LEGAL NOTES VOL 11/2023

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CENTRE FOR CHILD LAW v TS AND OTHERS 2023 (6) SA 1 (CC)

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Children — Parents — Never-married parents — Unfair discrimination — Only divorced and divorcing parents included in optimised process to involve Office of Family Advocate in disputes regarding minor children — Constitutional invalidity of enabling legislation confirmed — Mediation in Certain Divorce Matters Act 24 of 1987, s 4.

Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 provides for the Office of the Family Advocate (the Family Advocate) to enquire and report on the

[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!**

welfare of minor children 'after the institution of a divorce action', or 'after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act 70 of 1979'. While divorced or divorcing parents need only fill in a form (annexure B to the regulations under the Act) in order to prompt the Family Advocate to initiate an enquiry in terms of s 4, never-married parents have to approach a court and bring a two-pronged application where, in part A, they seek an order for the Family Advocate to investigate and file a report on the best interests of the child; and part B being an application for whatever substantive relief they seek. (See [36].)

This disparity between the positions of never-married parents and divorced/divorcing parents was first raised by the High Court in an application by Mrs TS for relief relating to her intended relocation to Australia — with her husband and two minor children born of her relationship with Mr BN, to whom she was never married. In part A of that application, she sought, inter alia, an order directing the Family Advocate to investigate the best interests of her minor children around their possible relocation. The hearing was, however, adjourned, with a directive that the parties address her on the constitutionality of s 4, which the court was concerned imposed an arbitrary distinction between the children of married, or formerly married and divorced parents, and children whose parents have never been civilly married. (See [9].)

Subsequent to the issuing of the directive, the Centre for Child Law (the CCL) was joined to the proceedings, together with the Minister of Justice and Correctional Services, who was also mandated to appear and make submissions on behalf of the Family Advocate. At the hearing, the CCL and Mrs TS submitted that the distinction infringed the constitutional rights of parents not to be unfairly discriminated against on the grounds of marital status (s 9(3)); the minor children's rights to have their best interests held to be paramount in all matters (s 28(2)); and unmarried litigants and their children's rights to dignity (s 10). The High Court concluded that the challenge was justified and, based on the violation of the right to equality, declared the impugned provision unconstitutional.

The present case concerned an application, moved by the CCL, for the Constitutional Court's confirmation of the High Court's order of constitutional invalidity. The CCL argued that there were at least three rights that were violated by the impugned provision, namely the right to equality (s 9), the right to human dignity (s 10), and the right of minor children to have their best interests considered of paramount importance

(s 28). The Minister, who was the second respondent, conceded that the Act was outdated and ought to be aligned with constitutional norms and standards. Mr BN did not oppose the application but sought to offer court a different perspective by disputing that s 4 was discriminatory. His argument was that it was not accurate to contend that the impugned provision discriminated on the basis of marital status because married parents who chose to separate without divorcing would also not benefit from s 4. (See [18] – [21], [34], [38].)

Held

Section 4 of the Act only catered for married parents who were in the process of divorce or had already divorced. This meant, first, that never-married parents could never invoke s 4 to enlist the services of the Family Advocate in circumstances that were analogous to those of married parents who were in the process of divorce or already divorced. Second, it meant that married parents who chose to separate — for an indefinite or short period — without divorcing each other, also could never enjoy the protections provided for by s 4. Thus, the provision treated divorced or divorcing parents differently to how it treated never-married parents and married parents who were separating, but not divorcing. Differentiation was thus established. (See [28] – [29].)

There was no rationale for this differentiation: just like married parents, unmarried parents may also disagree on issues concerning custody, guardianship and parental responsibilities for the children. The Act ignored the reality that some married parents who were separated and remained in that position for a long period, may have such disagreements; it simply had in mind the need to protect the interests of minor children during divorce. There was no legitimate government purpose advanced for the differentiation. (See [30] – [32].)

A dispute regarding the custody or guardianship of, or access to, a child generally arose when parents were either getting divorced or separated, or were no longer able to agree on a parental-responsibility arrangement concerning the children. A fair process would be for both married and unmarried parents to be afforded the same process to resolve these disputes. The fact that some married parents may not go through a divorce, and thus not approach the Family Advocate, did not mean that they were not entitled to the simpler streamlined process. As such, the reality was that s 4 indirectly discriminated on the basis of marital status. (See [35], [38], [41].) Section 4 therefore undoubtedly discriminated on the basis of marital status, albeit indirectly.

Marriage was at the centre of divorce proceedings and, thus, at the centre of the discrimination.

The nature of the right implicated — the right not to be discriminated against on the basis of marital status — in turn implicated the rights of children born of married parents and those born of unmarried parents. What was at the core of the implicated right were the best interests of the child. There was no argument that the limitation was significant and there is no discernible purpose for it; it was outdated and no longer in line with constitutional imperatives. (See [49].)

Section 4 limited ss 9(1) and 9(3) of the Bill of Rights, and this limitation was not justifiable in terms of s 36 of the Constitution, and it was therefore also an unjustifiable limitation of the rights of affected parents and children in terms of ss 10 and 28 of the Bill of Rights. A declaration of invalidity would be made, coupled with an interim reading-in, to allow never-married parents to approach the Family Advocate in order to enlist its services. (See [58], [64].)

MFOZA SERVICE STATION (PTY) LTD v ENGEN PETROLEUM LTD AND ANOTHER 2023 (6) SA 29 (CC)

Minerals and petroleum — Petroleum — Petroleum products — Purchase and sale — Unreasonable contractual practice — Arbitration — Powers of arbitrator — Whether arbitrator may resort to award of damages to correct unreasonable contractual practice — Petroleum Products Act 120 of 1977, s 12B(4)*(a)*.

Section 12B(4)*(a)* of the Petroleum Products Act 120 of 1977 (the PPA) empowers an arbitrator, in proceedings brought under that provision, to determine whether petroleum wholesalers or retailers have engaged in unfair or unreasonable contractual practices and, if so, to 'make such award as he or she deems necessary to correct such practice'.

The main issue in this application for leave to appeal to the Constitutional Court was whether the remedy of damages was available under s 12B(4)*(a)* to correct unfair or unreasonable contractual practices. It first arose in arbitration proceedings under the PPA relating to the lease agreement between the parties, Mfoza Service Station (Pty) Ltd (Mfoza) and Engen Petroleum Ltd (Engen). Mfoza sought monetary compensation relating to alleged past loss of profit, loss of goodwill and loss of property value it

allegedly suffered due to Engen's conduct. Engen raised the point in limine that the Mfoza claims amounted to a claim for damages, which was precluded by the PPA.

The arbitrator found that Supreme Court of Appeal authority to the effect that an award of damages was not competent under the remedial jurisdiction of s 12B(4), was not a proposition of universal application. He also found that the scope of an arbitrator's power to make a corrective award in terms of s 12B(4)*(a)* was formulated in general terms and included a range of corrective measures. The arbitrator accordingly determined that a finding of 'an unreasonable or unfair contractual practice' could be corrected by monetary compensation. (See [6] – [7].)

A review application brought by Engen for the rescission of the arbitrator's award was decided in Engen's favour. The High Court ruled that the arbitrator had incorrectly interpreted s 12B(4)*(a)* to confer a right on Mfoza to claim patrimonial damages, a remedy that was not available under s 12B(4)*(a)*. Both the High Court and the Supreme Court denied Mr Mfoza leave to appeal. (See [12] – [15].)

In application for leave to appeal to the Constitutional Court, the CC unanimously agreed that its jurisdiction was engaged and that leave to appeal would be granted (see [31]). The majority and the minority disagreed, however, on the main issue. The minority would have upheld the appeal for the reasons set out (by the majority) in [71].

Held (majority)

Section 12B envisaged a limited arbitral mechanism. It dealt only with allegedly unfair or unreasonable contractual practices and their 'correction'. The award had to be *necessary to correct the practice.* The award envisaged in s 12B(4)*(a)* was thus one that would correct the practice — it was never intended to address all disputes and claims arising out of the contractual relationship between the parties. The contemplated arbitral system therefore represented a deliberate legislative choice to deal only with correcting the conduct of a party to an unfair or unreasonable contractual practice. In this context, 'to correct a practice' was therefore about restoring the relationship by identifying the contractual practice that imperilled the relationship, and then making an award that would end the practice in question. It was an intervention that was essentially forward-looking and corrective in the sense of putting right a relationship. The limited role of 'to correct a practice' did not extend to addressing the historical effect or consequences of that practice, as that was not what was required to correct the practice. An award of compensation that dealt with the consequences of an unfair or unreasonable contractual practice might compensate but leave a practice

uncorrected. This was not what s 12B(4)*(a)* had in mind. The question of loss and the compensation for loss fell outside of the s 12B process. (See [37], [40] – [46], [50].)

Also, no ancillary implied power to award damages arose, since the primary power of the arbitrator to correct could be given effect to without the power to make an award of compensation under s 12B(4)*(a)*. And, if the lawmaker intended the arbitrator to have the power to make a compensatory award in terms of s 12B(4)*(a)*, it would have simply done so, as it did in the context of s 12B(4)*(b)*. That it chose not to do so was evidence of a deliberate legislative choice, and one that fitted into the overall scheme of the PPA, and must be respected. The arbitral system of s 12B was not arbitration by agreement, which was a common feature of most arbitration processes. There were several features of the s 12B system that were fit for purpose and fell into the limited scope of the arbitral system. If the power of the arbitrator was seen as a limited one, confined to correcting forward-looking conduct, it would largely fall into the fit-for-purpose limited scope of s 12B. Absent the protection of the ordinary rules of litigation and absent a normative framework, it was too great a risk to the constitutional values of equality and fairness to permit a final and binding compensatory award to be made in those circumstances, with no right of appeal to a court. Another reason why s 12B(4)*(a)* could not have the meaning Mfoza contended for was that it could result in disparate outcomes and consequences, which would be contrary to the constitutional values of fairness and equality. It would mean that a party who was obliged to submit to statutory arbitration faced the risk of a non-appealable award of damages. And, while the Arbitration Act referred to an arbitration agreement, the form of arbitration created by s 12B of the PPA was not by agreement between the parties. Courts should generally tread with caution when defining the scope of the arbitration or the powers of an arbitrator under such circumstances. (See [53], [56], [58], [61] – [62], [67].)

The suggestion, that the arbitrator could, as part of a corrective award, make an award of damages, simply did not fit into any interpretation of the section. An award of damages, if competent, had to be preceded by a determination of a breach of contract or some other basis to justify an award of damages. The difficulty was that the arbitrator was not empowered to stray into those areas, as the power given to the arbitrator in terms of s 12B(4)*(a)* was limited. There was simply no room for any suggestion of an award of damages, and the determination that must precede it, in this carefully constructed innovation to the PPA. To suggest otherwise would be to give the arbitrator a power that does not accord with the PPA.

While on the face of it, it may be so that there was nothing in s 12B(4)*(a)* that excluded compensation or damages as a corrective award, if regard was had to the language, purpose and context of the section, then everything militated against the interpretation that s 12B(4)*(a)* contemplated such a process and such a power. Accordingly, the appeal would be dismissed. (See [69], [71], [78].)

MOGALE AND OTHERS v SPEAKER, NATIONAL ASSEMBLY AND OTHERS
2023 (6) SA 58 (CC)

Constitutional law — Legislation — Enactment — Parliament — Duty to facilitate public involvement in legislative process — Factors bearing on whether duty fulfilled — Traditional and Khoi-San Leadership Act 3 of 2019.

Applicants were individuals and bodies with an interest in traditional and Khoi-San leadership and related matters. Respondents were respectively the Speaker of the National Assembly (NA), Chairperson of the National Council of Provinces (NCOP), Speakers of the Provincial Legislatures, the Minister of Cooperative Governance and Traditional Affairs, the Chairperson of the National House of Traditional Leaders, the President, Congress of Traditional Leaders and the Khoi and San Council.

The case implicated the process leading to the enactment of the Traditional and Khoi-San Leadership Bill. That was as follows:

The Department of Cooperative Governance and Traditional Affairs (COGTA) conducted hearings toward, and ultimately executed, the drafting of the Traditional and Khoi-San Leadership Bill. This it introduced into the NA, where the Portfolio Committee on Cooperative Governance and Traditional Affairs invited submissions on the Bill. To this end meetings were conducted in the nine provinces and these were subsequently impugned for alleged deficiencies in the public participation process.

The NA passed the Bill and referred it to the NCOP, which 'deferred' itself holding hearings to the provincial legislatures. The legislatures conducted the hearings on behalf of the NCOP, and they again met with the criticism that the participation process was wanting.

The provincial legislatures then adopted their negotiating mandates and the NCOP's Select Committee on Cooperative Governance and Traditional Affairs voted in accordance with the provinces' mandates. It adopted an amended version of the Bill and referred it to a plenary vote in the NCOP. It voted in favour and referred the Bill to the NA, which adopted it.

The President then signed the Bill into law as the Traditional and Khoi-San Leadership Act 3 of 2019, and published a notice bringing it into force.

The applicants then brought their application for direct access to the Constitutional Court, contending that Parliament had failed to comply with its constitutional obligation to facilitate public involvement in the legislative process.

The provisions cited were ss 59(1)*(a)*, 72(1)*(a)* and 118(1)*(a)*, which provide in identical terms that each body 'must facilitate public involvement in the legislative and other processes [of respectively its Assembly/Council/ legislature] and its committees'. 'Public involvement' in this sense required enabling citizens to know about the issues, have an adequate say, and be capable of influencing the outcome.

The challenge was directed specifically at the public hearings held by the NA and by the provincial legislatures on behalf of the NCOP.

The issue was whether Parliament had fulfilled its constitutional obligation to facilitate public involvement in the legislative process. This was required to be judged against the standard of reasonableness: were Parliament's actions toward fulfilment of its obligation reasonable?

Factors bearing on this were:

- Parliament had determined that reasonable action included 'intensive' hearings and translation of the Bill (see [40]);
- Parliament was not constrained by time or cost (see [48] and [50]);
- deficiencies preventing members of the public preparing for public hearings (insufficient notice, lack of pre-hearing education, inaccessibility of hearings) (see [61], [64] and [66]);
- shortcomings preventing participation in public hearings (inaccessibility of the text of the Bill — it not being provided at all, it being provided in the wrong language, etc) (see [68]);
- prioritisation of certain speakers, and prevention of others speaking (see [73] – [74]);
- deficiencies preventing the public's views being conveyed to and/or considered by lawmakers (insufficient consideration of written submissions, inaccurate and inadequate records of public hearings) (see [76] and [78]).

The court's conclusion was that, collectively, the deficiencies indicated that Parliament had failed to fulfil its obligation to facilitate public involvement in the process leading to the Bill's enactment, and this invalidated the Act (see [82] – [83]).

Declared: Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Act, and, as a consequence, the Act was adopted in a manner inconsistent with the Constitution and was therefore invalid (see [87]).

The order suspended for 24 months to enable Parliament to re-enact it in a constitutionally compliant manner, or to pass another statute in such manner (see [87]).

VJV AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT AND ANOTHER 2023 (6) SA 87 (CC)

Children — Conception and birth — Artificial fertilisation — Female same-sex couple A and B in permanent life partnership — A's egg fertilised in vitro with C's semen and embryo transferred into B's uterus — B becoming pregnant and giving birth to child — Section 40 of Act providing that only B having rights and responsibilities in respect of child — Provision unconstitutional — Reading-in ordered — Children's Act 38 of 2005, s 40.

First and second applicants were women in a permanent life partnership. Respondents were the Minister of Social Development and the Minister of Justice and Constitutional Development.

First applicant's egg and a third party's semen were fertilised in vitro, and the embryos transferred into second applicant's uterus. Second applicant became pregnant, and twins were born. Per s 40 of the Children's Act 38 of 2005, the twins were second applicant's children, and only second applicant had rights and responsibilities in respect of them. First applicant had no rights or responsibilities.

Section 40 provides in essence that when a gamete of a third party is used with a husband and wife's consent for artificial insemination of the woman, the child born is regarded as the child of the husband and wife, in the same manner as if the husband or wife's gamete was used for the artificial insemination (s 40(1)).

Moreover, when the gamete of a third party is used for artificial insemination 'of a woman', the child born is regarded as the child of the woman (and not of the third party) (s 40(2)).

No rights and responsibilities arise between the child and third party. Rights and responsibilities only arise between the child and its artificially inseminated mother, and the husband of the mother at the time of the artificial insemination (s 40(3)).
First and second applicants challenged the constitutionality of s 40 in the High Court, and obtained a declarator that it was unconstitutional in its exclusion of permanent life partners (see [3] – [4]).
Here, they applied to the Constitutional Court for confirmation of the order of constitutional invalidity (see [97]).
Held, that s 40 unfairly discriminated against female permanent life partners in same-sex relationships on the basis of sexual orientation; limited such partners' dignity; and limited the best-interests-of-the-child principle (see [55], [59], [60] and [63]). The limitations were unjustifiable and the provision accordingly unconstitutional and invalid (see [79]).
As an interim remedy 'permanent life partner/s' would be read into s 40, and if Parliament did not amend the provision within two years, the reading-in would endure, until such time as Parliament amended it (see [82] and [85]).
The invalidity itself would be retrospective, to the date s 40 came into force (see [87]).
Ordered that the High Court's declaration of invalidity was confirmed; the declaration would take effect from 1 July 2007; the declarator's operation would be suspended for two years; and from the date of the order 'permanent life partner/s' would be read in (see [97]).

BERZACK v HUNTREX 277 (PTY) LTD AND OTHERS 2023 (6) SA 120 (SCA)

Servitude — Praedial or personal — Servitude to develop and maintain garden on servient tenement registered against servient tenement's title deed — Whether registrable in light of prohibition on registration of personal servitudes of usufruct, usus and habitatio — Utilitas requirement satisfied — Features of servitude distinctively praedial — Servitude registrable — Deeds Registries Act 47 of 1937, s 66.

When Ms Berzack subdivided her residential property into two erven, she could not do so without a significant portion of her existing garden falling into the subdivided portion she intended to sell. In order to reserve her rights to the garden, she and the first purchaser thereof (one Mr Wellens) agreed to a servitude, subsequently endorsed on the title deed of the subdivided portion. The servitude was 'in favour of [Ms Berzack]

and her successors in title as owner of the [remainder]', and contained a clause (clause P) with the following conditions:

'(i) No wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing); (ii) The seller shall have the right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above; (iii) The seller shall have full rights of access to such servitude area in fulfilment of the rights hereby granted.'

Huntrex 277 (Pty) Ltd (Huntrex) was a successor in title to the subdivided portion. The members of Huntrex, who resided there, wished to remove and replace the existing fence. When Ms Berzack refused, Huntrex approached the High Court for relief on the basis that the servitude was not praedial, but a personal servitude of usus, and so was not registrable under s 66 of the Deeds Registries Act 4 of 1937 (which provides in relevant part that '(n)o personal servitude of *usufruct*, *usus* or *habitatio* purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered . . .'). Huntrex accordingly sought orders to the effect that it could remove and replace the fence; that it be declared that Ms Berzack's servitude was only a personal servitude of usus over erf 8[. . .], which ceased to have effect on her death; that it was not capable of being registered in the title deeds as a praedial servitude in favour of Ms Berzack and her successors in title; and that the Registrar of Deeds (the second respondent) be directed to rectify the deed of transfer and record the servitude as a personal servitude of usus.

Mr Wellens filed an affidavit in support of Ms Berzack's opposition, that the reservation of the garden as a praedial servitude upon the Huntrex property was agreed to between him and Ms Berzack. Ms Berzack also counter-applied that her intention and that of Mr Wellens could still be realised by rectification of the clause, if necessary, by inserting appropriate terms into the Huntrex title deed dealing with the servitude. As further alternative relief, in the event of rectification not being successful, she claimed a praedial right, that she had exercised and enjoyed for more than 30 years, be conferred on her and the Berzack property by virtue of acquisitive prescription.

The High Court, after considering the elements of a praedial servitude, found that the element of utilitas was lacking; and concluded that clause P established a personal servitude of usus which could neither be rectified nor cured by acquisitive prescription because s 66 of the Deeds Act prohibited such servitude from being registered by the Registrar of Deeds. The High Court also found that it was appropriate that the title

deed of the Huntrex property be rectified by substituting the original clause with a new clause that had been proposed by Huntrex, designed to convert the original praedial servitude into a personal servitude.

The present case concerned Ms Berzack's application to the Supreme Court of Appeal for leave to appeal. The application for leave was referred to court for argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act), and, if successful, for the determination of the appeal itself. The main issues were whether the terms of the clause amounted to a praedial or personal servitude of usus; and, depending on the nature of servitude that was created in clause P, whether such servitude was capable of being registered in terms of s 66. The secondary issues, ie rectification and prescription, depended on the outcome of the determination of the main issues.

Held (majority)

Leave to appeal would be granted. The appeal raised important questions of law, such as whether a servitude involving reservation of rights of access to use and enjoyment of a garden was a praedial servitude or a personal servitude of usus, and therefore hit by the prohibition in s 66 (see [6]).

The interpretation of the clause was at the heart of this matter. To the extent that the High Court did not interpret the clause with regard to the grammatical meaning of the words used therein, in light of the context, purpose and the background circumstances under which the contract creating the servitude was made between Ms Berzack and Mr Wellens, it erred. The meaning of the clause, read as a whole, showed that the element of utilitas was present. The Huntrex property had been serving the Berzack property continuously for a period spanning more than 30 years; and the right to the garden was reserved on the servient land and it enured in favour of the Berzack property. The servitudal rights created served as a guarantee that no structure could be constructed on the grounds designated as the garden area. In this fashion, the dominant tenement's poolside entertainment area would always be an area with a view. That a view adds utilitas and enhances the value of residential property, was incontrovertible. The fact that, in tending the garden, Ms Berzack was able to pursue her personal pleasure or caprice, did not detract from the advantages to the dominant tenement. (See [22], [24], [32].)

On the facts, the intention expressed in writing by Ms Berzack and Mr Wellens in 1983 was that the garden should be reserved on the subdivided property for Ms Berzack's

benefit and subsequent successors in title of the Berzack property in perpetuity — hence the registration of the servitude. The features of the garden servitude met the distinctive characteristics of a praedial servitude because the clause bore all the hallmarks of a praedial servitude, not a personal servitude of usus. In the event, the registration of the servitude by the Registrar of Deeds could not be faulted; the judgment and order of the High Court could not stand and the appeal would be upheld. (See [27], [29] – [32].)

Held (minority)[*]

The majority judgment's recognition of the right to develop and maintain a garden upon a servient tenement as a praedial servitude marked a significant development of the scope of presently recognised praedial servitudes at common law — a development premised upon a misapplication of the principles of law which govern the field of servitudes. (See [36].)

The nature and content of a servitude depended only to an extent on the intention of the parties who created it because 'the law will not give effect to the intention of the parties if they intended to do something that is not possible according to the principles of property law', such as creating 'a personal servitude that is transferable or perpetual'. As s 66 prohibited the registration of a personal servitude of usus that purported to extend beyond the lifetime of the person who created it, Ms Berzack was not legally capable of 'imposing' the servitude on the purchaser of her property in favour of herself and her successors in title. That had the result that, irrespective of what the servitude said or what Ms Berzack intended, the servitude expired on her death. The import and effect of s 66 of the Deeds Registries Act could not be ignored. It reflected a legislative purpose to bolster the common-law impediments to the extension of perpetual restrictions on the ownership of property. Its effect was that once a servitude bore the hallmarks of a personal servitude, it precluded registration. (See [48], [56].)

An interpretation of the servitude and the nature of the rights created confirmed that a personal servitude of usus was in fact created. And, when considering the essential requirements for the creation of a praedial servitude, the servitude at issue failed to meet requirements of perpetual cause and utilitas. In this case there is no feature or attribute of the servient tenement which could be said to provide an advantage to the dominant tenement. And, the 'increased market value' which might ensue from a beautiful garden developed upon a servient tenement, did not establish utility as

required by the common law. The utility in a view, if it were to serve as a basis for recognition of a praedial servitude, required more than the mere assertion of the existence of a 'view'. It follows that in respect of the principal issue, namely whether the servitude is praedial or personal in nature, and the remedial consequences that flowed therefrom, there were no prospects of success on appeal. (See [58] – [68].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v NYHONYHA AND OTHERS 2023 (6) SA 145 (SCA)

Company — Winding-up — Setting-aside — Test — Whether facts showed it was unnecessary or undesirable to continue winding-up — Decision as to whether test satisfied not characterisable as true discretion — Companies Act 61 of 1973, s 354(1).

In this matter a creditor obtained the final winding-up of a company. Respondents then applied to a High Court and obtained an order under s 354 of the Companies Act 61 of 1973 setting aside the winding-up.

Section 354(1) provides:

'The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings . . . on such terms and conditions as the Court may deem fit.'

The Commissioner appealed to the Supreme Court of Appeal with its leave. The first issue was whether a court's discretion to set aside a winding-up was a true discretion.

Held, that s 354 gave courts a discretion to set aside a winding-up on the basis, (1) that it should not have been granted at all; and (2) — as was of application here — by reason of subsequent events. In turn, the test for setting aside on the 'subsequent events' basis was whether the facts showed that it was undesirable or unnecessary to continue the winding-up. This did not involve a choice between 'permissible alternatives' — a hallmark of a true discretion — and accordingly was not. (See [20] – [22].)

Held, further, that even were the discretion a true one, with the concomitant that the grounds for interference were limited, the High Court's decision was based on incorrect facts and wrong principles of law (see [24]).

Held, further, that on the evidence before the court, the company was both factually and commercially insolvent, and accordingly there was no basis to find that setting aside the winding-up was necessary or desirable (see [33]).
Appeal upheld and the order of the High Court set aside and replaced with an order dismissing the respondents' application (see [36]).

DEMOCRATIC ALLIANCE v MINISTER OF HOME AFFAIRS AND ANOTHER 2023 (6) SA 156 (SCA)

Immigration — Citizenship — Loss of — By South African citizen acquiring citizenship of another country — Validity of provision — South African Citizenship Act 88 of 1995, s 6(1)*(a)*.

The appellant, the Democratic Alliance, applied to the Gauteng Division for a declarator that s 6(1)*(a)* of the South African Citizenship Act 88 of 1995 was inconsistent with the Constitution and invalid from 6 October 1995; and a further declarator that all persons who lost their South African citizenship in terms of s 6(1)*(a)* on or after 6 October 1995 were South African citizens (see [1]).
Section 6(1) provides:

'Subject to . . . subsection 2, a South African citizen shall cease to be a citizen if —

(a) he . . . by some voluntary and formal act . . . acquires the citizenship or nationality of a country other than the Republic; . . . .'

And s 6(2) provides:

'Any person referred to in subsection (1) may, prior to his . . . loss of South African citizenship in terms of this section, apply to the Minister to retain his . . . South African citizenship, and the Minister may, if he . . . deems it fit, order such retention.'

The High Court dismissed the application, rejecting the contentions that s 6(1)*(a)* was irrational and infringing of constitutional rights. It refused leave to appeal, but leave was obtained from the Supreme Court of Appeal to appear before it (see [2]).
The first issue was whether s 6(1)*(a)* was irrational (see [23]).
Held, that it was (see [33]). Considerations in this regard were the following.

• Respondents (the Minister of Home Affairs and the Director-General of the Department) were unable to point to a legitimate purpose s 6(1)*(a)* sought to achieve, barring the general submission that its purpose was to regulate acquisition and loss of South African citizenship. This overarching function was not however the purpose of

the section — all legislation regulated something — and to meet the standard of rationality the Minister was required to provide the specific purpose. This he had not done (see [25]).

• Moreover s 6(2), which authorised retention of citizenship on application to the Minister, begged the question (and implicated rationality): why then automatic loss of citizenship? This was not specified (see [26]).

• Sections 7(1) and 8(2) expressly recognised dual citizenship, so making it clear Parliament sanctioned the holding of dual citizenship, and thus that s 6(1)*(a)* could not be based on the premise that dual citizenship was inherently undesirable. Indeed no basis was apparent for how dual citizenship could be recognised as permissible, yet also warrant loss of citizenship (see [27] – [28]).

• The purpose of s 6(1)*(a)* could not be to regulate renunciation of citizenship, because that would render s 7 redundant (see [29]).

• Section 6(1)*(a)*'s purpose could not be to regulate dual citizenship: its loss occurred without an official making the decision on consideration of individual circumstances, and without notice to the individual concerned (see [30]).

• Section 6(2), which gave the Minister a discretion to allow or refuse retention of South African citizenship, failed to remedy s 6(1)*(a)*'s arbitrariness, in that the discretion was unconstrained by guidelines on its exercise (see [31]).

The second issue was whether s 6(1)*(a)* infringed constitutional rights (see [34]).

Held, that it did (see [37]):

• Any form of deprivation of citizenship infringed s 20 of the Constitution, the stipulation that 'no citizen may be deprived of citizenship', and loss of citizenship was a species of such deprivation (see [35]).

• Citizenship was a gateway to the constitutional rights in ss 19, 21 and 22, and its loss resulted in their loss (see [36]).

As to remedy, the Act came into effect on 6 October 1995 at the time when the interim Constitution was in force, and the section was thus unconstitutional from the date of its promulgation, 6 October 1995. The declaration of invalidity would be made effective from that date (see [41]).

As to retrospectivity, there was no reason to not order full retrospectivity, as would be done. Its effect would be that citizens who lost their citizenship by reason of s 6(1)*(a)* would be deemed not to have (see [43]).

There was, moreover, no need to suspend the order of invalidity since the striking-down of the provision would not disrupt the administration of justice (see [45]).

Ordered, that the appeal was upheld, the High Court's order set aside, and replaced with an order declaring the section inconsistent with the Constitution and invalid from the date of its promulgation (6 October 1995), and that those citizens who lost their citizenship by operation of the provision were deemed not to have lost their citizenship (see [47]).

PREVANCE BONDS (PTY) LTD v VOLTEX (PTY) LTD AND OTHERS 2023 (6) SA 173 (SCA)

Contract — Consensus — Rectification — Document containing security cession incorrectly describing creditor — Rectification of agreement by creditor after debtor placed into liquidation and concursus creditorum established — Whether permissible.

The High Court granted an application by Voltex (Pty) Ltd (Voltex 2) to rectify a recordal on a credit-application form in respect of facilities extended to First Strut (RF) Ltd — subsequently liquidated — insofar as the form cited Voltex 2's company-registration number incorrectly. The application was brought after the Master upheld an objection by rival creditor of First Strut, Prevance Bonds (Pty) Ltd, to the liquidation and distribution account recording Voltex 2 as a secured creditor of First Strut. Voltex 2 had relied on a security cession contained in the credit-application form to prove its claim as secured creditor.

Prevance had opposed the application on a number of grounds, inter alia, that —

- the liquidators should have excluded Voltex 2's claims, having regard to the fact that same were premised on unsupported documents and that the purpose of the application was to substitute an unsecured creditor for a secured creditor, in circumstances where the unsecured creditor's claim should not have been admitted; and
- that it was incompetent for the court to order rectification of a document after the institution of a concursus creditorum in instances where its effect would enable an

otherwise unsecured creditor to establish a secured claim, as was the case here, because it would have the unlawful effect of disturbing the concursus. (See [15].)

The present case concerned Prevance's appeal to the Supreme Court of Appeal.

Held

There was no factual basis for Prevance's allegations that the purpose of the rectification application was to substitute a secured creditor in circumstances where the unsecured creditor's claim should not have been admitted. Voltex 2 had made out a prima facie case for the relief sought, which Prevance did not answer. Mr Green, for Voltex 2, explained how it came about that the company registration number of Voltex 1, instead of Voltex 2, was recorded on the application for credit facilities that was presented to First Strut by Voltex 2. He testified that it was the intention of both Voltex 2 and First Strut that the creditor referred to in the security cession was Voltex 2, and not Voltex 1. On the facts, the High Court was correct to conclude that Voltex 2 had made out a case for rectification of the document which embodied the security cession. (See [25] and [47].)

The intervention of insolvency of First Strut was no impediment to the rectification of the document in which the security cession was recorded, as it was clear from the evidence that a valid cession of book debts was concluded between the parties. From that moment, Voltex 2 became a secured creditor and remained as such when First Strut was wound up. Rectification did not bring about a change in Voltex 2's status. Rectification did not therefore offend the concursus creditorum principle and did not prejudice the rights of the third-party creditors. (See [48].) In the result, the appeal would be dismissed (see [49]).

AFRIFORUM v SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS 2023 (6) SA 188 (GJ)

Constitutional law — Human rights — South African Human Rights Commission — Powers — Not empowered to make final decision on contravention of hate-speech provisions in s 10 of *PEPUDA* — Opinion of Commission on substance of complaint made to it relevant only to bringing of proceedings before competent court — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10; South African Human Rights Commission Act 40 of 2013, s 13(3).

While the South African Human Rights Commission (SAHRC) may, under s 13(3) of the South African Human Rights Commission Act 40 of 2013 (the Act), form an *opinion* whether there is substance to a claim that a human right has been violated, it is not empowered to make a definitive *decision* on issues addressed in s 13(3), such as 'deciding' that s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was contravened. The SAHRC's opinion is relevant only to the bringing of proceedings before a competent court.

The present court so held in two review applications. The applicants, both civil rights organisations, complained to the SAHRC that a statement by a politician, Mr Malema of the EFF, was hate speech prohibited under s 10 of PEPUDA. The SAHRC, purporting to act under s 13(3), decided that it was not, and exonerated Mr Malema.

The applicants challenged the decision on review to the Johannesburg High Court, where the SAHRC, reversing an earlier stance articulated in its communication to the applicants, argued that its decision was not subject to review.

The High Court, in reaching the conclusion outlined above, reasoned as follows:

The SAHRC derives its powers from the Constitution and the Act, specifically its s 13 (powers and functions of Commission). Section 13(3) empowers it to conduct investigations with the purpose of forming a prima facie 'opinion' whether human rights were violated, in which case it may bring the matter before court for its decision on whether they were, in fact, violated. Hence it is not in the SAHRC's power to state that an alleged violation is indeed a violation or to exonerate someone from such an allegation. Since the SAHRC's 'decision' that Mr Malema did not contravene s 10 of PEPUDA was therefore ultra vires and null ab initio, it would be set aside as such. (See [12], [20] – [23].)

BESTER NO v MASTER, HIGH COURT AND ANOTHER 2023 (6) SA 199 (WCC)

Administration of estates — Executor — Rights, powers and duties — Sale of estate property — Nature of Master's discretion in approving sale — Broad discretion guided by purpose of obtaining best possible price for heirs — Master must consider view of heirs on manner and conditions proposed by executor — Whether order substituting Master's failure to make decision appropriate — Administration of Estates Act 66 of 1965, s 47.

Section 47 of the Administration of Estates Act 66 of 1965 (the AEA) provides that an 'executor shall sell the property in such *manner and subject to such conditions as the Master may approve*'.

When the second respondent, the sole heir of the deceased, refused to consent to the immovable property in the deceased estate being sold in order to realise funds to finalise the estate, the applicant, the executor of the deceased estate, requested authorisation to sell it from the Master as contemplated in s 47 of the AEA. And when no response was forthcoming from the Master, the executor launched the present review application, asking the court to set aside the Master's failure to make a decision and to substitute it with its own decision granting the requested authorisation. (See [20] – [24].)

This raised the issue of nature and extent of the Master's powers under s 47 — the broadness of the discretion to approve the manner and conditions of sale — because, in substituting the Master's decision, the court would have to ensure that it was exercising the same power that the Master had been given under the statute. (See [51].)

Held

The proper interpretation of the section must take into account its text, context and purpose. The language of the section indicated that the sale would be authorised in such manner and subject to such conditions as the Master determined. This signified a broad discretion. It was not, however, an unguided discretion; it must be exercised in the light of the purpose of the section, to attain the best possible price for the benefit of the heirs. The views of the heirs about the manner and conditions proposed by the executor would be a relevant consideration for the Master to take into account. (See [52], [54] – [55], [57].)

While the review of the Master's failure to take a decision under s 47 would succeed, this was not an appropriate case for an order of substitution. The court was not in as good a position as the Master to make a decision on the manner and conditions of sale, and the matter would therefore need to be remitted to the Master with a requirement that the decision be taken within two months of the order. (See [66] and [69].)

BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS v FORMER WAY TRADE AND INVEST (PTY) LTD AND OTHERS 2023 (6) SA 214 (KZP)

Spoliation — Mandament van spolie — When available — Money held in bank account — Holder of bank account not possessor of funds standing to its credit — Mandament not available where money removed by reversal of debit order.
Banking — Relationship between bank and client — Right to money in bank account — Reiterated that when money deposited into client's account, it becomes property of, and is possessed by, bank — Client's personal right against bank not protected by mandament van spolie — Application of principles to contested reversal of debit order.

The first respondent (Former Way) from time to time paid the applicant (All Fuels) by way of debit order for fuel supplied in terms of a wholesale fuel-supply agreement (the agreement). The cost was calculated by a formula. When the relationship between the parties soured, Former Way, contending that All Fuels had failed to adhere to the agreement or the agreed formula in charging for the fuel, reversed the last two debit-order payments it had made, thereby extracting the sum paid — R5,6 million — from All Fuels' bank account.
All Fuels, claiming that it had complied with its contractual obligations, sought relief by way of the mandament van spolie, alleging that the R5,6 million taken from its bank account was despoiled by Former Way, and demanding its restitution ante omnia.
In the alternative, All Fuels sought judgment against the first respondent based on the *condictio furtiva*, submitting that Former Way and its guiding minds — the second and third respondents — had committed theft, alternatively fraud, against it. This was denied by Former Way by way of the facts alleged in a counter-application by which it sought a judgment of R5,6 million against All Fuels for breach of contract. Former Way claimed that it merely took back money All Fuels had removed from its account without justification. Former Way, while conceding that All Fuels had been entitled to use the debit-order payment system for the payment of correctly invoiced sums, argued that since the invoicing had been *incorrect* in terms of the formula, none of the money was due.
Former Way was subsequently placed in voluntary liquidation and the sixth and seventh respondents appointed as provisional, and later final, liquidators. They brought their own counter-application against the fourth respondent (the second and

third respondents' attorneys) and the fifth respondent (Former Way's banker), alleging that the funds extracted from All Fuels' bank account and held in trust by the fourth and fifth respondents, were assets belonging to Former Way's insolvent estate.

Held

While the mandament was an ancient remedy, there was a dearth of cases on its application to funds held in a bank account (see [38]). It was settled law that such funds belonged to the bank and were possessed by it, so that the account-holder had a mere personal right over them. Personal rights were not, however, protected by the mandament. Significantly, the extension of the mandament to incorporate the 'quasi-possession' of incorporeal rights did not apply to *all* incorporeal rights: contractual rights, for example, were excluded from the mandament's protection. (See [23] – [24] and [34] – [36].)

So, All Fuels had never possessed the money taken from its account: it had belonged to, and had been possessed by, its bankers. All Fuels had a personal right to the money that was not protected by the mandament. Another difficulty for All Fuels was that the reversed payments had their origins in contract and that All Fuels was claiming specific performance of contractual rights, which were not protected by the mandament. (See [36] – [37].) Accordingly, All Fuels' relief based on the mandament had to be refused (see [39]).

Since All Fuels' allegations in the alternative claim based on the *condictio furtiva* were denied in Former Way's allegation in the first counter-application that there was a reasonable ground for its conduct, the alternative relief had to be adjourned *sine die* for the court to hear the counter-application, which would itself be adjourned *sine die* for the sixth and seventh respondents to arrive at a view on its merits (see [41], [47]).

As to the liquidators' counter-application: while it was quite possible that Former Way was guilty of fraud or theft in extracting the funds from All Fuels' account, or that it had made misrepresentation to induce it, the essential question was whether Former Way acquired a personal right to the funds when they were retransferred into its bank account. If it did, then those funds accrued to its estate on liquidation, and the counter-application should succeed. Since Former Way had acquired a personal right to the credit balances in its favour in its accounts with the fourth and fifth respondents, which then fell into its insolvent estate, the counter-application would be upheld. All Fuels would thus be left with a claim against Former Ways' insolvent estate. (See [50] – [53].)

The court accordingly made an order dismissing All Fuels' application premised on the mandament; adjourning All Fuels' alternative claim based on the *condictio furtiva*; adjourning Former Way's counter-application; and granting the sixth and seventh respondents' counter-application (see [54]).

BROADHURST v GEARHOUSE SPLITBEAM (PTY) LTD AND ANOTHER 2023 (6) SA 232 (GJ)

Delict — Reduction and apportionment of damages — Joint wrongdoers — Proceedings against — Where no notice given to joint wrongdoer who not sued in initial action — Application for leave to sue such wrongdoer on good cause shown why no notice given — Whether such leave of court on good cause shown can be sought after action in respect of which such notice is required has already been instituted — Section 2(4)*(a)*, properly interpreted, allowing it — Apportionment of Damages Act 34 of 1956, s 2(4)*(a)*.

In terms of s 2(1) of the Apportionment of Damages Act 34 of 1956 (AOD Act), where two or more persons are jointly or severally liable to a person (the plaintiff) in delict for the same damage, such 'joint wrongdoers' may be sued in the same action by the plaintiff. In respect of such an action, in terms of s 2(2), joint wrongdoers who were not sued may be given notice of such action at any time before close of pleadings, after which they may intervene as defendants, should they wish to do so. The present matter concerned the interpretation of s 2(4)*(a)*: That provides:

'If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and *no notice* is given to him in terms of paragraph *(a)* of subsection (2), *the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.*'

The question to be answered in this matter was: Could such leave of the court on good cause shown be sought *after the action in respect of which such notice was required had already been instituted*? The background follows. The applicant was injured during the course of attending a musical production at a theatre when a mirror ball that had been suspended from the ceiling fell on his head. Two years later in an action (the first action) the applicant, as plaintiff, sued the three joint wrongdoers he was aware of at the time, namely the owner of the theatre, the event-management company responsible for the production of the show, and the company that the plaintiff

contended was the rigger of the equipment for the show. During the course of the exchange of pleadings of that first action, the applicant became aware of two further joint wrongdoers, namely the theatre equipment specialist company, and the civil and structural consulting engineer who attended to the erection of the mirror ball — respectively the first respondent and the second respondent (Mr Hussey) in this application — when these parties were joined by the defendants by way of third-party notices. Importantly for present purposes, the applicant, in that first action, declined to issue to the respondents notices under s 2(2) of the AOD Act. What the applicant did do was to later sue the respondents for damages in a separate action (the second action), *but without first seeking leave under s 2(4) of the AOD Act before doing so*. That prompted Mr Hussey to contend, by way of a special plea, that such failure precluded the applicant from instituting the second action against the respondents. In the present application, the applicant now sought leave of the court in terms of s 2(4)*(a)* of the AOD Act to proceed against the respondents in the second action. Mr Hussey opposed the present application on the basis that the leave of the court could not be sought *after* the action had already been instituted, the institution of the action being a nullity and which nullity could not be cured after the event by leave now being sought and granted in terms of s 2(4)*(a)*. The applicant on the other hand contended that the leave of the court need not be sought *before the institution of the action*. This legal issue formed the key focus of the court's decision. The other issue, of relevance if it was found that leave could be sought after the event, was whether the applicant had shown good cause for leave to be granted in this instance.

Held, that leave in terms of s 2(4)*(a)* of the Apportionment of Damages Act could be granted *after the institution* of the further action in which that joint wrongdoer has been sued. Such an interpretation of s 2(4)*(a)* could be reasonably ascribed to the wording of the provision; did not render nugatory the purpose of s 2, namely to avoid a multiplicity of actions arising from a single loss-causing event; and further advanced the constitutional right of access to courts. (See [30], [32], [33], [38] – [39], [43] – [44].)

Held, that the delay in asking for the leave after the further action had already been instituted, rather than before, and any prejudice that it may cause the joint wrongdoer, was a factor to be taken into account in determining whether good cause had been shown for leave to be granted to the plaintiff to proceed with the further action. (See [49] – [50] and [58].)

Held, as to whether the applicant should be granted leave to proceed with the present action, that the explanation offered by him for failing to initially give notice to the respondents, and then to seek leave after the second action had already been instituted against the respondents, was not convincing (see [73]. [The explanation, effectively, was ignorance on the part of the applicant's legal advisors as to the requirements of s 2(4)*(a)*.] Nevertheless, the weakness of such explanation had to be counter-balanced with the following factors: the clear position of Mr Hussey as a joint wrongdoer; that Mr Hussey was already compelled to participate in the litigation by way of his joinder thereto by the other defendants; and the fact that the applicant would be left largely remediless against Mr Hussey if leave were not granted. (See [80].) Accordingly, the applicant had shown good cause, and leave should be granted to him to proceed with the action against the respondents (see [81]).

COMMUNICARE v APOLISI AND OTHERS 2023 (6) SA 250 (WCC)

Eviction — Remedy — PIE to replace mandament van spolie in eviction proceedings because mandament not affording due constitutional protection — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 5.

Spoliation — Mandament van spolie — When available — Not in eviction proceedings — Should be replaced by proceedings under PIE — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 5.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) should be used instead of the mandament van spolie in eviction proceedings (see [35]).

The Western Cape High Court, in a consolidation of three urgent applications for spoliation, alternatively eviction under PIE s 5, ruled that the applicant was not entitled to use the mandament because PIE s 5 provided a sufficient constitutional replacement for it. The court granted eviction orders based on the danger of damage to the properties, the likely hardship to the applicant if eviction was not granted, and the lack of another effective remedy (see [45]).

The court, having pointed out that s 5 was defective because it failed to require the provision or at least a consideration of alternative accommodation, made its order subject to an investigation into alternative accommodation by the City of Cape Town (see [41], [50]).

HENQUE 3935 CC t/a PQ CLOTHING OUTLET (IN BUSINESS RESCUE) v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2023 (6) SA 260 (GJ)

Company — Business rescue — Moratorium on legal proceedings against company — Pre- and post-commencement debt — Income tax liability — Additional assessment issued after commencement of business rescue — Whether amounting to pre- or post-commencement debt — Companies Act 71 of 2008, s 133(1); Income Tax Act 58 of 1962, s 5; Tax Administration Act 28 of 2011, ss 1, 92 and 96.

Revenue — Income tax — — When due and payable — Due and payable upon assessment or additional assessment made and issued to taxpayer — Income Tax Act 58 of 1962, s 5; Tax Administration Act 28 of 2011, ss 1, 92 and 96.

The taxpayer, a close corporation, filed a tax return for 2017 with the South African Revenue Service (Sars) claiming to have made a loss. At the same time, it had accumulated tax credits for value-added tax (VAT). On 29 November 2017 the South African Revenue Service (Sars) issued a notice of assessment recognising that the taxpayer was due a VAT refund. In the same notice, Sars also informed the taxpayer that it was to be subjected to an audit. On 31 January 2018 — before Sars had issued an additional assessment based on the completed audit showing taxable income for the 2017 year — the taxpayer commenced business rescue proceedings.

When the taxpayer requested payment of the VAT refund, Sars refused, asserting that it was entitled to set off the taxpayer's VAT refund against its assessed tax liability as per the additional assessment completed on 31 May 2018. The present case concerned the taxpayer's application for declaratory relief against Sars' stance.

Sections 128(1)*(b)* read with s 133 of the Companies Act 71 of 2008 places a temporary moratorium on the rights of claimants iro pre-commencement debt, ie debts of the entity that have accrued prior to the commencement of business rescue proceedings. Sars contended that the taxpayer's tax liability for 2017 had only become due and payable on 31 May 2018 when the additional assessment with regard thereto was completed, and so was a post-commencement debt not subject to the moratorium; and that therefore it was entitled to set off the VAT refund against the assessed income tax liability (under s 191 of the Tax Administration Act 28 of 2011 (the TAA)).

The taxpayer contended that the assessment, including the additional assessment of liability subsequent to 28 February 2017, only quantified but did not create tax liability for the 2017 tax year — which arose on 28 February 2017. That the assessment was completed after the commencement of business rescue did not alter the liability for the 2017 year, and therefore the taxpayer's 2017 tax liability amounted to a pre-commencement debt.

Held

Section 5(1) of the Income Tax Act 58 of 1962 established only 'generally the liability' for tax, but, reading s 5(1)*(d)* of the Income Tax Act 58 of 1962 in the context of ss 1, 92 and 96 of the TAA, it was clear that the income tax only became due and payable when the assessment or additional assessment was made and issued to the taxpayer. Only when it was quantified and became due and payable did it become a 'debt'. The additional assessment transformed a general liability into an actual one. The amount assessed, thus, only became due and payable on 31 May 2018. Until then it was not a 'debt'. Thus, the 2017 additional assessment constituted a post-commencement debt or finance, not a pre-business rescue debt. Accordingly, Henque's call for declaratory relief holding otherwise would be rejected. (See [16], [18] – [20].)

HR COMPUTEK (PTY) LTD v DR WAA GOUWS (JOHANNESBURG) (PTY) LTD AND OTHERS 2023 (6) SA 268 (GJ)

Company — Winding-up — Setting-aside — Locus standi — Directors retaining residual common-law power to obtain rescission of liquidation order granted in company's absence without cooperation of liquidators — Dicta suggesting that rescission only permissible under s 354 of Companies Act 61 of 1973 (which excludes company, whether through its directors or otherwise, from bringing such application), wrong or obiter.

Company — Proceedings by and against — Authority of person acting for company — Proof of authority must be acceptable — Copy of extract of alleged resolution signed only by general manager, an unrehabilitated insolvent, not acceptable proof of adoption of resolution to initiate proceedings — Companies Act 71 of 2008, s 73(8).

While a company in liquidation cannot, without the cooperation of the liquidators, use s 354(1) of the Companies Act 61 of 1973 (the old Act) * to apply for the rescission of a liquidation order granted in its absence, its board of directors retains a residual

common-law power to do so. Dicta suggesting that a company is precluded from doing so are either wrong or obiter. (See [12], [17], [21] – [25].)

A person purporting to act for a company in legal proceedings must prove his or her authority by placing sufficient evidence before the court to warrant the conclusion that it is the company, and not some unauthorised person, who was initiating the proceedings. (See [28].)

The applicant company, acting through its sole director, sought the rescission of provisional and final liquidation orders granted against it. It relied on the common law, alternatively rule 42 of the Uniform Rules of Court, contending that the liquidation orders were obtained in its absence, without proper notice and fraudulently.

The first respondent denied the allegations of impropriety and argued, in limine, that the applicant lacked standing because rescission was available only under s 354 of the old Act, which disqualified the applicant from seeking rescission without the cooperation of the liquidators.

The applicant also raised a point in limine, argued that the first respondent was not properly before the court because the extract of the resolution to oppose attached to the answering affidavit was not properly verified as envisaged in s 73(8) of the (new) Companies Act 71 of 2008. The extract of the minutes provided as proof of the adoption of the resolution was signed by one Gouws, an unrehabilitated insolvent.

Held

Dismissing the first respondent's point in limine, that, while it was true that s 354(1) of the old Companies Act excluded a company in liquidation from itself bringing the rescission application, it could clearly do so under the common law or, presumably, rule 42. It followed that the applicant was entitled to bring the rescission application without the cooperation of the liquidators. (See [17], [24] – [25].)

Upholding the applicant's point in limine, that the court could not conclude that Gouws was properly authorised by the first respondent to oppose the application — the document he put up did not meet the requirements of s 73(8) of the new Companies Act; he was disqualified from being a director; and there was thus no proof of the alleged resolution to oppose. (See [28], [35] – [37].)

SH v MH 2023 (6) SA 279 (GJ)

Marriage — Divorce — Rule 43 proceedings — Contribution to costs — Extent of — Effect of constitutional right to equality in exercise of court's discretion — Bound under constitutional interpretation to guarantee rights to equality before law and to equal

protection — Gendered dynamic of rule 43 applications not to be ignored — Constitutional rights to equality (s 9) and access to justice (s 34) may require order for payment of full legal costs — Constitution, ss 9, 34; Uniform Rule 43(1)*(b)*.

Uniform Rules of Court must be interpreted and applied by judges exercising judicial discretion. The gendered dynamic of rule 43 applications cannot be ignored when they interpret and apply the rule. (See [75] – [79].)

The exercise of this discretion must take place through the prism of the Constitution; it would be inconsistent with it to apply rule 43 in a manner maintaining inequality between parties or preventing one party from accessing justice. The rights to equality (s 9) and of access to courts (s 34) are at the centre of rule 43 applications. Considering rule 43 through the lens of the Constitution is significant. The import of the constitutional right to equality adds a great deal because it defines the manner in which judges *must* exercise their discretion. (See [80], [82], [88], [93], [103].)

The application of rule 43 necessarily involves the right to equality; it exists to provide equality of arms so that a disadvantaged party is placed in a position to defend their case. Section 9 does not envisage a passive or purely negative concept of equality, but rather one requiring positive steps to redress inequalities that led to disadvantage. Such a positive step would be for judges, when exercising their discretion, to interpret and apply rule 43 in the light of the constitutional right to equality. (See [85] – [86].)

Rule 43 operates to ensure access to court, and is therefore measured against, and guided by, the constitutional right to access court. Where limited resources prevent a party from placing their case effectively before a court, the right to access justice is engaged. Justice may be denied where one spouse is not able to meet legal costs without sufficient contributions, while the other party can.

The real issue is whether the spouse, most often the wife, is able to defend her case, that is, whether she has an equal opportunity to have her voice heard. Rule 43 is not aimed at providing for payment of *all* the applicant's costs, but to place an applicant in a position to adequately present their case. Ordinarily, one partial costs would be sufficient. However, when the constitutional requirements of equality and access to justice require full legal costs to be ordered to be paid, then that was a legal possibility. Interpreting and applying rule 43 through the prism of the Constitution mean that it is possible for one spouse to be entitled to a claim for all her legal costs. (See [89] – [90], [101].)

Looking at rule 43 through the lens of s 9 means recognising that everyone must be in a position to be able to present his or her case to a court. If one party embarks on a luxurious degree of litigation, the exorbitance of which means that the other party cannot properly present his or her case, then it cannot be said that the two are equal before the law. To be equal before the law, the parties require equality of arms. In addition to this common-law principle, the Constitution requires that when a judge exercises his or her discretion in determining the extent of the contribution towards costs, he or she is bound by s 9 to guarantee the right to equality before the law and equal protection of it. (See [104].)

JEANRU KONSTRUKSIE (PTY) LTD v BOTES 2023 (6) SA 305 (GP)

Appeal — Security for costs — Rule obliging appellant to furnish security for costs of respondent in appeal — Validity — Requirement to furnish security for costs was procedural matter, the source of which was High Court's common-law and constitutional powers to regulate its own processes — Rule regulating how that procedural matter to be dealt with — Accordingly, it could not be said that rule promulgated ultra vires powers of Rules Board — Uniform Rules of Court, rule 49(13). Rule 49(13) of the Uniform Rules of Court provides that, in respect of civil appeals from the High Court, an appellant must furnish 'good and sufficient' security for the respondent's costs of appeal, unless the respondent has waived their right to security, or the court granting leave to appeal has released the appellant from the obligation. Presently, one Jaco Botes, after being granted leave to appeal to the full court against a summary judgment granted by a single judge of the High Court against him in favour of the company Jeanru Konstruksie (Pty) Ltd, and after filing a notice of appeal, sought to prosecute such appeal by delivering the record and thereafter applying for a date of hearing of the appeal. In doing so, in contravention of rule 49(13), Botes failed to provide security. Consequently, Jeanru, as applicant in the present matter — in an application in terms of Uniform Rule 30 — claimed that the prosecution of the appeal by Botes was an irregular step, and sought to set aside his application for a date for the hearing of the appeal. Botes, as respondent, opposed the application purely on the basis that rule 49(13) was invalid. He argued that the rule was promulgated ultra vires the powers of the Rules Board (that made the rules), in circumstances in which the Board was not empowered to determine 'where security is required'; and there was no source elsewhere, for instance, in a statutory provision or the common law, for such obligation (see [15]).

The court held the determination of the requirement to furnish security for costs was a procedural matter, whose source was the High Court's common-law and constitutional powers to regulate its own processes. Rule 49(13) merely regulated how that procedural matter was to be dealt with. Accordingly, it could not be said that rule 49(13) was promulgated ultra vires the powers of the Rules Board. (See [25] – [27] and [29].) It followed, the court held, that the appeal had been irregularly prosecuted, and the applicant ought to succeed with its application (see [29]).

MINISTER OF PUBLIC WORKS AND OTHERS v NMPS CONSTRUCTION CC AND OTHERS 2023 (6) SA 314 (ECB)

Discovery and inspection — Production of documents — Application proceedings — Parties may at any stage invoke rule 35(12) — Court order not required — Uniform Rules of Court, rule 35(12).

Rule 35(12) of the Uniform Rules of Court, which regulates the production of documents, stands apart from the other subrules of rule 35 in that no court order is required for its invocation in application proceedings. Accordingly, parties to application proceedings may invoke rule 35(12) at any stage, particularly right after the filing of an affidavit in which reference is made to a document or tape recording, with the object of compelling its production under rule 30A. (See [21], [37], [39].)

SOUTH AFRICAN CRIMINAL LAW REPORTS NOVEMBER 2023

MINISTER OF POLICE v GQAMANE 2023 (2) SACR 427 (SCA)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, ss 40(1)*(b)* and *(q)* — Prerequisites for validity of — Exercise of discretion by arresting officer — In action for damages for unlawful arrest and detention, plaintiff bearing onus to prove that discretion not properly exercised where jurisdictional requirements for valid arrest established.

In a claim for damages for unlawful arrest and detention for assault with intent to do grievous bodily harm, the trial court found that the arrest was lawful in terms of s 40(1)*(q)* of the Criminal Procedure Act 51 of 1977, in that it was based upon a

reasonable suspicion that the respondent had committed an act of domestic violence as contemplated by s 1 of the Domestic Violence Act 116 of 1998. The arrest had been effected some 12 days after the incident. The High Court overturned the decision on appeal, finding that the appellant had met the jurisdictional requirements to arrest the respondent, but that the trial court had failed to address the issue of the discretion to arrest, and this led to an improper decision. In a further appeal to the Supreme Court of Appeal, the question arose whether the High Court was correct to mero motu determine this question. The respondent contended that the discretion to arrest was inherent in the question of the lawfulness of the arrest, and a court on appeal could consider the issue if it was canvassed fully at the trial.

Held, that it was not apparent from the High Court judgment what aspects of the evidence it accepted or rejected, and the reasons for the choice. The reasons for its conclusion that the arresting officer had not exercised his discretion were not discernible. Nor did the court discuss the fact that the appellant pleaded justification for the arrest, not only under s 40(1)*(b)*, but also under s 40(1)*(q)*. A fuller treatment of the facts would have been necessary for the court to decide whether the order of the High Court was correct. (See [15].)

Held, further, that the submission by the respondent, that the discretion to arrest was inherent in the determination of the lawfulness of the arrest, conflated the jurisdictional requirements to carry out a warrantless arrest and the exercise of discretion which arose once those jurisdictional facts were established. The High Court had similarly conflated the onus to prove the jurisdictional requirements to arrest (which rested on the appellant) and the overall onus to prove other elements of the claim, including the improper exercise of a discretion to arrest (which rested on the respondent). Once the High Court found that the jurisdictional requirements to arrest were met, the appellant had discharged the onus, and this was dispositive of the case pleaded by the respondent. The implication of the High Court's decision was that the onus to prove the proper exercise of the discretion to arrest had rested with the appellant rather than the respondent, which was incorrect in law (See [16] – [17].)

The appeal was accordingly upheld, and the High Court's order was set aside and replaced with one dismissing the respondent's appeal. (See [22].)

MAUGHAN AND ANOTHER v ZUMA 2023 (2) SACR 435 (KZP)

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

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

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

The applicants in the present two matters heard in the Pietermaritzburg High Court were William John Downer (Mr Downer) and Karyn Maughan (Ms Maughan). The respondent in each was Jacob Zuma (Mr Zuma), former president of the Republic of South Africa, and the subject of a criminal prosecution currently before the Pietermaritzburg High Court on charges of corruption, money-laundering and fraud. Mr Downer was senior counsel and senior state advocate stationed at the offices of the National Prosecuting Authority, Cape Town, and had been the lead prosecutor since the inception of the litigation involving Mr Jacob Zuma, which culminated in his criminal prosecution. Ms Maughan was a senior legal journalist employed by News24 and had been reporting on the criminal investigation of Mr Zuma by the Scorpions, his subsequent indictment, and the numerous legal challenges and interlocutory proceedings relating to Mr Zuma's prosecution for almost 20 years. In the present applications the applicants sought, on the grounds of, inter alia, abuse of process of court, the setting-aside of the summons that Mr Jacob Zuma, in the capacity of 'private prosecutor', had caused to be issued out of the Pietermaritzburg High Court

against them; as well as an order interdicting Mr Zuma from reinstituting or taking any further steps pursuant to the said private prosecution. The charges brought against Mr Downer were that he, in breach of s 41(6)*(a)* and *(b)*, read with s 41(7), of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), had sanctioned the disclosure by Advocate Andrew Breitenbach SC to Ms Maughan of a letter containing confidential medical information pertaining to Mr Zuma, written by Brigadier General (Dr) Mdutywa (Mdutywa) of the South African Military Health Service (counts 1 and 2); and that he disclosed official information pertaining to the pending prosecution of Mr Zuma to a journalist, Mr Sam Sole (count 3). As regards Ms Maughan, the charges were that she had disclosed to News24 readers and/or the general public, without the requisite permission, the contents of the aforesaid letter written; and that she had aided Downer in contravening the NPA Act.

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

However, the main ground on which the court found that the summons was unlawful and should be set aside was that it constituted an 'abuse of process' of court. This ground formed the focus of the court's attention, and the reasoning of the court follows: *Applicable legal principles:* The court confirmed that a public prosecution that was brought for an 'ulterior' or 'improper' purpose, that is, for reasons *other than bringing the accused person to justice*, constituted a breach of the principle of legality, and amounted to an 'abuse of process'. A court was duty-bound in such circumstances to intervene and put an end to such abuse. (See [77], [85], [152] and [157].) In assessing whether or not a private prosecution constituted an abuse of process, a court may have regard to the prospects of success in the prosecution (see [81]), the court held;

a prosecution that was unsustainable also constituted an abuse of process of the court (see [85] and [97]).

The court also referred to recent pronouncements of the Constitutional Court to the effect that so-called SLAPP suits — that is, 'lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest . . . not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others . . . and deter that party, or other potential interested parties, from participating in public affairs' (see [173]) — were prohibited under the doctrine of abuse of process (see [172] – [184]). While such findings were made in the context of civil proceedings, the court held, they were equally applicable to criminal proceedings, and in particular private prosecutions. (See [186] – [188].) Private prosecutions employed with the goal of intimidating, harassing and silencing critics had to be protected against (see [188]). The court stressed further that journalists ought to be protected against SLAPP suits instituted against them with the view of intimidating, censoring and silencing them: such would be consistent with the provisions of s 16 of the Constitution, which guaranteed freedom of expression, including the freedom of the press and media. (See [189] – [190].)

Findings of abuse of process in respect of Mr Downer: The court held that the charges brought against him were without merit and unsustainable: As to counts 1 and 2, as had been previously found by Koen J in previous s 106 (CPA) plea proceedings brought by Mr Zuma, the medical letter was a public document neither intended to be, nor was in fact, confidential, the disclosure of which was not an actionable violation of Mr Zuma's rights (see [56], [60], [101], [107] and [109]). As to count 3, aside from the fact that the court had no jurisdiction to adjudicate on his private prosecution on this charge (see [110]), Mr Downer's stance — that the exchange between himself and Mr Sole related merely to Mr Sole's queries about the procedure to be followed when the NPA obtains mutual legal assistance from other countries — was not disputed by Mr Zuma. (See [110] – [113].) As was apparent from the unsustainability of the charges, and having regard to the previous meritless challenges relating to his criminal prosecution stretching over a 20-year period, the private prosecution, the court held, was not brought against Mr Downer in order to bring him to justice; it was instituted with an ulterior motive, of preventing Mr Downer from carrying out his duties as prosecutor, and, forming part of a wider 'Stalingrad' tactic, of delaying the institution of proceedings against him. (See [89] – [91], [93] – [97], [101], [107], [113].) The court

accordingly concluded that the private prosecution against Mr Downer amounted to an abuse of process (see [91], [96], [107], [109], [113] and [197]).

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

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

MINISTER OF POLICE v DUNJANA AND OTHERS 2023 (2) SACR 486 (ECM)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Lawfulness of — Duty of arresting officer — Reasonable suspicion — No duty on arresting officer to investigate truth of person's exculpatory statement.

Damages — Measure of — For unlawful arrest, detention and assault — Respondents arrested, assaulted in public view and detained for 35 hours — Assault perpetrated for purposes of obtaining information from plaintiffs and deserving of censure — Awarded R150 000 in damages.

The Minister of Police (the appellant) appealed against an award of damages to the respondents for an alleged unlawful arrest, detention and assault of the respondents by members of the South African Police Service. Their arrests and detention followed a robbery at a supermarket by eight persons armed with firearms. A member of the police reaction unit, upon hearing of the robbery, looked in the neighbourhood for an

abandoned car — it was apparently common practice for perpetrators to exchange vehicles when fleeing the scene. He found a vehicle which was confirmed as stolen and matched the description of the vehicle used in the robbery. A member of the public, who wished to remain anonymous, reported seeing the occupants leave in a silver Volkswagen, but could only provide certain letters of the registration number. An informant told the officer that two Volkswagen Polos, one of which was silver and the other red, were at a certain address. The police officer, backed by members of a tactical response unit, arrived at the address where they found five persons sitting in the vehicles, who attempted to flee. Nothing was found on them or on two persons found inside the house. A search of the vehicles and house yielded, inter alia, items of clothing that included a black leather jacket (found in the red vehicle). The respondents explained that the reason for their presence at the house was that they were celebrating a birthday. Another police officer, who viewed the closed-circuit television footage of the robbery, informed the arresting officer that the clothing worn by the participants in the robbery resembled that found in the search. The latter then arrested the respondents, without a warrant, having formed what he said was a reasonable suspicion that they had committed the robbery at the supermarket. On the video footage, the robbers all wore balaclavas and could not be identified.

The respondents were detained for a period of 35 hours and, except for the second and fourth respondents, assaulted outside the house where they were arrested, on the ground, in full view of local residents and other bystanders. The were kicked, trampled upon, and threatened with firearms by policemen whose faces were masked to hide their identities. The assaults were accompanied by verbal abuse and perpetrated for an unlawful purpose, namely an attempt to force them to provide the police with information regarding the whereabouts of the firearms used and the money stolen in the robbery. The trial court awarded damages of R500 000 for the unlawful arrest, detention and assault of each of the respondents.

On appeal, the court held that there was no evidence that there had been any physical assault on either the second or the fourth respondent, and they were therefore not entitled to damages for the assault. As to the arrest, during proceedings the ability of the arresting officer to form a reasonable suspicion, without first investigating information provided by a suspect, was raised.

Held, as to the application of the test for a reasonable suspicion, that a misconception had taken hold that, framed as a rule of general application, police officers purporting

to act in terms of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 had to investigate exculpatory explanations offered by a suspect before they could form a reasonable suspicion for the purpose of a lawful arrest. In the present case it manifested itself in the submission that the arresting officer could not objectively have formed a suspicion that the respondents were the perpetrators of the robbery without first having attempted to determine the veracity of their alibi. There was no authority for this proposition, or for the proposition that flowed therefrom, namely that a police officer had a duty to prove or disprove the truth of what had been conveyed to him by a suspect before he could execute a warrantless arrest in terms of the provision. (See [19] and [25].)

Held, further, on the facts, that the nature of the information received by the arresting officer from the anonymous bystander was scant and purely circumstantial in nature. It provided no information relating to the model of the vehicle or the number and the possible identities of the persons who got into the vehicle. Furthermore, the information received regarding the video footage was, similarly, nothing of a concrete nature. The suggestion that the clothing worn by the suspect was similar to those items seen on the video footage was rather meaningless. In the circumstances, the trial court could not be said to have erred in finding that the arresting officer was not a credible witness, and that he could not have entertained a reasonable suspicion in the circumstances. (See [29] – [30].)

Held, as to the quantum of damages to be awarded, that an important factor was that the respondents' unlawful arrest and detention were accompanied by assaults, the purpose of which was to extract information from them. This conduct, its duration and public nature were deserving of censure. However, it did not justify an award to the extent made by the trial court. In the circumstances, the appeal against the quantum had to succeed. An award of R70 000 in favour of the second and fourth respondents, and an amount of R150 000 in favour of the other respondents, who had suffered physical assault, was appropriate. (See [41] and [43].)

S v TO 2023 (2) SACR 507 (WCC)

Child — Offences by — Criminal record — Entry of any order in terms of s 156 of Children's Act 38 of 2005 unlawful, and proof thereof as previous conviction in subsequent criminal case inadmissible.

Trial — Irregularity in — What constitutes — Magistrate having prior knowledge of accused's conflict with law as child and considered aggravating factor in later criminal case — Such prejudicial to accused, especially when magistrate previously presiding over children's court matter and was primary source of information — Constituting gross irregularity vitiating proceedings.

The accused, a 19-year-old male, appeared in a magistrates' court on a charge of housebreaking with intent to steal and theft. He was not legally represented and pleaded guilty to the charge. After conviction the prosecutor proceeded to prove previous convictions as reflected on his SAP69 form. These showed that he had been convicted of theft, and a contravention of s 45(1) of the Sea Fisheries Act 12 of 1988, for which he was referred to the children's court. He was subsequently referred to a child and youthcare centre in terms of 156 of the Children's Act 38 of 2005 (the CA) by the magistrate who conducted proceedings in the present matter. He had a further conviction for the contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 and had been sentenced to a fine of R200. In the prelude to sentencing, the magistrate indicated that he knew the accused as he had appeared before him on a previous occasion. The magistrate sentenced him to two years' imprisonment. On review,

Held, that the entry of any order in terms of s 156 of the CA on the criminal record against the name of a child was unlawful, and proof thereof as a previous conviction in subsequent criminal cases was inadmissible. (See [15].)

Held, further, that, in a case such as the present, where prior knowledge of conflict with the law of an accused when he was a child was considered as an aggravating factor in a later criminal case, the accused suffered prejudice. Even more so where the same magistrate previously presided over the children's court matter and was the primary source of that information. This amounted to a gross misdirection which vitiated the proceedings. (See [23].)

The conviction and sentence were set aside, and the Director of Public Prosecutions directed to request the removal of any order in terms of s 156 of the CA, which purported to be a previous conviction (See [24].)

S v NTAMEHLO 2023 (2) SACR 518 (WCC)

Murder — Sentence — Murder of spouse — Effect of conviction on matrimonial-property benefits of deceased and accused — Court ordering forfeiture of benefits.

In sentencing proceedings on conviction for the premeditated murder of his spouse, it appeared that the accused had killed her to obtain sole rights to a house allocated to her. He had strangled her after a vicious assault, put her body in a wheelie bin and taken it to a river where he buried it in a shallow grave. After her death, unknown persons arrived from the Eastern Cape to claim the body of the deceased as their relative and take it for burial. The whereabouts of the grave was unknown to the deceased's other relatives. The deceased left behind a young child who was left severely traumatised by his mother's death at the hands of his father. Evidence of a probation officer, who travelled to the Eastern Cape to establish the accused's circumstances, revealed that he was known in his home town as a man who broke into the homes of single women in the middle of the night and sexually assaulted them. It appeared that multiple protection orders had been issued at the instance of the deceased, but these had not had any effect on the accused's treatment of his spouse, whom he repeatedly assaulted. The court held that there were no substantial and compelling circumstances to justify a lesser sentence than life imprisonment, and accordingly sentenced him to that sentence.

The court also remarked that it was a sad reality of our law that a spouse in divorce proceedings could obtain a forfeiture order of matrimonial-property benefits, but a murdered spouse could not. In the court's view the time had arrived that a spouse who caused the marriage to end by way of a murder should not be placed in a better position than a spouse who caused the marriage to end because of a divorce. (See [24].) Reasonableness, equity and fairness demanded this. (See [25].) It accordingly made an order that the patrimonial benefits of the marriage between the accused and the deceased, in respect of the property in question, were forfeited by the accused in favour of the only child — an advocate was appointed as curator ad litem for the child at the state's costs. The court also ordered that the Mayor of the City of Cape Town ensure the establishment of a trust for the benefit of the minor child and assist in upholding his rights to freehold ownership of the property. The Premier of the Eastern Cape was ordered to trace the remains of the deceased and take all necessary steps

to ensure that the minor child, as well as the deceased's family, visit such grave as part of their emotional and psychosocial therapy. (See [28].)

ZINYANA v SMITH AND OTHERS 2023 (2) SACR 532 (GJ)

Corruption — Public officer — Duty to report — Judge not 'public officer' for purposes of Act and therefore no duty to report — Inherent duty on judicial officers, however, to uphold Constitution and would be appropriate to refer unlawful conduct to relevant authority for investigation — Prevention and Combating of Corrupt Activities Act 12 of 2004, s 34(4)*(e)*.

In an application for relief under s 163 of the Companies Act 71 of 2008, it appeared that the shareholders' agreement of the NJM (the fourth respondent) was concluded for the purposes of securing a tender issued by Eskom, and that the respondents did not intend to be bound by it. This implied that there was an intentional misrepresentation in the fourth respondent's tender bid, so that it could be a successful bidder. The court questioned whether such conduct would bring the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) into operation, and whether there was a duty on the court to report the matter under s 34 of the Act. Although the parties were in agreement that there was a duty on the court to report, the court held that the definition of 'public officer' in s 1 of PRECCA expressly excluded judicial officers from the provisions of the Act (see [24]). The same, however, the court held, did not apply to the first to third respondents, the directors of the fourth respondent. They had an express duty to report under s 34(4)*(e)* of PRECCA, although there was no indication that they had done so. (See [25].) Nonetheless, the court held that, although there was no express duty on judicial officers to report, there was an inherent duty on such officers to uphold the Constitution and not condone unlawful conduct. In those circumstances it would be appropriate to refer the application papers to the relevant authority for investigation. (See [26] – [27].) The first to third respondents were accordingly directed to comply with their reporting duties, and the matter was referred to the Directorate for Priority Cime Investigation for investigation. (See [33].)

All South African Law Reports (LexisNexis) Nov 2023:

Barnard NO and another v National Consumer Tribunal and another [2023] 4 All SA 277 (SCA)

Civil Procedure – Appeal jurisdiction – Competence of appeal to High Court against decision of National Consumer Tribunal made in absence of appellants – Correct remedy in challenging Tribunal's order was rescission rather than appeal, depriving High Court of jurisdiction to entertain appeal.

Civil Procedure – Special leave to appeal – Applicant must show reasonable prospect of success on appeal and existence of special circumstances for granting such leave.

An investigation by the National Credit Regulator (the "Regulator") into the business practices of a company ("CMR") in respect of which the appellants had been appointed as provisional liquidators led the Regulator to conclude that a scheme offered by CMR to its customers was in contravention of section 101(1)(d) read with regulation 42 of the National Credit Act 34 of 2005 ("NCA") by charging an excessive amount of interest; section 81(2) in failing to conduct affordability assessments; and section 100(1)(a) by imposing a prohibited charge. Those contraventions prompted the Regulator to seek declaratory relief against CMR before the National Consumer Tribunal.

CMR was placed in voluntary liquidation before the hearing. The Tribunal later ordered *inter alia*, that CMR's registration as a credit provider be cancelled; it be interdicted from entering into future credit transactions; and that all CMR agreements be declared reckless and obligations arising therefrom be set aside. The orders were made in the absence of the Regulator and the appellants. Aggrieved by the decision of the Tribunal, the applicants, in their capacity as joint liquidators of CMR, noted an appeal to a full bench of the High Court in terms of section 148(2)(b) of the NCA against some of the orders of the Tribunal. The appeal was dismissed. The applicants' application for leave to appeal the judgment of the High Court met the same fate. Dissatisfied with the decision of the High Court, the applicants applied for special leave from the present court. That application was accompanied by an application for condonation, as it was filed out of time. The Court ordered that the application for special leave to appeal and condonation be referred for oral argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013.

Held – In an application for special leave from the Supreme Court of Appeal, the applicant must, in addition to showing the existence of reasonable prospects of success on appeal, show that special circumstances exist for the granting of such leave. The appeal from the decision of the High Court should have been sought in terms of section 16(1)(a) of the Superior Courts Act. Although that was not done the Court deemed it to be in the interests of justice to proceed to deal with the application as an application for leave to appeal in terms of section 16(1)(a) of the Superior Courts Act.

An order granted by a competent court may be appealed against as long as the required jurisdictional requirements are met. Jurisdiction is a legal issue and nothing precluded the High Court from establishing whether it had competence to deal with the appeal. The applicants misconstrued their remedy under the NCA. Instead of applying to the Tribunal to rescind its order, they sought to appeal it in terms of section 148(2)(b) of the NCA. The High Court correctly found that the rescission of an order granted in the absence of a party, facilitates the rehearing of the matter and affords the absent party an opportunity to present its submissions on an issue in dispute. That, in turn, enabled the Tribunal to properly consider the issues and deliver a reasoned judgment. The only route open to the applicants was to apply for a rescission of the Tribunal's order, which was made in default of their appearance at the Tribunal hearing. Based on that jurisdictional obstacle, the matter was struck from the roll.

Block v Upington Correctional Supervision and Parole Board and others [2023] 4 All SA 295 (NCK)

Constitutional and Administrative Law – Judicial review of decision of correctional services authorities not to admit prison inmate to parole – Whether decision to deny inmate recognition for meritorious service in terms of section 80 of the Correctional Services Act 111 of 1998 – Parole Board's limiting itself to factors listed in document intended to serve as a mere guide amounting to fettering of discretion – No rational basis existing for conclusions because the impugned decision could not be said to be rationally connected to information before decision-makers .

The applicant was serving a 15-year sentence pursuant to his conviction on a charge of corruption. The first respondent (the “Parole Board”) was responsible for the consideration of reports of offenders serving sentences and the determination their parole, within the contemplation of section 75 of the Correctional Services Act 111 of 1998 (the “Act”). The remaining respondents were various functionaries and authorities within the Correctional Services department.

In an urgent application, the applicant sought the review and setting aside of the decisions by the relevant respondents in respect of his application for parole, and for declaratory relief regarding his parole application. According to the applicant, the issues were whether the decision to deny him recognition for meritorious service in terms of section 80 of the Act, was justified; whether the applicant was placed on a list of offenders who qualified to be released and his name subsequently removed arbitrarily; and whether he should have been released under the Covid-19 special dispensation as announced by the President on 27 April 2020. The latter special dispensation was an attempt to combat the spread of the Covid-19 virus in correctional centres. Qualifying offenders were those low risk sentenced offenders who would reach their minimum detention periods within 60 months, from the date of the proclamation. The applicant contended that on that basis, he was a qualifying offender, and that the respondents had relied on the wrong date in excluding him.

Held – The interpretation of the proclamation, applying the Interpretation Act 33 of 1957, established that the applicant fell outside the Covid-19 remission period by approximately 18 days and he was not a qualified sentenced offender, in terms of the criteria mentioned in the Proclamation, unless he qualified for special remission of sentence for highly meritorious service, as contemplated in section 80 of the Act.

In support of his claim to having given highly meritorious service as an inmate, the applicant pointed to his numerous accomplishments in prison. He contended that the Parole Board had wrongly applied section 80 by limiting itself to an internal document developed as a guide that referred to a closed list of factors that might be regarded as deserving for special remission. Thus, when the applicant’s application for special remission was investigated and considered, it was found that whilst his actions were commendable, they did not meet the criteria in the guide, to qualify for special

remission. However, the specific wording of section 80 could not be read to limit the factors that might be taken into account in the definition of “highly meritorious service.” The Parole Board wrongly rigidly limited itself to a document intended to serve as a mere guide. Administrators may not act in ways that effectively prevent their discretionary powers from being exercised in the manner envisaged by the empowering provision.

The impugned decision was therefore not based on accurate findings of fact or the correct application of the law. Consequently, no rational basis existed for the respondents’ conclusions because the impugned decision could not be said to be rationally connected to the information the respondents. The application for review was granted.

Brummer v Road Accident Fund
[2023] 4 All SA 324 (GP)

Personal Injury/Delict – Claim for damages arising from injury in motor vehicle accident – Assessment of evidence – Errors by trial court in finding that appellant did not sustain any injuries as a result of accident and that the injuries sustained triggered the condition from which she suffered – Principles of causation explained and causation found to have been established.

The appellant appealed against the dismissal of her claim against the defendant, for damages, arising from injury she had sustained in a motor vehicle accident. The court *a quo* found that the appellant had failed to prove, on a balance of probabilities, that she had sustained any injuries during the accident, or that there was a nexus between the accident, the negligent conduct of the insured driver and the fibromyalgia from which the appellant suffered. In the result the appellant’s claims for past medical expenses, general damages, loss of earnings and/or earning capacity were dismissed with costs.

Held – The issues on appeal were whether the appellant was entitled to orders for payment of her claims in respect of past medical expenses and general damages; whether the appellant had proved her claimed entitlement to an order for payment in respect of her claim for loss of earnings and/or earning capacity; and the issue of the

quantum of the appellant's claim for loss of earnings and/or earning capacity. It emerged that the claim for general damages had been settled in the amount of R350 000, although the court *a quo* erred in neglecting to make an order for payment of that amount.

A court of appeal will not interfere with a trial court's finding unless a material misdirection has occurred. It is a principle of our law that a trial court's findings of fact are presumed to be correct in the absence of a clear and obvious error. That presumption is rebutted by an appellant convincing a higher court that the trial court's factual findings were plainly wrong. Examining the evidence, the court was satisfied that the court *a quo* had erred in finding that the appellant did not prove, on a balance of probabilities, that she had indeed sustained injuries during the motor vehicle accident. The evidence of the appellant that she had suffered a violent whiplash injury during the accident was uncontested. Ample expert evidence of the injuries suffered by the appellant in consequence of the accident was placed before the trial court. The onus was on the appellant to show, on a balance of probabilities, that the injuries were directly caused by the negligent driving of the insured driver, alternatively that it was causally connected with the negligent driving of the insured driver at the relevant time, and that such driving was therefore, a *sine qua non* thereof. In essence, the crisp issue to be determined on appeal was whether the court *a quo* had erred in finding that the appellant did not sustain any injuries as a result of the accident and whether the injuries sustained triggered the condition from which she suffered. Referring to the principles applicable to the question of causation, the Court stated that our courts follow a flexible approach to determining legal causation, in which various theories of causation may serve as criteria reflecting legal policy and convictions as to when legal liability should be imposed. It was found that the court *a quo* should have found that the appellant had succeeded in proving her case.

The Court acceded to the appellant's request that the present Court decide on the issue of quantum of damages to be awarded instead of remitting the matter to the trial court. Taking all factors into account, a total award of R5,932,374,07 was made.

Department of Agriculture, Land Reform and Rural Development, Northern Cape Province, Kimberley v Master of the High Court, Kimberley
[2023] 4 All SA 347 (NCK)

Wills, Trusts & Estates – Investigation ordered by Master of High Court, in terms of section 16(2) of the Trust Property Control Act 57 of 1988, into affairs of trust forming part of programme established by State department – Making of order against Department for costs of investigation – Costs order within Masters powers under Trust Property Control Act.

The respondent, as Master of the High Court, was responsible, under the Trust Property Control Act 57 of 1988, for the regulation and the control of trust property and matters incidental thereto within his jurisdiction. The applicant was the Department of Agriculture Land Reform and Rural Development, Northern Cape. The Master had launched an investigation in terms of section 16(2) of the Act, into the affairs of a trust which formed part of an equity scheme programme established by the Department to uplift farmworkers. The Department was then directed by the Master to bear the costs of the investigation into the affairs of the trust in terms of section 16(3) of the Act. The impugned costs order was in the amount of R3 726 000. The Department denied being liable for the costs of the investigation on the grounds that it had not instructed or authorised the Master to appoint an investigator; and that the Master had failed to apply his mind and ignored the provisions of section 16(2) by appointing a person with whom he had prior contact. It sought orders setting aside the Master's decision to make the costs order against it.

Held – Section 16 of the Trust Property Control Act empowers the Master to call upon a trustee to account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property. In terms of section 16(2), the Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property. The section does not state that a written request or authorisation is required before the Master may launch an investigation.

Regard being had to the minutes of the Department's meetings, it was clear that the Department had requested the Master to investigate the maladministration of the relevant trusts. That request having been made, it was thereafter entirely within the discretion of the Master in terms of section 16(2) whether such an investigation should be carried out.

The second ground of review was that the Master had failed to apply his mind when he appointed the investigator to conduct the investigation. However, as the person appointed had already been involved in the investigation of the equity schemes on behalf of the beneficiaries and had also been called upon by the Department to assist, he was an obvious choice to be appointed as the section 16 investigator. It could not be said that the Master had failed to apply his mind in making the appointment. The Court also rejected the contention that the Master had not exercised his discretion properly in finding that the costs of the investigation be borne by the Department and that he had only made the costs order that he did because the Department had requested the investigation.

The majority judgment specifically addressed the minority ruling in which the obligations which section 217(1) of the Constitution and the Public Finance Management Act 1 of 1999 placed on the Master. The minority view was that those obligations had been disregarded by the Master in his interaction with the Department regarding the appointment of the investigator and the costs associated therewith. That was shown by the majority ruling not to be correct.

The application was dismissed.

Hanekom and another v Lombard
[2023] 4 All SA 381 (WCC)

Property – Sub-division of agricultural land – Contravention of Subdivision of Agricultural Land Act 70 of 1970, section 3(d) rendering lease agreement void – Par delictum rule not of application where no turpitude existed on the part of the lessor at the relevant time – Lessees having no right to remain on property in light of invalid lease agreement.

The respondent was the owner of two adjacent agricultural properties held under a single title deed. The properties were agricultural land as defined in section 1 of the Subdivision of Agricultural Land Act 70 of 1970. A written commercial lease agreement was concluded between the parties on 1 September 2000 in terms of which specified portions of the farm were leased by the appellants. It was common cause that the lease agreement and an option contained therein were void for being in contravention of section 3(d) of the Act. The required written consent of the Minister of Agriculture was not obtained in respect of either the lease agreement or any of its renewals. Despite conceding the voidness of the agreement, the appellants contended that the respondent had failed to make out a case for the relief he sought, which was the appellants' eviction. In that regard, the appellants relied on the *par delictum* rule. They alleged that in terms of the *par delictum* rule, the respondent was barred from claiming the return of possession of the property under a turpid agreement. The court *a quo* was not persuaded that the respondent had acted with turpitude or dishonourably, as neither of the parties were aware of the need to obtain the Minister's consent and that the failure to do so rendered the agreement null and void.

The issues on appeal were whether the *par delictum* rule applied on the facts of the present application, where the lease agreement by virtue of which the appellants occupied portions of the respondents' farm was admittedly void for contravention of the Act; if the *par delictum* rule did not apply, then whether the appellants had any defence to the application for the ejectment; and if the *par delictum* rule did apply, whether its application should be relaxed in the circumstances of the present case.

The gist of the appellants' case on appeal was that there was no fragmentation of the agricultural capacity of the farm on a factual level, and therefore the Act found no application and no Ministerial consent was required. On that basis the relevant lease agreement would be valid. The appellants also sought to adduce new evidence on appeal.

Held – The Court exercising appeal jurisdiction will allow the leading of further evidence on appeal, but only in special circumstances as it is in the public interest that there should be finality to the trial. The basic requirements for such an application have been set out in case law. The appellants had not established those requirements. The

introduction of the new evidence would also result in their having proffered three different versions as the basis upon which they opposed the respondent's application. Leave to adduce further evidence was refused.

On the merits, the court stated that although the farm consisted of two cadastral units, both were indivisible units of the farm. Legally, one portion could not be divided from the other unless the title deed was amended. The Act seeks to prevent the fragmentation of agricultural land into uneconomic portions. The appellants failed to convince the court that the lease agreement did not fall foul of the provisions of section 3(d) of the Act. The court *a quo* correctly held that at the conclusion of the agreement, no turpitude existed. The appellants therefore failed to show that the *par delictum* rule applied. There was no other basis upon which the appellants could assert a right to be in possession of the farm. The appeal was thus dismissed.

Jaihai v Financial Services Tribunal and another
[2023] 4 All SA 404 (GP)

Financial Services Regulation – Financial Services Tribunal – Review application – Tribunal failing to comply with procedures set out in the Financial Sector Regulation Act 9 of 2017 and Tribunal's Rules, in not constituting a panel or issuing directions or calling for a hearing prior to summarily dismissing a reconsideration application, and failing to apply rules of natural justice – In summarily dismissing reconsideration application, Tribunal failing to properly apply its mind, rendering decision reviewable.

A protected disclosure made to the second respondent (the "Prudential Authority") by the applicant was found not to reveal any contraventions, and the matter was considered finalised. The applicant's request for reasons for the decision was refused, and the applicant applied to the first respondent (the "Financial Services Tribunal") for reconsideration of the second respondent's decision. The Tribunal summarily dismissed the application for reconsideration under section 234(4) of the Financial Sector Regulation Act 9 of 2017, ruling that the applicant had no interest in the

outcome of the decision or lack of the decision, as he was in the position of an informer and was not a person aggrieved. The applicant brought the present application in terms of section 6(2)(a)(i) and 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, alternatively on the principle of legality, seeking the review and setting aside of the Tribunal's summary dismissal of the application for reconsideration.

Held – Section 34 of Constitution guaranteed the right to a fair trial which included affording parties to the litigation a fair opportunity to adequately address material issues in the papers, by evidence or during argument. A basic rule of fairness was that a person who would be adversely affected by an act or a decision of the administration or authority should be granted a hearing before he suffers detriment.

Section 8 of the Protected Disclosures Act placed a duty on the Prudential Authority to render assistance to an employee such as the applicant where another body was the appropriate body to deal with the matter. The Prudential Authority was required to have advised the applicant of the appropriate forum to resolve his complaint. The Authority refused to provide reasons for its decision to dismiss the matter, and whilst some of the information might be covered by the secrecy clause detailed in section 33 of the South African Reserve Bank Act, that did not absolve the second respondent of its statutory duty in terms of section 8 of the Protected Disclosures Act. The applicant was clear that the review was based on the grounds of the Tribunal's failure to comply with the procedures set out in the Financial Sector Regulation Act and Tribunal's Rules, in not constituting a panel or issuing directions or calling for a hearing prior to summarily dismissing the reconsideration application. He was not seeking to review whether or not the Tribunal had jurisdiction. The court found the grounds of review to have merit, and questioned the Prudential Authority's opposition to the present application, when the Tribunal, against which the relief was sought, abided by the court's decision.

The Tribunal did not at any stage of its investigation find it necessary to engage with the applicant, who was clearly adversely affected by the decision. That was against the principles of natural justice and fair procedure, and rendered the decision reviewable. The Tribunal did not properly apply its mind to the matter in summarily dismissing the application. Its decision was set aside and the application for reconsideration was remitted to the Tribunal.

Keele v Legal Practice Council and another [2023] 4 All SA 422 (GP)

Constitutional and Administrative Law – Administrative decision – Application for judicial review – Section 6 of the Promotion of Administrative Justice Act 3 of 2000 sets out the circumstances in which a person may institute proceedings for the judicial review of administrative action – In absence of proof of alleged mistake undergirding administrative decision sought to be set aside, review application is dismissed.

On being informed by the Legal Practice Council ("LPC") that his complaint against the second respondent was not going to be investigated, the applicant brought an application for review in terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000. The second respondent was the attorney representing the applicant's wife in divorce proceedings instituted by her. The applicant took exception to his wife's leaving the matrimonial home. He questioned her right to do so and instructed the second respondent to advise her to return. The second respondent's failure to follow his instructions led to the complaint lodged with the LPC. In the present proceedings, the LPC averred that the applicant had failed to provide *prima facie* evidence of misconduct on the part of the second respondent, and that he should pay the costs of the present application on the attorney and client scale as the application was ill-advised, constituted an abuse of the court process, was vexatious, and had not been brought *bona fide*.

Held – The applicant's allegations regarding the second respondent's contravention of the Code of Conduct for legal practitioners, and his threats against the second respondent, were unjustified. His actions were strongly condemned insofar as they cast aspersions on the second respondent and interfered with the applicant's wife's right to independent legal representation.

Section 6 of the Promotion of Administrative Justice Act 3 of 2000 sets out the circumstances in which a person may institute proceedings for the judicial review of administrative action. Because administrative decision has to be taken on an accurate factual basis, a material mistake of fact renders an administrative decision subject to

review. Section 33(1) of the Constitution guaranteed the right to administrative action that is procedurally fair. Section 6(2)(c) of the Promotion of Administrative Justice Act provides for review of administrative action on the ground that the action was procedurally unfair. Furthermore, the principle of legality requires rational decision-making. Both the process by which the decision is made and the decision itself must be rational.

Relying on section 6(2)(e)(iii), the applicant contended that the LPC's decision was taken because irrelevant considerations were taken into account, but he failed to explain what those irrelevant considerations might be. The averment that the decision was arbitrary and capricious as it was not based on the true facts, as contemplated in section 6(2)(e)(vi) was also unsubstantiated.

Satisfied that there was no evidence of misconduct on part of the second respondent and that the LPC had not acted irrationally, arbitrarily or capriciously, the court dismissed the application for review.

Kekkel en Kraai Suid Afrika (Pty) Ltd v Bes-Buhr Trading CC and others
[2023] 4 All SA 439 (WCC)

Arbitration – Appeal against dismissal of application for review of findings of arbitration appeal tribunal – Appeal tribunal correctly deciding that it did not have the power to condone the late bringing of the cross-appeal, where such power was not granted by the applicable arbitration rules – Tribunal also correct in deciding that pleadings did not cover the complaint relied upon.

In 2013, the appellant ("Kekkel"), as owner of the "Kekkel en Kraai" franchise, and the first respondent ("Bes-Buhr"), concluded a franchise agreement in terms of which Bes-Buhr was granted the exclusive right and licence to establish a Kekkel en Kraai outlet at certain premises and to exclusively trade within a five hundred meters (500m) radius from the premises. In 2019, Bes-Buhr obtained Kekkel's permission to deliver the product to areas outside the exclusive area, which right was granted on a temporary basis and subject to Kekkel's exclusive right to withdraw such consent. Kekkel stated that Bes-Buhr had breached the agreement by delivering and selling the product outside the designated area without consent. The consent was consequently withdrawn by Kekkel. After a subsequent dispute, Kekkel referred the dispute to

arbitration, where most of its claims were dismissed. It was unsuccessful on appeal (in the form of a cross-appeal), and sought review of the Appeal Tribunal's decision in the court below. In terms of the Rules of the Arbitration Foundation of South Africa ("AFSA"), the cross-appeal had been filed late. The dismissal of the review application led to the present appeal.

Held – The question before the court *a quo* and the present Court was first, whether the Appeal Tribunal was correct in deciding that it did not have the power to condone the late bringing of the cross-appeal, and on that basis alone, whether it was unable to hear, let alone decide the cross-appeal. The second jurisdictional issue on appeal was whether the Appeal Tribunal was correct in deciding that the pleadings did not cover the complaint that Bes-Buhr had breached the franchise agreement.

The relevant AFSA rules did not suggest that the Appeal Tribunal did have jurisdictional power to condone the late filing of the cross-appeal. The Tribunal could not arrogate to itself unspecified powers which it did not have. The rules appeared to be strict and required compliance with specific time frames. Having not complied with the time frames, Kekkel contended that the Appeal Tribunal and the court a *quo* committed a gross irregularity and that the tribunal exceeded its powers by failing to condone its late filing of the cross-appeal. In essence, Kekkel averred that it was denied a fair trial. Those submissions were without merit and the first ground of appeal was dismissed.

Turning to the second issue, the Court confirmed that no agreement between the parties allowed for the arbitrator to go beyond the pleadings of the parties. The case which a party has to meet must be properly and clearly pleaded. The court agreed with Bes-Buhr's assertion that Kekkel, in its statement of claim, did not establish the alleged breach by Bes-Buhr. The court a *quo* therefore did not err in dismissing the second ground of review.

The appeal was dismissed with costs.

Kusasa Refining (Pty) Limited v Commissioner for the South African Revenue Services [2023] 4 All SA 459 (GP)

Tax – VAT – Tax audit conducted in respect of taxpayer – Failure by Commissioner of Revenue Service to finalise audit or to keep taxpayer informed of progress – Section 42 of the Tax Administration Act 28 of 2011 requires that a SARS official involved in

or responsible for an audit must provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit – Failure to comply with duty constituting unlawful administrative action.

An audit by the respondent ("SARS") in respect of the applicant's value-added tax ("VAT") returns commenced on 31 July 2020, and remained not finalised. The applicant had furnished all requested information and after 7 June 2021, no further questions were to put to its representatives by the SARS auditors. Despite requests by the applicant for the audit to be finalised, SARS failed to accede to the request and failed to provide any feedback or progress on the audit. Consequently, the applicant brought the present application in terms of section 8(2) of the Promotion of Administrative Justice Act 3 of 2000, alternatively on the principle of legality, for review of SARS' failure to take a decision to finalise the audit. It was submitted that such failure affected the applicant's rights and had already severely prejudiced the applicant.

SARS' contention was that the applicant could only seek a finalisation of the audit in terms of the Tax Administration Act 28 of 2011, and that the application was circumventing the legal position that a decision to conduct an audit in terms of section 40 of the Tax Administration Act does not constitute administrative action. It therefore raised a *point in limine* that the relief sought was incompetent. It stated that there was no administrative action to be reviewed by the court.

Held – Section 42 of the Tax Administration Act requires that a SARS official involved in or responsible for an audit must, in the prescribed form and manner, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit. The court considers the applicability of the rules of natural justice and the public interest, stating that the public interest necessarily comprehends an element of justice to the individual. The competing values of fairness and individual justice on the one hand, and administrative efficiency on the other hand, constitute the public and the private aspects of the public interest. The duty of the courts to uphold and vindicate the constitutional rights of the applicant to its good name cannot have the effect of precluding SARS from discharging duties and responsibilities exclusively assigned to it by the relevant legislation. However, such an inquiry may

only proceed in a manner which strictly recognises the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.

Despite the duty imposed on SARS in terms of section 42 of the Tax Administration Act, it offered no explanation as to why the applicant was not kept informed of progress on the audit. SARS's conduct constituted administrative action. Its failure to engage with the applicant or to furnish an explanation for the delay in finalising the audit until after the review application was brought, ran counter to the rules of natural justice. The failure to take a decision as to whether or not to finalise the audit was reviewed and set aside, and SARS was ordered to take such decision within ten days of the order.

Mango Airlines SOC Limited (in business rescue) and others v Minister of Public Enterprises and others [2023] 4 All SA 475 (GP)

Constitutional and Administrative Law – Judicial review – Failure by Minister to make decision on application for business rescue of a State entity in terms of section 54(2) of the Public Finance Management Act 1 of 1999 – Although the Minister was entitled to request additional information to satisfy himself as to whether or not to approve the section 54(2) application, based on the time period specified in that section, the Minister had failed to take a decision – Minister's inaction was unlawful and constitutionally invalid and was reviewed and set aside.

The first applicant ("Mango Airlines) had been grounded due to dire financial constraints experienced by it. Despite ongoing efforts, business rescue proceedings were put on hold due to various factors, one of them being the alleged absence of outstanding relevant information from the appropriate accounting authority ("SAA") with the capacity to file an application for business rescue in terms of section 54(2) of the Public Finance Management Act 1 of 1999 (the "PFMA") on behalf of the airline. The present matter concerned the alleged failure by the first respondent (the "Minister") to make a decision regarding the section 54(2) application that was submitted to him in December 2022. That brought to the fore the interplay between the provisions of the PFMA and the Companies Act 71 of 2008 insofar as they related to business rescue proceedings involving public entities, the accounting authority, and an application for approval of disposal of public assets.

In the present application, Mango Airlines and the second applicant (as business rescue practitioner) sought an order compelling the Minister to make a decision on their application and/or to declare that the application had been approved by operation of law as per section 54(3) of the PFMA. The business rescue practitioner ("BRP"), based on a revised business rescue plan which had been adopted by the creditors of Mango Airlines, procured an investor for Mango Airline. The investor would acquire the company's shareholding from SAA, settle payments to all creditors, and settle the remaining debts of Mango Airlines as per the business rescue plan. Consequently, an application was submitted by the BRP, for the Minister's approval in terms of section 54(2) of the PFMA on 29 September 2022. At the time of the present judgment, the Minister had not yet made a decision in terms of section 54(2).

The issue of standing arose because of an apparent conflict between section 54(1) and (3) of the PFMA and section 152(2) and (3) of the Companies Act. The former empowered the accounting authority to lodge the application in terms of section 54(2) of the PMFA whereas the latter empowered the BRP to do so.

Held – The contention by the first and second respondents that section 54(2) of the PFMA when properly construed and interpreted, excluded the applicants, could not be accepted. The BRP had a direct and substantial interest in the subject matter and outcome of the litigation. The primary role of the BRP is to assess whether and how a company could be rescued. The BRP had, throughout the process, been working together with SAA to ensure that the section 54(2) application was finalised. Consequently, the BRP had standing to institute the present proceedings. The court went on to find that the allegedly conflicting statutory provisions were capable of being reconciled.

The Minister had acted within his powers as provided for in the PFMA, in requesting additional information to satisfy himself whether or not to approve the section 54(2) application. However, based on the time period specified in that section, the Minister had failed to take a decision. The present application was thus ripe and rightly brought before the court. The failure by the Minister to make a decision constituted administrative action, and constituted a violation of the applicants' right to administrative action that was lawful and reasonable. The inaction was unlawful and constitutionally invalid and was reviewed and set aside. The Minister was directed to take a decision in respect of the section 54(2) application and communicate the

outcome thereof to the applicants and third respondent within 30 days of the service of the court order.

Robert Ross Demolishers (Pty) Ltd v All Persons Listed on "RJR1" Portion 20 of Farm 7787 Cape Division and others [2023] 4 All SA 521 (WCC)

Civil Procedure – Application for leave to amend notice of motion – Non-compliance with time limits – Application for condonation – A party seeking condonation must make out a case entitling it to the courts indulgence, and must show sufficient cause why condonation should be granted – A full explanation for the non-compliance with the rules of court is required.

In launching an application for eviction of the first respondents, who had invaded its property, the applicant stated that it had attempted to safeguard the property by deploying guards who sought assistance from the police but were informed that the police were unable to assist as the conduct related to private land. By the time the eviction application was instituted, there were approximately two hundred informal structures on the property, with the number growing. When it appeared to the applicant that the successful eviction of the occupiers from the property was an objective impossibility due to the cost of carrying out such an eviction, it joined the third to ninth respondents to the proceedings. In the present application, the applicant sought leave to amend its notice of motion so as to obtain a declarator that various of the respondents had failed to protect its constitutional proprietary rights, and that the City of Cape Town be ordered to purchase the property, with the purchase price to be paid by the third to ninth respondents. The eighth respondent (the "Minister of Police") opposed the application for amendment on the basis that the applicant could not be allowed to introduce a number of claims and prayers against it by means of a declarator in relation to events which had occurred more than a decade ago. Amongst other objections, it was said that such claims had prescribed. It was contended that the period of prescription provided for in the Prescription Act 68 of 1969 was completed by the end of 2015, and the Minister was only joined in March 2022. In light thereof, it was stated that the alleged claim which the applicant might have against the Minister had become prescribed in terms of section 11 and 12 of the Prescription Act,

and the applicant was therefore precluded from effecting its intended amendments, insofar as they sought to implicate or potentially implicate the Minister.

The applicant asked the court to condone its failure to observe the time periods as stipulated in rule 28(4) of the Uniform Rules of Court. That application was not opposed by the respondents.

Held – Although there was no opposition, condonation is not for the mere asking. The courts have an oversight role in all matters that come before it, and exercise a discretion as to whether or not to grant condonation. A party seeking condonation must make out a case entitling it to the courts indulgence.

It must show sufficient cause why condonation should be granted. That required the applicant to give a full explanation for the non-compliance with the rules of court. The applicant's explanation failed to address the degree of lateness, or to establish the reason for the lateness, the actual prejudice to the Minister and a triable case against the Minister.

According to the notice of amendment, the applicant knew in 2012 that it had a constitutional claim against the respondents. For over a decade, nothing was done to ensure that the respondents were made aware of the alleged claim. The applicant had not shown any entitlement to condonation, and condonation was refused, as was the application for leave to amend as against the Minister.

Sonae Arauco (SA) Pty Ltd v Mbombela Local Municipality and others
[2023] 4 All SA 543 (MM)

Mining, Minerals & Energy – Interruptions in supply of energy to customer – Agreement between customer and municipality, in terms of which customer undertook to limit its electricity usage to 70% or less of its usual usage in return for an uninterrupted supply of electricity – Breach of agreement by municipality not justified, leading to granting of interdictory relief.

The applicant ("Sonae") operated a business situated within the Mbombela Local Municipality's jurisdiction. It was the single largest contributor to the municipality's electricity revenue, spending more than R100 million annually on electricity which it purchased from the municipality. Its factory operated continuous production lines, running 24 hours per day, and depended on a steady electricity supply. To address

the problem posed by loadshedding, it allegedly entered into an agreement with the municipality, in terms of which it would limit its electricity usage to 70% or less of its usual usage in return for an uninterrupted supply. When the municipality reneged on the agreement, Sonae approached the court for a mandatory interim interdict forcing the municipality to comply with its obligations in terms of the agreement by refraining from implementing load shedding, and to grant a continuous electricity supply in the area where the grid of Sonae's factory was located, pending the finalisation of Part B of the notice of motion.

The municipality's view was that the relief sought by Sonae was incompetent and that Sonae had failed to satisfy the requirements for an interdict. Both the municipality and the second respondent ("Eskom") took issue with Sonae's bringing its application on an urgent basis.

Held – The challenge to urgency was dismissed. Sonae had explained the consequences of load shedding and what effect the continuation thereof had on its operations and the broader community.

On the merits, Sonae's case was squarely founded upon its agreement with the municipality and the municipality's alleged breach thereof. Sonae also relied on the legislative scheme in terms of which electricity is generated and distributed in South Africa. There was no real dispute between the parties that the generation, distribution and use of electricity is governed by statute and policy. What was in dispute was the implementation of the legislation and the policy. On the one hand, Sonae stated that the municipality had a statutory, constitutional and contractual obligation to supply its factory with electricity, and on the other hand, the municipality and Eskom contended that they had the right to restrict the supply of electricity to the factory and a failure to do so would be unlawful. The court outlined the obligations of Eskom as national energy supplier and of the municipality, which bore a public duty to provide electricity to its residents. The court rejected the denial by the municipality and Eskom of the existence of the agreement with Sonae. Sonae and the municipality had indeed entered into the agreement and nothing prevented the municipality from entering into such agreement. The court also rejected Eskom's defence that Sonae could not have had a legitimate expectation the municipality would comply with the provisions of the agreement. To have a legitimate expectation, as Sonae pleaded, the expectation had

to be reasonable and, in public law, the expectation had to be legitimate. Those requirements were met.

Referring to the four requirements to be established by Sonae for an interim interdict, the court was satisfied that all four requirements had been established. In the premises, interdictory relief was granted against the municipality and Eskom.

Waterford Estate Homeowners Association NPC v Riverside Lodge Body Corporate and others [2023] 4 All SA 565 (GJ)

Property – Sectional title scheme – Levying of contributions by homeowners' association – Adjudicator's ruling on reasonableness of levies – Powers of adjudicator – Section 39(1)(c) read with section 39(1)(e) of the Community Schemes Ombud Services Act 9 of 2011 – While adjudicator's decision may be taken on review, no grounds were established for setting aside of decision where adjudicator properly applied provisions of Act.

The applicant homeowners' association sought a declaration that section 39(1)(c) read with section 39(1)(e) of the Community Schemes Ombud Services Act 9 of 2011 ("the CSOS Act") unconstitutional in so far as it afforded an adjudicator power to declare that a contribution levied was unreasonable, and to grant associated relief. It also sought the review and setting aside of certain decisions of the adjudicator.

The first respondent was the relevant body corporate. It fell into arrears with payments owed to the applicant, and the directors of the applicant unilaterally commenced determining contributions payable by the sectional title owners directly on the basis that such sectional title owners were members of the applicant. The first respondent and the sectional title owners refused to make payment. In terms of section 38 of the CSOS Act, the applicant applied for payment of the contributions allegedly owing by the respondents. The first respondent filed a counterclaim seeking a declaration that the contributions levied by the applicant on the respondents had been incorrectly determined, rendering them unreasonable. The adjudicator ordered the first respondent to pay the sum of R621 854.32 plus interest to the applicant, but also upheld the counter-claim, requiring the applicant to refund payments which had

been made by the respondents. That decision was the subject of the applicant's review application.

Held – The final determination of the matter rested on two aspects, *viz* whether the adjudicator's decision was reviewable, and whether section 39(1)(c) read with section 39(1)(e) of the CSOS Act were unconstitutional insofar as the section afforded the adjudicator certain powers of a declaratory nature.

Referring to the definition of administrative action in section 1 of the Promotion of Administrative Justice Act 3 of 2000, the court confirmed that the exercise of powers of an adjudicator in terms of the CSOS Act did amount to administrative action. The application was correctly brought under the Promotion of Administrative Justice Act (PAJA). The point in *limine* raised by the respondents that the adjudicator's decision was not reviewable under PAJA on the basis that it was not administrative decision was dismissed. A further point of substance raised related to whether the adjudicator's decision was final and binding. There was nothing in the CSOS Act which gave the adjudicator's rulings finality and binding effect, and therefore nothing preventing the decision from being taken on review.

On the question of whether there were any grounds justifying the review of the decision of the adjudicator, onus fell on the applicant to show how and in what instances the adjudicator acted unlawfully, unreasonably and without following fair procedure. It was evident that the adjudicator had correctly applied the Act and the applicant was unable to show why the ruling should be set aside.

Finally, the applicant sought an order declaring section 39(1)(c) and 39(1)(e) of the CSOS Act unconstitutional on the basis that the sections were never intended to vest the adjudicator with the authority to declare a payment or levy unreasonable. The constitutional challenge was brought for the first time in the review application, and further, the applicant had not directed the court to the provisions relied on in order to demonstrate that the impugned provisions were unconstitutional.

The application was thus dismissed.

END-FOR NOW