LEGAL NOTES VOL 9/2023

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MAKANA PEOPLE'S CENTRE v MINISTER OF HEALTH AND OTHERS 2023 (5) SA 1 (CC)

Mental health — Involuntary detention — Involuntary inpatient treatment — Whether process for admission to involuntary inpatient treatment constitutionally sound — Whether Mental Health Review Boards involved in such admission sufficiently independent — Constitutional Court finding that admission process passing constitutional muster and declining to confirm High Court's invalidation of provisions in question — Constitution, ss 10, 12(1) and 34; Mental Health Care Act 17 of 2002, ss 18 – 24 and 33 – 34.

In this matter Makana People's Centre applied for and obtained High Court relief in the form of declarators that ss 33 and 34 of the Mental Health Care Act 17 of 2002 were constitutionally invalid for not providing an automatic independent review prior to or immediately following the initial detention of a mental health care user who was involuntarily detained under the Act; and that ch 4 of the Act (ss 18 – 24) was constitutionally invalid for failing to provide an adequate level of independence to Mental Health Review Boards involved in such detention. (See [5] and [7]; and see further [27] – [36] for an outline of the ss 33 and 34 admission process, and [37] – [41] for associated steps in ss 35 – 38. A 'mental health care user' is the Act's terminology for a person receiving mental health care services.)

[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!**

Here, Makana applied to the Constitutional Court for confirmation of the declarators (see [8]).

The issues, as foreshadowed, were whether ss 33 and 34 limited the rights of involuntarily detained users contained in ss 10, 12(1) and 34 of the Constitution; and whether ch 4 failed to provide constitutionally sufficient independence to Review Boards (see [3] and [79]).

The court concluded that there was no limitation of the rights and that the degree of independence afforded the Boards was sufficient (see [203]).

In coming to this conclusion it surveyed the salient international instruments at [82] – [108] and made certain observations thereon at [109] – [111].

At [117] – [118] the court considered the substantive component of s 12(1)*(a)* of the Constitution (the requirement that there be good reason for deprivation of liberty), and at [119] – [127] its procedural component as developed in South African case law. At [128] – [132] the court examined English and European Court of Human Rights jurisprudence, concluding at [133] – [134] that our law went further in its protections.

Then at [135] – [136], on analysis of the deprivation of liberty that involuntary inpatient treatment brings about, the court found that the most effective safeguards were those ensuring that a user's evolving condition was assessed over an appropriate period by multiple experts and officials in proximity to the user. In the court's view, the Act contained procedural safeguards of this kind (see [137]).

As to Review Boards, the considerations at [156] – [160] pointed to their possessing a level of independence sufficient for them to qualify as 'independent and impartial tribunal[s]' as intended in s 34 of the Constitution (see [151], [154] and [171]).

Moreover, the Act's procedures occurred in time frames meeting the constitutional guarantee of fair process (see [181] – [185]).

Accordingly, the deprivation of liberty that ss 33 and 34 brought about occurred within the framework of a fair process, and as a part of that process, Review Boards were sufficiently independent to perform their functions (see [188]).

Thus ss 33 and 34 and ch 4 did not limit s 12(1) of the Constitution (see [188]).

Furthermore, those sections did not limit s 34 of the Constitution: the Act did not impede a user or interested person on a user's behalf contesting the involuntary treatment in a court; the Act provided for a judge's involvement if a user was to remain under involuntary treatment after a Review Board's decision; and a Review Board qualified as an 'independent and impartial tribunal' (see [189] and [192] – [193]).

As to users' right to dignity: if the Act's criteria were met, then involuntary inpatient treatment of a user would be consistent with the user's dignity, and indeed to withhold such treatment might result in impairment of that dignity (see [194]).
The Constitutional Court therefore declined to confirm the High Court's declarations of constitutional invalidity (see [203]).

BUTCHER SHOP AND GRILL CC v TRUSTEES FOR THE TIME BEING OF THE BYMYAM TRUST 2023 (5) SA 68 (SCA)

Lease — Rental — Remission — Vis major — Loss by subtenant of use and enjoyment of leased premises due to Covid-19 lockdown regulations — Whether tenant may claim remission from landlord — Common law not allowing tenant to claim remission from landlord where loss of use and enjoyment of property suffered by subtenant — Common law not allowing court to disregard separate legal personality of subtenant to allow tenant to raise, as defence to landlord's claim for payment of rent, defence that subtenant would have been entitled to raise against it — Facts further not warranting development of common law.

This matter concerned the entitlement of a lessee to claim remission of rent payable to a lessor where vis major had interfered with a sublessee's beneficial use and enjoyment of the leased property. The background was as follows. The appellant, Butcher Shop and Grill CC (Butcher Shop), as lessee, and the respondent, the trustees for the time being of the Bymyam Trust, as lessor, entered into a lease agreement in respect of premises owned by the Trust. From the commencement of the lease, Butcher Shop sublet the premises to Apoldo Trading (Pty) Ltd (the Trust), which operated a restaurant business there. Butcher Shop and Apoldo shared the same sole shareholder, Mr Pick. What gave rise to the present case was the decision of Butcher Shop to withhold payment of rent to the Trust, consequent to the advent of the Covid-19 pandemic and the promulgation of a National State of Disaster, as a result of which restrictions were placed on trading by restaurants. That in turn prompted the Trust to launch an application in the Western Cape High Court in which it claimed amounts outstanding in terms of the lease. Butcher Shop, in response, in addition to opposing the relief sought, launched a counter-application in which it sought a declaration that it was entitled to remission of the base rental payable in a specific amount. Butcher Shop's case was that its loss of the use and enjoyment of the premises in the light of the trading restrictions had caused it a significant loss of

turnover in its business, which entitled it to remission of rent. The High Court found in favour of the Trust, granting the main application and dismissing the counter-application. Leave to appeal was granted to the SCA.

Before the SCA the Trust argued that the lease agreement itself excluded Butcher Shop's claim for remission. This the SCA rejected, having regard to the lease agreement read as a whole (see [28]). Key remaining issues to be determined in the SCA, and which formed the focus of its attention, were the following:

(a) Whether, as Butcher Shop argued, under the common law it was entitled, as lessee, to claim remission of rent arising from *its sublessee*'s loss of beneficial occupation on account of vis major.

(b) Whether, alternative to the above, as Butcher Shop argued, given that Butcher Shop and Apoldo were in effect Mr Pick, their sole shareholder, in corporate guise, and therefore one business entity, the court, through a process akin to a reverse piercing of the veil, should disregard the separate legal personality of Apoldo, to allow Butcher Shop to raise, as a defence to the Trust's claim for payment of rent, a defence that Apoldo would have been entitled to raise against it.

(c) Whether, if the answer to the above was no, the common law ought to be developed to permit the court to disregard the corporate personality of Apoldo in the present circumstances.

Held, as to *(a)*

Under the common law, the general principle was that remission of rent was available to a lessee or tenant who suffered loss consequent upon the interference with its use and enjoyment of the leased property. It was an equitable remedy which sought to ameliorate the prejudice caused by circumstances beyond the control of the parties to the lease. It may only be claimed by the party who suffered the loss. Such loss had to be directly attributable to the vis major event and had to be substantial. (See [34].) In the present instance Apoldo, a separate legal entity, occupied the premises, had use and enjoyment thereof and conducted the business of the restaurant. In terms of the subletting arrangement between Butcher Shop and Apoldo, it stood in the position of tenant vis-à-vis Butcher Shop as landlord. As a matter of fact, the loss of beneficial use and enjoyment of the subleased premises was suffered by Apoldo; not Butcher Shop. Accordingly, the existence of the subtenancy in law precluded a claim for remission based on loss suffered by the subtenant. (See [35].)

Held, as to *(b)*

The general common-law principles that applied when the question of piercing of the corporate veil arose were the following: One, a court had no general discretion to simply disregard a company's separate legal personality whenever it considered it just to do so (see [43]). Two, as a matter of policy, the separate corporate personality ought to be upheld, and 'piercing' of the corporate veil would not lightly occur, and then only when considerations of policy favoured it (see [43]). Three, the balancing of policy considerations would only arise where there was some element of fraud, abuse or dishonesty in respect of the corporate personality (see [44]). Four, the purpose of piercing the corporate veil was to fix the person or persons responsible for abuse with liability (see [44]).

Butcher Shop argued that these principles, applied with the required flexibility to the facts of this case, entitled Butcher Shop to the relief it sought in its counter-application for remission of rent (see [46]). It acknowledged that this was not the usual case in which a piercing of the veil was sought, but was akin to 'reverse piercing', where the members or shareholders of a company sought to have the corporate identity of the company disregarded to advance rights, which would otherwise accrue to the company, as their rights. It argued that the remedy was not only available to an outside party or creditor who sought to ignore the consequences of the separate legal personality of a company in order to fix liability upon the shareholders of the company. (See [49].

There was, however, no scope for the application of the remedy of disregarding the corporate identity, upon the existing principles of the common law, on the facts of this case (see [54]): There was no authority for the proposition that the ordinary employment and use of a corporate form, involving no abuse, misuse or unconscionable conduct, would entitle a court to ignore the separate legal personality of a company (see [50]). Further, 'flexibility' did not imply that the guiding principles were jettisoned. It meant no more than that careful consideration be given to the facts of the case and that the matter was not approached on the basis that the principles applied only in a set category of cases (see [49]). What Butcher Shop sought was to disregard, for its own benefit, the separate corporate personality of Apoldo, in circumstances where their joint shareholder had deliberately arranged that Apoldo operated the restaurant, even though Butcher Shop was the Trust's tenant. The

common law did not countenance disregarding corporate identities to allow this to be done. (See [54].)

Held, as to *(c)*

The argument for the development of the common law was premised upon the particular facts of the case. No general policy considerations were raised as being a conceivable basis for such development. The proposition was that the common law ought to recognise the availability of the remedy of disregarding corporate identity as a generally available equitable remedy to meet the exigencies of this case. The proposition would require this court to hold, inter alia, that the law accepted that the courts would pierce the corporate veil in the interests of justice; that the remedy was available, even in circumstances where the use of a corporate personality involved no misuse, abuse or other form of unconscionable conduct. (See [58].) Such development was, in truth, not a development of the common law so much as an abrogation of the principles of the common law, long accepted by the courts of this country, and duly recognised in statutory form by s 20(9) of the Companies Act * (see [59]). This, accordingly, was not a case where there was any warrant for the sort of development of the law sought by Butcher Shop (see [63]).

Given, that there was, in effect, no contest in relation to the relief which was sought in the main application brought by the Trust, the conclusions above meant that the High Court's orders had to stand. Appeal accordingly dismissed. (See [65] – [66].)

CONSTANTIA INSURANCE CO LTD v MASTER, JOHANNESBURG HIGH COURT AND OTHERS 2023 (5) SA 88 (SCA)

Company — Financial assistance by — Validity — Group transactions — Indemnification of guarantor of related company — Amounting to securing of said company's obligations — Board of indemnifying company to pass resolution after applying its mind to matters in CA s 45(3), including that it was appropriate to place its assets at risk (CA s 45(3)*(b)*) — If requirements not complied with, transaction void — Not saved by CA s 20(7) — Companies Act 71 of 2008, s 20(6), s 45(3)*(b)*.

Company — Financial assistance by — Validity — Invalidity where CA s 45 not complied with — Not amounting to arbitrary deprivation of property — Not unconstitutional — Companies Act 71 of 2008, s 45(6).

Company — Financial assistance by — Validity — Requirements in CA s 45(3) — Constituting substantive requirements, not formal or procedural requirements as intended in CA s 20(7) — Companies Act 71 of 2008, s 20(7) and s 45(3).
Company — Financial assistance by — What constitutes — Definition in Companies Act 71 of 2008, s 45(1) exhaustive.
Insolvency — Creditors — Proof of claims — Expungement of claims admitted to proof at creditors' meeting — Test — Master expunging creditor's proved claim on suspicion that agreement which formed basis of claim void — Wrong test applied — Objective test appropriate — Master may reduce or expunge claim only if, on conspectus of all evidence placed before him or her, sufficient ground existing therefor — Insolvency Act 24 of 1936, s 45(3).

When, in winding-up proceedings under the Insolvency Act 24 of 1936 (IA), the Master's disallowance of company X's claims against company Y — which was in the process of being wound up together with its affiliates (the Y group) — was confirmed by the Johannesburg High Count, X noted the present appeal to the Supreme Court of Appeal. The Johannesburg High Court had expunged X's claims despite concluding that the Master had used the wrong test when she decided to disallow the claims. *
The facts were that X had in 2013 provided performance guarantees to the Y group in respect of its members' contractual obligations to third parties. In return, X was indemnified for losses incurred in making good on the guarantees. The effect was that each company in the Y group undertook an independent obligation to indemnify X in respect of any demand on it or payment by it under the guarantees. X's disallowed claims, which had been proved on oath at a meeting of creditors, related to guarantees it had issued to third parties to secure the obligations of Z, one of the members of the Y group. Y's liquidators, however, disputed the claims on the ground that the indemnity amounted to financial assistance by Y to Z as intended in *s 45 of the Companies Act 71 of 2008* (CA s 45). Under CA s 45(6) financial assistance, or a board's decision to provide it, was void to the extent that it did not comply with CA s 45. X argued that s 45(6) permitted the unconstitutional deprivation of property.
In their report to the Master regarding the disputed claims, the liquidators — after pointing out that they had been unable to find a resolution of Y's board authorising the indemnity or indicating compliance with CA s 45 — concluded that the indemnity was void under CA s 45(6) and that the claims should therefore be expunged. The Master

agreed with the liquidators and expunged the claims on the ground that, given that she had not been provided with satisfactory documentary proof of compliance with CA s 45, she had *reasonable grounds for suspecting they were invalid*. The liquidators argued that this was the wrong test since IA s 45(3) required the Master to determine whether the *liquidators* had a reasonable belief, based on facts ascertained by *them*, that X's claim was unsustainable and had to be expunged. Under IA s 45(3) the Master could either confirm, reduce or disallow (expunge) disputed claims.

Held

As to the correct interpretation of IA s 45(3): The test was objective. The Master had to objectively view all the material placed before him or her — ie not only the liquidator's report, but also the material submitted to substantiate the claim(s). The Master could reduce or expunge a claim *only if there were sufficient grounds for doing so*. To the extent that it diverged from this approach, *Chappell v The Master and Others* 1928 CPD 289 was wrongly decided. Since the Master had applied the wrong test — ie one based on her 'suspicion' that the claims were invalid — the Johannesburg High Court correctly decided the matter afresh before finding against X. The issue was whether the High Court's finding was correct. (See [18] – [20].)

As to whether Y had provided 'financial assistance' to Z within the meaning of CA s 45: The wording of s 45(1)*(a)* — 'including lending money, guaranteeing a loan or other obligation, and securing any debt or obligation' — extended the primary meaning of 'financial assistance' to the listed matters, and was therefore exhaustive. As was apparent from s 45(2), s 45 applied to both direct and indirect financial assistance. Here, X had guaranteed the contractual obligations of Z toward third parties in return for an undertaking by Y to indemnify it (X) in respect of any claims under these guarantees. By doing so, Y had put its property at risk to ensure that X provided the guarantees Z required. Y therefore indirectly secured the obligations of Z within the meaning of s 45(1)*(a).* (See [22] – [26].)

As to whether CA s 45 had been complied with: The expression 'the board may authorise' in CA s 45(2) meant that the board had to adopt a resolution authorising the proposed financial assistance, but only after having satisfied itself of the two matters listed in s 45(3)*(b)*, namely (i) that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test (an actual performance of the solvency and liquidity test was not, however, required); and (ii) that the terms were fair and reasonable to the company. Here, however, there was no evidence that Y's

board had even adopted a resolution to bind Y to the indemnity, so that it could not be said that it had considered the matters mentioned in s 45(3)*(b)*, in particular that it was appropriate for Y to place its assets at risk. The indemnity was therefore void to the extent that it had provided Z with financial assistance contrary to the requirements of CA s 45. (See [27] – [31].)

As to whether the indemnity was saved by CA s 20(7), under which outsiders dealing with a company were 'entitled to presume' that the company had complied with applicable 'formal and procedural' requirements: Since the requirements, that a company's board must resolve to provide financial assistance under s 45, and that it must be satisfied of the matters mentioned in s 45(3)*(b)*, were *substantive* requirements, s 20(7) did not avail X. (See [33] – [34].)

As to the constitutionality of s 20(6): X did not come close to making a case that s 45(6) should be declared unconstitutional (see [37]).

EASTERN CAPE RURAL DEVELOPMENT AGENCY AND ANOTHER v AGRIBEE BEEF FUND (PTY) LTD AND OTHERS 2023 (5) SA 100 (SCA)

Government procurement — Procurement process — Whether for goods and services as intended in Constitution, s 217 — Tripartite agreement between two organs of state and private party for latter to provide farmers with livestock and training in animal husbandry — Constituting contract for 'goods or services' as intended in s 217(1) — Therefore, s 217(1)-compliant procurement process to precede agreement for its validity.

In this matter first and second applicant organs of state ('the Agency' and 'the Department', respectively) entered into an agreement with a private party ('the Fund') which had as its aim the development of cattle-farming.

To this end the agreement provided that the Department would transfer funds to the Agency, that the Agency would administer these and transfer them on to the Fund, and that the Fund would practically implement the project. This entailed the Fund, inter alia, buying cattle and selling them on to farmers, and providing animal husbandry training (see [15] – [16] and [24]).

Of note, was that no procurement process was followed before the agreement was concluded, where s 217(1) of the Constitution requires that '(w)hen an organ of state

. . . contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective' (see [2] and [14]).

By and by the Agency and Department formed the view that the agreement was invalid, and applied to the High Court to set it aside. They were, however, unsuccessful, with the court taking the view that the agreement was not one for goods and services, and so not subject to s 217(1) (see [1] and [37]).

Here, with the High Court's leave, they appealed to the Supreme Court of Appeal (see [1]).

The issue was whether the agreement, properly characterised, was one for goods and services (see [25]).

Held, on interpretation of the agreement, that it was. It entailed the Fund providing both goods and services to the beneficiary farmers; and the service to the Agency and Department of providing to the farmers those goods and services — tasks that the Agency and Department would otherwise themselves have had to undertake (see [13] and [35]).

Accordingly, given this character, s 217(1) applied, and the absence of a procurement process rendered the agreement invalid (see [37]).

Appeal upheld, order of the High Court set aside, and replaced with a declarator that the agreement was invalid (see [39]).

EZULWINI MINING CO (PTY) LTD v MINISTER OF MINERAL RESOURCES AND ENERGY AND OTHERS 2023 (5) SA 112 (SCA)

Minerals and petroleum — Mines — Underground water — Mine operator during period of operation of mine pumping water from underground works — Operator later ceasing operations — Whether ongoing obligation to pump water from underground mining area — National Environmental Management Act 107 of 1998, s 24N; Mineral and Petroleum Resources Development Act 28 of 2002, s 43(1).

Appellant (Ezulwini) was the holder of a mining permit and operator of a mine. It had taken over the mine from a previous operator and from that time had pumped groundwater from the underground mining areas (groundwater seeped into those areas from the rock above).

Ezulwini then discontinued the mining operations and applied to the Department of Mineral Resources and Energy for authorisation to cease pumping out such water. Its

application was in terms of the National Environmental Management Act 107 of 1998 (NEMA).

The application was, however, refused, which prompted Ezulwini to appeal internally. In this it was partly successful. However, before that process was finalised, Ezulwini applied to the High Court for a declarator that neither an environmental authorisation in terms of NEMA nor an amendment of its water-use licence was required in order for it to cease pumping (see [7] – [8]).

The Minister of Mineral Resources and Energy and the fifth and sixth respondents, who were, respectively, the owner and operator of the adjacent mine, opposed the application (see [9]).

Fifth and sixth respondents also counterclaimed for a declarator that Ezulwini was required to keep pumping until the Minister had issued it a mine-closure certificate in terms of s 43 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). Their interest in the matter was that their mine was connected to Ezulwini's underground, albeit that the connection was sealed, and they were concerned that, were Ezulwini's mine to fill with water, the seal might break, with associated risks to their employees. (Fifth and sixth respondents' mine was in use.) (See [9] – [10].)

The High Court granted the counter-application and declared that Ezulwini remained responsible for pumping water from its mine until the Minister issued it a closure certificate, or until the effluxion of a longer period in NEMA (s 24R). Ezulwini was granted leave to appeal to the Supreme Court of Appeal. The issue was whether Ezulwini was obliged to continue pumping water from its underground mining works, even though it had ceased mining (see [2], [11] – [12]).

Held, on interpretation of s 43(1) of the MPRDA and s 24N of the NEMA, that Ezulwini was obliged to continue pumping until authorised to stop doing so in accordance with mine-closure procedures (see [24], [28] and [32]).

Ordered that part of the High Court's order be set aside and replaced with an order declaring Ezulwini responsible for pumping water from the underground workings of its mine until the Minister had issued it a closure certificate in terms of s 43 of the MPRDA (see [48]).

The appeal was otherwise dismissed (see [48]).

LIBERTY GROUP LTD v MOOSA 2023 (5) SA 126 (SCA)

Insolvency — Compulsory sequestration — Provisional sequestration — Dismissal — Order dismissing application for provisional sequestration is appealable — Insolvency Act 24 of 1936, s 150(5).

In this case appellant (Liberty) applied for the provisional sequestration of respondent (Moosa); the High Court dismissed the application; Liberty applied for leave to appeal, and the High Court again refused the application, citing s 150(5) of the Insolvency Act 24 of 1936. Section 150(5) provides, inter alia that, '(t)here shall be no appeal against any order made by the court in terms of this Act', with the High Court reasoning that the order dismissing Liberty's application for provisional sequestration (the order), was an 'order made . . . in terms of [the] Act' (see [2] – [3]).

Here, on application for leave to appeal before the Supreme Court of Appeal, the issue was whether the order was indeed an 'order made . . . in terms of [the] Act'. If it was, no appeal against it could be made, while if it was not, an appeal lay (see [4]).

Held, on interpretation of s 150(5) and overruling a line of cases, that an order dismissing an application for a provisional sequestration order was not an order referenced in s 150(5) and was accordingly appealable (see [16] and [20]).

Leave to appeal granted, the appeal upheld, the High Court's order set aside, and substituted with an order, inter alia, placing Moosa's estate in provisional sequestration (see [30]).

MASHININI v MEC FOR HEALTH, GAUTENG 2023 (5) SA 137 (SCA)

Medicine — Medical negligence — Future medical expenses — Public healthcare defence — Onus — Public healthcare authority to show that identified medical services available at state hospital, and that standard of service would be equal to or better than that provided by private sector — This in line with common-law principle of delict that plaintiff required to allege and prove quantum of damages flowing from delict — No need to develop common law.

Medicine — Medical negligence — Future medical expenses — Public healthcare defence — Compatible with established common-law principles of damages in delict — No need to develop common law.

The appellant underwent surgery at a public hospital under the respondent's authority. There was a mishap during the surgery which required further surgery to fix. Afterwards, the appellant sued the respondent and the surgeon for damages for medical negligence out of the Johannesburg High Court, claiming, inter alia, future medical expenses of R880 000.

The respondent raised the so-called 'public healthcare defence', and asked the High Court to develop the common law to direct the respondent to provide future medical treatment at a state hospital instead of compensating the appellant in monetary terms. The defence found favour with the High Court, which — on the strength of *MSM obo KBM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ) ([2020] 2 All SA 177; [2019] ZAGPJHC 504) — made an order directing the respondent to ensure that the required services be rendered at the state hospital 'as and when required at the same or better level of service than in the healthcare sector'. In *MSM* the judge held that she had developed the common law because the order was not catered for under the ambit of delictual relief.

In an appeal to the Supreme Court of Appeal, the appellant argued that the High Court had erred in relying on *MSM* as authority for the proposition that the common law needed development to permit the court to uphold the public healthcare defence and make the order sought. The appellant also submitted that the respondent had presented no factual evidence to substantiate the pleaded argument in respect of the development of the common law, which the Constitutional Court in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 355 (CC) (2017 (12) BCLR 1528; [2017] ZACC 37) set as a requirement for the granting of such relief.

The respondent in turn argued in support of the High Court order that the facts before court showed that the appellant had already been receiving the required treatment at the public hospital.

Held

The appellant discharged the onus of proving the quantum of her future medical expenses of R880 000, for which she had to be compensated in money, as the identified medical services will have to be rendered by private healthcare. This constituted prima facie proof that the payment of these expenses would place her financially in the same position as she would have been had the failed operation not occurred. On the evidence there was nothing to show that the amount of R880 000 for

future medical treatment was not a reasonable and necessary sum by which the appellant's patrimony had been diminished by the hospital staff's conduct. (See [24].)
In addition, the High Court was wrong in its application of *MSM*, which did *not* develop the common law to provide for the implementation of the public healthcare defence. When the judge found that the identified services were available at the state hospital at the same standard as in the private sector, she held in effect that the state had discharged an evidential burden to show that the costs of private healthcare were not reasonable or necessary in the circumstances. Since the state had tendered the services in question, it consented to the order, thereby reducing the monetary award in line with existing delictual principles. (See [25].)
In the present matter the respondent, having pleaded the public healthcare defence, bore an evidentiary burden to rebut the prima facie case established by the appellant. But the respondent presented no evidence to counter the appellant's evidence that state hospitals were not capable of rendering the services she required. There being no evidence that medical services of the same, or an acceptably high, standard would be available at no cost or for less than that claimed by the appellant, the respondent's public healthcare defence fell to be dismissed. Appeal upheld. (See [26] – [28].)

ROAD ACCIDENT FUND v TAYLOR AND RELATED MATTERS 2023 (5) SA 147 (SCA)

Court — Jurisdiction — Overreach — Deciding non-issues without evidence — Perception that system of state administration broken not licence to disregard fundamental principles of procedural or substantive law.
Motor vehicle accident — Compensation — Claim against Road Accident Fund — Final settlement — Power of court to make compromise order of court on request — Compromise extinguishing disputed rights and obligations, putting end to litigation and having effect of res iudicata — Court having no jurisdiction to enquire into whether compromise justified on merits or validly concluded.
Practice — Judgments and orders — Judicial overreach — Deciding non-issues without evidence — Perception that system of state administration broken not licence to disregard fundamental principles of procedural or substantive law.
Practice — Judgments and orders — Orders affecting person who not party to legal proceedings — Order referring conduct of attorneys, medical experts and actuary to

statutory body or institution responsible for their oversight, without giving them hearing — Set aside on appeal for offending audi alteram partem principle.

This case concerned a number of appeals against a High Court order in two actions against the Road Accident Fund (the RAF), one by Ms Taylor (the *Taylor* matter), and another by Mr Mathonsi (the *Mathonsi* matter). Each of the actions was settled without proceeding to trial, and in each the same firm of attorneys, De Broglio Inc, represented the plaintiffs. In the *Taylor* matter, when it was sought to remove it from the roll the, court — without requiring any further judicial oversight of the settlement — requested to be addressed on a number of issues. These included whether the RAF was entitled to settle a matter with a plaintiff without judicial approval of a settlement, and whether a court may exercise judicial oversight to determine if a settlement was proper. In the *Mathonsi* matter the parties agreed that the court be requested to make the draft order an order of court.

After hearing each matter separately and in each reserving judgment, the court handed down a single judgment dealing with both. It held that in the *Taylor* matter, De Broglio Inc, the specific attorney who dealt with the matter (Ms De Swardt), counsel (Mr Van den Barselaar) and also the actuary who calculated the loss-of-income claim (Mr Kramer), together dishonestly misrepresented the facts to the RAF in order to extract a grossly inflated settlement offer, and sought to avoid judicial scrutiny of the consequent settlement agreement (see [19] – [20]). The same conclusion was reached in respect of the *Mathonsi* matter, and the counsel, medical expert and actuary involved. The court ordered both cases postponed *sine die*; that the impugned conduct be referred to the respective professional bodies concerned; and that a copy of the judgment be delivered to, inter alia, the Minister of Transport (see [23]).

Ms Taylor and Mr Mathonsi applied for leave to appeal against those parts of the order applicable to them; and De Broglio Inc, Ms De Swardt, Mr Van den Barselaar and Mr Kramer (the affected persons) separately for leave to intervene and for leave to appeal against those parts of order affecting them. The court dismissed the applications for leave to appeal on the basis that it had made no appealable order in respect of them. (See [24] – [25].)

In their appeals to the Supreme Court of Appeal (the SCA), with its leave, the main issues were (1) the consequences of the settlement of disputed issues in litigation and the powers of a court in relation thereto; and (2) the rights of a person who was not a

party to legal proceedings, but whose conduct was referred by the court to the statutory body or institution responsible for oversight over the members of the profession that the person belonged to; and (3) whether the court was guilty of judicial overreach, the findings having been made without any admissible evidence.

Held

(1) When a court was asked to make a settlement agreement an order of court, it had the power to do so, derived from a long-standing practice aimed at assisting the parties to give effect to their compromise. This power was not derived from the jurisdiction of the court over the issues that had been raised before it but were subsequently settled. In making a compromise an order of court, the court plainly did not determine the issues that the compromise settled. When parties to litigation confirmed that they have reached a compromise, a court had no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. Also, at common law, a compromise extinguished disputed issues, putting an end to litigation; it had the effect of res iudicata. It followed that the court a quo should have removed the *Taylor* matter from the roll, and that there was no legitimate reason for refusing to make the draft order in the *Mathonsi* matter an order of court. Their appeals would therefore succeed. (See [36], [40], [42], [48] and [51] – [52].)

(2) The principle of *audi alteram partem* required that the affected persons be afforded reasonable prior notice and opportunity to state their cases. Here, they were not, and it followed that findings and referrals were made in complete disregard of their rights. The referrals were manifestly unjust, could not stand and would be set aside. (See [33] – [34].)

(3) The findings in respect of the settlement agreements and the conduct of the affected persons, were based on the unspecified knowledge of the judge of the facts and circumstances in other matters and the pleadings and expert reports in the court files — none of which constituted evidence before the court. Thus, the judge decided non-issues without evidence, to the detriment of all concerned. This injudicious overreach had to be strongly deprecated. Where the misappropriation of public funds was properly raised before a court, it must deal with it decisively and without fear, favour or prejudice. But a court had no general duty or power to exercise oversight over the expenditure of public funds. A perception that a system of state administration

was broken, was not a licence to disregard fundamental principles of procedural or substantive law. (See [30] – [31].)

TWK AGRICULTURE HOLDINGS (PTY) LTD v HOOGVELD BOERDERYBELEGGINGS (PTY) LTD AND OTHERS 2023 (5) SA 163 (SCA)

Appeal — In which cases — Against dismissal of exception — *SCA* confirming long-standing rule that, save in exceptional circumstances, dismissal of exception not appealable.
Appeal — To Supreme Court of Appeal — Appealability — Doctrine of finality — Interests of justice — Appropriate test.

The respondents were shareholders of the appellant company. They came to believe that a decision by the appellant to amend its memorandum of association had a material and adverse effect on the preferences, rights, limitations and other terms of their shares. After complying with the formalities required by s 164 of the Companies Act 71 of 2008 (the Companies Act), the respondents demanded the appellant pay the fair value of their shares. After the appellant declined to do so, the respondents approached the High Court, basing their cause of action on their appraisal rights — a remedy provided by s 164 read with s 37(8) of the Companies Act — and seeking that the appellant pay them R120 per share held by them, alternatively a determination of the fair value of their shares and payment of the value so determined. The response of the appellant was to raise two exceptions to the effect that the respondents' particulars of claim lacked averments necessary to sustain a cause of action, in this case to secure an appraisal remedy: in that they failed to aver that the appellant had more than one class of shares; and that they failed to show that the shares themselves had been materially and adversely affected. The single judge hearing the matter as court of first instance upheld the exceptions. The full court, however, upheld the respondents' appeal against such decision, and dismissed both exceptions. With special leave the defendant appealed to the Supreme Court of Appeal.
The SCA raised the issue with the parties whether the full court's order dismissing the exceptions was appealable to the SCA. This, in the light of SCA authority — *Maize Board* — affirming the rule followed in a long line of cases, that a dismissal of an exception (save an exception to the jurisdiction of the court) *did not finally dispose of the issue* raised by the exception, and was accordingly *not appealable*. In response,

the appellant argued that such rule was not immutable, as was clear from recent SCA authority — *Really Useful Investments* — which had held that '(w)here it was incontrovertible on the papers that the effect of the exception [was], so to speak, the last word on the subject, the dismissal of an exception [was] appealable'. The appellant argued further that, now, as was apparent from SCA case authority, as well as the wording of the new Superior Courts Act 10 of 2013 (the SC Act), ultimately, appealability to the SCA was determined by recourse to the overarching principle of the interests of justice. The considerations set out in the traditional test for appealability formulated in *Zweni* (see [12]), which had placed an emphasis on the doctrine of finality, whilst still remaining relevant, had ultimately to yield to the demands of the interests of justice. Applying the test for appealability so understood, the appellant argued, led one to conclude that the dismissal of the exceptions by the full court was appealable (see reasoning at [14] – [18]).

Held, that, as a general principle, the High Court should bring finality to the matter before it, in the sense laid down in *Zweni*. Only then should the matter be capable of being appealed to the SCA. Such an approach allowed for the orderly use of the capacity of the SCA to hear appeals that warranted its attention. It prevented piecemeal appeals that were often costly and delayed the resolution of matters before the High Court. It reinforced the duty of the High Court to bring matters to an expeditious, and final, conclusion. And it provided criteria so that litigants could determine, with tolerable certainty, whether a matter was appealable. These were the hallmarks of what the rule of law required. (See [21].) Furthermore, the approach enabled the Constitutional Court to be highly selective in deciding upon matters that should be heard by it (see [26]).

Held, furthermore, that the SC Act had not supplanted the primacy of *Zweni*; nor had it enthroned the interests of justice as the overarching principle to decide whether a matter was appealable. (See [22] and [24].)

Held, accordingly, that the SCA ought not to decide appealability on a case-by-case basis under the ultimate guidance of the interests of justice; the doctrine of finality had to figure as the central principle of consideration when deciding whether a matter was appealable to the SCA. Different types of matters arising from the High Court may warrant some measure of appreciation that went beyond *Zweni* or may require an exception to its precepts. But, any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of

this court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of *Zweni* (see [30] and [41]).
Held, further, having regard to the importance of the doctrine of finality, the rule in *Maize Board*, to the effect that the dismissal of an exception was not appealable because no legal obstacle stood in the way of the trial court finally deciding the point of law, ought to be retained (see [39]). Accordingly, further, the dictum in *Really Useful Investments* referred to above could not stand: there never was, or ought to have been, a qualification to the rule affirmed in *Maize Board* that the dismissal of an exception sought was appealable where the decision of the SCA would be the 'last word' in resolving the litigation (see [40]).
Held, accordingly, that the orders made by the full court did not meet the requirements of appealability to the SCA. As a result, despite special leave having been granted by two judges of the SCA, the appeal was not properly before the SCA, and the appeal had to be struck from the roll. (See [51].)

ABRAHAM v MINISTER OF HOME AFFAIRS AND ANOTHER 2023 (5) SA 178 (GJ)

Immigration — Refugee — Asylum seeker — Detention — Illegal foreigner who is detained pending deportation and who evinces intention to apply for asylum — Whether individual may be detained pending his being brought before Refugee Status Determination Officer to make asylum application — Immigration Act 13 of 2002, s 34(1); Refugees Act 130 of 1998.

These were three matters which were heard together. In each instance the applicant was a foreigner who had been found within the country without a visa or residence permit, had been arrested and detained, pending deportation. This in terms of s 34 of the Immigration Act 13 of 2002.
Each had later evinced an intention to apply for asylum, but had not been released in order to do so, so prompting court applications for same.
These had been unsuccessful, with the High Court directing in each instance that the foreigner be taken before a Refugee Status Determination Officer to make the application, but refusing their release pending that.
Here, each matter came on appeal to the full bench.
Held, at [36], that —

• detention under s 34 of the Act ceased to be lawful when the Refugees Act 130 of 1998 became applicable;

• the Refugees Act became applicable when an illegal foreigner expressed a desire to apply for asylum; and

• on such expression the illegal foreigner became entitled to immediate release from s 34 detention.

• Regulation 8(3) of the Refugees Regulations, properly interpreted, provided that the good-cause enquiry was part of the application-for-asylum enquiry — good cause did not have to be established as a condition precedent to being permitted to make the asylum application. (The regulation provided that '(a)ny person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic . . . .') (See [17].)

Appeal upheld and the High Court's order substituted with an order reflecting the holdings stated above (see [40]).

CNN v NN 2023 (5) SA 199 (GJ)

Marriage — Divorce — Proprietary rights — Pension benefits — Non-member spouse's share — Enforceability of order directing fund to pay to non-member spouse 'accrued pension benefits' of member spouse, who had retired shortly before divorce — Under s 7(8) of Divorce Act, court only allowed to make order directing fund to pay non-member share of member spouse's 'pension interest', ie those benefits accruing to member spouse due to divorce — Court unable to order fund to pay non-member spouse share of member spouse's pension benefits that had accrued prior to divorce, for instance, through retirement — Divorce Act 70 of 1979, ss 1 sv 'pension interest', 7(7) and 7(8).

The applicant obtained a divorce order dissolving her marriage with the respondent. The order incorporated a settlement agreement assigning the applicant 50% of the respondent's 'pension interest', and directing the fund of which the respondent was a member to pay the applicant such amount. However, when the applicant approached the fund seeking payment, she learnt that the respondent, two months after being

served with the divorce summons, and before divorce was granted, had resigned from his employment and exited the fund: this meant, she was informed, there was no 'pension interest' in which she could share; it stood at nil; and what the fund held now on behalf of the respondent was rather his 'accrued pension benefit'. What she should do, the applicant was informed, was to provide the fund with a divorce order directing it to pay a 'pension benefit', as opposed to a 'pension interest'. This response prompted the present proceedings before the High Court, in which the applicant sought the variation of the settlement agreement, such that applicant be assigned a share of the respondent's 'accrued pension benefit', instead of a share of his 'pension interest'. The decision of the High Court turned on the question of the enforceability of the amendment sought.

In considering this question, the court referred to applicable sections of the Divorce Act 70 of 1979 relevant to the applicant's case. Section 7(7)*(a)* provided that, 'in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the *pension interest* of a party shall . . . be deemed to be part of his assets' (see [26]). Section 1 defined 'pension interest', in relation to a party who was a member of a pension fund, as 'the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office' (see [21]). Further, s 7(8) empowered a divorce court to grant an order directing a fund to pay part of this 'pension interest' of a member to their spouse, *when any pension benefits accrued in respect of that member* (see [27]).

The court held that the effect of these provisions was that under s 7(8) of the Divorce Act — in terms of which a court could only order a fund to pay a share of a 'pension interest' — a non-member spouse could only claim from a pension fund a share of the pension benefits of their member spouse that had accrued to the latter *due to divorce*. A non-member spouse could not claim a member spouse's pension benefits held by their fund that had accrued to them *prior to the ordering of divorce*, for instance, through their retirement, as had occurred here. Accordingly, the court could not grant the variation sought directing the fund to pay a share of the respondent's 'accrued pension benefits' because to do so would fly in the face of s 7(8) of the Divorce Act. (See [19], [22] – [23], [31] and [35] – [36].) The court did describe it as a serious concern that, under the present legal framework, it was possible for unscrupulous member spouses to deliberately prejudice their non-member spouses' claims to their

'retirement benefits' by resigning from their work after being served with a divorce summons. Nevertheless, the court noted, the applicant had not challenged the present law, and the court was bound to follow it. (See [20], [33], [35] and [36].) The court accordingly dismissed the application (see [37]).

COOPER NO AND OTHERS v MARKET FISHERIES (OUDTSHOORN) CC 2023 (5) SA 212 (WCC)

Close corporation — Winding-up — Inability to pay debts — Deeming of close corporation's inability to pay debts — Notice contemplated by s 69(1)*(a)* — Service on registered address sufficient — No need for service on both registered and principal place of business — Close Corporations Act 69 of 1984, ss 25, 66 and 69.

This was an application for costs pursuant to the settlement of winding-up proceedings brought by the applicants against the respondent close corporation. The application for winding-up had been brought on the basis that the respondent was unable to pay its debts as contemplated in ss 66 and 69 of the Close Corporations Act 69 of 1984, read with ss 344*(f)* and 345(1) of the 1973 Companies Act, and/or that it would otherwise be just and equitable for the respondent to be wound up.

One of the grounds on which the respondent argued that it should not be ordered to pay costs was that proceedings should never have been instituted against it in the first place: had the existence of the debt in question come to its attention, it would have paid it. In this regard, the respondent argued that the Close Corporation Act required that statutory notices to be served on a close corporation had to be served at both its registered address and its principal place of business. In this case, the letter demanding payment of a debt that a creditor was required by s 69 of the CC Act to send to a CC debtor in order for the latter to be deemed to be unable to pay its debts, was sent only to the respondent's 'registered address', but not its principal place of business, of which the applicants were aware.

The court held it was a peremptory requirement of the CC Act that the s 69 letter of demand be sent to the respondent's registered address (see [17]). However, there was no obligation on the applicants to have served any of the requisite statutory notices at both the registered address *and* principal place of business of the respondent. This was so, in light of the availability of the dual-jurisdiction principle to

the applicants as creditors of a close corporation, given the applicability of the provisions of the old Companies Act, by virtue of s 66 of the CC Act (see [19]).
In conclusion, the court held that the respondent ought to pay the costs of the winding-up application (see [24]).

ERICSSON SOUTH AFRICA (PTY) LTD v JOHANNESBURG METRO AND OTHERS 2023 (5) SA 219 (GJ)

Access to information — Access to information held by public body — Information generated for public body by third party — Deemed to be under control of public body (state) and not third party — Third party not necessary party to proceedings.
Access to information — Access to information held by public body — Request for record relating to third party — State's obligation to notify third parties where record containing information supplied by them in confidence — State must take reasonable steps to identify third parties before it can deny request for access to record on ground of ignorance of their identity — To protect identity of informants and whistle-blowers, court may order access to records subject to redaction of information about them — Promotion of Access to Information Act 2 of 2000, ss 37(1)*(b)*, 47(1) and 49(2).
Access to information — Access to information held by public body — Refusal — Grounds — Protection of confidential information of third party; protection of police methods; protection of records privileged from production in legal proceedings; protection of advice supplied for policy formulation; public interest — No basis for refusal on any of these grounds found — Promotion of Access to Information Act 2 of 2000, s 37(1)*(b)*, s 39(1)*(b)*, s 40, s 44 and s 46.

In March 2019 the appellant (Ericsson) requested access, under the Protection of Access to Information Act 2 of 2000 (PAIA), to a report the first respondent (the City) had commissioned from a third party, Nexus. * The City refused access, initially on the ground in s 7 of PAIA (the requested record related to ongoing civil proceedings) and later on various other grounds, including s 37(1)*(b)* (the requested record contained information supplied in confidence by third parties). † Reliance on s 37 triggered s 47(1) (notification of third parties), which required the state to take reasonable steps to inform third parties 'to whom or which the record related' of the request for access. Section 49 then gave affected third parties a right to make representations on why the request should be refused.

When Ericsson's internal appeal against the City's s 7 refusal failed, it applied to the Johannesburg High Court for relief, but was rebuffed in limine on the ground that Nexus, as the compiler of the report, had not been joined despite its 'direct and substantial interest' in the matter. Ericsson appealed to a full bench.

Having relied initially on s 7, the City raised, inter alia, the s 37 ground for refusal for the first time in its answering affidavit. Ericsson objected, relying on *AfriForum v Emadleni Municipality* [2016] ZAGPPHC 510 to argue that the City was not permitted to change tack and to rely on new grounds in its answering affidavit.

The issues before the full bench were thus —

(i) whether the court a quo should have upheld Ericsson's point in limine;

(ii) if not, whether the City was entitled to rely, in its answering affidavit, on new grounds of refusal;

(iii) if so, whether the City's reliance on s 37 was justified.

On (iii), the City argued that it was entitled to refuse access in order to protect the interests of the whistle-blowers and informants Nexus had relied on to compile its report. It also conceded that it had not complied with its own obligation under s 47 to notify them of Ericsson's request for access but claimed this was because it was not aware of their identity. Before the hearing of the present appeal, the City proposed an order that would direct it to notify Nexus of the request on the ground that it was the necessary 'conduit' between the court and the whistle-blowers.

Held

As to (i): The court a quo erred in upholding the point in limine. Under s 4 of PAIA, a 'record in the possession or under the control of . . . an independent contractor engaged by a public body [was] regarded as being a record of that public body'. As a matter of law, therefore, the Nexus reports and supporting documents used by Nexus to generate the report were deemed to be in the possession or under the control of the City. The court a quo had thus erred in treating Nexus as the possessor or controller of the record, and hence as a necessary legal party to the proceedings. (See [47] – [48].)

Since the state had to justify a refusal to provide access to a record which was legally under its control, even if it had been generated by a third-party independent contractor, the City ought to have dealt with this issue in its answering affidavit, instead of justifying its refusal to give access to the Nexus report on statutory grounds, which presupposed that the City was in possession of it, unless a contrary averment was made. Since the

City made no such averment, the court a quo erred in assuming without evidence that it was unable to produce the report or other documents and then finding that Nexus should have been joined as a necessary party with a direct and substantial interest in the application. (See [49] – [51].)

The court a quo also erred in overlooking the facts (i) that the City never denied being in possession of the report; and (ii) that there was no reason why the City could not have produced it without Nexus' assistance. Therefore, the second basis for the court a quo's finding, that Nexus had a direct and substantial interest in the application, was also fatally flawed. (See [52] – [54].)

As to (ii): Ericsson's reliance on *AfriForum v Emadleni* overlooked the fact that it was overruled by the Constitutional Court in *President v M & G Media* (2012), ‡ which held that in PAIA proceedings the court 'decided the [state's] claim of exemption from disclosure afresh'. This meant that the City was *not* limited to the reasons given for its decision to refuse the request or in its decision in the internal appeal. (See [56] – [59].)

As to (iii): While s 47(1) had to be read with s 37(1), the latter had nothing to do with whether a third party had possession or control of the requested information, but related to the need to protect confidential information from disclosure. In casu, the City did not aver that the information was disclosed to it or to Nexus on a confidential basis as required by s 37(1)*(b)*, nor did it make the averments required to make Nexus a third party to which notice had to be given under s 47(1). However, the real crux of the issue raised by the City centred on the position of the third-party informants and whistle-blowers Nexus had used for the compilation of its report. The City's lack of knowledge of their identities did not mean that it could deny Ericsson access to the report: it had to first comply fully with its obligations under s 47 and s 49. Save for the information pertaining to the informers and whistle-blowers, the City had failed to justify its refusal on any of the grounds relied on. It followed that the City's decision to refuse access had to be set aside because it was unlawful, while its decision to refuse access to the information pertaining to the third-party informers and whistle-blowers had to be set aside because it was premature, in that it had not complied with its obligation to take reasonable steps to notify them under s 47 of the Act. (See [94], [104] – [110].)

To balance the interests and constitutional rights of Ericsson and the third-party informants and whistle-blowers, the City would be directed (i) to take reasonable steps to notify them of Ericsson's request; (ii) to redact the report to remove any information

relevant to them; and (iii) to provide Ericsson with the balance of the record. (See [110].)

FORTY SQUARES (PTY) LTD AND ANOTHER v NORIS FRESH PRODUCE (PTY) LTD t/a GOLDEN HARVEST (IN LIQ) AND OTHERS 2023 (5) SA 249 (WCC)

Company — Business rescue — Liquidation proceedings already initiated — Requirements — Reasonable prospect of rescue — Discussion — Companies Act 71 of 2008, s 131(4)*(a)*.

On 23 February 2023 the first respondent, Golden Harvest, a company which had operated a fruit-distribution business in Cape Town and Johannesburg, was placed in final liquidation by the Western Cape High Court, at the instance of a creditor, the seventh respondent, Capespan (Pty) Ltd. Golden Harvest had not offered any opposition to those proceedings. In the present application, lodged on 10 March 2023, the first applicant — Forty Squares (Pty) Ltd, the shareholder in Golden Harvest — brought an application, in terms of s 131 of the Companies Act 71 of 2008, for an order placing Golden Harvest into business rescue. Forty Squares proposed a business rescue plan to save the business of Golden Harvest that involved the introduction of post-commencement finance (PCF) under s 135 of the Companies Act, of R20 million, contributed by itself, which it in turn would obtain from certain entities; would be of three years' duration; and would give creditors dividends of 30 cents in the rand. The liquidators of Golden Harvest (second and eighth respondents), in addition to an intervening creditor, a landlord of Golden Harvest, formally opposed this application.
In terms of s 131(4)*(a)* of the Companies Act, before a court could grant an order placing a company into business rescue, it had to be satisfied that there was 'a reasonable prospect for rescuing the company'. The court asserted, based on SCA authority, that in cases where, as here, business rescue was sought *in respect of a company that had already been liquidated*, a court had to be satisfied that there was a realistic prospect of the circumstances of the company 'improving radically', such that it would become profitable (see [20]). In the present case, the court asserted, various factors demonstrated unequivocally that there were no anticipated circumstances that would 'radically improve' the prospects of Golden Harvest being returned to solvency and commercial viability. In fact, they pointed the other way. (See [22].) Amongst others, they were:

- The major creditors had all indicated that they would not vote in favour of the business rescue plan before the court, or any similar plan. (This, alone, the court stressed, rendered the application for business rescue very problematic.) (See [23] – [26].)
- The liquidators had cancelled all of the company's leases (see [27]).
- The company had ceased trading, and no longer had any employees (see [28]).
- The company had suffered severe reputational damage in the marketplace owing to its inability to pay suppliers (see [30]).
- The PCF was not likely to be sufficient to put the company so very heavily burdened by debt back into solvency (see [33]).
- The proposed duration (three years) of the business rescue plan was extraordinarily long, in circumstances in which business rescue was meant to be a speedy process aimed at a so-called quick-fix solution (see [34]).
- The proposed return for creditors in the business rescue plan was based on an overly ambitious estimate of the projected profit margin once PCF funding had been secured (see [36]).
- The haste with which the application was made — this where the directors of Golden Harvest had not applied for business rescue when it was in fact warranted, that is, at the earliest the beginning of 2022, when it was apparent that the company was in serious financial trouble, and at the latest 9 December 2022, when papers for the provisional winding-up of the company were served on the company — suggested that it was not bona fide (see [41] – [43]).

The court accordingly concluded that the application for business rescue ought to be dismissed (see [43] and [47]).

MINISTER OF POLICE v ZAMANI 2023 (5) SA 263 (ECB)

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Prescription of delictual claim for wrongful arrest and detention — What facts plaintiff required to have knowledge of before prescription could commence running — When plaintiff acquired knowledge of such facts — Prescription Act 68 of 1969, s 12(3).

Section 12(1) of the Prescription Act 68 of 1969 (the Act) provides that '(s)ubject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due'; and s12(3) provides that '(a) debt shall not be deemed to be due until the creditor *has knowledge of the identity of the debtor and of the facts from which the debt arises*: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

This case concerned an appeal against the trial court's dismissal of a special plea of prescription — placed before it for separate adjudication — in a delictual action for damages, instituted by Mr Zamani arising out of his alleged unlawful arrest and detention. The trial court had found that the defendant had failed to prove that the plaintiff's claim had prescribed by not placing any evidence before it as to why the claim had prescribed.

A rape charge against Mr Zamani had been withdrawn after the results of a DNA analysis. It was not disputed that Mr Zamani knew the identity of the arresting officer, or that a period of more than three years had elapsed between Mr Zamani's arrest and his release from custody, and the time when he instituted his claim. In reply to the special plea, Mr Zamani claimed that he did not know that he had a claim for compensation against the defendant, or that his arrest was unlawful, until November 2018, when he had heard on a radio programme that he might have such a claim and thereafter consulted an attorney. His evidence was that he did not know that he had a claim against the defendant, or that his arrest was unlawful, until he consulted with the attorney.

Insofar as Mr Zamani relied on not knowing 'the facts from which the debt arises' as contemplated s 12(3), the issues were what facts the plaintiff was required to have knowledge of before prescription could commence running in an action for unlawful arrest and detention; and when the plaintiff acquired knowledge of such facts.

Held

Section 12(3) did not require the plaintiff to know that the conduct of the police was unlawful or that he had a legal right to bring a claim against the defendant. The nature of 'the facts from which the debt arises' in s 12(3) encompassed facts that were material to the debt, ie necessary for a plaintiff to prove to support a claim. Knowledge that the conduct of the debtor was wrongful or negligent — a legal conclusion, not a fact — was not required before prescription commenced to run, nor was knowledge of the full extent of his or her legal remedies and what the full legal implications of the

known facts were. Rather, what was required was knowledge of the material facts from which the legal conclusion of the elements of wrongfulness and fault in a delictual claim may be drawn. Knowledge of the material facts did not mean that the creditor must have knowledge of all the facts underlying the cause of action as pleaded, or of all of the alleged facts as they appear from the pleadings. It was also not necessary for the creditor to have knowledge of the full extent of their legal remedies, or what the full legal implications of the known facts were. The facts material to a delictual debt were a combination of the facts which must enable the court to arrive at legal conclusions regarding the constituent elements of the delictual cause of action in question, such as a causative act, harm, unlawfulness and fault. Since unlawful arrest and detention was a form of iniuria that did not require fault, the plaintiff only had to prove that he was deprived of his freedom without justification. The fact that the plaintiff was not required to allege and prove the absence of justification for his or her arrest and detention meant that the facts from which it must be concluded that authority for the arrest of the plaintiff did, or did not, exist, were not material facts from which the delictual debt arose. 'Facts' for purposes of s 12(3) included facts that would cause the creditor to reasonably believe that a constituent element of the delict in question was present. Prescription was not postponed until such time as the creditor was in a position to comfortably prove their case, nor was it necessary for the creditor to have certainty in regard to the law and the defendant's rights and obligations that might be applicable to such debt. (See [11], [13] – [16], [18], [20], [26].)

In the context of the claim in the present matter, the plaintiff was not required to conclusively know that the arresting officer did not have authority to arrest him or her, but rather the question was whether the plaintiff had knowledge of sufficient facts which would reasonably have placed him in a position to form the belief that the arrest was without justification, and to investigate the matter further. The information which he obtained from the radio programme formed no more than a realisation that he may have a claim against the policeman who arrested him, as opposed to the material facts relating to his arrest and detention that he would need to prove in order to establish the liability of the defendant. The full extent of the plaintiff's cause of action was complete and the debt became due when he was released from detention. There was nothing that prevented him from giving instructions to an attorney to institute proceedings. That the plaintiff may not have known what his legal rights were, did not

delay the running of prescription. Section 12(3) did not require the creditor to have knowledge of any right to sue the debtor. (See [15], [21], [23].)
Accordingly, the defendant discharged the burden of proving, firstly, that the plaintiff had knowledge of the identity of the debtor, and, secondly, that the plaintiff had knowledge of the facts from which the debt arose (as envisaged in s 12(3) of the Act) more than three years prior to the institution of proceedings for the recovery of damages. In the result, the plaintiff's claim had become prescribed, and the appeal would be upheld. (See [28].)

PREMIER FMCG (PTY) LTD v BAKER 2023 (5) SA 279 (GP)

Practice — Applications and motions — Striking out — When application should be made — Preliminary interlocutory application for striking-out of material appearing in affidavit filed in main application which yet to be heard — Such should rarely, if ever, be granted — Should be restricted to very clearest cases of inadmissibility, where no possibility of court in main application arriving at different conclusion — Most appropriate course for striking-out application to be made to court trying main application at time application before court for decision on merits.

The applicants, Mr Farhaad Joosub Aboo Baker (Mr Baker) and Farhaad Distributors (Pty) Ltd (Distributors), were respectively the subjects of a sequestration application and a liquidation application brought against them by the respondent, Premier FMCG (Pty) Ltd (Premier). The applicants, after filing notices to oppose those applications — and having not yet filed answering affidavits — each launched an interlocutory application against the respondent, seeking, under the common law, to strike out material appearing in the affidavits filed by the respondent in its sequestration and liquidation applications. The material in question constituted evidence of Premier's former senior credit controller, Ms Van Zyl, given at an enquiry that was held in terms of ss 417 and 418 of the Companies Act 61 of 1973 into the affairs of ABC Fire Projects (Pty) Ltd (in liquidation), a company in which Ms Van Zyl had an interest. Such evidence, the applicants claimed, was inadmissible in the sequestration and liquidation applications; to allow it would breach the clear rule that evidence procured at an enquiry was admissible only against the party who gave evidence (in this case, Ms Van Zyl or her company), and not against a third party (in this case, Mr Baker and Distributors). Such evidence, the applicants continued, should be struck out now,

rather than later, so that when they came to file their answering affidavits they would only have to deal with evidence that was admissible against them. The respondent, for its part, argued that such applications should not be decided now, but rather as part of the main applications. The respondent argued that the applicants should file answering affidavits, and the striking-out applications could then properly be decided at the main hearing, in the light, inter alia, of the content of those answering affidavits. The key issue to be decided was whether it was appropriate for the court to determine the striking-out applications in interlocutory proceedings brought prior to the determination of the main applications. In answer, the court quoted with approval the decision in *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W), holding that an application for striking out material in affidavits in a main application should properly be made to the court *trying such application* at the time the application was before the court for a decision on the merits. (See [12].) Such a court would be in the best position to decide whether or not to admit such evidence. Drawing on this case and others, the present court held that an interlocutory application to strike out material in affidavits in application proceedings on the basis of inadmissibility, should very rarely (if ever) be granted — such relief should be restricted to the very clearest cases of inadmissibility, where there was no possibility of the court in the main application arriving at a different conclusion. (See [11].)

The court went on to acknowledge that there was clear authority in favour of the inadmissibility of Ms Van Zyl's evidence (see [14.1]). However, the basis of such inadmissibility, the court confirmed, was the *rule against hearsay evidence*, with the result that a court had to, when asked, consider whether the evidence should not be admitted in terms of the provisions of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) (see [16]). The considerations relating to an enquiry under the Hearsay Act into whether or not the offending evidence ought to be admitted (assuming for present purposes that Premier will in due course apply for such admission) were extremely wide-ranging. Given this, the court held, there was simply no way it should seek to bind the court which heard the main application; for example, one of the considerations that a court would take into account in considering hearsay admissibility would be the content of Mr Baker's fuller answering affidavits. (See [23].) The court concluded that the relief that the applicants sought could not be granted, and the striking-out applications should rather be heard and determined together with the pending main sequestration and liquidation applications (see [25] and [29]).

ROAD ACCIDENT FUND v NEWNET PROPERTIES (PTY) LTD t/a SUNSHINE HOSPITAL AND ANOTHER 2023 (5) SA 289 (GP)

Appeal — Execution of judgment pending appeal — Automatic appeal — Exceptional circumstances — What constitute — Exceptionality must be fact-specific — Role of prospects of success on appeal — Superior Courts Act 10 of 2013, s 18(1), 18(4).

Section 18(1) of the Superior Courts Act 10 of 2013 provides that, 'unless the court under exceptional circumstances orders otherwise', the operation and execution of a decision 'which is the subject of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal'. Section 18(4) provides for an automatic right of appeal when the court ordered 'otherwise' and uplifts suspension under a 18(1).

The respondent (Newnet) had obtained a non-compensatory-related money judgment against the Road Accident Fund (the RAF) in the High Court, relating to non-payment for service rendered. After both the High Court and the Supreme Court of Appeal denied the RAF leave to appeal, it applied to the Constitutional Court for leave to appeal. With the latter application still pending, Newsnet applied under s 18(1) to execute the judgment.

The court accepted that exceptional circumstances existed to order the enforcement of the order. These related to the RAF's statutory obligation to pay for services, and the physical wellbeing of unnamed patients in Newnet's care affected by the RAF's non-payment (see [15]). The court also considered that the RAF had an emaciated prospects of success on appeal, and that this served as an exceptional circumstance to justify ordering 'otherwise' (see [23]).

The present case concerned the RAF's automatic appeal under s 18(4) — to a full bench of the division — against the High Court's s 18(1) order.

Held

The default legislated position was that once a decision was subjected to an application for leave to appeal, such decision was automatically suspended. What would upset the default legislated position was meeting the requirements that exceptional circumstances be demonstrated, and proving irreparable harm and the absence thereof on another party. When disturbing the default legislated position, the aggrieved party gained an automatic right of appeal to the next-highest court. And

when faced with an automatic appeal, the higher court must be satisfied that the requirements to upset the default position were met; it was only under exceptional circumstances that a court was empowered to order otherwise. (See [3], [8], [13].)
The presence of exceptional circumstances was fact-specific; it did not involve the exercise of judicial discretion. The facts giving rise to the exceptional circumstances must be related to the applicant itself, and the applicant itself must produce evidence demonstrating quandaries as a result of the suspension of the decision. (See [19].)
The purpose of the common-law rule of practice was not to insulate the sanctity of the impugned decision, but to prevent an irreparable harm being done to the intending appellant by the execution of the judgment pending an appeal process. Prospects of success on appeal appropriately applied in a situation where an application for leave to execute was refused, as opposed to when the leave to execute is granted. The fact that an appellant possessed poor prospects of success on appeal did not in and of itself constitute an exceptional circumstance to deviate from the default position and uplift the suspension. Even in the absence of prospects of success, a court may successfully consider a s 18(3) application and/or s 18(4) appeal. (See [9], [23], [24].)
Newnet failed to demonstrate any exceptional circumstances to justify dislodging the default legal position. Its claim was purely contractual and did not implicate RAF's statutory obligation to pay compensation, nor did the 'physical well-being of the patients' play any pivotal role. Nothing specific was provided by Newnet to attract exceptional circumstances. Financial quandaries were not something rare, different or out of the ordinary. The speculated plight of the patients was not truly exceptional in the absence of specificity. (See [18] – [20].)
Accordingly, the court below erred when it concluded that exceptional circumstances existed to enforce the order. While this conclusion was dispositive of the case, nevertheless Newnet also failed to prove on a balance of probabilities that the RAF would not suffer any irreparable harm. The appeal would accordingly be upheld, and the impugned order replaced with an order that the application to uplift the suspension was dismissed with costs. (See [22], [29], [32] – [33].)

SERITI AND ANOTHER v JUDICIAL SERVICE COMMISSION AND OTHERS 2023 (5) SA 304 (GJ)

Judge — Oversight — Judicial Service Commission — JSC having oversight also over judge who had been discharged from active service — Argument that s 7(1)*(g)* of

JSC Act unconstitutionally widening meaning of 'judge' in s 172 of Constitution rejected — Judicial Service Commission Act 9 of 1994, s 7(1)*(g)* sv 'judge'; Constitution, s 176(2).

The applicants, whilst they were serving judges, acted as commissioners in a commission of enquiry into the allegations of improprieties in the procurement of arms for the defence force in the period 1997 – 1999. In light of complaints lodged by the fourth and fifth respondents concerning the applicants' conduct whilst acting in such capacity, the Judicial Service Commission decided that it would institute proceedings against the applicants in terms of its disciplinary status. Importantly for present purposes, the applicants were now *retired* judges. Despite this, the JSC retained jurisdiction: In ch 2 of the Judicial Service Commission Act 9 of 1994 (the JSC Act), provision was made for the lodging of, and procedures for the investigation of, complaints against judges, and s 7(1)*(g)* defined 'judge' as a 'judge referred to in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001) [the JRCS Act], *which includes a judge who has been discharged from active service in terms of that Act* . . .'. In the present application, the applicants argued that s 7(1)*(g)* of the JSC Act was unconstitutional on the basis that it was inconsistent with s 176 of the Constitution. Whether this was correct was the sole question under consideration. Section 176, located under ch 8, 'Courts and Administration of Justice', and headed 'Terms of office and remuneration', in ss (2) provided that 'judges hold office *until they are discharged from active service* in terms of an Act of Parliament'. The effect of this section, the applicants argued, was to exhaustively circumscribe the concept of a 'judge' as an incumbent *during a prescribed term of judicial office*; once discharged, the person who was a judge thereupon ceased to be one. Accordingly, the applicants argued, s 7(1)*(g)* of the JSC Act could not legitimately include retired judges as 'judges' in its definition, and, by doing so, it committed a vain attempt to broaden the concept of judge as sanctified by the Constitution.

The court held that the Constitution was not intended to be the sole source of regulation of the judiciary. That was apparent, it explained, from s 180 of the Constitution, which stated that national legislation may provide for any matter concerning the administration of justice that was not dealt with in the Constitution, including 'procedures for dealing with complaints about judicial officers'. The JSC Act was such an Act as contemplated by s 180. (See [7], [14] and [22].) Section 7(1)*(g)*,

the court held, constituted a permissible '*extrapolation*' of the provisions of the Constitution. It was not '*inconsistent*' with them. In this regard, the court stressed that s 176 of the Constitution did not purport to define who was a judge: its tenor was to regulate the *duration* of office, not the *standing* of judgeship. (See [18] – [22].)

Accordingly, the court granted an order dismissing the application, and declaring that s 7(1)*(g)* of the JSC Act was not inconsistent with the provisions of the Constitution (see [21] and [28]).

SOUTH AFRICAN CRIMINAL LAW REPORTS SEPTEMBER 2023

S v DE VILLIERS 2023 (2) SACR 221 (SCA)

Sentence — Compensatory order — Section 300 of Criminal Procedure Act 51 of 1977 — When to be made — Order may only be imposed by trial court and not by court on appeal.

The appellant pleaded guilty in a regional magistrates' court to theft of R900 000 from the complainant, an elderly long-standing client of his accounting practice. Whilst testifying in the sentencing proceedings, the complainant expressed the wish to be repaid the stolen money by the appellant. The court imposed a sentence of seven years' imprisonment, of which three years were suspended for three years, and no order was made with respect to compensation. Leave to appeal against the sentence was denied. Petitions to the High Court and Supreme Court of Appeal were also rejected, as was a subsequent appeal to the Constitutional Court. Some four years later the appellant was granted leave to appeal to the full court and to present further evidence in the light of his changed circumstances. (See [6].) The appeal was dismissed, and the custodial sentence confirmed. A compensation order in terms of s 300(1) of the Criminal Procedure Act 51 of 1977 (the CPA) was added, however, in terms of which the appellant was ordered to pay the complainant the amount of R900 000. The Supreme Court of Appeal granted the appellant special leave to appeal against the addition to the sentence. On appeal,

Held, that, on a proper construction of s 300(1) of the CPA, only the court that convicted a person could award compensation under the section. The full court had therefore erred in not remitting the matter to the trial court for the imposition of the order. Additionally, no application had been made to the court in terms of the provision, either by the complainant, or by the prosecutor on her instruction, as required by the section. Notice had also not been given that the court was considering invoking the provision, and the appellant had been prejudiced thereby. (See [13] – [15].)

Held, further, that the evidence by the appellant and the state, admitted by the full court, was not available to the regional court during the sentence proceedings. The setting-aside of the additions to the order had left that evidence still intact and available for consideration, and the only court competent to consider it and to impose an

appropriate sentence was the trial court. Therefore, in remitting the matter to the trial court it was necessary for the trial court to reconsider not only the evidence placed before it at the original sentencing stage, but also the further evidence. (See [17] – [18].)

In a separate judgment, Molemela JA, while supporting the order of the majority, was of the view that, whilst it was within the discretion of the regional court to determine an appropriate sentence, its judgment had not demonstrated that it followed a victim-centred approach. The circumstances of the case and interests of justice required this. In failing to do so, it had exercised its discretion unreasonably, and the full court had correctly found that the sentence imposed by the regional court had to be interfered with. (See [29].)

S v PHK 2023 (2) SACR 234 (FB)

Trial — Presiding officer — Conduct of — Magistrate cautioned to desist from voicing own personal views and experiences during trial, or asking questions that could elicit confession — Conduct in circumstances of case irregular, but trial not unfair.

In an appeal against a conviction for a number of sexual offences, including the rape of his 13-year-old daughter for which he was sentenced to life imprisonment, a number of criticisms were raised against the conduct of the presiding officer for his interference with the witnesses and the appellant's legal representative. After examination of the record of the proceedings the court,

Held, that, the magistrate in the present case had treated the appellant with courtesy and endeavoured to understand his version and circumstances. Nevertheless, he was inclined to voice his own personal views and experiences and should cease that habit, which was tantamount to evidence from the bench. The question that raised the most discomfort, however, was the magistrate asking if the appellant had made a mistake, although the appellant had not been intimidated and had stood his ground. The presiding officer had to be admonished to stop asking questions of this nature and realise the consequences of such. If the appellant had confessed to the crimes on this question, it could have led to a gross irregularity, and it was not the place of the presiding officer to elicit confessions. The record in its entirety nevertheless showed that the appellant was guilty as charged and the trial was fair. The appeal accordingly had to be dismissed. (See [38] – [41].)

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v PILLAY 2023 (2) SACR 254 (SCA)

Trial — Assessors — Appointment of — For purposes of trial — Murder trial — Section 93ter(1) of Magistrates' Courts Act 32 of 1944 — Duty of magistrate where accused legally represented — Requirements met where legal representative confirms that assessors not required.

Trial — Assessors — Appointment of — For purposes of trial — Murder trial — Section 93ter(1) of Magistrates' Courts Act 32 of 1944 — Proper application of.

The appellant appealed from a decision of the High Court which had, in an appeal from a conviction and sentence for murder, mero motu raised the question whether the regional court had correctly applied the provisions of s 93*ter*(1) of the Magistrates Courts Act 32 of 1944. The court found that the peremptory requirements had not been satisfied and set the conviction aside.

The appellant was legally represented throughout the proceedings and, at a pretrial conference, the appellant and his co-accused had been advised of the use of lay assessors. The record reflected that they understood their rights and the appellant's legal representative confirmed that no assessors would be required. This was confirmed by the appellant. When the trial commenced, the appellant's legal representative confirmed that no assessors would be required, and the matter then proceeded to conviction and sentence.

Held, per Goosen JA for the majority of the court, that the High Court erred in accepting as principle that the presiding officer was obliged to address an accused person directly and explain the ambit and effect of s 93*ter*(1) to such person without reference to their legal representative. All that was in fact required was that the magistrate bring to the attention of an accused person the provisions of the section and establish whether such person had made a request to proceed without assessors. If the accused made such request, the magistrate could exercise a discretion regarding the appointment of assessors. (See [27].)

Held, further, that s 93*ter*(1) dealt with the constitution of the court and regulated the criminal jurisdiction of a regional court. It did so on a discretionary basis by way of an election made by the presiding judicial officer, except in the case of a murder charge. In the latter case, the section provided for the peremptory involvement of assessors to assist the presiding judicial officer. In both instances, the participation of the assessors was delineated, and provision made for disqualification, recusal, and the continuation of the trial without an assessor. The section did not confer upon an accused person a right to be tried by a 'properly constituted' court. The language employed conferred only a right to request that the trial proceed without assessors. The request was not dispositive. Once it was made, the magistrate had a discretion to summon one or two assessors to assist them, notwithstanding the request. The fact that the court had such a discretion, effectively negated the notion of any kind of 'election' by the accused. (See [29] – [30].)

Held, further, that, where an accused person was legally represented, the obligation which rested upon a presiding officer was of a different character. The presiding officer remained under an obligation to ensure that the trial was fair and that an accused person's constitutional rights are protected, but that general obligation was to be carried out in the light of the accused having exercised the right to legal representation. This right encompassed the right to have a plea tendered vicariously by the legal representative. (See [32].)

Held, further, on the facts, that s 93*ter*(1) had been complied with. In the circumstances, the High Court erred both in respect of the law relating to the section and in its application to the facts. It followed that the appeal had to succeed, and the conviction and sentence were reinstated. (See [41] and [43].)

Held, per Schippers JA, concurring but for different reasons, that the proviso to s 93*ter*(1) was silent on the manner in which an accused had to be informed of the court's composition, or whether a statement or confirmation by an accused's legal representative that the trial may proceed without assessors, constituted compliance with the proviso. Sensibly interpreted, however, if it appeared from the record that an accused had been informed of the proviso — by the magistrate or the accused's legal representative — and that there was a formal request that the trial proceed without assessors, there would be compliance with the proviso. In the case of an accused who was legally represented, it was implicit in a statement or request to the magistrate that no assessors were required, that the accused has been informed of the proviso. This was because judicial officers acted on the assumption that a duly admitted lawyer was competent. It could therefore be accepted that a legal representative would inform the accused of the proviso, explain its requirements, and that when the representative informed the court that assessors were or were not required, that the accused understood what had been explained to them. (See [57] – [58].)

MOTLADILE v MINISTER OF POLICE 2023 (2) SACR 274 (SCA)

Damages — For unlawful arrest and detention — Assessment of — Not mechanical exercise determined only by number of days incarcerated — Other factors to be considered set out.

The appellant appealed against the quantum of damages awarded to him by the High Court for his unlawful arrest and detention, namely an amount of R60 000. He was a traditional healer and involved in the business of transporting passengers. On Christmas morning in 2014 he was arrested for having transported a buyer engaged in the fraudulent purchase of cattle. He was held in detention until the evening of 29 December 2014, without having appeared in court. During this period, he was required to share a filthy cell with five other inmates who assaulted him and stole his food. He did not report this to the police as he feared further assaults. Because of his incarceration, he and his wife were unable to attend his sister-in-law's wedding in Gaborone. As elders, the appellant and his wife had a particular standing at the wedding, and his failure to attend the ceremony was a source of great embarrassment to him and his family. He and his family were severely traumatised by his arrest and detention. In assessing the quantum of damages, the court had adhered to what appeared to be a practice in the division of awarding damages of R15 000 per day as compensation for unlawful arrest and detention. On appeal,

Held, that the assessment of an award of damages to a plaintiff, who was unlawfully arrested and detained, was not a mechanical exercise that had regard only to the number of days that a plaintiff had spent in detention. Other factors to be taken into account included the circumstances under which the arrest and detention occurred; the presence or absence of improper motive or malice on the part of the defendant; the conduct of the defendant; the nature of the deprivation; the status and standing of the plaintiff; the presence or absence of an apology or satisfactory explanation; publicity given to the arrest; the simultaneous invasion of other personality and constitutional rights; and the contributory action or inaction of the plaintiff. (See [17].)

Held, further, that the High Court's award of damages was not commensurate with the injuries suffered by the appellant, largely because the court had scant regard to the circumstances of the case which were germane to the assessment of damages. Crucially, it gave no consideration to the circumstances under which the appellant was arrested; and that he had volunteered his name and contact details to the complainant, ostensibly to be called as a witness. It also failed to consider that, on his return from Gaborone, the appellant readily contacted the investigating officer and met with him on Christmas Day to assist in his investigation, little knowing that he would be victim to an unlawful arrest and detention. The manner in which the investigating officer dealt with the appellant was suggestive of an improper motive and malice, which justified a higher amount of damages. (See [19] – [20].)

Held, further, that the court had disregarded the unchallenged evidence of both the appellant and his wife in respect of the trauma, mental anguish and distress suffered by him in custody, and had disregarded his standing and status in the community. The court had attached no weight to the fact that the appellant had committed no crime, and he received neither an apology nor a satisfactory explanation for his arrest and detention from the respondent following his release from unlawful custody. (See [22] – [24].)

The award was substituted with one of R200 000. (See [25].)

S v TOM 2023 (2) SACR 283 (ECMk)

Evidence — Expert evidence — DNA analysis — Nature of — Circumstantial evidence.

Evidence — Expert evidence — DNA analysis — Weight of — Not necessary that had to be corroborated by other evidence — In present case, however, such corroborative evidence available.

The applicant was convicted in the High Court of rape as well as several other serious offences and was sentenced to life imprisonment. His conviction was largely based on DNA evidence which was matched to his DNA established when he was arrested in the Western Cape three years after the offences in the present case. The complainant had been confronted in her home by an intruder who covered her head with a blanket and demanded money, it being well-known locally that she kept money for a 'tea society'. After she handed the money to the intruder, he raped her. The complainant was unable to identify her attacker. Despite the intruder's efforts, DNA material was extracted from tights worn by the complainant at the time of the incident.

The court proceeded to examine the nature of DNA evidence and held that it was not direct evidence. Where the identity of the perpetrator of the crime was in dispute in criminal proceedings it did not provide direct proof of that fact. It could only establish that someone could be the source of a genetic sample and was in law regarded as circumstantial evidence. Further, the law drew no distinction between circumstantial evidence and direct evidence in terms of its weight or importance, and either type of evidence, or a combination of both, could be sufficient to meet the required standard of proof. There was no reason for treating DNA evidence any differently from any other form of circumstantial evidence, and accordingly no room for any suggestion, either

that it had as a rule to be corroborated by other evidence, or that it could only serve as evidence that corroborated other evidence of the commission of the crime. (See [8] – [9] and [13].)

The court noted, on the facts, that the reliability of the DNA analysis had not been placed in dispute. The sample analysed was positively identified as being semen without any difficulty reported which might have raised a reasonable possibility of degradation of the DNA material. Another aspect relevant to the weight of the DNA evidence was that there was a geographical association between the appellant and the offences, as his family home was in the same village and situated within sight of the complainant's own home. He was related to the complainant by marriage, and the fact that the attacker knew that the complainant's son was to attend circumcision school in that December, and asked about her husband, strongly suggested that the person was from the same village.

A further important aspect was the statistical evidence which showed that the probability of a random individual in the target population possessing identical numbers of repeat units at all STR locations was 1 in 1,6x10 to the sixth trillion. (See [17] – [20] and [22].) The court was accordingly satisfied that the appellant had been correctly convicted of the offences and the appeal had to be dismissed.

AM v SD 2023 (2) SACR 296 (KZP)

Harassment — Nature of — Some form of torment arising out of constant and ongoing interference or intimidation required — Protection from Harassment Act 17 of 2011.

Trial — Presiding officer — Conduct of — Failure to react promptly to request for reasons for decision to grant protection order, and then declining to provide any — Magistrate deprecated for tardy and inadequate response.

The appellant appealed against the grant of a protection order in terms of s 9(4) of the Protection from Harassment Act 17 of 2011. The order was made on a preprinted form and the magistrate merely stated that: 'The complainant is given protection by this court.' The court noted that it appeared that the magistrate had granted an order as sought by the respondent, which prohibited him from engaging in harassment of the complainant or other persons whose particulars were provided; enlisting the help of another person to engage in harassment of the persons mentioned; and committing any of the following acts: engaging in or attempting communication with the plaintiff verbally, physically, visually or any other way; and approaching within one kilometre of the complainant.

The appellant requested reasons from the magistrate for her decision, who took two months to respond that she had nothing to add. The court noted that magistrates should respond with promptitude to invitations to provide further reasons and not dwell on matters unnecessarily. There had been no explanation for the delay. The court also cautioned magistrates to carefully consider their ex-tempore judgments and assess whether they had clearly and explicitly expressed themselves before concluding that they had nothing to add. In the present case the magistrate should have clarified whether she found that acts of harassment had been established or whether she found

that acts of sexual harassment had been established. (See [5].) The court also noted that the relief claimed by the respondent in her application made no specific reference to sexual harassment and therefore the court was to approach the matter on the basis that what was found established was harassment simpliciter. (See [11].)

The respondent sought the protection order in November 2021 complaining about four incidents in the past, the first of which commenced when she was 13 years old in 2012. On that occasion she alleged that the appellant had touched her on her legs and inner thigh, while asking her intimate questions. The house was full of people but the respondent, after extricating herself from the sofa and the appellant, did not report to any of them what had happened. The second incident occurred approximately seven years after the first incident, and the allegation was that the appellant slapped her on the buttocks. The third incident occurred during May 2021 at the appellant's daughter's wedding, when the appellant contrived to sit next to her, but she managed to find another place to sit. The fourth incident occurred on 7 November 2021 at a prayer session, when the respondent was seated next to the appellant. At a certain stage the participants were required to close their eyes and keep them closed. After she closed her eyes, the respondent felt someone on her left-hand side grabbing her left hand, touching her engagement ring and moving it up and down her finger. She concluded that it could only have been the appellant.

Held, that the conduct of which the complaint was made had to result in some form of torment arising out of constant and ongoing interference or intimidation. It therefore had to be persistent and not intermittent. (See [31]).

Held, further, that the first incident demonstrated conduct that was oppressive and unacceptable, and the second incident likewise also involved unacceptable conduct. However, the third and fourth incidents could not be classified as falling into that category of conduct. To the extent that the magistrate accepted the evidence of the complainant in preference to the version of the appellant, she was entitled to do so. But even if the magistrate was correct in her findings in that regard, it did not mean that she was entitled to arrive at the conclusion to which she came. (See [27] – [28].)

Held, further, that the first incident was not actionable as it predated the commencement of the Act. The second incident was notionally actionable and occurred two years before the respondent sought the protection of the Act. The conduct of the appellant as regards the third and fourth incidents was unattractive and potentially upsetting, but not actionable in terms of the Act. There was therefore only a single actionable act on the part of the appellant that could be taken into account, and accordingly no repetitive conduct that was overwhelmingly oppressive. (See [34].) The appeal was accordingly upheld, and protection order set aside.

S v MOLATUDI 2023 (2) SACR 307 (GJ)

Appeal — Leave to appeal — From magistrates' court to High Court — Where sentence of life imprisonment imposed by regional court — Leave to appeal against conviction refused by trial court and High Court on petition — Such refusal incorrect

by virtue of amendment to law — Effect of invalid order — Criminal Procedure Act 51 of 1977, s 309(1)*(a)*; Judicial Matters Amendment Act 42 of 2013, s 10.

The appellant was sentenced to life imprisonment in a regional magistrates' court for the rape of a minor. He applied for leave to appeal against the conviction and sentence, which was dismissed. On petition, the High Court granted him leave to appeal against sentence only. In terms of the amendment of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 by s 10 of the Judicial Matters Amendment Act 42 of 2013, however, the appellant had an automatic right of appeal against his conviction to the High Court. The question then arose whether the appellant was barred from appealing further by the nullity of the earlier order by the High Court refusing leave to appeal against the conviction. Both the appellant and the state sought a declaratory order on whether it was necessary to take the earlier High Court order on appeal to the Supreme Court of Appeal.

Held

An order of a court, regardless of its dubious validity, had to be deferred to by whomsoever was subordinated to it. However, when an invalid order stood in the way of subsequent legal proceedings, the court which heard that subsequent matter might disregard the previous order on the grounds of voidness. (See [12].)

The court which heard the subsequent matter should nevertheless be alerted to such, so that, if necessary, a formal recognition of the absence of validity of the earlier order could be made. That might be necessary where some doubt existed about the status of the allegedly void order. In such an instance the practical approach would be to seek, in addition to the principal relief, a declaratory order to end the debate about its status. (See [13].)

The present set of facts illustrated that the National Prosecuting Authority was concerned about having to decide whether to defer to an order or defer to the statute. The act of processing an appeal in accordance with the automatic right created by the amended s 309 was, however, not an act of contempt of an order of court. The order was manifestly irregular, and it therefore followed that it was unnecessary to take it on appeal to the Supreme Court of Appeal to clear the way for an appeal to be enrolled before the High Court. (See 14].)

As it was already seized with the matter, the court issued an appropriate declaratory order and directed the parties to enrol an appeal on the conviction before the High Court. (See [18].)

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Director of Public Prosecutions, KwaZulu-Natal v Pillay [2023] 3 All SA 613 (SCA)

Criminal Law and Procedure – Criminal trial involving murder charge – Constitution of trial court – Magistrates' Courts Act 32 of 1944, section 93ter(1) – Interpretation – Section 93ter(1) providing that in a trial involving a charge of murder, the magistrate

shall be assisted by assessors unless the accused requests that the trial proceed without assessors – Request by accused is not dispositive, and once made, magistrate has discretion to summon one or two assessors to assist, notwithstanding the request.

The Director of Public Prosecutions, KwaZulu-Natal (the "DPP") appealed against the High Court's setting aside of the respondent's conviction and sentence on a charge of murder. The appeal was prosecuted on the basis that it raised a question of law, namely the proper interpretation and application of section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944. The High Court's judgment dealt only with the constitution of the trial court. It held that the peremptory requirements of section 93*ter*(1) had not been satisfied and it set aside the respondent's conviction.

Held – Section 93*ter*(1) provides that in a trial involving a charge of murder, the magistrate shall be assisted by assessors unless the accused requests that the trial proceed without assessors.

A consideration of relevant case law showed a sharp difference in judicial opinion relating to the ambit of a magistrate's duties in relation to section 93*ter*(1) where the accused is represented, and concerning the sufficiency of evidence required to establish that an accused person has elected to proceed with a trial in the absence of assessors. The Court held that section 93*ter*(1) did not confer upon an accused person a right to be tried by a properly constituted court. The language employed in the section confers only a right to request that the trial proceed without assessors. The request is not dispositive. Once the request is made, the magistrate has a discretion to summon one or two assessors to assist, notwithstanding the request. The fact that the court has a discretion to summon assessors despite the request, effectively negates the notion of any kind of election by the accused. What section 93*ter*(1) requires is that an accused person must be informed of the section's mandatory provisions and that he may request that the trial proceed without assessors. Where an accused person is legally represented, the obligation which rests upon a presiding officer is of a different character. The presiding officer remains under an obligation to ensure that the trial is fair and that an accused person's constitutional rights are protected. But that general obligation is to be carried out in the light of the accused having exercised the right to legal representation. Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent upon the presiding officer to ensure that the court is constituted in accordance with section 93*ter*(1).

The High Court ignored the fact that, on the facts, section 93*ter*(1) had been complied with. It erred both in respect of the law relating to the section and in its application to the facts, with the result that the appeal had to succeed.

Freedom Under Law (RF) NPC v Judicial Service Commission and another [2023] 3 All SA 631 (SCA)

Constitutional and Administrative Law – Judges – Disciplinary action against judge – Gross misconduct – Judicial Service Commission not justified in rejecting findings and conclusion of the Judicial Conduct Tribunal that judge's conduct constituted gross misconduct and that the provisions of section 177(1)(a) of the Constitution be invoked.

In 2007, the second respondent ("Judge Motata") was arrested after he drove into the boundary wall of a residential property, and then became involved in a verbal altercation with the property owner. He was subsequently charged and convicted of driving a motor vehicle whilst under the influence of intoxicating liquor. The incident led to three complaints being lodged against Judge Motata with the first respondent, the Judicial Service Commission ("JSC"). All three complaints were considered by the Judicial Conduct Committee (the "JCC") of the JSC, which decided in terms of section 16(4)(b) of the Judicial Service Commission Act 9 of 1994 that the complaint, if established, would *prima facie* indicate gross misconduct by Judge Motata and accordingly recommended that it be investigated by a Judicial Conduct Tribunal (the "Tribunal"). The Tribunal concluded that Judge Motata's conduct constituted gross misconduct and recommended to the JSC that the provisions of section 177(1)(a) of the Constitution be invoked. The majority of the JSC, however, rejected the Tribunal's recommendation. It found Judge Motata guilty of misconduct *simpliciter* and imposed a fine of R1 152 650, 40 to be paid to the South African Judicial Education Institute.

The appellant, Freedom Under Law ("FUL") applied in the High Court, to review and set aside the JSC's decision and to substitute that decision with a finding that Judge Motata was guilty of gross misconduct as contemplated in section 177(1)(a) of the Constitution, alternatively, for the matter to be remitted to the JSC to be decided afresh taking into account the findings of the court. The court's dismissal of the review application relating to one of the complaints led to the appellant's appeal.

Held – The majority decision of the JSC did not offer reasons for rejecting the factual findings of the Tribunal in respect of the relevant complaint, including the findings on the credibility of the witnesses. It also did not engage with the heart of the complaint that a judge who conducted himself as Judge Motata had betrayed the public's confidence in the judicial system. The evidence showed that Judge Motata had alleged that he had been provoked by the property owner whom he also alleged had used a racial slur against him. That was proven not to be true. The High Court should have enquired whether the JSC was entitled to simply disregard the Tribunal's factual findings in the manner that it had. It did not do so. Had the court undertaken that task, it would have realised that no justifiable warrant existed for the JSC to have rejected the Tribunal's findings.

The Court did not consider remittal of the decision to the JSC to be acceptable. It considered itself as well placed as the JSC to make a decision and decided therefore on substitution of the order.

Judge Motata's conduct was egregious characterised by racism, sexism and vulgarity. The appeal was upheld and the matter was remitted to the JSC – not for a finding to be made, but to be dealt with in terms of section 20(4) of the Judicial Service Commission Act.

A dissenting judgment would have remitted to the JSC for a finding to be made.

Vantage Goldfields SA (Pty) Ltd and another v Arqomanzi (Pty) Ltd and others [2023] 3 All SA 667 (SCA)

Corporate and Commercial – Cession in securitatem debiti – Validity of acquisition of claims from party to which claims had been ceded in securitatem debiti – Entitles who were not parties to relevant agreements surrounding ceded claims and having no legal interest therein, not permitted to challenge validity of said agreements – Prohibition of any change in ownership or control of a mining right without the consent of the Minister in section 11(1) of the Mineral and Petroleum Resources Development Act 28 of 2002, must be interpreted to include direct cessions, transfers, and leases.

The first respondent ("Arqomanzi") and the appellants were engaged in an ongoing dispute regarding the business rescue proceedings of the Vantage Companies. The second respondent ("VGL") had ceded two claims *in securitatem debiti* to Standard Bank. Upon any breach which was not remedied, Standard Bank could sell the claims. In July 2019, Standard Bank delivered a written demand to the first appellant ("VGSA") to remedy its breach. In the demand, Standard Bank informed VGSA that should it fail to timeously remedy its breach, then it intended to dispose of the claim for R8 911 771,35. VGSA failed to remedy the breach and Standard Bank realised its security by selling the claim to Arqomanzi in August 2019 (the "sale agreement"). However, the business rescue practitioners of the two companies to which the claims related and the appellants denied that Arqomanzi had lawfully acquired the claims. Arqomanzi obtained an order in its favour in the High Court, leading to an appeal.

Held – The issues arising on appeal were *inter alia* whether Arqomanzi had validly and lawfully acquired the loan account claims that had initially been ceded to Standard Bank *in securitatem debiti*; whether Arqomanzi was an independent creditor of VGL and the third respondent ("Barbrook"); whether, by virtue of two subordination agreements, Arqomanzi had a voting interest in the Vantage Companies; and whether the fourth respondent's and Barbrook's mining rights could be exercised without the consent of the Minister under section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002, in circumstances where there had been a change of control in the ultimate holding company of the Vantage Group.

On the question of whether Arqomanzi had validly and lawfully acquired the claims that were ceded to Standard Bank, the Court held that the appellants, who were strangers to the agreements, could not challenge the validity thereof. Secondly, in terms of the Companies Act 71 of 2008, the identity of the creditor and its relationship to the company in business rescue are the determining factors. As Arqomanzi had validly acquired the claims and was not related to any of the Vantage Companies, it was an independent creditor of Barbrook. The High Court was found to have correctly interpreted the subordination agreements. Finally, to confine the interpretation of section 11(1) of the Mineral and Petroleum Resources Development Act to direct cessions, transfers, and leases would lead to absurdity because by doing so, Ministerial consent (and therefore two of the principle objects of the Act) could easily be thwarted.

The appeal was accordingly dismissed.

Broadhurst v Gearhouse Splitbeam (Pty) Ltd and another [2023] 3 All SA 682 (GJ)

Civil Procedure – Delictual claim – Apportionment of Damages Act, 1956 – Whether, in terms of section 2(4)(a) of the Act, leave to sue a joint wrongdoer may be obtained after the action against the joint wrongdoer for which such leave is sought has already been instituted – Determination of good cause as to why notice was not given to joint wrongdoer before close of pleadings – On proper interpretation, leave to sue a joint wrongdoer may be obtained after action against joint wrongdoer for which such leave is sought has already been instituted.

While attending a production at a theatre, the applicant sustained injury when a mirror-ball suspended from the ceiling fell onto his head. He instituted action claiming damages from the theatre owner, the event management company and the company responsible for rigging of equipment. It was only during the exchange of pleadings in that action in March 2020 that the plaintiff came to learn of the present defendants, who were the theatre equipment specialist company and the civil and structural consulting engineer ("Mr Hussey") who had attended to the erection of the mirror-ball. A second action was then instituted against the said defendants. The institution of two actions against two sets of alleged joint wrongdoers arising out of the same incident and for the recovery of the same damages in delict rendered section 2(1) of the Apportionment of Damages Act, 1956 applicable. Section 2(1) provides that where it is alleged that two or more persons are jointly or severally liable in delict to a third person for the same damage, such joint wrongdoers may be sued in the same action. In terms of section 2(2) of the Act, Mr Hussey as a joint wrongdoer, was entitled, at any time before the close of pleadings, to notice of the first action. That notice was not given by the applicant. In terms of section 2(4)(a), the applicant could then not sue Mr Hussey except with the leave of the court on good cause shown as to why notice was not given. Based thereon, Mr Hussey raised a special plea to the second action, contending that the applicant was precluded, in terms of section 2(4)(a) from instituting the present proceedings, which were said to be unlawful and a nullity.

The applicant consequently brought the present application seeking the court's leave, in terms of section 2(4)(a), to proceed with the second action. Mr Hussey argued that the court's leave could not be sought after the action had already been instituted.

Held – The Court was required to undertake an interpretation of section 2(4)(a), applying the established rules of interpretation. What section 2(4)(a) provided was that unless a plaintiff obtained the leave of the court on good cause shown, he could not, after having failed to give the requisite notice in terms of section 2(2)(a) before close of pleadings, sue the joint wrongdoer, the section did not necessarily provide that such leave to sue must be obtained before the joint wrongdoer was so sued. Pointing to the difficulties in an interpretation as advocated by Mr Hussey, the Court favoured an interpretation that section 2(4)(a) did permit an application in terms thereof to be brought after the further action had already been instituted. The applicant was not consequently not precluded from seeking such leave of the court in terms of section 2(4)(a).

While the applicant had not shown good cause as to why notice was not given to Mr Hussey as a joint wrongdoer before the close of pleadings, the court exercised its wide

discretion to grant leave in terms of section 2(4)(a), permitting the applicant to proceed with the further action against the joint wrongdoer.

Equal Education v Provincial Minister for Education: Western Cape Province and others and a related matter [2023] 3 All SA 698 (WCC)

Education – Schools – Establishment of Collaboration Schools, Donor-Funded Schools and intervention facilities in amendments to Western Cape Provincial Schools Education Act 12 of 1977 – Whether new school models conflicted with provisions of South African School's Act 84 of 1996 and constitutional imperatives – Envisaged schools not shown to be unconstitutional, falling within Provincial Legislature's powers in respect of the right to education.

In an attempt to address the education crisis in public schools, amendments were made to the Western Cape Provincial Schools Education Act 12 of 1977 (the "Provincial Act"), so as to establish two new types of schools, *viz* Collaboration Schools and Donor-Funded Schools as well as intervention facilities. To overcome inadequate State-funding, no-fee public schools were identified, private donors provided funding to those schools, and donor-selected operating partners were paired with each school to use their capacity, skills and resources to empower a school governing body ("SGB"), school management and educators to deliver quality education. An operating partner would have 50% of the seats and voting rights on the SGB.

The applicants ("EE" and "SADTU") each brought a separate application contending that the Provincial Legislature's formulation of the Act suffered from various constitutional defects, each of which the court dealt with in turn.

Held – EE's contention that there were no guaranteed places for parents or learners on SGB's in Collaboration Schools was disproved by a contextual reading of the Provincial Act and section 23(2) of the South African School's Act 84 of 1996 ("SASA"). There was no limitation of learners' rights to participate in decisions that affected them. EE also argued that the power to prescribe categories of remaining members on the SGB was overlooked or unlawfully delegated. However, the contention that the first respondent (the "MEC") could disenfranchise parents and learners was unpersuasive. The MEC did not exercise unrestrained power and was bound by the SGB membership categories in SASA. EE's further objections that there were inadequate eligibility criteria for donors and operating partners, and for conversion into Collaboration Schools or Donor Funded Schools were incorrect as the Act set out the relevant definitions and requirements in that regard. It was also not true that there was no participation on the proposed contract to convert an ordinary public school. The declaration of a public school as a Collaboration School could not occur unless the MEC had called for public comment in respect of the intended declaration and given due consideration to any comments received.

Part of SADTU's case involved a constitutional challenge to the Provincial Act. That challenge was rejected as it was not raised in the founding papers, and it is impermissible for a party to rely on a constitutional complaint that was not pleaded. A

further argument raised was that by having operating partners serve on the SGB, the Provincial Act was inconsistent with SASA and that teacher appointments in Collaboration Schools conflicted with national legislation. Noting that education is a functional area of concurrent national and provincial legislative competence, the court held that the provisions of the Provincial Act fell within the Provincial Legislature's powers in respect of the right to education.

Both applicants criticised the intervention facilities which the MEC was authorised to establish to address misconduct of learners, contending that the intervention facilities were regressive and too drastic as a disciplinary measure, and that required protections had to be prescribed in the Act. However, the Court held that it was permissible to empower the MEC to decide on the required guidelines and protections.

SADTU's criticisms of the Western Cape School Evaluation Authority ("WCSEA") was dismissed, as the WCSEA served a well-intended constitutional purpose, and was a reasonable and justifiable mechanism to evaluate schools in the province.

The applications were dismissed.

Eskom Holdings SOC Limited v Emfuleni Local Municipality and others (Emfuleni for Change NPC and others as Intervening parties) [2023] 3 All SA 745 (GP)

Constitutional and Administrative Law – Organs of State – Intergovernmental relations – Duty of co-operative governance – Section 41 of the Constitution requiring Organs of State to exercise their powers and perform their functions in a manner that did not encroach on each other's functional and institutional integrity.

Mining, Minerals and Energy – Bulk electricity supply to municipality – Municipality's failure to pay for electricity supplied to it constituting a contravention of the Electricity Regulation Act 4 of 2006 – Duties and powers of National Energy Regulator – National Energy Regulator empowered, in terms of section 18 of the Electricity Regulation Act, to decide upon case of non-compliance and to take steps to force a licensee to comply with its obligations.

In fulfilment of its legislative obligations, the applicant ("Eskom") generated and supplied electricity to the first respondent municipality ("Emfuleni"). Emfuleni, in turn, sold or supplied the electricity to customers and/or end-users within its municipal area at marked-up tariffs to raise revenue to fund operations. Eskom contended that Emfuleni was failing to comply with its contractual and statutory obligations in that it was failing to pay Eskom for its bulk electricity supply. In 2018, Eskom decided to interrupt the electricity supply of Emfuleni during certain hours of the day. The decision resulted in several large power users of Emfuleni launching urgent applications to interdict implementation of the decision pending review. The Full Court referred the dispute back to the respondents for resolution in terms of section 41(3) of the Constitution, and granted an interim interdict against Eskom. The court also authorised the applicants to pay amounts which they owed to Emfuleni directly to Eskom so as to curb Emfuleni's debt from spiralling. Emfuleni refused to comply with the order, contending that the direct payment regime could not be implemented due to absence

of the necessary oversight by the third respondent (NERSA). The ongoing non-compliance by the municipality led to Eskom seeking an order holding Emfuleni in contempt of court, and related relief. The intervening applicants (representing businesses) proposed a different remedy, namely that Eskom acted as agent of Emfuleni with necessary amendments to Emfuleni's license with NERSA. Eskom subsequently presented the court with a draft order which, in the main, adopted the relief proposed by the intervening applicants.

Held – Chapter 4 of the Constitution dealt with cooperative governance, with section 41 requiring Organs of State such as Eskom, Emfuleni and NERSA to exercise their powers and perform their functions in a manner that did not encroach on each other's functional and institutional integrity. The Electricity Regulation Act 4 of 2006 imposed constitutional and statutory obligations on local government to provide basic municipal services, including electricity. The intervening applicants were entitled to receive such services and Emfuleni could not be allowed to thwart that right. If a licensee did not comply with its licence conditions or contravened any provisions of the Electricity Regulation Act, NERSA could, in terms of section 18, decide upon the matter and if the allegations were proved to be true, take steps to force the licensee to comply with its obligations. Despite the extensive powers granted to NERSA to regulate and enforce all matters related to access to electricity, NERSA had dismally failed to fulfil its duties.

To ensure access to electricity, Eskom and Emfuleni had a reciprocal duty to work together to comply with their contractual and statutory obligations owed towards each other.

NERSA and Emfuleni had both acted in contempt of the interim order and their conduct was unconstitutional and unlawful. As part of the just and equitable remedy decided upon by the court, Emfuleni and its municipal manager were declared to be in contempt of court; and Emfuleni was to appoint Eskom as its service delivery agent.

Mfolozi Community Environmental Justice Organisation and others v Tendele Coal Mining (Pty) Ltd and others [2023] 3 All SA 768 (KZP)

Civil Procedure – Application for interim interdict preventing respondents from undertaking any mining and mining-related activities pertaining to mining right until complying with steps to be taken as outlined in court order – Requirements for interim interdict – Applicant must establish a prima facie right; a well-grounded apprehension of irreparable harm if interim relief is not granted, and final relief is ultimately granted; absence of any other satisfactory remedy; and balance of convenience favouring granting of interim relief – Even if all requirements for an interim interdict are satisfied, a court retains an overriding wide discretion to refuse to grant an interim interdict.

Civil Procedure – Interpretation of judgment or court order – Proper approach to interpreting judgment explained.

Constitutional and Administrative Law – Administrative decisions – Law regarding potentially invalid administrative conduct – Administrative conduct that has been found to be invalid may nevertheless be ordered to continue to apply until set aside by competent court.

On becoming aware of a mining right granted to Tendele, the applicants lodged an appeal with the Minister of Mineral Resources and Energy, in terms of section 96(1)(b) of the Mineral and Petroleum Resources Development Act 28 of 2002. The dismissal of the appeal led to them approaching the High Court for review of the decision to grant the mining right to Tendele; the decision to approve Tendele's Environmental Management Programme ("EMPr") in respect of new areas to which the mining right was extended; and the decision of the Minister to dismiss their appeal against the two aforesaid decisions. During argument, Tendele conceded a significant portion of its case. The order (the "2022 order") set aside the impugned decisions, directed the Minister to reconsider the applicants' appeal, and required Tendele to take certain steps to address environmental and other concerns. In February 2023, Tendele issued three letters indicating its intention to resume certain activities relating to the mining. However, whether the 2022 order, which stated that the impugned decisions were not set aside, allowed mining to continue was a matter of law.

The applicants sought an interim interdict preventing the respondents from undertaking any such activities pertaining to Tendele's mining right until it had complied with the steps to be taken as outlined in the 2022 order.

Held – The right to mine and activities associated therewith were regulated by various statutory provisions aimed at balancing the competing rights relating to *inter alia*, the principle of legality, the right to an environment that is not harmful to health or well-being, the right of the mining entity to freedom of trade and to earn an income and the right to just administrative action.

The requirements for an interim interdict are a *prima facie* right on the part of the applicant; a well-grounded apprehension of irreparable harm if interim relief is not granted, and final relief is ultimately granted; absence of any other satisfactory remedy; and the balance of convenience favouring the granting of interim relief. Even if all the requirements for an interim interdict are satisfied, a court retains an overriding wide discretion to refuse to grant an interim interdict. Public-interest factors can be taken into account in the exercise of the court's discretion. A court will grant an interim interdict upon a degree of proof less exacting than that required for a final interdict. The test is whether the applicant has furnished proof which, if uncontradicted at the trial (or the final interdict in part B of the notice of motion), would entitle the applicants to final relief.

The proper interpretation of the 2022 order, specifically what was sought to be conveyed by the order that the decisions were "not set aside", and what issues the judgment covered, were the primary issues in the present application. The Court confirmed the proper approach to interpreting a judgment. It also confirmed that the decisions that were declared invalid were administrative decisions, and summarised the law regarding potentially invalid administrative conduct. Tendele's mining right and EMPr had to be treated as valid and binding unless and until reviewed and set aside by a competent court. Thus, administrative conduct that has been found to be invalid, as found in respect of the impugned decisions, may nevertheless be ordered to continue to apply. The question of whether a court which has found administrative conduct invalid, nevertheless intended, as a just and equitable remedy, that the administrative conduct should continue to exist and that effect be given thereto, depends on the terms of the judgment. The express provision in the 2022 order that

the decisions were not set aside led to the conclusion that the applicants had not established a *prima facie* right that Tendele was prohibited by the judgment from undertaking the work foreshadowed in its letters, before the Minister would reconsider the appeal.

The application was dismissed.

MN v BN [2023] 3 All SA 809 (FB)

Personal Injury/Delict – Claim for damages – Alleged fraudulent misrepresentation or non-disclosure on part of ex-wife regarding true paternity of child – Party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly – Onus is the ordinary civil onus, requiring proof on a balance of probabilities – No legal duty to disclose extra-marital affair to spouse – Delictual claim in circumstances contra bonos mores and against public policy.

The plaintiff was the former husband of the defendant. Having discovered after the parties' divorce that he was not the biological father of the youngest of three children who were born during the parties' marriage, he sued the defendant for damages. His cause of action was based on alleged fraudulent misrepresentation, alternatively, fraudulent non-disclosure.

Held – The essential elements for a claim based on fraud are a representation; which the representor knew to be false and on which the representor intended that the representee would act; that the representation must have induced the representee to act in response to it (causation); and where damages are claimed, it must be alleged that the representee suffered damages because of the fraud. If reliance is placed on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It must also be shown that the breach of the duty to disclose was deliberate and intended to deceive. A party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly. The onus is the ordinary civil onus, requiring proof on a balance of probabilities, bearing in mind that fraud is not easily inferred.

A fraudulent misrepresentation, which gives rise to delictual liability, may be defined as a wrongful and intentional false representation of fact which induces another to act and which causes patrimonial loss. Based on the evidence, it could not be found that the defendant had made a representation by means of a positive act (a *commisio*) as alleged by the plaintiff. There was consequently no misrepresentation. The plaintiff in any event failed to prove that it was a fraudulent misrepresentation; since the evidence did not establish that it was proven beyond reasonable doubt that the defendant knew that the child was not the biological child of the plaintiff.

The reliance on the alternative of a fraudulent non-disclosure was based on the averment that the defendant had a duty to disclose to the plaintiff that she had had an extra-marital affair during the time that N was conceived, which she failed to do with the intention to deceive the plaintiff. As stated in the authorities, for reasons of public policy, the law is reluctant to assume too readily the existence of a legal duty in instances of an alleged omission. The Court considered whether a legal duty exists to disclose an extra-marital affair. An analysis of case law pointed to a relaxation of societal norms and attitudes around adultery and a delictual claim in that context runs counter to constitutional values and public policy. Consequently, there is no legal duty

on one spouse to disclose the existence of an extra-marital affair to the other. The defendant therefore had no legal obligation to have informed the plaintiff of her sexual encounter with a third party. Her failure to have done so was thus not a fraudulent non-disclosure.

The Court deemed it necessary despite the above findings being dispositive of the claim, to deal with the aspect of public policy raised as part of the defence to the claim. Apart from how such an action impacts the right to privacy, the irreparable emotional damage the action caused to the child, her relationship with the plaintiff and the whole family relationship, was very evident from the totality of the evidence. The claim was thus *contra bonos mores* and against public policy.

Having dismissed an application by the defendant for absolution from the instance, the court confirmed the applicable test and legal principles.

The action was dismissed.

President of the Republic of South Africa v Zuma and others [2023] 3 All SA 853 (GJ)

Civil Procedure – Private prosecution – Nolle prosequi certificates – Validity and lawfulness – Nolle prosequi certificates issued by Director of Public Prosecutions in respect of party other than the accused in private prosecution unlawful, invalid and unconstitutional.

In December 2022, the first respondent (Mr Zuma) issued summons out of the present court, instituting a private prosecution against Mr Ramaphosa in his personal capacity. To each summons, Mr Zuma attached a *nolle prosequi* certificate. He charged Mr Ramaphosa with being an accessory after the fact to criminal conduct. Mr Ramaphosa then brought the present application in his capacity as President. The present proceedings were Part B of the application, in which the President sought an order declaring the two summons unlawful, unconstitutional, invalid and of no force and effect and setting them aside. He also sought the same order in respect of the *nolle prosequi* certificates to the extent they were interpreted to relate to Mr Ramaphosa. In addition, he sought an order declaring the private prosecution unlawful, unconstitutional, invalid and of no force or effect, and setting aside and interdicting the private prosecution. One of the arguments raised in support of the relief sought was that the *nolle prosequi* certificates did not relate to a charge against Mr Ramaphosa, with the result that there was no *nolle prosequi* certificate justifying the issuing of the summons against Mr Ramaphosa.

Held – Preliminary points raised by Mr Zuma were dismissed. In the first, relating to the applicant's lack of *locus standi*, the court stated that the interest directly affected by the impugned private prosecution related to Mr Ramaphosa both as an individual person occupying the Office of the President and in his official capacity as President. As an individual occupying the Office of the President, Mr Ramaphosa bore constitutional rights which were threatened by the impugned private prosecution. As an individual in those circumstances, he had standing as President to protect those rights by having the impugned private prosecution declared unlawful and set aside. As

President, he also had a direct interest in the potential impact of the private prosecution. The court also dismissed objections alleging lack of jurisdiction and prematurity of the application. The frontal challenge was not brought prematurely, seeking instead to enforce the individual rights of the accused not to be subjected to an unlawful private prosecution process, thus protecting and vindicating the rule of law.

On the merits, the applicant contended that the *nolle prosequi* certificates did not relate to the person of and charge against Mr Ramaphosa. A *nolle prosequi* certificate issued by the Director of Public Prosecutions ("DPP") is a necessary prerequisite for a private prosecution where the DPP has declined to prosecute for an alleged offence. The two complaints that Mr Zuma had referred to the DPP to determine whether the State would prosecute the cited individuals related to persons other than Mr Ramaphosa. The DPP declined to prosecute and issued the *nolle prosequi* certificates. The *nolle prosequi* certificates therefore did not apply to Mr Ramaphosa and were unlawful, invalid and unconstitutional and fell to be set aside, as were the summons.

None of the remaining arguments raised by Mr Zuma on the merits were sustainable.

To succeed in obtaining interdictory relief, the applicant had to establish a clear right, reasonable apprehension of harm and the absence of an alternative remedy. The President succeeded in establishing those requirements.

Mr Zuma's private prosecution of Mr Ramaphosa instituted under the summons was unlawful and unconstitutional and was set aside, and the private prosecution was interdicted.

Sithole and others v African National Congress and others [2023] 3 All SA 890 (GJ)

Constitutional and Administrative Law – Political party – Leadership elections – Validity of elective conference – Where processes leading to exclusion of branches had no foundation in party's guidelines or constitution, the decision to disqualify relevant branches was ultra vires and void – Departure from rules allowing for ex post facto manipulation of the voting results – Procedural and substantive irregularities were material to outcome of elective conference, resulting in decisions and results emanating therefrom being invalid.

The applicants sought the setting aside of all decisions and elections resulting from the Eighth Regional Conference of the Ekurhuleni Region of the African National Congress (the "Conference") and an order that the National Executive Committee ("NEC") of the African National Congress ("ANC") appoint an interim regional task team, to exercise the powers of the Regional Executive Committee of the ANC in the Ekurhuleni Region until the ANC was able properly to organise and constitute a new regional conference.

Purporting to make a complaint on behalf of the task team appointed to attend to preparations of the Conference, the twenty seventh respondent had singled out certain

branches for possible disqualification from attendance at the Conference on the basis of the alleged flouting of a rule relating to electronic scanning for registration purposes. That led to the disqualification of four branches as explained below.

Held – The organisational framework of the ANC was found in its constitution and rules and regulations adopted by the NEC. The election structure was such that leadership elections took place at conferences (elective conferences) of the kind in issue in this case. The guidelines which applied to the holding of elective conferences were central to the case, as the ANC was bound to apply those guidelines. A central feature of the guidelines was the dispute resolution process, which was central to the matter. The ANC used a system of electronic scanning of identity documents in order to register attendance at meetings and conferences. Attendance was also registered by means of signature of an attendance register. Those two records of attendance were used to determine quorum, and were important because only a member who attended a meeting could lodge a complaint under the guidelines.

Section 19 of the Constitution affords every citizen the freedom to make political choices, which includes the right to participate in the activities of a political party. An individual could not participate in the activities of the ANC unless he was in good standing and a branch could not participate in the regional structures unless all its members were in good standing. The essential component of being in good standing was the payment of a subscription. The Conference in question was preceded by an audit and verification of members' and branch standing, resulting in the disqualification of four branches. When voting proceeded, it was decided that the delegates from the disqualified branches would be allowed to participate in the Conference on the basis that their votes were quarantined. The applicants' case was that the results of the Conference had to be set aside because of the unlawful disqualification of branches and the quarantining of their votes, which had a material effect on the election process undertaken at the Conference.

The issues for determination were whether all that was required for a valid conference was that 70% of the branches were in good standing, whether irregularities had occurred; if so, whether the irregularities were so material as to allow for the setting aside of the Conference and its results; and the consequential relief to be granted if that was done. The Court rejected the 70% rule, confirming that if there was corruption and/or illegality in any tier of the organisational structure, the entire structure was compromised. The processes leading to the exclusion of the branches had no foundation in the guidelines or the constitution. The decision to disqualify the relevant branches was *ultra vires* and void. The quarantining of votes was inherently unfair in that it created potential for *ex post facto* manipulation of the voting results. The procedural and substantive irregularities were material to the outcome of the Conference.

The Conference and all decisions, resolutions and election results emanating therefrom were set aside.

END-FOR NOW