given the reference to 'agent for any purpose', indicating that the legislature had in mind agency in its widest possible meaning, had to be interpreted as prohibiting summary execution clauses such as the ones contained in clauses 2.3 – 2.10. (See [57].)

The court referred further to clauses 1.1 and 1.3 of the AOD/POA, in terms of which the applicants 'unconditionally' acknowledged and confirmed their indebtedness to Absa. In doing so, the applicants waived their rights set out in the NCA, and, in circumstances in which no s 129 letter was sent to the applicants before the AOD/POA was entered into, without being properly advised of their rights. The clauses accordingly amounted to a breach of s 90(2) of the NCA. (See [63] – [65].)

The court found the following further clauses, inter alia, of the AOD/POA to also constitute unlawful provisions prohibited by s 90(2) of the NCA:

- Clause 13, in which the applicants acknowledged the AOD/POA was not subject to applicability of the National Credit Act (breach of s 90(2)*(a)* and *(b)*).
- Clause 9, in which the applicants acknowledged that they could not rely on any warranties or representation made by or attributable to Absa (breach of s 90(2)*(h)*(i)).
- Clause 8.2, in which the applicants consented to an emoluments attachment order being issued from the court of the district in which the clients' employer or debtors resided, carried on business or were employed (breach of s 90(2)*(k)*(vi)*(bb)*).

The court concluded that the AOD/POA, its being a supplementary agreement containing a number of provisions that would have been unlawful, had they been included in a credit agreement, constituted a contravention of s 91(2) of the Act. It accordingly amounted to an unlawful agreement in terms of s 89(2)*(c)* of the NCA. (See [66] – [67].) The court went on to hold that, in terms of s 89(5) of the NCA, a just and equitable order in the circumstances would be to declare the AOD/POA void as from the date the agreement was entered into. (See [70].)

The court added that, insofar as it might have erred in coming to the conclusion that the AOD/POA constituted a supplementary agreement, it found in the alternative that it constituted a credit agreement as defined in s 8(4)*(f)* of the NCA (see [71] – [72] and [77]). The presence of unlawful provisions constituted an infringement of s 90(1) and (2) of the NCA. In terms of s 90(4) of the NCA, the court held that the most appropriate course for it to take would be to declare the entire AOD/POA void as from the date the agreement was entered into. (See [78] – [83].)

SPECIAL INVESTIGATING UNIT v PHOMELLA PROPERTY INVESTMENTS (PTY) LTD AND ANOTHER 2023 (5) SA 601 (SCA)

Constitutional law — Courts — Powers — Declaration of invalidity — Remedial powers — Just and equitable relief — Nature of court's discretion — Test for interference on appeal — Discussion — Constitution, s 172(1)*(b).*

Constitutional law — Courts — Powers — Declaration of invalidity — Remedial powers — Just and equitable relief — Where contract invalidated — Whether there existing principle that 'even innocent tenderer has no right to retain what it was paid under an invalid contract' — No such principle — Were circumstances in which court would allow party to retain payments, and thus to benefit, under unlawful contract — Constitution, s 172(1)*(b)*.

The subject-matter of the present appeal was a lease in respect of the SALU Building in Pretoria, entered into in order to provide accommodation for the Department of Justice and Correctional Services (DOJ). The lessee was the Department of Public Works (DPW), and the lessor, originally Phomella Property Investments (Pty) Ltd, the first respondent (Phomella), and then later Rebosis Property Fund Ltd, the second

respondent (Rebosis). In the court a quo (the Pretoria High Court) the Special Investigating Unit (the SIU), the appellant, brought an application seeking *(a)* an order declaring the lease to be unlawful; and *(b)* an order that Phomella and Rebosis should jointly and severally pay the Minister of Public Works an amount representing wasteful expenditure during the lease. The High Court upheld the SIU's argument that, contrary to the requirements of Supply Chain Management Policy of the DPW, a complete needs assessment had not been conducted prior to signature of the lease. On such basis, the High Court declared the lease unlawful. It did so in accordance with the provisions of s 172(1)*(a)* of the Constitution, which provided that '(w)hen deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . .'. The relief relating to wasteful expenditure was sought under s 172(1)*(b)*, which provided that a court, 'when deciding a constitutional matter within its power', 'may make any order that is just and equitable . . .'. This relief the High Court declined. The SIU successfully sought leave from the High Court to appeal to the Supreme Court of Appeal.

The question before the SCA was whether it ought to interfere with the High Court's exercise of its discretion under s 172(1)*(b)*. In this regard, the SCA noted that the discretion exercised under such provision was a *true one*: As such, its exercise could only be interfered with on appeal if the appeal court was satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which 'could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'. (See [12].) The SIU argued, inter alia, that the High Court had been influenced by a wrong principle in making its decision. Namely, it had failed to apply the principle

as encapsulated in the dictum in *South African Broadcasting Corporation SOC Ltd and Another v Mott MacDonald SA (Pty) Ltd* [2020] ZAGPJHC 425 (GJ), that 'even an innocent tenderer has no right to retain what it was paid under an invalid contract'. The court in that matter, as authority for such proposition, had relied on a dictum appearing in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (2014 (6) BCLR 641; [2014] ZACC 12).

Held, that a careful and contextual reading of *Allpay* showed that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The

approach in *Allpay* was to allow a party to retain payments, and thus to benefit, under an unlawful contract, and such approach had been echoed in subsequent cases. (See [18].) Therefore, it must be said that the 'principle' relied upon by the SIU as set out in *Mott MacDonald* was no principle at all (see [19]). Therefore, the failure of the High Court to apply the 'principle' relied upon by the SIU did not afford a basis to interfere with the true discretion exercised by the High Court in the present matter (see [19]).
Held, that the findings and considerations based on which the High Court declined to exercise its discretion to order Rebosis to pay the almost R104 million requested by the SIU could not be faulted. It could not be said the exercise of the High Court's true discretion was subject to interpeference by an appeal court. For these reasons, there was no basis on which the SCA could uphold the appeal. The appeal was to be dismissed with costs, including the costs of two counsel where so employed. (See [27] and [28].)

WILD v LEGAL PRACTICE COUNCIL AND OTHERS 2023 (5) SA 612 (GP)

Legal practitioner — Advocate — Misconduct — Investigation — Advisory notice of Legal Practice Council regarding transitional conduct of disciplinary proceedings — Validity and effect — Application for review of decision dismissed.
Legal practitioner — Advocate — Misconduct — Investigation and striking-off applications — Effect of LPA — General Council of Bar, Society of Advocates and local bars retaining common-law standing in pending matters to investigate unprofessional conduct and seek suspensions and strikings-off — Exercising concurrent jurisdiction with Legal Practice Council over conduct of practitioners — Court retaining common-law powers — Legal Practice Act 28 of 2014, s 116(1) and (2).

The applicant, an advocate, initially sought the setting-aside of the decision of the Eastern Cape Bar (the ECB — the second respondent) to institute a striking-off application against her. But a few months later, in November 2018, the Legal Practice Council (the LPC — the first respondent) issued an advisory notice regarding transitional arrangements for the conduct of disciplinary proceedings against

advocates in the light of the requirements of the Legal Practice Act 28 of 2014 (the Act), which came into effect on 1 November 2018.

In the notice, the LPC sought to define the rights and duties of the General Council of the Bar of South Africa (the GCB — the fourth respondent) and its constituent bars in dealing with pending unprofessional-conduct cases of their members. To this end, it set out certain 'transitional arrangements' intended to preserve the status quo in respect of disciplinary procedures that were pending when the Act came into effect (see [39]). They provided, inter alia —

- that unprofessional-conduct enquiries and striking-off applications pending on 31 October 2018 had to be completed by the relevant bar;
- that any complaints received by the GCB or bars after 31 October had to be dealt with by the LPC of the province concerned; and
- that suspension and striking-off applications instituted after 31 October had to be transferred to the LPC of the province concerned.

This prompted the applicant to launch the present application, as a member of the ECB, in which she sought the setting-aside of the transitional arrangements. She argued that they were contrary to the Legal Practice Act 28 of 2014 (the Act), which in s 116 provided that pending striking-off applications had to be finalised *by the LPC* — not the GCB or its constituent bars — alternatively that they constituted unlawful administrative action, and had to be set aside on either ground. She also complained that she had been unfairly prejudiced by not having been afforded an opportunity to be heard.

The crisp issue before the present court was thus whether the LPC had been entitled to issue the notice and, if not, what remedy should follow. This entailed an investigation into, (i) the lawfulness of the LPC's decision to issue the notice; (ii) the correct interpretation of the transitional arrangements in s 116(1) and (2) of the Legal Practice Act 28 of 2014 (the Act); (iii) whether the Act empowered the ECB to proceed with the striking-off application against the applicant, notwithstanding the advent of the Act; and (iv) whether the GCB and its constituent bars retained their powers to investigate advocates' unprofessional conduct and to bring applications for their suspension or striking-off.

Section 116 of the Act, which regulated 'pending proceedings', stated that 'any [pending] enquiry into . . . unprofessional or dishonourable or unworthy conduct . . . must be referred to the [LPC] which must treat the matter as it deems appropriate' and

that any pending proceedings 'in respect of the suspension of any person from practice as an advocate . . . [or] in respect of the removal of their name from the roll of advocates . . . must be continued and concluded'.

Held

The transitional arrangements set out in the notice had no consequences other than that existing disciplinary procedures would continue. The notice, therefore, did not change the applicant's position from what it had been before the Act came into effect. Accordingly, the review application would fail because the LPC's decisions neither adversely affected the applicant's rights nor had a direct, external legal effect on her as intended in the Promotion of Administrative Justice Act 3 of 2000. And the applicant would in any event be given the opportunity to be heard on the striking-off application. (See [39] – [42].)

The courts' common-law right to enquire into the conduct of advocates and determine the disciplinary procedure to be followed was not affected by the Act. Nor did the Act alter the common-law standing of the GCB and constituent bars to investigate advocates' conduct and apply for their suspension or striking-off. The GCB and bars could, in addition, bring instances of misconduct by advocates to the attention of the courts. (See [79] – [80].)

While the LPC had primary jurisdiction over the conduct of advocates, this did not mean *exclusive* jurisdiction. The GCB and its constituent bars were still, together with the LPC, custodes morum of the profession. They had to work together to ensure compliance with the Act. (See [60] – [62], [81] – [83], [88].)

Section 116(1) and (2) of the Act applied only to pending enquiries and court proceedings instituted *under statutes repealed by the Act*, not to those instituted under the common law. Section 116 did not apply to enquiries instituted under the common law and did not deprive the GCB and the Society of Advocates of their common-law standing in pending matters. They were entitled to continue and conclude pending enquiries and proceedings and did not have to be replaced by the LPC. Furthermore, it remained the common-law right of the courts to decide whether to accept the standing of the GCB and the Society of Advocates in any matter concerning disciplinary proceedings involving advocates. (See [91] – [93].)

In conclusion, the applicant was not entitled to a declaratory order or interdictory relief in respect of the decisions of the Council as reflected in the advisory notice. Application dismissed. (See [102], [107].)

S v KHUMALO 2023 (2) SACR 323 (FB)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Rape of 7-year-old girl — Trial court failing to consider accused's personal circumstance and concluding, without foundation, that offence planned, could be guilty of similar offences, and was dangerous person — Misdirection in failing to find substantial and compelling circumstances — Sentence replaced with one of 22 years' imprisonment.

Trial — Delay in completion of — Appellant having appeared on 51 separate occasions over three years — Although lower courts overloaded, duty on all participants to ensure cases finalised sooner rather than later — Magistrate should have investigated delays at early stage to enable issuing of appropriate order — Criminal Procedure Act 51 of 1977, s 342A.

The appellant appealed against his conviction and sentence of life imprisonment imposed for the rape of a 7-year-old girl. The conviction was confirmed. It appeared, however, that the trial had proceeded at a snail's pace: from the appellant's first appearance in court on 28 October 2013 to the finalisation of the case on 26 September 2016, the appellant appeared in court on no fewer than 51 separate occasions.

Held

It was accepted that lower courts were overloaded, especially with matters dealing with sexual offences, and the court a quo's factual exposition of the case could not be disregarded. However, more could and should be done to improve case management. All relevant role players had to play their part in ensuring finalisation of cases sooner rather than later. The case could have been finalised much earlier. The witnesses were accessible, and there was no explanation why they could not all have testified in 2014 — it was accepted that the appellant was also to be blamed for the delays from the middle of 2015. The magistrate in the circumstances ought to have investigated the delays at an early stage in accordance with s 342A of the Criminal Procedure Act 51 of 1977, to enable him to issue an appropriate order. (See [4] – [5].)

As to the sentence of life imprisonment, the court a quo made a material misdirection in finding that there were no substantial and compelling circumstances, where the 35-year-old first offender was the owner of immovable property, married with two children,

aged 15 and 9, and had a grade 12 certificate. He had also worked for a security company, while having his own pest-control business. Without foundation, the court had stated that he was a most dangerous person, had planned the offence at length, and could possibly be guilty of other offences of that nature. It further appeared that the complainant had suffered no physical injuries. This did not mean that the court could not take into consideration that the victim must have suffered some emotional trauma, but sentence was imposed without sufficient evidence in this respect. In the circumstances, the appeal against sentence had to be upheld and the sentence replaced with one of 22 years' imprisonment. (See [26] – [28] and [34].)

S v MURPHY AND OTHERS 2023 (2) SACR 341 (WCC)

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Extracurial statement by former co-accused electing to testify for state, but recanting contents at trial — Where statement amounting to inadmissible confession, evidence thereof not admissible against co-accused — Criminal Procedure Act 51 of 1977, ss 204, 219 and 219A.

In a criminal trial in the High Court one of the state witnesses was a woman who had been arrested whilst packing a large package of methamphetamines and charged with dealing in drugs. After her arrest she gave a detailed statement to the police in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the CPA). The charge against her was subsequently withdrawn, and she was used as a state witness against her co-accused. She was, however, discredited as a hostile witness and cross-examined by the state. Her statement incriminated all but one of the accused in varying degrees. On the face of it, the statement amounted to a confession to the offence of drug-dealing and contained admissions pertinent to other charges.

At the close of its case, the state applied for a ruling in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) that her statement be admitted as evidence as proof of the contents thereof. The defence opposed the application on the grounds that the state had not proved that the witness had in fact said what was attributed to her in the statement; that she had been unduly influenced to make the statement; and that her constitutional right to legal representation had been violated in the process of procuring the statement. The court made a preliminary ruling that it

was admissible. At the close of the defence case, counsel applied, inter alia, for a reconsideration of the hearsay ruling. For the first time the defence raised the issue of the admissibility of the statement in terms of s 219 of the CPA.

Held, that the statutory prohibitions in ss 219 and 219A of the CPA, against the use of extracurial confessions and admissions as evidence against anyone but the maker, were not confined to the confessions or admissions made by a co-accused in a criminal trial. The plain meaning of those provisions entailed that the prohibition also operated in circumstances where the confession or admission was made by an accomplice who was never charged and became a state witness in terms of s 204; or was made by a co-accused who pleaded guilty and subsequently testified against the former co-accused; or by a former co-accused who elected to become a state witness in terms of s 204 and the charges against her were withdrawn, as happened in the present case. (See [48].)

The court noted that, although there may be cogent reasons for revisiting what appeared to be a blanket prohibition in ss 219 and 219A of the CPA against the use of extracurial confessions and admissions against any person other than the maker, s 3(1)*(c)* of the Hearsay Act notwithstanding, the court was bound by precedent in this respect. It was accordingly constrained to set aside the earlier ruling admitting the statement. (See [52] and [54].)

S v NDLOVU 2023 (2) SACR 358 (ML)

Trial — Presiding officer — Recusal of — Magistrate returning to finalise case more than three years after retirement — Mero motu recusing himself when trial not ready to proceed — Procedure to be adopted.

The applicant was convicted of rape and sentenced to life imprisonment, but the appeal court set aside the conviction and sentence and ordered that the matter be remitted to the trial court within a period of 20 days. The prosecutor arranged for the matter to be revisited, but it was beset by numerous delays, mostly of the applicant's making, and in the end the magistrate recused himself. The applicant nonetheless applied for a stay of his prosecution on the grounds of undue delay. The court held that there was no merit to his case and that the application had to be dismissed. (See [33].)

As to the recusal, on the last day of the resumed proceedings the magistrate had, apparently out of frustration, stated that he been retired for three years, and had returned, having been assured by the prosecutor that everything was ready. The applicant, however, appeared to have no interest in seeing the matter finalised. The magistrate concluded by remarking that the applicant had made an informed decision about the matter and would not see him again. He then recused himself, noting also that he had not been reimbursed for expenses. (See [31] and [34].)

The court held that the recusal by the magistrate had serious repercussions for all involved. The magistrate was not entitled to mero motu recuse himself from the case for the reasons given. A final determination, however, could not be made, as the trial court had not had an opportunity to give its side of the story. Instead, the presiding officer was directed to consider recalling his order of recusal. In the event of his failure to do so, the National Director of Public Prosecutions was directed to consider within a period of six weeks whether to invoke the provisions of s 22(1)*(c)* of the Superior Courts Act 10 of 2013 to review the matter, or to start the matter de novo before another judicial officer. (See [37] – [43].)

VAN VEEN v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND OTHERS 2023 (2) SACR 370 (WCC)

Fundamental rights — Right to trial within reasonable time — Inordinate delay in bringing prosecution — Remedy — Permanent stay of prosecution — Complaint of health problem affecting mental and intellectual capacity and precluding fair trial — Such incidental to delay and remedy lying in application based on ss 77 and 79 of CPA in criminal trial — Application for permanent stay dismissed — Criminal Procedure Act 51 of 1977, ss 77 and 79; Constitution, s 35(3).

The applicant was the director and controlling mind of the Evercest Aggressive Fund, a hedge fund. He and his company, Evercest Capital (Pty) Ltd, which managed the Fund, were facing charges in a specialised commercial crimes court. These comprised various counts involving dishonesty and other financial statutory offences relating to losses by the Fund of R146 million. The offences were investigated from July 2007, but the applicant only received the charge-sheet in August 2019. In the present matter, the applicant sought the permanent stay of the prosecution.

The court considered the delay manifestly inordinate and palpably unreasonable, but that this was not by itself enough to justify the stay. The applicant had to show that he suffered resultant material prejudice. (See [16].) In this respect the court held that there was a lack of detail in the founding papers concerning the nature of the forensic prejudice he would suffer on account of the delay, if the trial proceeded. This was a fatal defect in the trial-related prejudice-based aspect of his case. (See [18] – [20].) The only prejudice identified with any particularity was the applicant's intervening medical condition, which related to a 'significant deterioration which precluded him from having a fair trial'. The court held here that, while there might be some truth in that, the delay was entirely incidental to the question of the applicant's mental or intellectual capacity to adequately conduct his defence. The timing of the onset of his ill health was an accident of fate. Notionally, it could have intervened even if the state had commenced the criminal proceedings much earlier. (See [25] – [26].) That begged the question whether it would be appropriate for the court in civil proceedings to grant the relief sought by the applicant, drawing on s 35(3) of the Constitution and the common law, when the legislature had specifically provided in the Criminal Procedure Act 51 of 1977 (the CPA) how the situation should be addressed within the context of the criminal proceedings. According to the principle of subsidiarity, the principle dictated that the applicant's remedy lay in ss 77 and 79 of the CPA, and not in a civil application for a stay of prosecution. (See [33] and [38].) The application was dismissed.

S v YANTA 2023 (2) SACR 387 (WCC)

Bail — Application for — Renewed application after earlier refusal of bail — Factors to be taken into account summarised — Criminal Procedure Act 51 of 1977, s 60(11)*(a)*.

The applicant applied on a second occasion for his release on bail based on new circumstances, in a matter where the provisions of s 60(11)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) applied, and he therefore carried the onus to adduce evidence that would show that there were exceptional circumstances permitting his release. He had been charged with murder, robbery with aggravating

circumstances, and various offences relating to firearms. It was alleged that he was the driver of one of two vehicles involved in the robbery of a photographic shop in which seven men had taken part. One of the men had shot and killed an armed security guard and stolen his firearm.

The state contended that it had a strong case against the applicant and relied on video footage obtained from the parking area and from inside the shop, identity parades, ballistics evidence and cellphone data placing the applicant near the scene of the crime. The applicant argued that the new facts were that the investigation by the state was at that stage complete; that he no longer had any similar pending cases against him; that he had been in custody for more than two years and was unable to develop a relationship with his minor children, to their detriment; and that his continued incarceration had led to his ill health, which would only deteriorate further, should he not be released on bail.

The court distilled the principles applied by the courts as to what constituted new facts justifying a further bail application and summarised these as follows: whether the facts came to light after bail had been refused or circumstances had changed since the first bail application was brought; whether the facts were sufficiently different in character from those presented previously; whether the new facts were relevant, in that they would assist the court to consider the release of the accused afresh; whether the facts were indeed new; and that, where evidence was already known and available, but not presented by him at the time of his earlier application, such evidence could generally not be relied upon. (See [15].)

Applying these principles, the court held that the investigation had for all practical purposes been completed when the initial bail application was heard, and that this could not be considered to be a new fact (see [19]); that the applicant no longer had any pending cases amounted to a new fact (see [25); that the delay in the finalisation of the trial was unacceptable, but there was no evidence to indicate that the prosecution had been the cause of the delay — the court would, in any event, accept that the applicant's continued incarceration had an impact on his minor children, and this would be considered, together with all the other facts (see [28]); and, although the court was not convinced that his medical condition would have any influence on the outcome of the renewed bail application, insofar as it was a changed circumstance, the court would consider that as well (see [30]).

Ultimately, the court held that the state, prima facie, had a strong case against the applicant. But, more importantly, that the applicant had placed false evidence before the court in the initial bail application in the form of a medical certificate which sought to provide him with an alibi. In terms of the provisions of s 60(4)*(d)*, read with s 60(8)*(a)* of the CPA, this showed a likelihood that the applicant, if released, would undermine the proper functioning of the criminal justice system. (See [36] – [40].) In the circumstances, the applicant had not established a case permitting his release on bail, and the application was dismissed.

S v SELLO 2023 (2) SACR 399 (FB)

Bail — Pending appeal — Application for — Jurisdiction — Applicant granted leave to appeal against conviction and sentence by High Court, after refusal by regional court — High Court vested with jurisdiction at moment of granting of leave to appeal — Criminal Procedure Act 51 of 1977, ss 304(2)*(c)*(vi) and 309(3).

The applicant brought an urgent application for bail pending appeal to the High Court from his conviction in a regional court and sentence of 15 years' imprisonment for murder. The regional court had refused his application for leave to appeal, but the High Court granted him leave to appeal against both conviction and sentence. In issue was whether the court had the necessary jurisdiction to grant bail as the court of first instance.

Held, that there was good reason why the High Court should be entitled to hear bail applications in matters such as the present, although the Supreme Court of Appeal should not do so. In petitions to the latter court, the trial record was not provided unless the accused was not represented during the trial, in which case the justices considering the petition usually requested to be provided with the trial record. Rule 6 of that court's rules set out which documents were to be provided. The position was different in the High Court where all applications for leave to appeal had to be accompanied by the full trial record, allowing the judges not only to rely on the judgment of the court a quo and written representations thereto, but to consider the evidence presented. (See [20].)

Held, further, that the present court was satisfied that, at the moment when the application for leave to appeal was granted by the judges of the High Court, it became

vested with jurisdiction in respect of the bail-application proceedings in terms of s 309(3), read with s 304(2)*(c)*(vi), of the Criminal Procedure Act 51 of 1977. In either event, if the court were to dismiss the application, the applicant would have to return to the regional court, and then possibly return to this court on appeal. Such a cumbersome and time-wasting procedure could never be in the interests of justice. (See [22].) The court accordingly adjudicated the matter and admitted the applicant to bail. (See [1].)

S v LENTING AND OTHERS 2023 (2) SACR 409 (WCC)

Evidence — Witness — Closed-circuit television — Requirements of s 158(2) of Criminal Procedure Act 51 of 1977 — Adult witness too traumatised to testify in open court after observing gang-related murder — Psychologist's evidence confirming state of witness — Exposing witness to aggressive cross-examination by accused in such circumstances not in accordance with proper administration of justice — Fact that accused opposing application for evidence to be so led, having become aware of witness's personal details, also not bar to such application.

Evidence — Witness — Closed-circuit television — Application of ss 153 and 158 of Criminal Procedure Act 51 of 1977 — Not limited to child witnesses, or child offenders, or sexual offence cases — Provisions applying equally to adult witnesses whose evidence was likely to be compromised by fear or distress about testifying in open court, or in accused's presence.

In a criminal trial, 20 accused faced a slew of gang-related charges, including for murder, housebreaking with intent to commit murder, and various offences under the Prevention of Organised Crime Act 121 of 1998. The state sought orders, in terms of ss 153(2)*(b)* and 158(2)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA), that a witness it intended calling testify via closed-circuit television, and that her identity should not be disclosed to the public. In support thereof the state tendered a report by a clinical psychologist confirming that the witness appeared to be suffering from anxiety and reported experiencing symptoms of a panic attack when recounting the crime she witnessed. She was also in the early stages of pregnancy, which would make the process of testifying in court more traumatic for her. The investigating officer noted that the witness was terrified that her identity would become known, resulting in

severe security implications for her and her minor children. The ninth accused opposed the application and contended that, during consultations, his legal representative had shown him the statement where the name of the witness in question appeared, and it would therefore serve no purpose for the relief to be granted. It was also argued on his behalf that the court should not be readily inclined to grant the application, as this was not a sexual offence matter. The court considered the applications under the two sections jointly.

Held, that, in many instances ss 153 and 158 of the CPA had been invoked in sexual offence cases, as well as in cases involving minor children, but the application of these sections was not limited to such. They applied with equal force to adult witnesses whose evidence was likely to be compromised by fear or distress about testifying in an open court, or in the accused's presence. (See [18].)

Held, further, that to expose such witness to aggressive cross-examination by the accused would not be in line with the proper administration of justice. Such an approach would have a deleterious effect on the witness and expose her to secondary trauma. It would also conflict with the tenets and the values espoused in the Constitution. (See [23].)

Held, further, as to the argument that the application should be dismissed because the accused knew the witness, that the protection envisaged in ss 153 and 158 was not only aimed at protecting a witness, but ensured that the evidence given was not reduced in quality because of the witness's fear or distress. Furthermore, if the court were to accept this argument, there would be very few circumstances in which such an order would be granted, because in most cases complainants knew their assailants. In any event, with the evolution of technology, it was expected that various criminal cases would be heard through the virtual platform in the near future, a view which was fortified by the recent amendment of s 158(2)*(a)* of the CPA, providing that the section applied to witnesses, irrespective of whether they were in or outside the country. (See [26] – [27].) The application was upheld.

S v NDZISHE AND ANOTHER 2023 (2) SACR 419 (WCC)

Drugs — Mandrax and Tik — Possession of in contravention of s 4*(b)* of Drugs and Drug Trafficking Act 140 of 1992 — Proof of — Accused pleading guilty — No

certificate in terms of s 212 of Criminal Procedure Act 51 of 1977 handed in to prove nature of substances — Effect of.

Trial — Irregularity in — What constitutes — Magistrate proceeding with trial case against accused in absence of his Legal Aid attorney, who was still on record representing him — Fair-trial rights infringed, resulting in prejudice to accused — Conviction and sentence set aside.

In two cases that came before the court on automatic review in terms of s 303 of the Criminal Procedure Act 51 of 1977 (the CPA) the accused faced charges in a magistrates' court of possession of drugs in contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992. In the first case the accused was alleged to have had three packets of methamphetamine and one lolly containing methamphetamine residue; and, in the second case, 22 packets of cocaine; eight packets of dagga; and half a Mandrax tablet. The accused both pleaded guilty. The court invoked the provisions of s 112(1)*(b)* of the CPA and questioned whether they confirmed that the drugs were respectively, methamphetamine, cocaine, dagga and Mandrax, to which they answered in the affirmative.

The court remarked that it was not clear how the accused could conclude that what had been found in their possession was indeed the drugs at issue. The fact that an accused person confirmed the identity of the drugs, or that they were used as drugs, had no meaning if there were no further attributes or indicators sufficient establishing the identity of such substances. It could thus not be assumed that the accused possessed a technical understanding of the substances found on them. (See [12].) In the circumstances the courts a quo did not have enough information to conclude that the accused were in possession of dependence-producing substances, and the convictions and sentences had to be set aside. (See [21].) In view of the seriousness of the charges, and failure of justice that could result if both accused escaped because of mere technicalities, the matter would be remitted to the same magistrate to allow the accused to plead afresh, so that the accused could be sufficiently questioned. (See [30].)

The court noted further that it was irregular for the court a quo to have proceeded with the trial in one of the cases against the accused in the absence of his Legal Aid

attorney, who was still on record representing him. The accused had been prejudiced by the irregularity, which infringed his right to a fair trial. (See [26].)

All South African Law Reports October 2023

Municipal Gratuity Fund v Pension Funds Adjudicator and another [2023] 4 All SA 1 (SCA)

Employee Benefits and Retirement – Pension funds – Ruling of Pension Funds Adjudicator regarding allocation of death benefit – Whether Pension Funds Adjudicator has jurisdiction where complainant lodges complaint directly with Adjudicator instead of fund – Failure to grant pension fund an opportunity to deal with the merits of a complaint against it offending the audi alteram partem principle, with the result that Adjudicator's determination could not stand.

Upon the death of a member of the appellant pension fund, a dispute arose concerning the allocation of the death benefits to his dependents. The second respondent (Ms Mutsila), the deceased's widow, was dissatisfied with the approach adopted by the fund in allocating the death benefits to certain beneficiaries whom she considered not to qualify for the death benefits. She lodged a complaint with the Pension Funds Adjudicator, who set aside the fund's determination and ordered it to pay R300 000 to Ms Mutsila. The fund was unsuccessful in setting aside the Adjudicator's determination in the High Court, and the present appeal was brought as a result.

Held – Section 30P of the Pension Funds Act 24 of 1956 states that any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the applicable division of the High Court for relief. The application to the High Court is effectively a reconsideration of the complaint. The court is not limited to a decision on whether the Adjudicator's determination was right or wrong. It is also not confined to the evidence, or the grounds upon which the Adjudicator's determination was based, as the court can consider the matter afresh and make any order it deems fit.

The first leg of the fund's challenge was that Ms Mutsila should have approached the fund before lodging a complaint with the Adjudicator, and therefore the relevant jurisdictional requirement was absent. Second, the fund contended that when the Adjudicator informed it about the complaint, it was not granted an opportunity to deal

with the merits of the complaint, and therefore the *audi alteram partem* principle had not been complied with.

The jurisdictional objection was without merit, as Ms Mutsila had in fact complained to the fund about the proposed distribution of the deceased's death benefit. She was dissatisfied with the fund's response and was advised by the fund to refer a dispute to the Adjudicator.

However, the second point raised by the fund was upheld, as it was clear that the *audi alteram partem* rule had not been complied with. The next question was whether the Adjudicator's ruling should stand. Setting out the applicable provisions of the Pension Funds Act regarding the distribution of death benefits, the court referred to the significant delay in finalising the matter. The parties and the beneficiaries in particular, were entitled to finality and would not achieve that if the Adjudicator's determination was allowed to stand. The court was satisfied that the fund's determination should prevail.

The appeal was thus upheld.

Goldex 16 (Pty) Ltd v Body Corporate of Waterford Golf and River Estate SS139/2006 [2023] 4 All SA 14 (FB)

Civil Procedure – Application for stay of proceedings on ground that order referring claim to trial was obtained through fraud – A requirement for purposes of fraud is the intention to defraud – Application to refer dispute for oral evidence – Where allegations of fraud were unfounded, request for stay application to be referred for hearing of oral evidence was refused, as was the stay application.

The applicant company ("Goldex") was the original owner of immovable property and the developer of the Waterford Sectional Title Scheme (the "Scheme") which was established on the property. It was also the registered owner of a real right of extension in the scheme in respect of 18 vacant stands demarcated on the Certificate of Real Right of Extension issued to it. The first respondent was the body corporate of Waterford Golf and River Estate.

In the first application (the "main application") involving the parties, Goldex had sought a declaration that no levies or other amounts as claimed by the body corporate

were due and payable by it. The Court dismissed the application on the ground that Goldex had agreed to pay levies on the same basis as other subsequent owners or developers of vacant stands over which they held real rights of extension. The Court granted a counter-application by the body corporate for Goldex to transfer to it, two units in the scheme, consisting of a gate house and ablution facilities. A monetary claim by the body corporate against Goldex was referred to trial.

The present application was for a stay of the body corporate's action proceedings against Goldex on the ground that the order referring the monetary claim to trial was obtained by fraud. It was alleged that the body corporate had been guilty of altering an email presented as evidence and failing to disclose certain documents. Goldex requested that the matter be referred for the hearing of oral evidence.

Held – At common law, a judgment can be set aside on restricted grounds, one of which is fraud. Goldex bore the onus of proving the fraud it relied on, on a balance of probabilities. Having regard to its contentions regarding the altered email, the Court pointed out that there was no suggestion in the judgment in the main application, that the email had had any influence on the court's conclusions. The Court found that there could not have been any fraudulent intention by the body corporate to mislead the Court in the main application, by the attachment of the altered e-mail. A requirement for purposes of fraud is the intention to defraud. The allegation of withholding of documents was also found to have been unfounded.

Regarding the request for the referral of the application for oral evidence, it was held that a court will refuse to order oral evidence when oral evidence would enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain, or fail to make out a cause of action at all. A court will also refuse to order oral evidence when it is clear that the sole purpose of cross-examination would be a fishing exercise designed to elicit admissions that might supplement the allegations in the supporting affidavit. As the allegations of fraud were unfounded, Goldex's request that the stay application be referred for the hearing of oral evidence was refused. The stay application was dismissed.

Jayiya v Member of Executive Council for Department of Health, Eastern Cape [2023] 4 All SA 72 (ECB)

Civil Procedure – Evidence – Expert evidence – Evaluation of expert opinion in determining its probative value and the considerations relevant thereto are determined by the nature of the conflict in the opinion, and the context provided by all the evidence and the issues which the court is asked to determine.

Personal Injury/Delict – Medical negligence – Claim for damages – In a claim for delictual damages, the plaintiff must prove, on a balance of probabilities, that the acts or omissions of the defendant were wrongful and negligent, and caused loss – Correct approach for establishing the existence of negligence involves reasonable foreseeability and the reasonable preventability of damage.

The appellant had instituted a medical negligence claim against the respondent ("MEC"). The claim was brought in appellant's own name and on behalf of her newborn child, who had suffered cerebral palsy as a consequence of a hypoxic ischemic encephalopathy during the birth process. Appellant alleged that the employees of the respondent, including the medical practitioners or doctors and nurses who had treated her at the clinic, were negligent. The court *a quo* found against the appellant after assessing the evidence before it. On appeal, the appellant contended that the court had erred in not attaching enough weight to the joint minutes of experts. It was submitted that the court had erred in not finding that, in view of the agreement reached by the experts in the joint minutes, it was not necessary for the appellant to call further witnesses on the agreed issues and that the court was bound to adjudicate the matter based on such agreement by experts because there was no valid repudiation or withdrawal of the agreement by any of the parties. The appellant also submitted that the court erred in its assessment of expert evidence and by substituting the direct uncontradicted expert evidence with its own logic and in that regard, it had committed a misdirection because the appellant's evidence was corroborated by the radiologists in their joint minutes. The appellant contended further that the court had adopted an incorrect approach in assessing her evidence.

Held – The issue for determination was whether the medical staff were negligent in their treatment of the appellant and, if so, whether their negligence caused her newborn to suffer hypoxic ischemic encephalopathy resulting in cerebral palsy.

In a claim for delictual damages, the plaintiff must prove, on a balance of probabilities, that the acts or omissions of the defendant were wrongful and negligent, and caused loss. Therefore, in order to succeed in her delictual claim for damages, the appellant had to establish that the wrongful and negligent conduct of the respondent's nursing and medical staff, acting within the course and scope of their employment, had caused her harm. The correct approach for establishing the existence of negligence involves reasonable foreseeability and the reasonable preventability of damage.

The Court was required to evaluate and resolve the conflict in the testimony of the expert witnesses called for the appellant and the respondent. The evaluation of expert opinion in determining its probative value and the considerations relevant thereto are determined by the nature of the conflict in the opinion, and the context provided by all the evidence and the issues which the court is asked to determine. In general, it is important to bear in mind that it is ultimately the task of the court to determine the probative value of expert evidence placed before it and to make its own finding with regard to the issues raised. An expert witness must state facts or assumptions upon which his opinion is based. The expert must not omit to consider the material facts that should detract from his concluded opinion. It is not expected of the court to simply accept the opinions of experts. The expert's evidence must be logical and his conclusions must be reached with knowledge of all the facts.

A court of appeal is only at liberty to interfere with the findings of fact and inferences drawn by the trial court, if there is a clear misdirection on the facts by the trial court and the court of appeal is satisfied that the trial court had reached a wrong conclusion.

Having regard to the conspectus of the evidence, the court *a quo* erred in rejecting the evidence of the appellant solely based on contradictions in her evidence and more importantly, in circumstances where no version was put to her by the respondent. Pointing to other misdirection in the court below, the present court upheld the appeal.

Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and another [2023] 4 All SA 111 (GJ)

Civil Procedure – Court order – Non-compliance – Claim for constitutional damages – Inability to give effect to an eviction order unlawfully infringing applicant's rights in terms of section 25(1) of the Constitution, justifying payment of compensation for the unlawful infringement.

Civil Procedure – Court order – Non-compliance – Contempt of court application – Upon proof of jurisdictional facts, there is a presumption or inference of wilfulness and mala fides, and the contemnor has an onus to rebut that inference on a balance of probabilities – Non-compliance on its own, provided it is bona fide, does not constitute contempt.

The appellant intended developing property within the jurisdictional area of the first respondent municipality. It presented the municipality with a proposal regarding the relocation of an informal settlement on the land but received no response from the municipality. The appellant proceeded to apply to the High Court for an order removing informal settlements from the property. The court granted the order and provided for the municipality to provide temporary emergency accommodation for any of the occupiers who might be entitled thereto. The municipality did not comply with the order and the appellant again approached the court for relief. A structured interdict was obtained, confirming that the municipality was constitutionally and statutorily obliged to ensure that it complied with the previous order. The deadlines set in that order were also not complied with. In 2017, the municipality purchased other property from the appellant for the purpose of relocating the unlawful occupiers. However, its attempts to develop the land for such relocation was thwarted by an order obtained by neighbouring property-owners. Its attempt to effect the relocation at other sites were chronicled in the court papers and according to the municipality, was going to take time. The appellant applied to have the municipality held in contempt of court. The dismissal of that application led to the present appeal.

Held – The party in civil contempt proceedings, who alleges that the other (the "contemnor") is guilty of acting in contempt of a court order, must establish that the order alleged to have been breached was granted against the contemnor; that the order was served upon the contemnor or that the contemnor had knowledge of it; and

that the contemnor did not comply with the order. Upon proof of those facts, there is a presumption or inference of wilfulness and *mala fides*, and the contemnor has an onus to rebut that inference on a balance of probabilities. The issue in this matter was whether the respondents had rebutted the inferences of wilfulness and *mala fides* on a balance of probabilities.

It could not be said that the respondents had wilfully and *mala fide* ignored the court orders. Instead, there was ample evidence that the respondents acted with good intention and that they encountered a myriad of obstacles in their efforts to relocate the unlawful occupiers. It was not proven beyond a reasonable doubt, or on a balance of probabilities that the respondents had acted in contempt of the court orders, or that they had wilfully and in bad faith set out to violate the dignity, authority and reputation of the court by not complying to the letter with the court orders that were made. Non-compliance on its own, provided it is *bona fide*, does not constitute contempt.

The appellant also claimed constitutional damages from the respondents. The question was whether the appellant's claim for constitutional damages was based on the alleged failure of the municipality to comply with the court orders, or on the alleged infringement of its rights in terms of sections 25(1) and 34 of the Constitution. The court found that the inability to give effect to the eviction order unlawfully infringed the applicant's rights in terms of section 25(1). The applicant was entitled to be paid compensation by the municipality for the unlawful infringement as from 1 February 2015 until the infringement ceased.

Matsose v Minister of Police and another [2023] 4 All SA 136 (NWM)

Personal Injury/Delict – Claim for damages – Malicious prosecution – In order to succeed with claim, a plaintiff must show that the defendant instituted or instigated the proceedings, acting intentionally and without reasonable and probable cause, and was actuated by an improper motive or malice, and that the proceedings terminated in the plaintiff's favour and that he suffered damage.

Personal Injury/Delict – Claim for damages – Unlawful arrest and detention – Where arresting officer had no prima facie case and/or reasonable grounds to believe that plaintiff had committed relevant offences, arrest and detention were unlawful.

The appellant, who was appointed executor in the deceased estate of the original plaintiff in this matter, was substituted for the deceased, who had sued the first respondent (the "Minister") for damages arising from his alleged unlawful arrest and detention and malicious prosecution. The deceased had been arrested by two police officers who had been following footprints from the scene of a murder and rape which had been reported. On encountering the deceased, the police noticed that he was wearing shoes matching the prints which had been left behind at the crime scene. Upon questioning him, they formed a suspicion that he was implicated in the crime, and arrested him. From the deceased plaintiff's first appearance in court, he was detained for a further 520 days. Bail having been refused, he remained in detention until the charges were withdrawn against him.

In considering the deceased's claim against the Minister, the trial court found in favour of the deceased but only for the arrest and detention prior to his first appearance in court. The claim for malicious prosecution, directed against the second respondent, was dismissed.

Held – On appeal, the requirements for a claim under the *actio iniuriarum* for unlawful arrest and detention have been established in case law referred to in the judgment. As held by the trial court, malicious prosecution is an abuse of the process of the court by intentionally and wrongfully setting the law in motion on a criminal charge. In order to succeed with the claim, a plaintiff must show that the defendant instituted or instigated the proceedings, acting intentionally and without reasonable and probable cause, and was actuated by an improper motive or malice. It must further be shown that the proceedings terminated in the plaintiff's favour and that he suffered damage.

The question on appeal was whether the harm associated with the deceased plaintiff's detention on the order of the magistrate after his first court appearance until his release when charges were withdrawn against him, could be attributed to the unlawful arrest by the police. The arrest and/or subsequent detention of the deceased plaintiff was unlawful due to the fact that the arresting officer had no *prima facie* case and/or reasonable grounds to believe that the deceased plaintiff had committed the relevant offences. That provided the causal link on the claim for malicious prosecution, which advanced the continued detention of the deceased plaintiff after his first

appearance in court. The question of legal causation, relevant to the entire period of the deceased plaintiff's detention, was thus engaged. The prosecutor, in deciding to continue with the prosecution of the case, failed to consider whether the investigating officer's statement was reliable. It was incumbent upon him to consider whether the contents of the statement provided a basis which was well-founded upon evidence, which if reasonably believed to be reliable and admissible, would constitute a *prima facie* case and could lead to a conviction. If not, he was duty bound not to initiate the prosecution. If there was no *prima facie* case against the deceased plaintiff, there could have been no reasonable and probable cause to institute the prosecution.

The appeal in respect of the claim for unlawful arrest and detention against the first respondent was accordingly upheld, insofar as the first respondent was liable for the detention of the deceased plaintiff from the date of his arrest, until the charges against him were withdrawn. The appeal in respect of the claim for malicious prosecution similarly stood to be upheld.

Minister of Department of Agriculture, Land Reform and Rural Development and others v Mountain View Community – Thaba 'Nchu and another
[2023] 4 All SA 163 (FB)

Property – Unlawful occupation of land – Application for eviction of unlawful occupiers – Evidence not establishing that land was suitable for occupation, that there were no other needs and uses for the land or that there were no environmental, health and safety issues pertaining to the land – Parties required to furnish further information to enable court to exercise a discretion.

The applicants sought the eviction of approximately 1500 respondents from land falling under the jurisdiction of the second respondent municipality. The land had been identified by the Department of Agriculture, Land Reform and Rural Development, which claimed to be the lawful custodian of the properties, for donation to the municipality for purposes of human settlement development. According to the applicants, the land in question contained heritage sites, including a wetland to be preserved for environmental purposes for the public at large; and the respondents' occupation of the land denied the rights of those who were legitimately entitled to the land and hampered the municipality's mandate to provide basic services to the public.

The respondents, on the other hand, stated that they had moved onto the land out of desperation and would be rendered homeless if evicted.

Held – Section 25 provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Section 26 protects the right to have access to adequate housing and obliges the State to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of the right. Those constitutional rights have been codified in the Housing Act and the National Housing Code. After a municipality demarcates land for residential purposes, it avails the land to the Provincial Human Settlement Department for the building of houses. The municipality thereafter allocates the houses. In identifying beneficiaries who qualify, the municipality uses a waiting list on the municipality's National Housing Needs Register ("NHNR") which offers households the opportunity to register their needs for adequate shelter by providing information about their current living conditions, household composition and to indicate the type of housing assistance they require. By using the NHNR system, the municipality ensures that the allocation of housing opportunities that are created through the various programs contained in the National Housing Code is done in a fair, transparent and auditable manner.

It was common cause that the respondents did not have title or consent to be in occupation of the land and they were in unlawful occupation. They did not, except for statistical data, place sufficient information before the court regarding their personal circumstances. The fact that there might be elderly people, children, households headed by woman, and people living with disabilities amongst the respondents was the primary consideration for the order to be made by the court. There is no obligation on the State to provide accommodation which is convenient to unlawful occupiers. The court could not accept on the available evidence that the area was suitable for occupation, that there were no other needs and uses for the land or that there were no environmental, health and safety issues pertaining to the land. Adopting a balanced approach, giving recognition to the legitimate rights and interests of both the applicants and the respondents, the court deemed it in the interest of justice that the application

be postponed to make available all the material facts for the court to exercise a discretion. The parties were directed to take certain steps to enable that to happen.

Motloung and another v Minister of Police and another [2023] 4 All SA 185 (GJ)

Criminal Law and Procedure – Claim for damages – Alleged unlawful arrest, detention and malicious prosecution – Whether arrest without warrant may be effected in terms of section 40 of the Criminal Procedure Act 51 of 1977, in respect of the offence of unlawful possession of firearms, and such arrest, founded upon a confession by a co-accused, is lawfully competent – Offence of unlawful possession of a firearm was included in the category of offences set out in Schedule 1 of the Criminal Procedure Act, in respect of which an arrest without a warrant in terms of section 40(1)(b) thereof, would be competent – Nothing which prohibits an arrest of one accomplice being made based on a confession (lawful or not) by another accomplice.

The plaintiffs instituted action against the Minister of Police and the National Director of Public Prosecutions, claiming damages based on their alleged wrongful arrests and detentions, and their alleged malicious, alternatively negligent prosecutions for unlawful possession of firearms.

Held – The first issue was whether an arrest without a warrant may be effected in terms of section 40 of the Criminal Procedure Act 51 of 1977, in respect of the offence of unlawful possession of firearms. The second issue was whether an arrest without a warrant, founded upon a confession by a co-accused, is lawfully competent.

The correct approach was to analyse the nature of the evidence which served before the various officers and prosecutorial officials at the various stages they exercised their respective discretions to arrest, to enrol, to oppose bail, to postpone, and to further the prosecution. The Court had to objectively enquire as to whether they did so reasonably and rationally at each step.

Considering the grounds of attack on the lawfulness of the second plaintiff's arrest, the court first explained the issue of lawfulness of an arrest without a warrant. Section 40(1)(b) of the Criminal Procedure Act provides that a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful

custody. The offence in question was the unlawful possession of firearms, which was not specifically listed in the Schedule. The question was thus whether the offence fell within the ambit of the definition in Schedule 1, of offences not specifically listed. The Court found that the offence of unlawful possession of a firearm, as envisaged in section 3 read with section 120(1) the Firearms Control Act 60 of 2000, was included in the category of offences set out in Schedule 1 of the Criminal Procedure Act, in respect of which an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act, would be competent. The contention that the second plaintiff's arrest was the result of a pointing out based on an inadmissible confession was rejected. There is nothing which prohibits an arrest of one accomplice being made based on a confession (lawful or not) by another accomplice. Restating the principles regarding the doctrine of precedent, the court referred to the circumstances under which a single judge may find that a finding by a previous full bench was rendered *per incuriam* and not binding.

Regarding the contention that the arresting officer could not have had, and did not have, a reasonable suspicion that the second plaintiff had committed an offence, the court found that the arrest of the second plaintiff was not unlawful as a reasonable suspicion existed which was objectively sustainable. The same applied in respect of the first plaintiff's arrest.

Finally, the Court set out the requirements for a claim of malicious prosecution, and explained that a prosecutor only has to establish if reasonable and probable cause exists which warrants prosecution and that no compelling reason exists not to prosecute. All that is required of a prosecutor is to apply his mind to the information available and to satisfy himself that it justifies the conclusion that the accused probably committed the crime. There was no duty on the prosecutors herein to establish whether there was a defence.

It could not be found that the plaintiffs' arrests, detentions, and prosecutions were unlawful, and their claims were dismissed with costs.

Muduviwa CFC and others v Minister of Home Affairs and another
[2023] 4 All SA 211 (GP)

Constitutional and Administrative Law – Decisions to cancel permanent residence permits – Judicial review – Absence of reasons and statutory basis for decisions to block and suspend the identity documents rendering decisions reviewable – Court having wide discretion in terms of Promotion of Administrative Justice Act 3 of 2000, to fashion appropriate remedy for unlawful administrative action – Section 8(1)(c)(ii) conferring power to substitute the decision-maker's decision in exceptional cases – Court must be satisfied that it would be just and equitable to grant an order of substitution, as opposed to usual position of remitting upon review.

The first and second applicants were Zimbabwean citizens and holders of South African permanent residence permits. They were married in Zimbabwe in 1996, and later registered their marriage in South Africa. Three children were born of their relationship. In 1998, a person with whom the second applicant had a fallout, threatened to report the applicants for holding possible fraudulent South African identity documents. Officials of the respondents subsequently raided the applicants' residence, and seized their identity documents pending an investigation. The applicants were informed that their identity documents were blocked, cancelled, and removed from the population register and that they were to return to their country of origin as soon as possible, failing which they would be deported. The applicants alleged that they were neither given reasons for such decision, nor afforded a hearing. They then made new applications for permanent residence exemptions. After being issued with certificates of exemption, they applied to be issued with identity documents under the issued exemption permits. The permanent residence permits issued to them were stamped into their passports. However, in 2009/ 2010, the applicants discovered that their permanent residency had again been blocked. Again, the applicants did not receive notice of any intended action, nor the opportunity to make representations before that decision was taken.

Having received no further feedback from the respondents, the applicants sought the review and setting aside of the respondents' abovementioned decisions and an order directing the respondents to reinstate the first and second applicants' identity documents on the population register of South Africa. In respect of their children, they

sought an order declaring that they were South African citizens and that they should be issued with identity documents.

Held – The power of the first respondent to deprive a person of citizenship is located in the Citizenship Act. However, in taking the decisions to block the applicants' identity documents, the respondents did not seem to have invoked the provisions of that Act. The statutory basis for the decision to block and suspend the identity documents was not dealt with in the papers or during argument. The version advanced by the respondents did not amount to any form of defence, as conceded by them.

The respondents being Organs of State, their decisions constituted administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Section 5(3) of PAJA states that if an administrator fails to furnish adequate reasons for administrative action it must, subject to section (5)4 and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason. Applying those provisions, the court held that the decisions had to be reviewed and set aside. Section 8 of PAJA confers on a court, in proceedings for judicial review, a generous jurisdiction to grant orders that are just and equitable. The court's discretion is wide, and it must fashion an appropriate remedy for unlawful administrative action. Section 8(1)(c)(ii) confers the power to substitute the decision-maker's decision in exceptional cases. Even where there are exceptional circumstances, the court must be satisfied that it would be just and equitable to grant an order of substitution, as opposed to the usual position of remitting upon review. The court has a discretion that must be exercised judicially. In the circumstances of the present case, a substitution order was considered the appropriate remedy.

The relief sought in the application was granted.

Van As v Additional Magistrate Cape Town and others [2023] 4 All SA 231 (WCC)

Criminal Law and Procedure – Domestic violence cases – Release of accused on warning – Cancellation of release – Lawfulness of cancellation – Section 72A of the Criminal Procedure Act 51 of 1977, as amended by the Criminal and Related Matters Amendment Act 12 of 2021, applied only when the State applied for the section to be

invoked and did not confer a discretion to the judicial officer to mero motu cancel the release on warning of an accused person.

The applicant sought the review and setting aside of the decision of the first respondent (as magistrate), to retain him in custody; to release him on bail with conditions; and to grant a final protection order and warrant of arrest against him in favour of the fourth respondent. The grounds for review were premised on the principle of legality and sections 22(1)(a) and 22(1)(c) of the Supreme Court Act 10 of 2013, which deals with absence of jurisdiction on the part of the court and gross irregularity in proceedings.

Having been arrested on a charge of assault, the applicant made his first appearance before the magistrate, where the prosecutor requested the magistrate to revoke the applicant's warning status and to remand him in custody. The magistrate complied with the request. The decision was based solely on the prosecutor's request, and the magistrate concluded that the process was permissible in terms of section 72A (read with section 68) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal and Related Matters Amendment Act 12 of 2021 (the "Amendment Act"). Based on a further request by the prosecutor during the bail proceedings, the magistrate issued a final protection order with the granting of bail. The applicant contended that to secure his release on bail he had to agree to the condition that a final protection order in terms of section 6 of the Domestic Violence Act 116 of 1998 would be granted by the court.

Held – The Amendment Act came into operation on 5 August 2022, and aimed to amend the Criminal Procedure Act so as to further regulate the granting and the cancellation of bail in domestic-related offences. It also sought to regulate sentences in respect of offences committed against vulnerable persons.

The principle of legality is one of the founding values of the Constitution, and anticipates that judicial officers may only exercise public power lawfully.

In determining the lawfulness of the cancellation of the release of the applicant on warning, the court noted that the magistrate relied on section 72A of the Criminal Procedure Act as amended when cancelling the applicant's release on warning. That section was applicable only when the State applied for the section to be invoked and did not confer a discretion to the judicial officer to *mero motu* cancel the release on

warning of an accused person. In cancelling the applicant's warning, the magistrate arbitrarily deprived him of his freedom and liberty, thereby acting contrary to the constitutional principle of legality. The magistrate's decision was unlawful, unconstitutional and invalid, and was set aside. The Court confirmed that the Amendment Act precludes the release on bail of a person arrested for allegedly committing an offence listed under section 1 of the Domestic Violence Act, which involves persons who are in a domestic relationship and that the applicant had erroneously been released on warning by the arresting or investigating officer, who lacked authority in that regard. However, the actions of the magistrate resulted in an infringement of the applicant's constitutional rights as he was not forewarned of the implications of the Amendment Act. Despite being aware of the provisions of that Act, the magistrate, in attempting to remedy the arresting officer's unauthorised decision and action, acted hastily and *ultra vires*.

The impugned decisions were reviewed and set aside.

Wintercastle Trading 44 (Pty) Ltd and others v Ringopro (Pty) Ltd
[2023] 4 All SA 257 (NWM)

Aviation – Lease of aircraft – Breach of lease agreement – Validity of agreement – Defence of alleged impossibility of performance due to lessee not holding a valid operating certificate allowing it to operate leased aircraft – Where lessee had represented that it did have an aircraft operating certificate in terms of which it would operate the aircraft, it could not escape the obligations under the lease and profit from its own misrepresentation.

The respondent ("Ringopro") obtained judgment against the appellants in the court *a quo*, in claims relating to arrear rental arising from the use of an aircraft; damages arising from the premature termination of a lease; and damages arising from the first defendant's failure to restore the aircraft to the condition it was at the commencement of the lease.

The unchallenged testimony of Ringopro regarding the signing of the dry lease agreement with the first appellant ("Wintercastle") was that Wintercastle did not possess an aircraft operation certificate ("AOC") or licence but the fifth respondent ("MEGA"), its associated company, did have such a certificate. It was therefore decided that Ringopro would enter into a "dummy" lease with MEGA. The aircraft was

placed on MEGA's AOC in order to permit it to operate. At the time of the conclusion of the Wintercastle lease agreement, the second and third defendants, acting personally, and the fourth defendant, represented by the second defendant, bound themselves as sureties and co-principal debtors *in solidum* with Wintercastle, for all amounts payable to Ringopro under the aircraft dry lease agreement.

The trial court's upholding of Ringopro's claims led to an appeal.

Held – The main question was whether the written dry lease agreement entered into or concluded between Ringopro and Wintercastle was a valid agreement that created rights and obligations in respect of operating the aircraft that was consequently assigned to MEGA. The issues for determination were whether the lease agreement was void by virtue of being impossible to perform; whether prior regulatory approval was required for the conclusion of the lease agreement; whether there was *animus contrahendi* to assign the operational rights and obligations in the dry lease agreement from Wintercastle to MEGA through the dummy dry lease agreement; whether the operational rights and obligations were validly assigned from Wintercastle to MEGA and in that connection, whether the parties intended to create lawfully binding obligations through the assignment; and whether even if the assignment of the operational rights and obligations was legally possible, any such purported assignment was otherwise a simulated, illegal and unenforceable agreement.

Wintercastle, pursuant to the dry lease agreement, had possession of and utilised the aircraft commercially to transport clients for reward from 19 January 2015 when it took possession of the aircraft until the aircraft was abandoned on 14 September 2015. Notwithstanding the use of the aircraft, it failed to perform fully in terms of its obligation to pay rental for the aircraft.

The dispute rested on the relevant applicable law and other legal prescripts which regulate the operation of an aircraft. The crux of the possibility of performance question in terms of the dry lease agreement was the possession of a valid AOC in terms of which Wintercastle would have been allowed to operate the aircraft. The high watermark of the appellants' case was that performance in terms of the dry lease agreement was impossible from inception because Wintercastle could only operate the aircraft in terms of an operating certificate that it did not have, and only a person holding a valid operating certificate may operate an aircraft. However, in terms of a

clause in the agreement, Wintercastle had represented that it did have an AOC in terms of which it would operate the aircraft. It could not escape the obligations under the lease and profit from its own misrepresentation. A party relying upon impossibility of performance bears the onus of alleging and proving that the impossibility is not its fault. The obligation to ensure that a valid AOC was in place was on Wintercastle. The impossibility of performance defence as a ground of appeal accordingly failed.

The regulatory prerequisite defence also failed as the court *a quo* correctly found that compliance with the relevant Civil Aviation Regulation was not a pre-condition to the validity of the lease, but rather a precondition for the lawful operation of the aircraft under the lease.

The appeal was dismissed.

END-FOR NOW