LEGAL NOTES VOL 1/2024

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INDEX[1]

South African Law Reports January 2024

MAMADI v PREMIER, LIMPOPO AND OTHERS 2024 (1) SA 1 (CC)

Administrative law — Administrative action — Review — Application proceedings — Reasonably foreseeable dispute of fact — Interaction between rule 6(5)*(g)* and rule 53 — Litigants' option to apply for referral to oral evidence — Court not having discretion under rule 6(5)*(g)* to dismiss rule 53 application merely because disputes of fact incapable of resolution on papers reasonably foreseeable — Role of Plascon-Evans rule — Duty of courts to render final decision in administrative review matters — Uniform Rules 6(5)*(g)* and 53.

Practice — Applications and motions — Dispute of fact — Referral for oral evidence — Reasonably foreseeable dispute — Interaction between rule 6(5)*(g)* and rule 53 — Court's discretion under rule 6(5)*(g)* where application cannot properly be decided on papers — Court may not dismiss application brought under rule 53 because disputes of fact incapable of resolution on papers reasonably foreseeable — Role of Plascon-Evans rule — Duty of courts to render final decision in administrative review matters — Uniform Rules 6(5)*(g)* and 53.

[1] **A reminder that these Legal are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2024 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!**

Uniform Rule 6(5)*(g)* vests a court with a wide discretion in applications in which disputes of fact arise. It provides that '(w)here an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision', including to 'direct that oral evidence be heard on specified issues' or to 'refer the matter to trial with appropriate directions'. The question in the present application for leave to appeal to the Constitutional Court was how rule 6(5)*(g)* interacted with rule 53 of the Uniform Rules, which regulated review proceedings.

The issue of the correct interpretation of rule 6(5)*(g)* implicated litigants' right to just administrative action and their right to have their dispute resolved by a final decision in court.

The High Court, confronted with a leadership dispute in a traditional community, initially dismissed an application for the review of the respondent Minister's decision on the matter on the basis that there were material disputes of fact that needed to be resolved through a trial rather than on the papers. The applicants argued that rule 53 had forced them to bring the application on motion, so that the appropriate course, given the disputes of fact, was for the High Court to refer the matter for oral evidence. The High Court held that rule 53 was not peremptory and that where irresoluble disputes of fact were reasonably foreseeable, a litigant was obliged to bring the review by way of an action. The High Court — without making a final determination — dismissed the application on the ground that the disputes of fact were reasonably foreseeable and that the review therefore should have been brought as an action. The Supreme Court of Appeal refused leave to appeal. The present case was an application for leave to appeal to the Constitutional Court (the court). (See [2], [18].)

The Constitutional Court was satisfied that its jurisdiction was engaged, since the application raised discrete questions of law implicating constitutional rights, ie the procedure available to litigants seeking to vindicate their rights to just administrative action (s 33 of the Constitution); and the circumstances in which a court could refuse to render a final decision in a matter implicating the right to have 'any dispute that can be resolved by the application of law decided in a fair public hearing before a court' (s 34 of the Constitution). (See [20].)

As to whether it should grant leave to appeal, the court found compelling considerations of justice to grant leave. The High Court order set a precedent of

substantial import, ie that where disputes of fact, irresoluble on the papers, were reasonably foreseeable, a litigant was required to forgo the advantages of rule 53, and bring a review as an action. The court also found compelling the fact that dismissals in terms of rule 6(5)*(g)* were without final effect; that it was in the interests of justice to determine whether the High Court made a mistake in law, since it prejudiced the applicant; and that the application had prospects of success. (See [21], [24].)

Closely related issues were (1) the appropriate approach for courts to adopt where disputes of fact, irresoluble on the papers, arose in a review application; and (2) the interaction between rule 6(5)*(g)* of the Uniform Rules of Court, which vested a court with a wide discretion in applications in which disputes of fact arose, and rule 53, which regulated review proceedings — more particularly whether, in review proceedings brought in terms of rule 53, after the applicant had obtained the record, a court may in terms of its discretion under rule (6)(5)*(g)* dismiss the matter on the basis it could not be decided on affidavit, without rendering a final decision. (See [3] and [41].)

Held

The High Court erred in holding that, where disputes of fact were reasonably foreseeable, judicial review proceedings necessarily had to be brought by way of action, thus forcing litigants to forgo the benefits of rule 53 (which allowed them access to documents and reasons relevant to the impugned decision). Since a litigant who brought a review in terms of rule 53 — and thus on motion — where disputes of fact were reasonably foreseeable, did not act impermissibly, the court was not entitled to penalise him or her by invoking rule 6(5)*(g)* to dismiss the matter without rendering a final decision. (See [31] – [43].)

This did not, however, mean that a rule 53 applicant was entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remained applicable. Thus, where a timeous application for referral was not made, the courts were entitled to proceed on the basis that the applicant accepted that factual disputes would be resolved by *Plascon-Evans*. Likewise, where an applicant relied on *Plascon-Evans*, but failed to convince the court that his or her application would prevail, the court could justifiably refuse a belated application for referral to oral evidence. If the affidavits did not make out a clear case, the application had to fail without recourse to *Plascon-Evans* or oral evidence, but if they did, and the disputes were genuine, far-reaching and fundamental, the proper

course in rule 53 proceedings was referral to oral evidence or trial. (See [22], [43] – [45].)

The court concluded that, since the High Court was moved by a mistake of law, it would interfere with its wide discretion under rule 6(5)*(g)* and refer the matter to trial. Leave to appeal granted, the appeal upheld, and the matter referred back to the High Court for trial before a different judge. (See [46], [50], [53].)

ORGANISATION UNDOING TAX ABUSE v MINISTER OF TRANSPORT AND OTHERS 2024 (1) SA 21 (CC)

Constitutional law — Legislation — Validity — Administrative Adjudication of Road Traffic Offences Act 46 of 1998 and Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 — Constitutional Court declining to confirm High Court's order of constitutional invalidity and rejecting finding that Acts fell within exclusive legislative competence of provincial legislatures and that they usurped exclusive executive functions of local sphere of government — Subject-matter of Acts fell within functional area listed in part A of sch 4 to Constitution, ie 'road traffic regulation', in respect of which Parliament and provincial legislatures had concurrent legislative competence — Constitution, schs 4 and 5.

Constitutional law — Legislation — Validity — Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019, s 17 — Section permitting service of documents under AARTO Act through means other than personal service or registered mail, ie by way of ordinary postage or through email — Given approach adopted by Constitutional Court to service of notices that credit providers were required to issue to debtors who defaulted on payments in terms of s 129 of NCA before taking further legal steps against debtors, s 17 not unconstitutional.

Constitutional law — Co-operative government — Autonomy of spheres of government — Overlapping functional areas — Proper approach — Constitutional Court rejecting approach adopted by High Court, that functional areas granted exclusively to provinces and local government could only be given meaningful content if they were carved out first, and that only remainder falling within functional area granted concurrently to national government — Constitution, s 44(1)*(a)*(ii), sch 4 and sch 5.

Constitutional law — Co-operative government — Autonomy of spheres of government — Competences — Proper approach to determining whether certain

piece of legislation falling within particular functional area listed in either sch 4 or sch 5 of Constitution — Discussion — Constitution, schs 4 and 5.

This was an application by Organisation Undoing Tax Abuse (OUTA) to confirm an order granted in its favour by Basson J of the Gauteng Division of the High Court, Pretoria, declaring to be unconstitutional and invalid the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (the AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 (AARTO Amendment Act). Those two Acts together created a new dispensation whereby traffic laws would be enforced through a *national system* of administrative tribunals, administrative fines and demerit points — a shift from the present default system of judicial enforcement through criminal law. The present relief, as well as that sought in the court a quo, was opposed by, inter alia, the first respondent, the Minister of Transport, and the third respondent, the Road Traffic Infringement Authority (RTIA), an entity established by the AARTO Act to give effect to the objects of that Act and to enforce its scheme.

Before the Constitutional Court, OUTA argued as follows: (1) The AARTO Act was unconstitutional and invalid because it was passed by Parliament where it fell within the exclusive legislative competence of provincial legislatures. (2) The AARTO Act was also unconstitutional because it usurped the exclusive executive functions of the local sphere of government. (3) Alternative to the above, at least s 17 of the AARTO Amendment Act was inconsistent with the Constitution, in that it permitted the service of documents under the AARTO Act through means other than personal service or registered mail, ie by way of ordinary postage or though email, despite the very serious consequences for road users who fail to receive, and therefore comply with, documents such as infringement notices and orders. The Minister and the RTIA for their part contended that the AARTO Act fell within the concurrent legislative competence shared between Parliament and the provincial sphere of government, and further that it did not take away any executive function or powers from the local sphere of government, nor did it encroach on those powers in any way.

Whether the AARTO Act fell outside the competence of Parliament

As to (1) above, the question, the CC held, requiring determination was whether the AARTO Act fell within one of the functional areas listed in part A of sch 4 to the Constitution — ie 'road traffic regulation' — in respect of which Parliament and provincial legislatures had concurrent legislative competence, or whether it fell within

one of the functional areas listed in part A of sch 5 to the Constitution, ie 'provincial roads and traffic', in respect of which the provincial legislatures had exclusive legislative competence. In the case of the former, the AARTO Act would not be unconstitutional; in the case of the latter, it would be. As to (2) above, the question was whether the AARTO Act fell within one of the functional areas listed in part B of sch 5 to the Constitution — ie 'municipal roads', or 'traffic and parking' — in respect of which municipalities had exclusive executive competence, in which case the AARTO Act would be unconstitutional. (See [30] – [36].)

The CC held that, as was clear from constitutional jurisprudence, in order to determine whether a piece of legislation fell within a particular functional area in either sch 4 or sch 5 of the Constitution, a court was required to determine the subject-matter of that legislation and then see within which sphere of government's functional area it fell. Determining the subject-matter of legislation entailed considering its substance, purpose and effects. It entailed determining what the legislation was about or determining its character. (See [87].)

Further, the CC rejected the approach adopted by the High Court to the interpretation of schs 4 and 5, that is, a so-called 'bottom-up' approach, in which one first determined the functional areas that fell within the exclusive legislative competence of a province, ie in sch 5, such that whatever remained would be said to fall under concurrent national and provincial legislative competence under sch 4. Rather, the CC held, a holistic approach was called for, that considered (i) the text of the schedule; (ii) the substance and purposes of the legislation; and (iii) whether the subject-matter of the legislation was one which required intra- or inter-provincial regulation — all the while remaining cognisant of the need not to impair or undermine the competence of the provincial and, where applicable, local sphere of government. (See [9] – [12].)

Moving to the present case, the CC held that the subject-matter of the AARTO Act could be summarised as the encouragement of compliance with the national and provincial laws, as well as municipal bylaws, relating to road traffic regulation and road safety; the introduction of an administrative system of adjudication of alleged infringements of national and provincial laws and municipal bylaws relating to road traffic and road safety; and the establishment of an agency to support the law enforcement and judicial authorities and to introduce the demerit points system to both encourage compliance with road traffic laws and discourage non-compliance therewith. (See [105].)

The CC held that the AARTO Act, having regard to its subject-matter, fell within the functional area 'road traffic regulation' in part A of sch 4, and therefore fell within the concurrent legislative competence of the national and provincial spheres of government (see [120]). The court reached this conclusion, having regard, inter alia, to the fact that the AARTO Act addressed matters — the adjudication of, and penalisation for, the breach or contravention of road traffic laws — which must appropriately be regulated nationally or inter-provincially. (The court noted in this respect that persons may violate traffic laws in any number of municipalities, or provinces, even on the same day.) (See [112], [115], [117] and [119].)

The CC further rejected OUTA's contention that the AARTO Act had usurped municipalities' executive or administrative functions (see [124] and [128]). The AARTO Act did not in fact remove any of their powers or functions. The new dispensation would not do away with municipality-made bylaws, and the administrative and executive functions relating to them would therefore still need to be carried out by municipalities. (See [124] – [126].)

Section 17 of the AARTO Amendment Act

The CC rejected the applicant's constitutional challenge to s 17 of the AARTO Amendment Act. It held that it would always be necessary for the RTIA to show that the alleged infringer probably received the notice or document, irrespective of the method of service it used to send the notice or document to the alleged infringer. This was so, given the approach adopted by the Constitutional Court to the notices that credit providers were required to issue to their debtors who defaulted on payments in terms of s 129 of the National Credit Act before taking further legal steps: In particular it had ruled that delivery of such notices by means other than personal service or registered mail would be sufficient for the purposes of the Act and was permissible, as long as proof of delivery was established. (See [130] and [135] – [139].)

In conclusion, the court declined to confirm the High Court's order declaring the AARTO Act and the AARTO Amendment Act inconsistent with the Constitution and invalid. It ruled further that s 30 of the AARTO Act, once amended by s 17 of the AARTO Amendment Act, would not be inconsistent with the Constitution. (See [141] – [142].)

PUBLIC INVESTMENT CORPORATION SOC LTD AND ANOTHER v TRENCON CONSTRUCTION (PTY) LTD AND ANOTHER 2024 (1) SA 66 (SCA)

Appeal — Power of court of appeal — Judgment sought to be appealed against null — Superior Courts Act 10 of 2013, s 16(2)*(a)*.

First appellant, the Public Investment Corporation (PIC), invited bids for the construction of a shopping centre. It did so on behalf of second appellant, the Government Employees Pension Fund (GEPF). First respondent (Trencon) and second respondent (GVT) submitted bids and the PIC awarded the contract to GEPF. Trencon then applied to review the award and for a declarator that GEPF was an organ of state. The High Court dismissed the application.

Trencon then filed a rule 42 notice, seeking amendment of the High Court's order (order 1). The basis was an alleged omission on the part of the High Court to pronounce on the declarator.

The High Court granted the declarator, and issued an amended order (order 2): 'for purposes of the present application' the GEPF is an organ of state.

The PIC then applied to the High Court for its leave to appeal order 2 to the Supreme Court of Appeal. The High Court granted leave.

Trencon applied to the High Court for leave to cross-appeal order 2. The High Court refused leave. Thereafter, Trencon did *not* petition the SCA for its special leave to appeal to it.

At this point the SCA, via its registrar, directed a note to the parties raising the issue, (1) whether there was still a dispute the SCA could exercise jurisdiction over; and (2), whether, if it issued a judgment, it would affect the rights of the parties inter se or have practical effect or result (s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013).

Responding, the PIC asserted that the issue of GEPF's legal status was a question independent of the review (ie not confined to the review — it would inform GEPF how to conduct itself prospectively), and therefore an issue requiring adjudication existed.

Held, that the issue was whether rule 42 was applicable and a rule 42 order possible (see [13]).

Held, that it was not: none of rule 42's grounds for operation were present. Accordingly, after issuing order 1 the High Court was functus officio (its authority over the matter was over), and order 2 null (see [12] and [14] – [15]).

Moreover, after Trencon had applied to the High Court for leave to appeal order 1 (dismissal of the review) and the High Court had dismissed the application, Trencon had *not* petitioned the SCA for its leave to appeal to it. Accordingly there was nothing before the SCA for it to adjudicate. The dispute ended there (see [16]).

In addition, order 2 was confined to the review ('for purposes of the present application'). There would therefore be no 'practical effect or result', were the SCA to pronounce on the issue (it would not alter the outcome in the review, nor define GEPF's status for its future dealings with Trencon or third parties) — grounds under s 16(2)*(a)*(i) to dismiss the appeal (see [10] and [18] – [19]).

Matter struck from the roll (see [21]).

SKOG NO AND OTHERS v AGULLUS AND OTHERS 2024 (1) SA 72 (SCA)

Land — Land reform — Statutory protection of tenure — Protected occupation of land — Whether termination of occupiers' right of residence on farm just and equitable — Factors to be considered — Whether judgment previously granted by magistrates' court rendered claim in Land Claims Court res judicata — Extension of Security of Tenure Act 62 of 1997, s 8(2), s 8(4), s 9(3), s 10(1)*(c)*, s 11(3)*(c)* and s 11(3)*(d)*.

The first and second appellants, in their capacities as trustees of the third appellant trust, appealed to the Supreme Court of Appeal against the Land Claims Court's (the LCC's) dismissal of their application for eviction of the 1st to 26th respondents (the occupiers) from the trust's property, a farm. The occupiers were former employees or the family members of the former employees of the trust or its predecessor in title (see [4] – [5]). The SCA was also seized with a cross-appeal by the occupiers against the LCC's dismissal of their defence that the matter had been rendered res judicata by an earlier (Jan 2017) magistrates' court order dismissing an eviction application brought by the trust against the same occupiers (though not citing their children as in the LCC application).

Applicable statutory provisions

- Section 8(1)*(b)* of the Extension of Security of Tenure Act 62 of 1997 (ESTA) provides that 'an occupier's right of residence may be terminated on any lawful ground, provided [it was] just and equitable, having regard to all relevant factors and in particular to . . . the conduct of the parties giving rise to the termination';

- s 8(2), that 'the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns . . . or is dismissed';
- s 8(4), that their residence could only be terminated if they had committed a breach contemplated in ss 10(1)*(a)*, *(b)* or *(c)*;
- s 10(1)*(c)*, which applies to persons who were occupiers before 4 February 1997, provides that an order of eviction my be granted against such persons if they had 'committed such a fundamental breach of the relationship between [them] and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship';
- ss 11(3)*(c)* and 11(3)*(d)*, which apply to persons who became occupiers after 4 February 1997, respectively make 'whether suitable alternative accommodation is available to the occupier' and 'the reason for the proposed evictions' factors in considering whether it is just and equitable to evict such persons; and
- s 9(3), which imposes limitations on the circumstances in which an eviction order may be made, including as a relevant consideration the availability of suitable alternative accommodation to the occupiers.

Litigation background

The said magistrates' court application was premised on the provisions of s 8(2) of ESTA insofar as the employment relationship between the trust and the occupiers had ended, and thatm, in terms of the lease agreement between them, the termination of their employment also meant the termination of their rights of residence. The magistrates' court concluded that, because of a dispute of fact as to existence of the employment contract and lease agreement specifying the tenure of their occupation of the trust's farm, the trust had failed to show that the occupiers' right of residence had been lawfully terminated. (See [6] – [11].)

The LCC eviction application was premised on the occupiers' conduct which purportedly caused an irretrievable breakdown of the relationship between them and the trust (s 10(1)*(c)*). In this regard, the appellants in their founding affidavit highlighted serious breaches of the relationship purportedly committed by the occupiers and which, on the trust's version, rendered the former's continued occupation of the farm untenable. The occupiers did not deny the trust's assertion that the relationship between the parties had 'wholly broken down' due to the manner in which the occupiers had conducted themselves. Their main defence, that the trust had failed to

identify the individual occupiers who were guilty of the alleged misconduct, succeeded in the LCC. (See [13] – [14], [25], [38].)

Issues

(1) Whether the termination of the occupiers' right to reside on the farm was lawful and, given all the circumstances, was just and equitable.

(2) Whether the magistrates' court's dismissal of the appellants' earlier application for eviction rendered the matter res judicata.

Held (1)

The occupiers' bald denials, in the face of detailed averments, did not amount to a genuine dispute of fact. Where a denial by a respondent was not real, genuine or in good faith, where the respondent had not sought that the dispute be referred to evidence, and where the court was persuaded of the inherent credibility of the facts asserted by an applicant, the court may adjudicate the matter on the basis of the facts asserted by the applicant. Notably, the averment that the relationship had irretrievably broken down was not disputed. The LCC should have applied this principle in order to reach its verdict. In failing to do so, it materially misdirected itself. (See [23] – [24].)

The fact that the relationship could not be restored was a major consideration in respect of those occupiers whose occupation of the farm commenced before 1997. A fundamental breach of the relationship on account of inappropriate conduct has been shown in respect of all the occupiers. The pronounced lack of mutual trust between the parties was self-evident. The inappropriate conduct complained of was of a serious nature, regardless of whether the occupiers' occupation commenced before or after February 1997. Section 11(3)*(d)* provided that in circumstances where the commission of a breach by occupiers was the reason for the proposed eviction, such breach was a relevant consideration, even in respect of those occupiers whose occupation commenced after February 1997. In the circumstances the conditions set out in s 8(2) of ESTA have been met. (See [41], [47] – [48].)

As to whether it would be just and equitable to order eviction, on the facts it would be unreasonable to expect the trust to continue to provide the occupiers with housing in the face of undisputed evidence of an unsalvageable breakdown of the parties' relationship. Given the undisputed averments pertaining to how the occupiers conducted themselves on the farm and the gravity of the conduct upon which the right of termination was predicated, the termination of the right of residence was just and equitable. And, as to alternative accommodation, the municipality was duty-bound to

provide them with alternative emergency accommodation. The eviction of the occupiers was therefore just and equitable, both procedurally and substantively. It followed that the LCC ought to have granted an order of eviction. (See [51] – [61].)

Insofar as the LCC exercised its discretion not to grant an eviction on the basis of a wrong application of the *Plascon-Evans* principle, its discretion was not properly exercised. Nothing precluded the LCC from granting the eviction order. Insofar as the LCC refused to grant that order on the basis that it was not just and equitable to do so, it erred. The appeal would therefore succeed (See [62].)

Held (2)

The requirements of res judicata should yield to the facts of each case. A requirement for the successful invocation of res judicata was that the earlier judgment relied upon was a final judgment. The substantive question of the breach of the relationship — raised in the LCC — was not finally determined by the magistrate, as the magistrate's reasoning on the question of the conduct, that allegedly gave rise to the breach of the relationship, was that there was a dispute of fact that was not resoluble on the papers. As the issue pertaining to the fundamental breach and irretrievable breakdown of the relationship, envisaged in s 10(1)*(c)*, was not finally determined by the magistrate, the defence of res judicata was therefore not available to the occupiers in the litigation that was initiated in the LCC. Moreover, as can be gleaned from the founding affidavit, the trust predicated its claim mainly on circumstances that obtained after the date of the judgment granted by the magistrates' court in 2017. It followed that the LCC, in dismissing the defence of res judicata, granted the correct order, and that the cross-appeal would therefore fail. (See [66] – [75].)

SOUTH AFRICAN NURSING COUNCIL v KHANYISA NURSING SCHOOL (PTY) LTD AND ANOTHER 2024 (1) SA 103 (SCA)

Words and phrases — 'Calendar year' — Meaning of in nursing regulation — Nursing Act 33 of 2005, ss 58(1)*(f), (g)*.

Statute — Interpretation — Dictionaries — Cautionary as to limitations of dictionaries in textual interpretation.

In this matter the first respondent (Khanyisa) asked the appellant (the 'Nursing Council') to accredit certain nursing programmes. The Nursing Council issued an accreditation as follows: 'Date of accreditation: . . . March 2022, however, the

commencement date of the approved program should be at the beginning of the academic year 2023.'

The applicable regulations defined an academic year as 'a period of at least 44 weeks of learning in any calendar year'. Khanyisa sought to commence its teaching in May 2022 to enable completion of the programmes before the May 2023 board exams.

Khanyisa challenged the date of accreditation of the nursing programmes and obtained a High Court order that the Nursing Council reaccredit the programmes with permission to commence instruction before mid-year. The Nursing Council obtained the High Court's leave to appeal to the Supreme Court of Appeal.

The context of the issue between the parties was that the 44 weeks of the academic year were required to be completed inside a 'calendar year'. The question was whether 'calendar year' was the period from 1 January to 31 December or a period starting from any date in a given year, and extending for 12 months from there (eg 1 May 2022 to 30 April 2023).

Held, that in these regulations, 'calendar year' had the latter meaning (see [17] and [25]).

Considerations pointing to this meaning were the following:

- There was no convention that an academic year run from 1 January to 31 December, and basis to suppose — the shortage of nurses — that flexibility was intended (see [18]).
- The purpose of the 44 weeks in a calendar year stipulation was to preclude the 44 weeks occurring in an indeterminate period, and this purpose was achieved (see [19]).
- The Minister of Health, the maker of the regulations, was unlikely against the backdrop described above, to have intended an academic year to run from 1 January to 31 December (see [2]).
- The Minister had consulted the Nursing Council before making the regulations, and the Nursing Council had previously accredited programmes to begin at mid-year (see [21]).
- The Nursing Council's past conduct — permitting programmes to begin at mid-year — suggested it understood 'calendar year' to be a flexible period, and the Nursing Council had given input in the making of the regulations (see [22] – [23]).

• If 'calendar year' meant 1 January to 31 December, students would have to wait several months to write their exams, so delaying their entry into the workforce, where they were needed (see [24]).

Then in passing, the court considered the role of dictionaries in textual interpretation, and cautioned as to their limitations (see [15] – [16]).

Appeal dismissed (see [29]).

BESTER NO AND OTHERS v MIRROR TRADING INTERNATIONAL (PTY) LTD t/a MTI (IN LIQUIDATION) AND OTHERS 2024 (1) SA 112 (WCC)

Consumer protection — Pyramid and related schemes — Prohibition against — Whether persons who unknowingly joined, entered or participated in Ponzi-type scheme entitled to enforce agreement between themselves and illegal scheme — Distinction in CPA between such consumers and those who knowingly participated only applicable to liability for administrative fees — Permitting unknowing investor to enforce agreement would be against purpose and policy of CPA — In casu, scheme conducted in breach of statutory provisions and common law — All agreements between illegal scheme and its investors declared unlawful and void ab initio — Consumer Protection Act 68 of 2008, s 43(2).

Insolvency — Property — What constitutes — Cryptocurrency — Constituting movable property as defined — In casu, investors losing ownership of their bitcoin invested in illegal scheme, acquiring personal rights against scheme — Insolvency Act 24 of 1936, s 1 sv 'property'.

Mirror Trading International (MTI), an online cryptocurrency trading platform, was placed in final liquidation on 30 June 2021 (see [17]). In this application, MTI's joint liquidators sought several declaratory orders, including (in paras 1.1 and 1.2 of the notice of motion) that all agreements between MTI and its investors formed part of the unlawful business of MTI and were therefore void ab initio (see [1]). It was submitted that a declaratory order to this effect would determine the extent of claims that investors may have against MTI in liquidation, and conversely the extent to which the applicants may have claims against investors who had shared in MTI's alleged profits (see [93]).

The liquidators contended that MTI's business amounted to common-law fraud in the light of its underlying business model, which was designed and implemented to perpetrate a fraud on members of the public by enticing them to invest in an illegal

Ponzi-type investment scheme; with the fraudulent intent of convincing them to transfer their right, title and interest, alternatively the effective control over their right, title and interest in their assets (specifically bitcoin) to MTI. They relied on (i) a report filed by the Financial Sector Conduct Authority (the FSCA) which concluded that MTI's business was unlawful; and (ii) evidence obtained in enquiries under the Companies Act, 1973 (see [33] – [34] and [92]).

Among the respondents' submissions were that they were not investors in MTI and never transferred ownership of their bitcoin to MTI, but contractually agreed to pool their bitcoin with other members in a club (the My MTI Club); and that all payments to this club were made by way of transfer of cryptocurrency — more particularly bitcoin — and, as bitcoin was not regulated by South African law, it did not amount to movable property in terms of the Insolvency Act 34 of 1936. (See [40].)

Held

As to whether the bitcoin was 'owned' by the investors

While it was so that ownership of bitcoin depended on the facts of each case, here the facts clearly demonstrated that investors lost 'ownership' of their bitcoin while acquiring personal rights against MTI. If MTI suffered losses, the reduction in the total amount of bitcoin would result in an investor being unable to claim entitlement to the number of bitcoin that they invested. The operation of MTI's business in cyberspace was irrelevant; it was domiciled in South Africa and its movable property, wherever situated, was therefore considered to be present at its domicile. (See [51] – [52].)

As to the lawfulness of MTI's business

It need not be shown that MTI was in breach of all the statutory provisions relied on by the applicants if, on a balance of probabilities, MTI's business was a common-law Ponzi-type scheme or conducted in breach of the Consumer Protection Act 68 of 2008 (the CPA). While MTI, as was found by the FSCA, breached several statutory provisions, on the evidence before court the applicants have also shown that MTI's business amounted to an unlawful and fraudulent scheme as a result of the various false representations made to investors. On a conspectus of the evidence, it could not be argued that MTI did not conduct a pyramid scheme in contravention of ss 42 and 43 of the CPA. (See [95], [100] – [101].)

As to the lawfulness of the agreements between MTI and its investors

Section 43(2) of the CPA made it illegal to operate a pyramid scheme. The distinction in the CPA between parties who joined knowingly and those who joined unknowingly

simply excluded unknowing participants from being liable in terms of s 112 to pay administrative fines. Persons who unknowingly joined, entered or participated in a pyramid scheme, would not be entitled to enforce an agreement between themselves and the illegal scheme. If an 'unknowing' investor were permitted to enforce an agreement with MTI, it would give effect to a business and to a fraudulent scheme prohibited by the CPA, which would not be in accordance with the CPA's purpose and policy. It followed that if the agreements, on the facts of this application, were not declared void ab initio, it would condone a scheme that was fraudulent and in conflict with several statutes. Such result would be contrary to public policy considerations. (See [110], [114], [116] – [119]).

The applicants showed that they were, on a balance of probabilities, entitled to the relief claimed in paras 1.1 and 1.2 of the notice of motion (see [138]).

HENNIE EHLERS BOERDERY CC v APL CARTONS (PTY) LTD 2024 (1) SA 149 (ECGq)

Practice — Judgments and orders — Summary judgment — Amended rule 32 — Amended rule unclear, unsatisfactory and likely to increase both judges' workload and parties' costs — Defendant's obligation to show prima facie defence, however, remaining unaltered — Uniform Rules of Court, rule 32.

Practice — Judgments and orders — Summary judgment — Amended rule 32 — Plaintiff's obligation to verify claim in terms of subrule (2)*(b)* substantive, not merely formal — Complaints about shortcomings in applicant's affidavit to be addressed by court hearing summary judgment application, not via separate rule 30 application — Court dismissing rule 30 application with costs.

Rule 32 of the Uniform Rules of Court, which deals with summary judgment, was recently amended to (i) prevent a plaintiff from applying for summary judgment before the defendant delivered a plea; and (ii) requires the plaintiff to deliver a more detailed affidavit than the formulaic one previously allowed. Rule 32(2)*(b)* requires the affidavit to 'verify the cause of action and the amount, if any, claimed and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain *briefly* why the defence as pleaded does not raise any issue for trial' (emphasis supplied).

In February 2022 the plaintiff instituted an action in which it sought over R9,14 million from the defendant. The defendant delivered a plea in which it stated that it had paid R6,97 million, allegedly the full extent of its indebtedness. The plaintiff denied this and applied for summary judgment under rule 32. The application was supported by a 22-page affidavit. In response, the defendant launched the present rule 30 application, in which it asked the court to set aside the affidavit as an irregular step under rule 32(2)*(b)* because it did not meet the rule's jurisdictional requirements, in that it was too long and introduced new evidence contrary to rule 32 precedent (see [17] – [21]).

The court was required to determine (i) whether rule 30 was the appropriate procedural mechanism to challenge an affidavit supporting an application for summary judgment for its alleged want of compliance with subrule 32(2)*(b)*; and, if so (ii) whether the affidavit had to be declared an irregular step. The rule 30 application was argued on the basis that it applied only to irregularities of form and not matters of substance.

Held

While the amended rule 32 was not a model of clarity and would likely increase the judges' workload and parties' costs, it was nonetheless clear that the requirements for a rule 32(2) affidavit were substantive rather than formal in nature (see [6] and [25]). In the past, disputes about what was permissible in such an affidavit had been appropriately dealt with in the court's hearing the applications, and not in separate procedures on the regularity of the affidavit (see [27]).

Rule 30 was, in the light of the above considerations, not the appropriate procedural mechanism to address complaints that rule 32 affidavits exceeded the ambit of what was permissible (see [30], [32]). Whether the plaintiff's supporting affidavit met the substantive requirements of subrule 32(2)*(b)* and the merits of the defendant's complaints were therefore matters best left to the court hearing the summary judgment application (see [32]).

The court accordingly dismissed the rule 30 application with costs and directed the defendant to deliver its affidavit opposing the summary judgment application within 15 days (see [34] – [35]).

KATHA v PILLAY NO AND OTHERS 2024 (1) SA 159 (GJ)

Prescription — Acquisitive prescription — Running of — Suspension — Grounds — Person against whom prescription running prevented by 'superior force' from interrupting running of prescription — Whether death of property owner constituting 'superior force' — Prescription Act 68 of 1969, s 3(1)*(a)*.

This matter concerned acquisitive prescription. Its facts were that party A in 1986 took possession of immovable property owned by party B and in 2014 B died. 2016 was 30 years from 1986. In 2017 executors were appointed to B's estate.

The separated issue before the court, in the context of A's claim of acquisitive prescription, was whether B's death (in 2014) was 'superior force' referenced in s 3(1)*(a)* of the Prescription Act 68 of 1969. Were it 'superior force' the running of prescription would be suspended until the executors' appointment in 2017, when they would be able to interrupt prescription by serving process on A claiming ownership of the land (see ss 4(1) and 4(4) of the Act).

Section 3(1) of the Act provides that:

'If —

(a) the person against whom . . . prescription is running . . . is prevented by superior force from interrupting . . . running of prescription . . . ; or

(b) . . . ; and

(c) the period of prescription would, but for the provisions of this subsection, be completed before . . . the day on which the . . . impediment referred to in paragraph *(a)* . . . has ceased to exist, the period of prescription shall not be completed before . . . expiration of . . . three years after the day referred to in paragraph *(c)*.'

Held, on consideration of the text, context and purpose of the words 'superior force', that 'superior force' must be interpreted to include the death of the property's owner (see [9] – [10], [12], [26], [33]).

Accordingly, after B's death in 2014, the running of prescription would be suspended until the executors' appointment in 2017, when it would recommence and run for three years until 2020 (see [3], [33]).

KOBI v TRUSTEES, DE LA REY BODY CORPORATE AND OTHERS 2024 (1) SA 174 (FB)

Housing — Consumer protection — Community Schemes Ombud — Jurisdiction in respect of financial issues — Appeal against adjudicator's order dismissing appellant's claim on basis that ombud lacked jurisdiction to determine incorrectly calculated levy account statements — Community Schemes Ombud Services Act 9 of 2011, s 39(1)*(c)*.

Mr Kobi brought this appeal in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 (the Act) against an adjudication order made by the adjudicator (the order), dismissing his claim in terms of s 8 of the Act for relief concerning alleged incorrectly calculated levy account statements. The complaint was dismissed on the basis that the third respondent, the Community Schemes Ombud, lacked jurisdiction to preside over the dispute.

In terms of s 38(1) any person may make an application if such a person was a party to or affected materially by a dispute. Section 38(3)*(a)* of the Act provides that '(t)he application must include statements setting out . . . the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39'. The latter section (s 39(1)) provides that 'an application made in terms of section 38 must include one or more of the following orders: In respect of financial issues . . . an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way; . . . .' (Quoted in full at [11].)

The appellant averred that she continued in pursuing the issue of the incorrectly determined amounts internally, without any success, leading to the lodging of the said dispute, which entailed a dispute resolution in respect of financial issues (see [9] – [10], [12.3]). The adjudicator viewed the relief sought as being for an order 'directing the respondent to arrive at a realistic amount taking into account all the issues raised' (see [12]). In reaching its conclusion the adjudicator stated that such relief would require the CSOS to determine the reasonableness of the amounts claimed, a discretionary power that the CSOS [was] devoid of and which properly fell within the ambit of the body corporate represented by the trustees (see [12.5]).

Held

The appellant's actions towards dispute resolution actions, as mandated by the Act, could leave no doubt that she was a person materially affected by the dispute as contemplated in s 38(1). The adjudicator's reasoning and finding, that the dispute did not fall within the ambit of s 39 of the Act, could not be correct. The documents before him did not leave any room for a conclusion other than that the dispute concerned financial issues of 'an order declaring that a contribution levied on owners is incorrectly determined or unreasonable' as contemplated in s 39(1)*(c)* of the Act. The dispute fell squarely within this provision. In addition hereto, the adjudicator could/should have made use of the powers of investigation conferred upon him in terms of s 51 of the Act. The adjudicator having erred in finding that the application did not fall within the ambit of s 39, the order would be set aside. (See [13] – [14].)

LEE v ROAD ACCIDENT FUND 2024 (1) SA 183 (GJ)

Appeal — Appealability — Judgment or order granted in default of appearance — Not appealable given that it is rescindable and accordingly not final.

A judgment or order granted in default of appearance was not appealable: such a judgment or order could be rescinded under rule 42(1)*(a)*, rule 31(2)*(b)* or under the common law, and was accordingly not final. (See [10], [15] and [24].) The High Court decision in *Moyana and Another v Body Corporate of Cottonwood and Others* [2017] ZAGPJHC 59, which held otherwise, was wrong (see [18] and [19]).

LEGAL PRACTICE COUNCIL v MKHIZE 2024 (1) SA 189 (GP)

Legal practitioner — Advocate — Misconduct — Cannot hide behind misconduct of assistants — Must exercise required control over practice.

Legal practitioner — Advocate — Misconduct — What constitutes — Accepted briefs and moneys directly from public and then failed to execute mandates — Misconduct established — Also failed to comply with court orders, lied in open court and obstructed investigation by Legal Practice Council — Unfitness to practise established — Removal from roll appropriate — Comprehensive order made.

Legal practitioner — Advocate — Referral rule — Importance to profession reiterated — Breach — Sanction — Legal Practice Act 28 of 2014, s 34(2)*(a)*(i).

The court was faced with an application by the Legal Practice Council (LPC) to remove the respondent's name from the roll of advocates, on the strength of complaints received from members of the public — all of them elderly — that he failed to assist them, despite being paid. Besides this, it appeared that he took the instructions and money directly from the complainants, without the intercession of an attorney. The respondent blamed his employees, who, he said, took the money on his behalf out of their own volition.

The court pointed out that an advocate accepting money directly from the public, in the absence of an attorney, trust account or fidelity fund certificate, breached the referral rule, and contravened s 34(2)*(a)*(i) of the Legal Practice Act and the LPC's code of conduct. The referral rule was central to the profession, clear and long-standing, and its breach constituted serious misconduct (see [63] – [64], [66], [90]). The court, besides finding the respondent's explanation of employee misconduct fanciful, also rejected his attempt to blame his employees, emphasising that he was responsible for the conduct of his employees and that a failure to exercise control and apply the necessary oversight over them did not amount to a defence, but rather behaviour which itself fell short of the standards and ethics of his profession (see [42] – [43]).

Having found misconduct to have been established, the court turned its attention to the issue of the respondent's fitness to practise, which entailed a value judgment and a weighing-up of the respondent's conduct against that expected of an advocate (see [67] – [71]). In this regard, the court held that his unfitness was clear, inter alia, from the following (see [71] – [81]):

- he had shown contempt for the proceedings brought against him by the LPC by making unwarranted accusations against it and obstructing proper scrutiny of his conduct, to the point of abuse of process; and
- he had treated court orders with contempt and repeatedly made false allegations in open court.

Having found that the applicant was unfit to be an advocate, the court moved on to the issue of appropriate sanction, one of the objects of which was the protection of the public (see [83]). In this regard it weighed with the court that the respondent's misconduct was repeated over a long period of time (see [85]). His obstructive conduct during the proceedings indicated that he lacked the moral fibre required of his profession (see [87]). Besides the fact that his transgressions were serious and

warranted serious sanction, the public needed protection from him, which rendered a suspended sanction ineffectual (see [90]). In addition, it was significant that his victims had been relying on him in times of desperate need, and that some of them were elderly (see [91]).

The court accordingly ordered the removal of the respondent's name from the roll of advocates. The order also made extensive provision for ancillary matters. (See [104].)

NDLOZI v MEDIA 24 t/a DAILY SUN AND OTHERS 2024 (1) SA 215 (GJ)

Defamation — Remedies — Permissible relief in motion proceedings — Immediate relief in form of declaration and interdict, as well as order that claim of damages be referred to oral evidence for determination at later stage — In principle, applicant entitled to bring hybrid application seeking such relief in exceptional circumstances and where no prejudice to other party — On facts, court allowing hybrid procedure adopted by applicant, given that there were no disputes of fact underlying primary defamation claim, and its adoption not prejudicing respondent.

Defamation — Defences — Truth and public benefit — Publication in newspaper of identity of suspect in criminal investigation — Need to balance any public benefit that may be derived from publication, against public interest in confidentiality of police investigations which at early stage — Confidentiality interest serving to protect integrity of police investigations, and dignity and privacy of complainant.

The applicant, Dr Ndlozi, was the senior leader of South Africa's third-biggest political party, and a Member of Parliament. In this application, he claimed to be defamatory three statements that were published by the *Daily Sun* newspaper (which was owned by the first respondent, Media 24), which statements were based on a tip-off received on the morning of 11 April 2021 by the third respondent, the journalist Mr Manayetso, from a confidential source within the SAPS, that the applicant was the subject of a complaint of rape made to the police. The first statement was a billboard under the *Daily Sun* banner that was tweeted on 11 April 2021 and appeared in physical form the next day; it stated: 'MBUYISENI NDLOZI RAPED ME!' The second statement was an article (that the billboard effectively 'teased') by Mr Manayetso that first appeared online on 11 April 2021. It named Dr Ndlozi as the subject of a complaint of rape made to the SAPS, and set out details of the complaint, as well as Dr Ndlozi's denial and the outline of his response that was secured before publication. The third statement was

an article first published on 13 April 2021 which addressed a media statement issued by the SAPS the previous day and which clarified that Dr Ndlozi was, in fact, not a suspect in the police investigation of the complaint. It also addressed criticism from the SAPS that Mr Manayetso had failed to first seek comment from the SAPS before publishing the article, which was denied.

In the High Court Dr Ndlozi sought, *on motion*, the following: a declaration that the statements were unlawful and defamatory; an order directing the respondents to remove the statements from all their electronic media platforms; an order that the respondents print a retraction and an apology; and an order that damages be paid in the sum of R120 000, or that the respondents be declared liable for damages and that quantification of damages be referred for the hearing of oral evidence.

The issues were the following: *(a)* Was it permissible for the applicant to have approached the court, *on motion*, seeking on the one hand immediate relief in the form of a declarator that he had been defamed and an interdict in restraint of such defamation, and on the other hand that the claim of damages be referred to oral evidence for determination at a later stage? *(b)* Were the three statements the *Daily Sun* published on the basis of the confidential source's tip-off defamatory? *(c)* If they were defamatory, were the statements nonetheless lawful because, as the respondents argued in defence, they were true, and it was for the public benefit that they be published?

Held, as to *(a)*, that the applicant was entitled to have approached the court adopting the 'hybrid procedure' he did: Such a hybrid procedure was in principle available to a litigant in *exceptional circumstances* and where there was no appreciable prejudice to either party in its adoption. In the present case its adoption was permissible in circumstances in which the primary question of whether Dr Ndlozi was in fact unlawfully defamed did not entail the resolution of factual disputes, and could accordingly be decided on the papers, and the respondents would not be prejudiced in any way, should the declaratory and interdictory relief be determined now, and the issue of damages and an apology later. (See [27] – [29], [31] – [36] and [38].)

Held, as to *(b)*, that the first and second statements, whose sting was that a complaint had been made to the police that Dr Ndlozi had raped someone, * were defamatory of Dr Ndlozi, because they tended to lower him 'in the estimation of the ordinary intelligent or right-thinking members of society'. (See [39] – [40] and [45] – [47].) The third statement, however, was not defamatory, concerned as it was, not with the truth or

falsity of the rape allegations, but with whether the police had accurately conveyed the respondents' efforts to secure comment from them before going to press (see [40] and [47]).

Held, as to *(c)*, that, in order to determine whether the publication of a true defamatory statement was for the public benefit, the question that had to be asked was whether there was an *overall public benefit* to the publication of the statement, in the way it was published, and when it was published; even if there was some benefit to be had from the publication, that must be weighed against any harm to the public interest that the publication caused. (See [57].)

Held, that, in this case, any public benefit that might be derived from reporting the fact of the complaint against Dr Ndlozi, in the sense that it could be argued that it was in the public interest to know the truth about the character and conduct of public figures like him, was outweighed by the public interest in the confidentiality of the police investigation at the early stage it had reached at the time of the publication in question: such a confidentiality interest served to protect *the integrity of police investigations*, as well as the dignity and privacy of the complainant, who had specifically chosen not to make her complaint public. Furthermore, in this case, it could not be said that the public could benefit from the publication of statements that were secured and disseminated in the manner they were, that is, where there was an interference by Mr Manayetso (no doubt inadvertently) with the police investigation through his naming the complainant to Dr Ndlozi and disclosing details of the complainant's statement to Dr Ndlozi before the police had been able to contact Dr Ndlozi themselves. (See [60] – [69].)

Held, accordingly, that the respondents had failed to demonstrate that the first and second impugned statements were published for the public benefit. Therefore, the publication of those statements was defamatory and unlawful. (See [70.)

The court went on to grant a declaratory order to the above effect; ordered the removal of the statements from all of the first respondent's media platforms; and granted an order directing that the applicant's prayer for damages and an apology must stand over for later determination once oral evidence had been led (see [38] and order at [72]).

NGCOBO v OELOFSE AND OTHERS 2024 (1) SA 233 (GJ)

Damages — Application for interim payment under rule 34A of Uniform Rules of Court — Nature of court's enquiry — What applicant must set out — Court emphasising that full disclosure establishing good cause for claim essential — Relevant documentation to be annexed — Application for second payment will not be granted where it appeared that applicant had squandered first payment to fund his or her lifestyle rather than for its intended purpose.

Plaintiffs seeking interim payments to tide them over while pursuing damages claims for medical costs or loss of income under rule 34A of the Unform Rules of Court must satisfy the court that the defendant has *admitted liability* in writing or that they have *obtained judgment* against the defendant for yet to be determined damages. A rule 34A payment, which is at the court's discretion, may not exceed a reasonable portion of the damages that are, in the court's opinion, likely to be recovered by the plaintiff, and no award may be made unless the defendant is insured in respect of the plaintiff's claim, or otherwise has the means to enable it to make the interim payment (see rule 34(4) and (5) at [109] of the judgment). Since the court is required to make only an interim assessment, the standard of proof is lower than it would be when the matter proceeds to trial (see [25], [34]).

Whether a plaintiff has, as applicant, made out a proper case for an interim payment under rule 34A depends on the facts of the case, but he or she must, as a bare minimum, (i) set out sufficient details to enable the court to ascertain the grounds for the relief; and (ii) provide sufficient documentary proof to enable the court to properly quantify the medical costs or loss of income in respect of which the interim payment is sought. The nature of disputed facts and the extent to which they are disputed might dissuade the court from granting an interim payment. If an interim payment has been made before, the plaintiff should apprise the court of how it was used, and a further payment will be refused where the plaintiff had squandered the first. Legal costs, household expenses and the need to repay loans from family or friends do not constitute valid bases for interim payments. (See [110] – [113], [123] – [125], [128].)

In the present case the court refused to authorise a claim for a second interim payment on the grounds that, (i) the applicant had used the first payment to fund her lifestyle rather than to fund het medical expenses; (ii) the applicant's precarious financial position was self-inflicted by overspending and inordinate delays in the prosecution of

the action; (iii) there was no safeguard for the respondent in the event of an overpayment; and (iv) the applicant had, in the light of the pervasive lack of documentary evidence, failed to establish good cause. The court did, however, make a limited order approving an undisputed claim for an interim payment in respect of ongoing medical treatment. (See [131], [135] – [139].)

GN OBO KN v MEC, DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCE
2024 (1) SA 258 (ECM)

Discovery and inspection — Production of documents — Notice to produce documents — Failure to comply — Whether further notice required before approaching court under rule 35(7) for order directing compliance — Uniform Rules 30A and 35(7).

Rule 35(7) is an inbuilt remedy available to a litigant who had sought discovery under rule 35 for the enforcement of subrules 35(1), 35(3), 35(6) and 35(8); there is no requirement in rule 35(7) for a further notice before approaching a court to apply for compliance with the provisions of rule 35 (except in relation to rule 35(12)). Rule 30A provided a general remedy for non-compliance with the rules — requiring further notice to the defaulting party — and was applicable to any failure to comply with the rules or request made or notice given pursuant to the rules, provided that the remedy was not in conflict with another rule.

Here the applicant, relying upon the provisions of rule 35(7), sought an order directing the respondent to comply with discovery notices served by her in terms of subrules 35(1), 35(8) and 35(10). In addition, the applicant had sought an order directing the respondent to deliver her discovery affidavit within a period of five days, and a costs order. No notice in terms of rule 30A, or any form of notice, was issued prior to the application to compel. This raised the following issues —

- whether a litigant seeking to enforce compliance with notices under subrules 35(1), 35(3), 35(6), 35(8) must provide notice under rule 30A, or any other form of notice, prior to launching of a rule 35(7) application to compel; and
- the effect of not giving such notice on the costs order sought.

Held

Rules 35(7) and 30A were not in conflict. The rules were designed to allow litigants to come to grips, as expeditiously and as inexpensively as possible, with the real issues between them. When notice was given for the delivery of documents within a

prescribed period, there was no default at that stage. The default would only arise once the period given expired without a response or delivery of the required documents. Once that occurred, self-evidently, the defaulting party must be warned about the consequences and be afforded an opportunity to comply with the notice or request that was made. Bearing in mind that the object of the rules was to achieve justice using less expensive means, it could not be countenanced that the aggrieved party could simply leap to court without demanding compliance, with the notice to the defaulting party, that an application to compel would be resorted to. Rule 30A(1) provided a remedy and a reasonable period for the defaulting party to purge the default complained about. There was no basis for a suggestion that notice was not required prior to the institution of an application to compel. Rule 30A should therefore be invoked in circumstances where there was a failure to comply with a request or notice given under these rules, and that included rule 35. (See [10], [19] – [22].)

However, non-compliance with rule 30A did not absolutely preclude relief being granted in the absence of condonation — compliance with rule 30A was not peremptory. In terms of rule 35(7) the court had a discretion whether or not to enforce discovery or inspection and must remain alert to the potential abuse of the discovery process. In sum, in applications to compel discovery, the aggrieved party should first give a notice in terms of rule 30A, although the court would not be precluded from exercising its discretion under rule 35(7), with consideration of appropriate costs orders where there was non-compliance with the requirement of reasonable notice. (See [10], [25], [30] – [31].)

In the present case there was a considerable delay between when the action was instituted and the present application to compel discovery, which was filed without affording opportunity to the defaulting party to correct the default. The application should have been preceded with a reasonable notice: rule 30A should have been followed, notwithstanding the provisions of rule 35(7). Even though there was no notice issued under rule 30A, in exercising the discretion under rule 35(7), the main relief for compliance with the notices issued under rule 35 would be granted, but no order as to costs would be made (See [28] – [30].)

RVRN CRUSHING (PTY) LTD v GDF INCORPORATED CONSULTANTS (PTY) LTD 2024 (1) SA 269 (GJ)

Practice — Irregular step — Costs — Cure after notice under rule 30A — No obligation on litigant who timeously cures irregularity to tender costs occasioned by irregular step — Costs to be costs in main proceeding — This in line with purpose of rule 30A to avoid excessive formality and point-taking.

On 22 April 2022 the respondent, GDF, instituted a claim against the applicant, RVRN. On 26 April 2022 RVRN gave notice of intention to defend. On 26 May 2022 GDF prematurely placed RVRN under bar. The next day RVRN issued a notice of non-compliance under rule 30A of the Uniform Rules of Court, whereupon GDF, acknowledging its mistake, withdrew the notice of bar.

RVRN then argued that GDF should have tendered costs together with its withdrawal of its notice of bar. GDF, recognising RVRN's obstructive conduct for what it was, placed it under bar again. RVRN then doubled down, bringing the present application to set aside GDF's first (premature) notice of bar, GDF's notice of withdrawal of that notice (said to be irregular because it did not contain a tender for RVRN's costs) and GDF's second notice of bar. RVRN also sought an order directing GDF to pay the costs occasioned by what it called the irregular notice of withdrawal of the notice of bar. Finally, RVRN asked that GDF be directed to pay the costs of its application to set aside these irregularities on a punitive scale.

The court seized with the matter ruled that there was no need for a litigant who took an irregular step and then, upon notice under rule 30A, timeously cured it, to tender the costs occasioned by the irregular step. Those costs would be costs in the main proceeding. This view was underpinned by two policy considerations, namely (i) that litigants who committed irregularities had to be encouraged to cure them quickly and cheaply, without running the risk of an adverse costs order, and (ii) that the purpose of rule 30A was to avoid excessive formality and point-taking and to enable the parties to get on with the litigation by curing between themselves any prejudice caused by an irregularity. (See [7] – [12].)

The court pointed out that, if every withdrawal of an irregular step gave rise to a subsidiary claim for costs, litigation would soon descend into absurdity, as illustrated in the present case, where RVRN, standing on its phantom claim for costs, refused to take any further steps to file its plea until the costs of pointing out GDF's irregular step

were tendered. This delayed the progress of GDF's claim in the main action for over a year while papers in RVRN's wholly meritless application were exchanged and the matter was enrolled for argument. Consequently, given the misguided nature of the proceedings, RVRN had to bear the costs of the application on a punitive scale. (See [13] – [15].)

SASOL SOUTH AFRICA LTD t/a SASOL CHEMICALS v PENKIN 2024 (1) SA 272 (GJ)

Practice — Pleadings — Amendment — Notice of amendment — Non-compliance with rule 28 subrules relating to notification of recipient of right to object to notice and absence of required costs tender — Absent prejudice, non-compliance not rendering notice irregular step liable to be set aside under rule 30 — Uniform Rules 28, 30.

This case concerned an interlocutory application to set aside respondent's notice of amendment of his plea as an irregular step brought under Uniform Rule 30. The applicant contended that a notice delivered by the respondent, styled 'Notice to Amend Plea', offended against the provisions of Uniform Rule 28 in that it did not comply with two of its subrules. This, in that a notice of intention to amend as contemplated in the rule must contain a provision notifying the recipient thereof of its right to object; and must contain a tender for the costs occasioned thereby. (See [33] – [35].)

The applicant, the plaintiff in the main pending action, was represented by attorneys and counsel; the respondent, the defendant in the action, was a lay person and had no representation (see [5]). The applicant did not deliver a notice, as contemplated in rule 28(3), objecting to the offending notice, notwithstanding its alleged prejudice, instead seeking to have the notice set aside as an irregular step (see [37]). The respondent failed to file amended pages foreshadowed in the impugned notice.

Held

A brief survey of the authorities demonstrated that it was deeply entrenched in our law that, when dealing with less than perfect procedural steps, the correct approach was to evaluate them based on prejudice and the interests of justice. The modern approach, predicated on the interests of justice, was to permit amendments unless they would cause real and substantial prejudice to a party. The rules were to be applied sensibly and pragmatically to bring about the ultimate ventilation of the true issues

between the parties. In the absence of prejudice, rigid adherence to the Rules of Court was a catalyst for delay and further costs. (See [11], [13], [27], [28].)

It was plain that the respondent endeavoured, through the notice of amendment, to place his defence to the applicant's action before the court in more precise terms. As inelegant as the notice may have been, the attempt to stymie the formulation and ventilation of the dispute between the parties ran contrary to the proper administration of justice, and was not in the interests of justice. (See [39] – [40].)

As a matter of practice, the respondent's proposed amendment lapsed when he failed to file amended pages, and the notice of amendment was thus of no force or effect. On this basis, on 23 November 2021, when the applicant delivered a notice in terms of rule 30(1), there was no extant 'notice of intention to amend' as contemplated in rule 28(1) — it having lapsed for want of either the delivery of amended pages or for want of an application for leave to amend under rule 30(2)*(b).* (See [43] – [45].)

It was therefore clear that there was no hindrance to the action proceeding when this application was brought. Nonetheless, the applicant persisted that it was prejudiced because the status of the document was unclear and uncertain. The substantive prejudice asserted by the applicant was more imagined than real. (See [47] – [50].)

There was no obligation on a party giving notice of intention to amend in terms of rule 28(1) to make a tender for the costs occasioned by the amendment (see [53]). In the result, the application would be dismissed (see [62]).

STELLENBOSCH UNIVERSITY v RETOLLA AND OTHERS 2024 (1) SA 284 (LCC)

Land — Unlawful occupation — Eviction — Statutory eviction — Procedure — Application to Land Claims Court for declarator as to whether ESTA applying to land concerned — Extension of Security of Tenure Act 62 of 1997, s 2(1).

Applicant, the University of Stellenbosch, was the owner of a property in Stellenbosch, and first and second respondents resided on it (see [2] and [4]). The university brought proceedings for eviction and as a preliminary point sought a declarator as to whether the Extension of Security of Tenure Act 62 of 1997 applied (see [2] and [5]). The Land Claims Court has jurisdiction over evictions governed by ESTA, but not those governed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Sections 2(1) and 2(2) of ESTA provide in this regard that:

'(1) Subject to the provisions of section 4, this Act shall apply to *all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law*, or encircled by such a township or townships, but including —

(a) any land within such a township which has been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

(2) Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.' [Emphasis added.]

Held, that there was no impediment to a litigant seeking such declaratory relief, provided that all parties intended to be bound thereby were notified, joined and afforded a fair opportunity to participate (the latter including access to legal representation) (see [39]).

Held, further, that, on analysis of the legislative history relevant to the land of which the university's property formed a part, that it was 'land in a township' referenced in s 2(1), and accordingly ESTA did not apply to the eviction proceedings (see [8], [23] and [36]). So ordered.

VAN DER WESTHUIZEN AND OTHERS v AKARANA HOMEOWNERS ASSOCIATION AND OTHERS 2024 (1) SA 301 (WCC)

Evidence — Privilege — Legal professional privilege — Scope — Without prejudice rule — Letter marked 'open letter' — Whether description of communication from plaintiff to defendant, containing proposals for settlement of matter, as 'open letter', meant that offer was not made on without prejudice basis — To determine whether communication amounted to offer made without prejudice, its substance had to be considered — If it formed part of genuine settlement negotiations made without prejudice to rights of offeror and without acknowledging any liability, it was privileged and may only be disclosed with consent of both parties — No 'particular magic' in use of words 'open letter' to introduce communication — Letter was 'without prejudice'.

The plaintiffs were members of the first defendant, the Akarana Homeowners Association (Akarana). They had launched an action against Akarana in the Western

Cape High Court for declaratory orders relating to the validity of various iterations of the Akarana constitution. In the present application, the plaintiffs sought leave to amend their particulars of claim. Most importantly, for present purposes, they sought now to refer to the fact that they had attempted to resolve matters by way of an '*open letter'* of December 2022 addressed by their attorneys on their behalf to the first defendant's attorneys, and to annex such letter to the papers. The letter, in its second paragraph, described itself as '*an open letter, the purpose of which is to make proposals for the settlement of the matter* as contained in paragraph 12 below'. Therein, the plaintiffs expressed their willingness to withdraw their action on the basis that one of the three proposals — which did not accord with the original relief sought — was adopted and implemented.

The defendants opposed the amendments to the extent they related to this letter. They argued that the letter amounted to an offer of settlement made 'without prejudice', and accordingly could not be disclosed without their consent, which they had not provided. The plaintiffs, for their part, argued that, because the letter was expressed to be an 'open letter', it could not be implied that the offer was made on a without prejudice basis: their position was that, because the letter warned the defendants that the offer was an 'open' one, the plaintiffs were at liberty to disclose the contents of such offer.

Held, that, in order to determine whether a communication amounted to an offer made without prejudice, its substance had to be considered: if it formed part of genuine settlement negotiations made without prejudice to the rights of the offeror, and without acknowledging any liability, it was privileged and may only be disclosed with the consent of both parties. There was no 'particular magic' in the use of the words 'open letter' to introduce a communication. (See [15] and [23].)

Held, with regard to the above, that the letter of December 2022, based on its rationale and content, was 'without prejudice', and accordingly privileged, and could therefore not be disclosed without the defendants' consent, which had not been given (see [14], [16], [22] and [28]). And the plaintiffs could not impose an entitlement to place the letter before the court by calling it an 'open letter' (see [22]). The plaintiffs' argument was based on a flawed distinction between offers that the offeror could frame in a manner that indicated that such offers may be disclosed; and offers that were made without prejudice (which may not be disclosed). But, whether an offer was made without prejudice was not determined with reference to whether the offeror (expressly or impliedly) intended that offer to be disclosed, but rather with reference to whether it

was made without prejudice 'to the rights of the person making the offer if it should be refused'. (See [23] and [24].)

Held, in conclusion, that the plaintiffs should be granted leave to amend their particulars of claim in various respects. However, they were prohibited from referring, by way of the amendment, to the 'open letter'. Furthermore, any reference to such letter in the record had to be removed. (See [1] and [32].)

CAPE TOWN CITY v INDEPENDENT OUTDOOR MEDIA (PTY) LTD AND OTHERS 2024 (1) SA 309 (CC)

Constitutional law — Legislation — Validity — National Building Regulations and Building Standards Act 103 of 1977, s 29(8) — Requiring local authority to seek authorisation of Minister before promulgating bylaw relating to erection of building, failing which bylaw void — Provision unconstitutional — High Court's declaration of invalidity confirmed.

Local authority — Buildings — Bylaws relating to — Requirement of s 29(8) of Act that local authority intending to make bylaw relating to 'erection of a building' obtain Minister's approval before promulgating bylaw — Section unconstitutional — National Building Regulations and Building Standards Act 103 of 1977, s 29(8).

Applicant was the City of Cape Town, a municipality, and first respondent was IOM, a company that managed advertising space. Second respondent was the body corporate of the Overbeek Building (Overbeek) in Cape Town. Third respondent was the Minister of Trade, Industry and Competition, the Minister responsible for the National Building Regulations and Building Standards Act 103 of 1977.

Overbeek leased two billboards on its façade to IOM for display of advertising (IOM would manage such displays on behalf of third parties). The billboards were frames attached to the building's external wall. It was common cause that the billboards fell within the Act's definition of 'building'.

The City authorised IOM to use the billboards for five years (this in terms of its then bylaws). The authorisations lapsed, but IOM continued to display advertisements without authorisation. The City's enforcement efforts were unsuccessful, and it ultimately brought an application against IOM for removal of the billboards. Overbeek subsequently applied separately for a direction that IOM remove the advertisements on the basis that they were not authorised by the advertising bylaw, the Outdoor

Advertising and Signage By-law of 2001 (the bylaw). The two applications were consolidated.

IOM, in opposing the City's application, counter-applied for a declarator that the bylaw was void for non-compliance with s 29(8) of the Act on the ground that it was promulgated without the ministerial approval required by the section. The City's collateral defence, which it later displaced with a direct challenge, was that s 29(8) was constitutionally invalid.

The High Court held s 29(8) to be constitutionally invalid and ordered IOM to remove the advertisements (see [10] – [16]). It reasoned that —

- s 29(8) violated municipalities' legislative authority
- violated sphere of government mutual-respect provisions of the Constitution (for example, ss 44(1)*(e)* and *(g)*);
- gave the Minister an impermissible veto power;
- while Parliament could legislate on 'building regulations', these powers were limited to a 'monitoring, supervising and support function', and s 29(8) exceeded this function;
- the Minister's veto was contrary to the scheme of ss 43*(c)*, 151(4) and 160(2)*(a)* of the Constitution; and
- the Minister's veto displaced the courts' role as the arbiter of the validity of laws.

The High Court rejected the interpretive argument that billboards were not covered by s 29(8) (following Western Cape and Gauteng Local Division authority); and reasoned that, even if billboards did not fall within the definition of 'building', other bylaws that related to erection of buildings (ie those not concerned with billboards) would remain affected (see [15]). It further found that the doctrine of avoidance did not apply (see [15]).

The City then applied to the Constitutional Court for confirmation of the High Court's declaration that s 29(8) was constitutionally invalid. The Constitutional Court —

Held, that the order had to be confirmed (see [66]). This on the basis that s 29(8) —

- overshot the national government's supervisory role (see [48]);
- usurped municipalities' legislative powers (see [49]);
- encroached on functional areas of competence (sch 5 part B of the Constitution) which were the preserve of municipal councils (see [50]); and
- infringed the separation of powers by giving the Minister powers in respect of municipalities' legislative process (see [51]).

Held, further, as to the argument that 'building' could be read narrowly to exclude billboards, that even were this interpretation adopted, it would not prevent infringement of municipalities' powers to legislate on other matters concerning erection of buildings (it would impact all other bylaws relating to erection of buildings); infringement of the separation of powers; and encroachment on sch 5 part B functional areas in spheres other than advertising signage (see [53] – [55]).

As to remedy, s 29(8) was invalid from the date the Constitution came into effect, and this invalidity operated retrospectively from that date. However, given s 35(3)*(l)* of the Constitution, the retrospectivity would not apply to criminal offences in the bylaw (see [59], [63] – [64]).

The Constitutional Court accordingly confirmed the High Court's order that s 29(8) was unconstitutional and invaid (see [66]).

SOUTH AFRICAN CRIMINAL LAW REPORTS JANUARY 2024

S v PM 2024 (1) SACR 1 (NWM)

Review — Record — Transmission of — Duties of clerk of court and magistrate — Delay in transmission of matter concerning child offender — Court drawing attention to importance of Justice Codified Instructions: Clerks of the Criminal Court and Child Justice.

The regional court magistrate convicted the 16-year-old accused of murder and assault with intent to do grievous bodily harm. On 27 February 2019, after having found that there were substantial and compelling circumstances which permitted a lesser sentence than the statutory minimum, he sentenced him to eight years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the CPA). On 14 February 2023 the magistrate sent the matter on special review. This followed discussions with a colleague and an apparent realisation that the sentence exceeded his sentencing jurisdiction, and that the provisions of the Child Justice Act 75 of 2008 (the CJA) were applicable.

The judge who initially reviewed the matter noted that the record of proceedings was incomplete and queried the magistrate, wanting to know why the matter had only come up for discussion on 14 February 2023 if the accused had been sentenced on 27 February 2019. The judge also noted that the magistrate's minute did not address the

core issues of the absence of the transcribed proceedings for certain days, and incomplete record for others. There was no manuscript endorsement confirming whether the proceedings were digitally recorded or not. Further, the correspondence of the officers seized with the transcriptions and appeals was wholly inadequate, in that it was not in affidavit form. It also lacked specificity, in that the individual court dates alluded to were not addressed, and spoke to an annexure which was not attached. The response to the queries was only received some five months later.

The present court remarked that the tenor of the affidavit of the clerk of the court, in response to her role in the review query not reaching the magistrate, was demonstrative of a very nonchalant attitude to her duties as clerk of the court. There appeared to be no record-keeping by way of review registers, and consequently no follow-up process and overhead checking by the relevant head of office at the court. In the circumstances, the clerk was advised to remind herself of her duties or reacquaint herself with the Justice Codified Instructions: Clerks of the Criminal Court and Child Justice (the Code) issued by the Department of Justice and Constitutional Development. (See [9] – [10].)

A further issue was that both the magistrate and the clerk of the court failed in their duties by not appreciating that the matter was automatically reviewable based on the nature of the sentence imposed on a child offender. (See [12].) The court pointed out that the Code, which every clerk of court or assistant registrar ought to be fully acquainted with, set out the duties and responsibilities of such offices of the court in specific detail, and that there were no excuses for the failure to comply with such duties. In the present case it appeared that no one was prepared to take accountability for what had transpired. (See [29].)

The court noted that the review of the matter had in fact been delayed for four years since 2019, as it had to be transmitted as an automatic review immediately upon finalisation in terms of s 304(4) of the CPA. Furthermore, the matter was subject to automatic review in terms of s 85 of the CJA, in that a child was sentenced to imprisonment, irrespective of the duration of the sentence. It was incomprehensible at the level of the regional court that the magistrate was oblivious to the peremptory prescripts of the CJA. In addition, in making a finding that there were substantial and compelling circumstances to deviate from a prescribed minimum sentence, the magistrate seemed oblivious to the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997, which excluded persons under the age of 18 at the time of the

commission of an offence. (See [30] – [37].) The proceedings were accordingly not in accordance with justice, and the conviction and sentence had to be set aside.

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v ZUMA AND OTHERS
2024 (1) SACR 32 (GJ)

Prosecution — Private prosecution — When competent — Abuse of process — Nolle prosequi certificates — Accused's name not appearing in nolle prosequi certificates and no indication that mentioned in docket perused by Director of Public Prosecutions who issued certificate — Nolle prosequi certificates unlawful, invalid and unconstitutional and set aside — Private prosecution for ulterior purpose and also set aside.

Prosecution — Private prosecution — When competent — Abuse of process — Application to set aside — Locus standi — Private prosecution against President in personal capacity — President as organ of state also having direct interest in potential impact of impugned private prosecution on performance of duties — Accordingly, having locus standi and entitled to be represented by state attorney — State Attorneys Act 56 of 1957, s 3(1) and (3).

Prosecution — Private prosecution — When competent — Abuse of process — Application to set aside — Jurisdiction of civil court — High Court, sitting as full court and constituted in terms of s 14(1)*(a)* of Superior Courts Act 10 of 2013, having jurisdiction to review institution of private prosecution.

Prosecution — Private prosecution — When competent — Abuse of process — Application to set aside — Whether proceedings premature — While frontal challenge generally disallowed, no absolute general rule against it and available in certain circumstances.

Mr Zuma (the first respondent) issued two summonses against the President (the applicant) instituting a private prosecution charging him with being an accessory after the fact to criminal conduct, alternatively, defeating the course of justice. The applicant sought orders that the nolle prosequi certificates issued on 6 June and 21 November 2022 did not relate to a charge against him; that, to the extent they were interpreted to relate to a charge against him, the nolle prosequi certificates were unlawful, unconstitutional and invalid; that it was unlawful and an abuse of process that the first respondent had subjected him to two summons in respect of the same offence, for

which he had to appear in court on the same day; and that the purported private prosecution was pursued for an ulterior purpose, in breach of s 1*(c)* of the Constitution. The first respondent contended in limine that the applicant lacked locus standi; that a civil court lacked jurisdiction in the present matter which should have been pursued in the criminal court; and that the challenge was premature.

Held, as to *locus standi*, that the criminal charges were grounded on the applicant's failure, in his capacity as the President, to investigate the first respondent's complaints against the prosecutor in his (the first respondent's) pending criminal trial, namely Mr Downer SC, and other National Prosecuting Authority (the NPA) officials. Those were materially distinguishable from the allegations that grounded the charges against the first respondent: he did not allege that the charges against him related to the performance of his duty as the President. As an individual person occupying the office of the President, the applicant was the bearer of constitutional rights, and the impugned private prosecution threatened to breach those constitutional rights. In such circumstances he had standing as the President to protect those rights by having the impugned conduct, in the form of a private prosecution, declared unlawful and set aside. The President as an organ of state also had a direct interest in the potential impact of an impugned private prosecution which would result in undue interference with the performance of his duties. As such, the President, as applicant in the proceedings, and not Mr Ramaphosa in his personal capacity, was entitled to be represented by the state attorney in terms of s 3(1) and (3) of the State Attorneys Act 56 of 1957. (See [53] – [59].)

Held, as to *jurisdiction*, that, although the dispute between the parties had its genesis in criminal proceedings, the relief that the applicant sought was civil in nature. The court, sitting as a full court and constituted in terms of s 14(1)*(a)* of the Superior Courts Act 10 of 2013, had jurisdiction to review, declare unlawful, unconstitutional, and invalid, and set aside the nolle prosequi certificates, summons and private prosecution, and grant the final interdict on the terms the applicant sought. (See [70].)

Held, as to *whether the proceedings were premature*, that, while a frontal challenge was generally disallowed, there was no absolute general rule against it. When determining whether it should be allowed or not, the interests of justice were paramount, each case being determined on its facts. In such an enquiry the court was concerned with ensuring that the jurisdictional requirements for a private prosecution were met, the private prosecution was not frivolous or vexatious, or brought to harass

the accused, or achieve some other ulterior purpose, and that the frontal challenge was not merely dilatory. From the merits of the present application, it was clear that the frontal challenge had not been brought prematurely. It had been brought to enforce the individual rights of the accused person not to be subjected to a clearly unlawful private prosecution process, thus protecting and vindicating the rule of law. The points in limine accordingly had to be dismissed. (See [84] – [85].)

Held, as to *the merits*, that it clearly appeared from the 6 June nolle prosequi certificate that the Director of Public Prosecutions (the DPP) declined to prosecute Mr Downer SC for the specific offence referred to as the 'alleged crime' on the certificate, and had not considered the docket for the purpose of making a decision to prosecute the applicant, because he was not mentioned as a suspect in the docket. The DPP's signature on the certificate therefore did not constitute confirmation that she had seen the statement on which the charges against the applicant were based, and that she had declined to prosecute him at the instance of the state for the relevant charges. There was in the circumstances no basis for interpreting that certificate to be related to the applicant. (See [101] – [102] and [104] – [105].)

Held, in respect of the 21 November nolle prosequi certificate, that the certificate differed from the earlier certificate only in that it replaced Mr Downer SC's name as the suspect, with the words 'Any Person'. It was common cause that, as a result of an objection, the first respondent approached the DPP to amend the certificate, but the only amendment that the DPP was prepared to make was to change the words as indicated. There was no basis for the DPP to conjecture, from the first respondent's complaint affidavit, that the applicant could possibly be an accessory after the fact in relation to the charge brought against Mr Downer SC, or guilty of the offence of defeating the ends of justice. Nowhere did the record reflect that the first respondent had expressly stated that he had laid charges against the applicant, and that he requested a nolle prosequi certificate in relation to him. (See [106] – [109].)

Held, further, that, in the premises, the nolle prosequi certificates were unlawful, invalid and unconstitutional, and fell to be set aside. (See [113].)

Held, further, that, on the papers, the first respondent had instituted the private prosecution for an ulterior motive, and he therefore lacked a peculiar and substantial interest in the issue of private prosecution instituted against Mr Ramaphosa. The charges would not lead to a conviction, as they were grounded in conduct that did not constitute a criminal offence. The private prosecution accordingly constituted an abuse

of process and had to be declared unlawful, unconstitutional, invalid, and set aside. (See [149].)

S v KHOMO AND OTHERS 2024 (1) SACR 73 (FB)

Court — Proper function of — Utilisation of court time — Court not entitled to regard Friday afternoon as justifying earlier closing of court.

Prosecution — Prosecutor — Conduct of — Prosecutor complaining of actions of magistrate in unacceptable tone — Prosecutor's conduct unjustified and to be deprecated — Prosecutors obliged to treat other stakeholders, like the judiciary, with respect they deserved.

This matter came before the court by way of what was called a special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA). The accused had been granted bail. This was not to the satisfaction of the senior public prosecutor, and she wrote a letter to the judicial head of the court in which she cited alleged irregular procedures by the presiding magistrate. These included that the judicial officer had not followed the procedure prescribed by s 60(11)B of the CPA; that she had granted bail without giving the state the opportunity to address the court; that the judicial officer did not understand criminal procedure and had committed blunder after blunder; and that this case was just the tip of the iceberg.

Held, that s 304(4) was not applicable in the present case, as no sentence had been passed. (See [5].)

Held, further, from a cursory browse of the record it was clear that the magistrate had duly exercised her discretion in granting bail. The contention that the prosecutor had not been afforded an opportunity to address the court was not supported by the record. Accordingly, the submissions by the senior prosecutor, that the procedure was grossly irregular, lacked merit and there were no grounds for the matter to be reviewed. (See [13] – [14] and [26].)

The court noted, further, that the correct route for the state to have pursued the matter was by way of an appeal. High Courts should not be burdened with unmeritorious matters which were not properly brought before them, and judicial heads of court in the magistrates' courts should guard against disguised 'appeals' such as the present. (See [15].)

As to the tone of the letter by the senior prosecutor, that was regrettable. The community expected a certain level of professionalism from prosecutors, and treating other stakeholders, like the judiciary, with the respect that they deserved. She had no right to cast aspersions on the competency or otherwise of the magistrate in the manner she did, which was unbecoming and had to be rebuked. She ought to have used the proper procedures to obtain redress. The code of conduct for members of the National Prosecuting Authority imposed a positive obligation on prosecutors to conduct themselves professionally, with courtesy and respect for all, and in accordance with the law, and to recognise standards and ethics of their profession. (See [16] – [17].)

As to the magistrate's conduct, it appeared from the record that the magistrate thought that it was in order for the court to adjourn early on a Friday afternoon. The magistrate's remarks displayed little or no appreciation to utilise available court time optimally. Her hurriedness and impatience to the parties, informed by the fact that it was a Friday, was a cause for concern. It was generally accepted that court time was 09h00 – 16h00 on each court day, and her conduct was in breach of para 5.1(vi) of the norms and standards applicable to judicial officers issued by the Chief Justice. (See [19] – [22].)

The registrar was ordered to forward a copy of the judgment to the relevant Director of Public Prosecutions and chief magistrate, for the appropriate attention. (See [26].)

S v NAKUMBA 2024 (1) SACR 81 (WCC)

Robbery — Aggravating circumstances — What constitutes — Framing of charge — Charge reading 'used a screwdriver to threaten' without going far enough to encompass 'threat to inflict grievous bodily harm', as contemplated in s 1(1)*(b)*(iii) of Criminal Procedure Act 51 of 1977 — Court then conflating requirements of s 1(1)*(b)*(i) of Act (wielding of firearm or dangerous weapon) and s 1(1)*(b)*(iii) (threat to inflict grievous bodily harm) — Conviction and sentence altered on appeal.

The appellant was convicted, inter alia, of robbery with aggravating circumstances. The operative part of the charge relating to aggravating circumstances read that he 'used a screwdriver to threaten', without going far enough to encompass 'a threat to inflict grievous bodily harm' as contemplated in s 1(1)*(b)*(iii) of the Criminal Procedure Act 51 of 1977. The trial court held that 'it is common cause that the attempted robbery involved a screwdriver which was in the possession of accused 2. Although argument

was made . . . that this weapon was meant only to open the glass cabinets, there is no doubt . . . that the staff members at Trigg Jewellery Store were threatened by this weapon, which was clearly wielded by one of the accused.'

The court held that it was doubtful on this formulation of the charge, excluding as it did a threat to inflict grievous bodily harm, that the state could ever prove the existence of aggravating circumstances as contemplated in s 1(1)*(b)*(ii) of the Act. This was because not every threat would constitute aggravating circumstances, but only if such threat related to the infliction of grievous bodily harm. The trial court further conflated the requirements of s 1(1)*(b)*(i) (the wielding of a firearm or a dangerous weapon) and 1(1)*(b)(*iii) (the threat to inflict grievous bodily harm) of the Act. This appeared to be due to the manner in which the charge was framed and, possibly, how the matter was argued. (See [35][37].)

The court held that the evidence relating to the use of the screwdriver on the day of the attempted robbery, in any event, did not suggest that it was used to threaten either of the complainants. Although the appellant could be seen on the video footage chasing one of the complainants around the shop and at times holding her hand, all that time the screwdriver remained tucked away in his pants. That the trial court misdirected itself regarding the presence of aggravating circumstances warranted the court's interference with the sentence in respect of the count of robbery. (See [39].) The conviction and sentence were altered accordingly. (See [47].)

LETHENA AND OTHERS v MINISTER OF POLICE AND ANOTHER 2024 (1) SACR 92 (GJ)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40 (1)*(b)* — Lawfulness of — Whether police had authority to arrest where court had discretion to impose fine for offence as envisaged by sch 1 to Act.

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1)*(b)* — Whether valid and lawful arrest could be made on basis of confession by accomplice.

The crisp questions for determination by the court were (1) the police could arrest a person without a warrant of arrest for an offence where the court had a discretion to impose a sentence of six or more months' imprisonment without the option of a fine,

and (2) whether a valid and lawful arrest could be made on the basis of a confession by a co-accused.

As to the first question, the court rejected the plaintiff's argument that sch 1 to the Criminal Procedure Act 51 of 1977 had to construed that an offence was excluded from the schedule where the court had the discretion to impose a fine, which in turn meant that an arrest without a warrant was impermissible for such offence. Such an interpretation detracted from the legislature's intention to include the most serious of offences in respect of which an arrest without a warrant of arrest would be competent, which the offences in question indisputably were. The offence of the unlawful possession of a firearm, as envisaged by s 3 read with s 120(1) of the Firearms Control Act 60 of 2000, and on which the plaintiffs were arrested,* was therefore included in the category of offences set out in sch 1 in respect of which an arrest without a warrant in terms of s 40(1)*(b)* of the Act would be competent. (See [110] – [114].)

As to the second question, the court was critical of the decision of the full bench of the same division in *Ngwenya v Minister of Police* [2018] ZAGPJHC 610 (A3128/2017; 29 October 2018), that a valid and lawful arrest could not be made based on a confession by an accomplice, and that it had been rendered per incuriam. For, if that were so, the administration of justice might well be compromised in that members of the police would be prevented from arresting accomplices in confessions by other accomplices without a warrant. (See [143] – [146].) The plaintiffs' claims were ultimately dismissed.

ALL SOUTH AFRICAN LAW REPORTS JANUARY 2024

Emalahleni Local Municipality v Lehlaka Property Development (Pty) Ltd [2024] 1 All SA 1 (SCA)

Civil Procedure – Non-joinder – Test for whether there has been non-joinder is whether a party having a direct and substantial interest in the subject matter of the litigation may be prejudiced by not being joined.

Local Government – Municipality's supply of electricity – Termination of agreement by consumer – Duties of property owner to unlawful occupiers of property – Private property owner having no constitutional or other legal obligation to pay for electricity consumed by unlawful occupiers – Although unlawful occupiers might be affected by the termination of the consumer.

The respondent (“Lehlaka”) was a property development company tasked by a mine to hand over a mining village to the community after the mine had ceased operations on the associated land. The village and its infrastructure had catered for miners who had worked in the mine. The mine had supplied the village with electricity, which was initially obtained from Eskom directly, and later from the appellant municipality. Lehlaka took ownership of the various properties in the village and transferred most of the village property, save for eight properties which remained under its ownership. It was responsible for the payment of all municipal services in respect of those properties. After the eight properties were invaded by unlawful occupiers who utilised the electricity, Lehlaka fell into arrears with its electricity bills. Although that was resolved with the municipality, Lehlaka subsequently sought to terminate its consumer agreement with the municipality. It was advised to first inform the unlawful occupiers of its intention, and then put a plan in place to relocate them before disconnecting the electricity. Although the municipality did not dispute Lehlaka’s right to terminate the consumer agreement, it asserted that it had a discretion as to whether or not to accept the termination, which it refused to accept. Lehlaka approached the High Court seeking declaratory and consequential relief. The granting of such relief resulted in an appeal by the municipality.

Held – The issue of non-joinder of the unlawful occupiers on the property was significant. The test for whether there has been non-joinder is whether a party having a direct and substantial interest in the subject matter of the litigation may be prejudiced by not being joined.

There is no constitutional or other legal obligation on a private property owner to pay for electricity consumed by unlawful occupiers. There is no legislation that provides for that. The unlawful occupiers might be affected by the termination of the consumer agreement, but that did not amount to the legal interest required to be joined in the proceedings. Furthermore, even if the unlawful occupiers were to be joined, it was unclear what remedy they could seek from Lehlaka. Importantly, an order was not sought to terminate the electricity supply to the unlawful occupiers, but merely to terminate the consumer agreement Lehlaka had with the municipality. The municipality could decide to terminate the electricity supply to the unlawful occupiers, or not. Should it do so, it was only at that stage that the unlawful occupiers might have rights *vis-à-vis* the municipality, including the right to procedural fairness in the form of

a pre-termination notice. The matter being a purely contractual one, there was no question of joining the unlawful occupiers as there was no contractual privity between them and Lehlaka and/or the municipality. Lehlaka had no constitutional obligation towards the unlawful occupiers to provide electricity, and the unlawful occupiers had no corresponding legal right to be provided with electricity by Lehlaka free of charge in perpetuity, or whenever the municipality in its discretion decides to accept the termination. They, therefore, had no legal interest worthy of protection in the current litigation.

The municipality's decision to refuse to terminate the consumer agreement did not amount to administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000, and was consequently not susceptible to judicial review in terms of section 6 of that Act. As a consumer has a right to terminate its agreement on the requisite notice, there was no choice to be made by the municipality and thus no decision to be made, other than a mechanical one.

Confirming Lehlaka's entitlement to terminate the contract with the municipality, the court dismissed the appeal.

Forestry South Africa v Minister of Human Settlements, Water and Sanitation and others and a related matter [2024] 1 All SA 22 (SCA)

Environment – Water and forestry – Lawful water use – Stream flow reduction activity – Whether lawfulness is a requirement for the verification of an existing lawful use contemplated in section 32(1)(a)(ii) read with section 36(1) of the National Water Act 36 of 1998 – Interpretation of Act – Correctly interpreted, the Act permitted the continuation of existing lawful water use to those who had access to existing use prior to the commencement of the Act, subject to any existing conditions or obligations that attached to such use.

Forestry South Africa ("Forestry SA"), which represented the interests of timber growers in South Africa, brought an application in the High Court for declaratory relief aimed at a definitive interpretation of certain provisions of the National Water Act 36 of 1998 (the "Act"). The Court dismissed preliminary points which had been raised by the respondents (the "statutory authorities") and granted some of the declaratory relief sought by Forestry SA. It refused other declaratory relief, and made an order for costs against the statutory authorities. Forestry SA appealed against the declaratory relief

that was dismissed and the statutory authorities appealed against the dismissal of the relevant preliminary points and against the declaratory relief that was granted in favour of Forestry SA.

Part 3 of the Act defined and regulated existing lawful water uses. Among those uses was stream flow reduction activity ("flow activity"), which was defined in section 36 of the Act as "the use of land for afforestation which has been or is being established for commercial purposes". Forestry SA sought a declaratory order that water use that was flow activity was not subject to authorisation under any law which was in force immediately before the commencement of the Act (the "recognition issue"). Its second contention was that in respect of flow use, the conditions and obligations referenced in section 34 did not limit the planting of specific species of trees (the "species issue").

Held – The Act recognised that commercial forestry is an activity that uses water. It may affect stream flow, and this might warrant regulatory intervention. The foundational principles of the Act are that the government is the public trustee of the nation's water resources; the Minister must ensure that water resources are protected and used in a sustainable and equitable manner in the public interest; and, to this end, the Minister has the power to regulate the use, flow and control of all water in the Republic.

The declarator sought by Forestry SA involved the question of whether its members who engaged in commercial forestry as a flow activity were only recognised as an existing lawful water use under the Act on the basis that such use was authorised by a law in force immediately before the commencement of the Act. Forestry SA contended that there was no such requirement. The Court agreed. The Court held that correctly interpreted, the Act permitted the continuation of existing lawful water use to those who had access to existing use prior to the commencement of the Act, subject to any existing conditions or obligations that attached to such use. However, in terms of the Act, existing rights were subject to the extensive regulatory powers found in the Act. The Act distinguished between authorised use and flow activity. Flow activity was a distinct use right that rested upon the exercise of existing property rights under old order law. The definition and recognition of existing lawful use does not absolve a person who would continue to exercise their rights of existing lawful use to do so subject to the conditions and obligations that attached to those rights. The Act's

recognition of existing water use rights did not immunise those rights from the regulatory remit of the Act. The High Court should therefore have granted the declarator sought.

Section 34, relevant to the species issue, determined that an existing lawful water use may continue, subject to three kinds of authority. The species declarator was directed at the proper demarcation of the conditions and obligations to be found in section 34(1)(a) as they pertained to flow activity. As already stated, the conditions and obligations in section 34(1)(a) were those that attached to the rights of flow activity that were recognised by the Act at its commencement. Forestry SA should have been granted declaratory relief on this point too, although in a modified form.

Knoop NO and others v National Director of Public Prosecutions [2024] 1 All SA 50 (SCA)

Civil Procedure – Appeal – Preservation order – Appealability – Test for appealability posits that an appealable decision has three attributes – Decision must be final in effect and not susceptible of alteration by the court of first instance; definitive of the rights of the parties; and must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings – Legislative objective of insulating preservation orders from challenge pending the forfeiture process would be compromised if preservation orders were susceptible to appeal.

On application by the National Director of Public Prosecutions (the "NDPP"), in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998, the High Court granted a preservation of property order. The property identified in the preservation order was all shares held in Optimum Coal Mine ("OCM"), the business of OCM as defined in a business rescue plan adopted by its creditors, and all shares held in Optimum Coal Terminal ("OCT"). The shares in question were held by a company ("Tegeta") which, like OCM and OCT, was in business rescue. The appellants were variously, the appointed business rescue practitioners. They appealed against the High Court's granting of the preservation order. Despite the wide-ranging defences raised by the appellants on the merits, the appeal turned on the preliminary point of whether a preservation order granted under Chapter 6 of the Prevention of Organised Crime Act is appealable.

Held – The test for appealability posits that an appealable decision has three attributes: (a) it is final in effect and not susceptible of alteration by the court of first instance; (b) it is definitive of the rights of the parties; and (c) it has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

In contending that the order was appealable, the appellants first relied on the cases of *Phillips and others v National Director of Public Prosecutions* [2003] 4 All SA 16 (2003 (6) SA 447) (SCA) and *Singh v National Director of Public Prosecution* [2007] 3 All SA 510 (2007 (2) SACR 326) (SCA). However, those two cases were not determinative of the question of the appealability of a preservation of property order. The court highlighted the important distinction between restraint orders (as considered in *Phillips*) and preservation orders. The scheme established by the Act ensured that prior to the granting of a forfeiture order (but after the preservation order), people with an interest in the property would have sufficient opportunity to do what they deem necessary to protect their interests, should they wish to do so. The court pointed to the legislative objective of insulating preservation orders from challenge pending the forfeiture process because of the indispensable role that a preservation order played in securing proceeds and instrumentalities of crime. That objective would be compromised if preservation orders were susceptible to appeal. Consequently, unlike the situation pertaining to restraint orders under Chapter 5, preservation orders under Chapter 6 were not intended to be appealable. The requirements in the test for appealability were also not satisfied in this matter. The appeal was therefore not properly before the court and was struck from the roll.

National Credit Regulator v National Consumer Tribunal and others [2024] 1 All SA 67 (SCA)

Consumer – National Consumer Tribunal – Powers of Tribunal – Permitting of late filing of supplementary founding affidavit – Tribunal having no inherent jurisdiction to regulate its own process in the interests of justice, and lacked power to grant a party leave to file a further affidavit.

The National Credit Regulator (the "NCR") had applied to the National Consumer Tribunal to cancel the registration of the second and third respondents as credit providers. The application was opposed by the respondents, who filed their answering affidavit together with an application for condonation, which was granted by the

Tribunal. The NCR thereafter filed its replying affidavit. The NCR subsequently applied to the Tribunal for an order condoning a departure from the rules or procedures so as to permit the NCR to file a supplementary founding affidavit. The Tribunal found that it had the power, in terms of the National Credit Act 34 of 2005 (the "Act") and the Rules for the Conduct of Matters before the National Consumer Tribunal, to condone the filing of the supplementary founding affidavit by the NCR, on good cause shown. It granted condonation and permitted the respondents to file an answering affidavit in response to the supplementary affidavit within 15 days, and made no order as to costs (the decision). The respondents' application for the review and setting aside of the Tribunal's decision succeeded in the High Court, leading to the present appeal. The respondents' case was that, as a creature of statute, the Tribunal did not have the power to allow the filing of the supplementary affidavit.

Held – In the majority judgment that both the NCR and the Tribunal had misconceived the enquiry. The NCR was not, in truth, seeking condonation for its failure to comply with one of the Rules. It was not asking the Tribunal to alter a time limit prescribed by the rules or to condone its failure to comply with a rule. Instead, it was, properly construed, seeking the leave of the Tribunal to file a further affidavit. Rule 34, on which the Tribunal had relied, is headed "Condonation of late filing and non-compliance with rules". However, the court questioned how that rule could apply to an application such as the present. Under the guise of a condonation application, the NCR was seeking the permission of the Tribunal to do something that may well have fallen outside the scope and ambit of the rules, namely, the admission of a further affidavit. The Tribunal has no inherent jurisdiction to regulate its own process in the interests of justice.

In the circumstances, the order by the High Court remitting the matter to the Tribunal, albeit for different reasons, had to stand. The appeal was dismissed.

Afrirent Fleet (Pty) Ltd v Moqhaka Local Municipality and another
[2024] 1 All SA 85 (FB)

Constitutional and Administrative Law – Procurement – Award of tender – Review application – Lawfulness of award of tender – Failure to award B-BBEE points due to expired B-BBEE certificate – Municipality's decision not unfair or unlawful where tender advertisement set an objective criterium – If there was no valid certificate, there could not be points to be claimed.

In August 2020, the first respondent municipality invited interested prospective bidders to submit offers for a tender. The applicant ("Afrirent") and second respondent ("Moipone") were among those whose bids were found to be responsive. Although Afrirent's tender price was lower than that of Moipone, the municipality awarded the tender to Moipone.

Afrirent brought an application to review the municipality's decision. It sought to have the tender process declared unlawful and void *ab initio*, that the tender process be reviewed and the tender set aside, and it sought compensation for its alleged loss as a result of the awarding of the tender to Moipone. It complained that the municipality had acted unlawfully when it did not award it any B-BBEE points. It had a valid certificate at the date that it submitted its tender. That certificate expired on 12 September 2020. As a result of the expired certificate, Afrirent forfeited ten B-BBEE points. If it had received the points, it would have received the highest points which would have entitled it to be awarded the tender. On 9 October 2020, a B-BBEE verification certificate was issued to Afrirent with date of expiry on 8 October 2021. That entitled it to ten B-BBEE points if the evaluation committee accepted the certificate.

Held – The Constitution requires that administrators take decisions lawfully, reasonably and in a procedurally fair manner. To succeed in its relief, Afrirent had to show that the municipality exercised a discretion to reject the fresh certificate on any of the grounds in section 6 of the Promotion of Justice Act 3 of 2000. It relied on only one ground, which was that the decision was unlawful. However, on considering the parties' submissions, it could not be said that the bid evaluation committee had not exercised its discretion fairly. The advertisement set an objective criterium. If there was no valid certificate, there could not be points to be claimed. Afrirent's certificate had lapsed, and it did not have a valid certificate in the period between 12 September 2020 and 9 October 2020. Its status thus changed and it was not possible to determine whether it would again qualify.

In an *obiter* comment, the court pointed out that the matter raised the important issue that government may pay much higher amounts for the same services when costs are not carefully considered, where there were other tenderers who might have lower B-

BBEE points. The constitutional values of competitiveness and cost-efficiency should always be considered. The municipality in this matter might pay in excess of R12 million more for the same service just on a points difference. While taking no issue with the point system, the court stated that this was an aspect that needed further consideration in public procurement.

The application was dismissed.

Association of Meat Importers and Exporters v International Trade Administration Commission and others [2024] 1 All SA 106 (GP)

Constitutional and Administrative Law – Judicial review – Imposition of anti-dumping duties in poultry market – Amendment to tariffs – Review application challenging authority to effect decision and rationality of decision – Failure of decision-maker to take into account all important factors rendering decision reviewable.

Upon accepting a final report by the first respondent ("ITAC"), the Minister of Finance effected an amendment to the tariffs in Schedule 2 of the Customs and Excise Act 91 of 1964. The amendment gave effect to the continuation of the imposition of anti-dumping duties imposed on frozen bone-in portions of chicken originating in or imported from Germany, the Netherlands, and the United Kingdom. The original imposition on the product was effected on 25 February 2015. The recommendation to continue such imposition emanated from a review process (sunset review) initiated and finalised by ITAC.

ITAC was the investigating authority, statutorily mandated by the International Trade Administration Act 71 of 2002 to conduct investigations pertaining to the introduction, continuation, or amendment of anti-dumping duties for the Southern African Customs Union.

The applicant ("AMIE") was a voluntary association representing meat importers and exporters of South Africa, who were the parties liable for the payment of such anti-dumping duties. AMIE, an interested party in the sunset review, opposed the continuation of the imposed anti-dumping duties on the product. It brought an application for judicial review of the initiation of the sunset review, ITAC's final recommendation and the decisions of the Minister of Trade, Industry and Competition and the Minister of Finance in the administrative chain. AMIE brought its judicial review

by way of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively by way of a legality review. The subject matter of the review essentially concerned the manipulation of economic activity within the poultry industry by preventing Germany, the Netherlands, and the United Kingdom from dumping the product into South Africa's established poultry market without consequences. Dumping generally refers to the introduction of goods into the commerce of a country or its common customs area at an export price less than the normal value of those goods in the country of origin. According to the General Agreement on Tariffs and Trade of 1947 ("GATT"), to which South Africa was a signatory, dumping was to be condemned if it threatened material injury to an established industry in the territory of a contracting party or if it materially retarded the establishment of a domestic industry. In circumstances of harm or in the likelihood thereof, anti-dumping duties are permissibly raised on offending goods in terms of GATT and the International Trade Administration Act 71 of 2002.

Held – The tariff amendment was only effected when the Finance Minister was in agreement with both ITAC and the Trade Minister to continue the imposition and, at what proposed tariff. As a result, it was only the decision of the Finance Minister which stood to be reviewed. As the Finance Minister's function was executive in nature, it was reviewable in terms of the principle of legality and not the Promotion of Administrative Justice Act 3 of 2000.

AMIE's challenge to the impugned decision on the basis of lack of authority of the decision-maker was unsustainable. While the decision was effected by the Deputy Minister, there was a proper delegation by the Minister and the Deputy Minister performed the function (ministerial amendment) in terms of the correct provision.

For the exercise of the public power to meet the standard of rationality, it had to be rationally related to the purpose for which the power was given and not made arbitrarily. This is an objective test and is distinct from reasonableness, which involves a test of the decision itself. By contrast, review for rationality tests whether there is sufficient connection between the means chosen and the objective sought to be achieved. The Deputy Minister was found not to have taken into account important factors such as complaints including fraud, procedural irregularities during the ITAC investigation.

On that basis, the impugned decision was reviewed and set aside.

Dlhomo NO and others v Chalwa NO and another (Small Enterprise Development Agency (SEDA) as intervening applicant) [2024] 1 All SA 126 (KZP)

Trusts, Wills and Estates – Appointment of administrator over trust – Only Master of High Court has power to make such appointment – Removal of trustee warranted where trustee repeatedly acted in breach of fiduciary duties – Core function of trustee is to ensure that trust's aims and objectives as provided in the trust deed are achieved.

The applicants and the first respondent were appointed by the Master as trustees of the National Construction Incubator Trust ("NCI Trust"), a public benefit organisation mandated to develop and mentor emerging construction companies within Southern Africa. Its focal point was BBBEE initiatives designed to empower emerging construction companies to compete with older and more established companies in the open market. The Small Enterprise Development Agency ("SEDA") was the founder and main beneficiary of the trust.

In March 2023, conflict arose between the applicants and the first respondent, leading to an urgent application by the applicants for the first respondent's removal as a trustee due to acts of misconduct by her. In September 2023, SEDA filed, on notice of motion, an urgent application for leave to intervene in the proceedings and for it to be granted the right to present written submissions in advance of the hearing. It also sought substantive relief which included a prayer for the appointment of an administrator over the trust.

Held – The application by SEDA to have an interim administrator appointed had to fail as the court had no jurisdiction in the circumstances to make such an order. The power to appoint an administrator in such circumstances lies within the exclusive preserve of the Master of the High Court.

The Court turned to the matter of the removal of the first respondent as trustee. The first respondent was not just the CEO of the NCI Trust but was one of four trustees. The core function of the trustee is to ensure that the trust's aims and objectives as provided in the trust deed are achieved. Although she was the CEO, she was a trustee and bound by the duties that attached to being a trustee. She bore the fiduciary duties of a trustee even if she was in charge of the management of the trust

on a daily basis. Despite having to consult her fellow trustees, the first respondent had made unilateral decisions pertaining to the running of the NCI Trust, which directly impacted upon the trust's ability to optimally perform its functions in accordance with the demands imposed upon it by the trust deed. Chronicling the numerous respects in which the first respondent had acted in contravention of her fiduciary duties, the court concluded that she had conducted herself in a manner completely unbecoming a trustee. Her continuance in office would be detrimental and prejudicial to the welfare of the NCI Trust and all its beneficiaries. She was thus removed as a trustee.

Erasmus v Commissioner for South African Revenue Service [2024] 1 All SA 153 (WCC)

Tax – Income Tax – Decision of Commissioner of the South African Revenue Services – Tax avoidance scheme – Application for review – Requirement of exhausting internal remedies – Application for exemption – In terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000, a court may, on application, exempt a party from discharging that obligation in exceptional circumstances if it deems that to be in the interests of justice – Applicant failing to establish exceptional circumstances as there were adequate dispute resolution processes put in place by the Tax Administration Act 28 of 2011 for such a dispute.

The applicant was the former CEO of a well-known South-African company ("Pepkor") which operates a portfolio of retail chains. At one time or another relevant to these proceedings, he was a director and shareholder of Pepkor and numerous other companies, and a beneficiary of a trust which was also a shareholder in one of those companies ("Treemo"). In 2001, Treemo paid a capital distribution and cash distributions to the applicant and the trust, in their capacities as shareholders of Treemo. The cash distributions constituted the payment of dividends to the applicant and the trust, and in the ordinary course would have been subject to dividend tax at the rate of 15%. No such tax was levied or paid, because at the time Treemo had Secondary Tax on Companies ("STC") credits which were set off against the value of the distributions. In 2019, the applicant was requested to provide the respondent (the "Commissioner") with an explanation and documentation pertaining to the various transactions that had taken place between Treemo, the trust and himself, between the 2015 and 2018 tax years. He was subsequently asked to explain why neither the

capital distribution of R 167 million and the combined cash distributions of R 1,2 billion had been declared in his 2016 return. His explanation was that the non-disclosure had been the result of an oversight by his accountants, but that no tax consequences flowed therefrom as the payments were exempt from tax. The capital contribution was said to be exempt as it constituted a return of capital, and the other distributions were exempt because of the STC credits which were held by Treemo. After an audit, the Commissioner decided that the provisions of the "General Anti-Avoidance Rule" embodied in sections 80A-80L of the Income Tax Act 58 of 1962 were applicable, as it appeared that the applicant and the trust had, together with a number of other corporate entities, engaged in an impermissible tax avoidance scheme. The Commissioner contended that the parties had contrived to obtain and utilise STC credits to shield the applicant from an anticipated liability for dividend tax by way of an interlinking series of opaque transactions. An assessment of dividend tax was raised on the amounts received by the applicant as cash distributions from Treemo, together with an understatement penalty of 75% of the value thereof.

The applicant applied for the review and setting aside of the Commissioner's decision, on the basis that the assessment was irregular and fatally defective in that its factual basis was incorrect. The Commissioner raised a preliminary point that the application should not be entertained as the applicant had failed to exhaust his internal remedies. That led to the applicant seeking leave to amend his notice of motion, in order to seek an order exempting him from exhausting his internal remedies prior to the hearing of the review.

Held – In terms of section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000, which applied to the review application, no court shall review an administrative action unless any internal remedy which is provided for in any other law has first been exhausted. However, in terms of section 7(2)(c), a court may, on application, exempt a party from discharging that obligation in exceptional circumstances if it deems that to be in the interests of justice. Exceptional circumstances are not defined in the Act, and regard had to be had to the interpretation which has been given to the term in case law. It has been held that what needs to be shown is that the circumstances are out of the ordinary, such that they render it inappropriate to require that the applicant should first exhaust any alternative remedies that may be available to them and justify the intervention of the court, rather than of an alternative available forum. The

applicant failed to establish exceptional circumstances in this case, as there were adequate dispute resolution processes put in place by the Tax Administration Act 28 of 2011 for such a dispute.

The application for an order exempting the applicant from exhausting the internal remedies of objection and appeal was dismissed, and the application for review was struck from the roll.

JJVR v Taxing Master, High Court of South Africa (Western Cape Division) and another (Horowitz and South African Legal Practice Council as intervening parties) [2024] 1 All SA 178 (WCC)

Legal Practice –Taxation of bill of costs – Right of appearance – Taxing Master cannot permit a party to appear before her where such appearance is contrary to the provisions of the law, such as the Legal Practice Act 28 of 2014 – A costs consultant who is not a duly admitted legal practitioner is precluded from representing a party at a taxation in the company of an admitted practitioner.

Pursuant to various orders made in the course of divorce litigation between the applicant and the second respondent, the latter instructed her attorneys to procure the taxation of a series of costs orders granted in her favour. After the various bills of costs in respect of both interlocutory applications and the main action had been drawn, they were presented to the first respondent (the Taxing Master) for taxation. The applicant opposed the bills of costs and instructed his attorneys to take the necessary steps to attend the taxation. The attorneys procured the services of a third party who described herself as a “Cost Consultant”, to attend to the taxation. She prepared the necessary documentation to oppose the taxation and attended the first part of the taxation in the company of an attorney, where she proceeded to argue the taxation with negligible (if any) input from the attorney. The matter was not completed in one hearing, and at a subsequent hearing, the consultant was informed by the attending assistant Taxing Master that she would not be permitted to make any submissions and that the Taxing Master would hear only the admitted attorney. The respondent launched proceedings to review the decision not to permit the consultant to appear further at the taxation. The respondent’s case raised the question of whether it was legally permissible for a

person such as the costs consultant to represent him further at the pending taxation as long as there was a legal practitioner present on his behalf.

Held – Given that the review was brought under the Promotion of Administrative Justice Act 3 of 2000, it was incumbent on the respondent to establish that the impugned decision constituted administrative action as defined under section 1(a) of the Act. The Taxing Master's ruling did not constitute administrative action.

All Organs of State (and in the present circumstances that would include the Taxing Master in the discharge of her functions under the control of the court) are bound by the rule of law and the principle of legality. The Taxing Master thus cannot permit a party to appear before her where such appearance is contrary to the provisions of the law, in this case the Legal Practice Act 28 of 2014. A further obstacle for the respondent in this case was the fact that the consultant in question had been interdicted from holding herself out as a legal practitioner. Her uncontested past conduct demonstrated dishonesty, deceit and fraud. As such, to permit her to participate in a process in which the integrity associated with a legal practitioner was not subject to regulatory control would be anathema to the interests of the legal system and the broader society in general. Further, case authority established that a costs consultant who is not a duly admitted legal practitioner is precluded from representing a party at a taxation in the company of an admitted practitioner.

The review application was dismissed.

Khanyile v Director-General Province of KwaZulu-Natal and others [2024] 1 All SA 204 (KZP)

Constitutional and Administrative law – Access to information – Application in terms of section 78 of Promotion of Access to Information Act 2 of 2000 to compel disclosure of information to which access had been denied – Section 81(3) of Act places the burden of establishing that a refusal of a request complies with the provisions of the Act on the party invoking the exemption from disclosure – Respondents failing to discharge the burden of establishing that refusal of requests to information complied with the provisions of Promotion of Access to Information Act.

An application made to the first respondent (the “Director-General”), for access to information, was dismissed. The applicant’s appeal was then dismissed by the second respondent (the “Premier”). As the various respondent parties had made common cause with each other regarding the application, they were referred to collectively as “the respondents”.

The applicant was the former Head of the KwaZulu Natal Department of Social Development. The information at issue comprised the records of a meeting of the Provincial Executive Committee relating to an agenda item concerning the applicant. The respondents opposed the application relying on the following provisions in Chapter 4 of the Promotion of Access to Information Act 2 of 2000 (“PAIA”): section 7 which provides that the Act does not apply to records requested for criminal or civil proceedings after their commencement; section 44 which pertains to the records of public bodies containing opinions, advice, reports, or recommendations; section 23 which relates to records which cannot be found; and section 12 which exempts the records of Cabinet and its committees from disclosure under the Act.

Held – The issue in the application was whether the respondents had discharged the burden of establishing that their refusal of the requests complied with the provisions of PAIA. The Act was enacted to give effect to the right of access to information enshrined in section 32 of the Constitution, subject to justifiable limitations including the reasonable protection of privacy, and good governance. Its objects include the promotion of transparency, accountability and the effective governance of all public bodies.

The respondents were public bodies as defined in section 1 of PAIA. Requesters are entitled to the records of public bodies regardless of the reasons given for requesting access or the information officer’s belief as to what the requester’s reasons are for requesting access, provided only that they comply with the procedural requirements of PAIA. If the requester has complied with the relevant procedure, access can only be refused on grounds contemplated in Chapter 4. Consequently, if the requester has complied with PAIA and the information does not fall within one of the grounds of exclusion, there is no discretion on the part of the public body or the court to refuse access. Section 81(3) of the Act places the burden of establishing that a refusal of a request complies with the provisions of the Act on the party invoking the exemption

from disclosure. Applications in terms of section 78 are civil proceedings, so the evidentiary burden must be discharged on a balance of probabilities.

Assessing the soundness of the respondents' refusal of the applicant's request, the court noted that the applicant stated that she required the information to clear her name of spurious allegations. She explained that the documents might lead to a press release or a claim for declaratory relief but she could not make a decision on whether further court proceedings might be warranted until she had seen the documents. The respondents failed to discharge the burden to justify the refusal of access to the requested records, save for two items. The balance of the records had to be supplied.

Madiro v Madibeng Local Municipality and others and a related application [2024] 1 All SA 225 (GP)

Civil Procedure – Contempt of court – Applicant must prove that a court order was granted; that the court order was served on respondents or that respondents had knowledge thereof; and that the court order was not complied with – Once those requirements were established, a presumption would arise that the non-compliance was wilful and mala fide.

Civil Procedure – Rescission – Rule 42 of the Uniform Rules of Court makes provision for rescission of an order in several circumstances including where erroneously sought or erroneously granted in the absence of any party affected thereby – Where parties deliberately elected to be absent, such absence not falling within the scope of rule 42(1)(a) – Rescission of a default judgment under common law requiring applicant to show good or sufficient cause – Entails giving a reasonable and acceptable explanation for the default; showing that the application was made bona fide; and showing that on the merits the applicant had a bona fide defence which prima facie carried some prospect of success.

In the main application before the court, the applicant (Mr Madiro) approached the court for an order authorising warrants of arrest for the municipal manager and/or the administrator of the Madibeng Local Municipality and/or the municipal manager of the Bojanala Platinum District Municipality. In terms of an interdict obtained by Mr Madiro in 2018, the Madibeng Local Municipality and the Bojanala Platinum District Municipality were ordered to ensure that sewerage discharged on Mr Madiro's

property be cleared and removed and that the necessary actions be implemented to prevent any future discharge of sewerage onto the property. Mr Madiro also obtained an order in 2019, declaring the municipal managers of the two municipalities to be in contempt of court. In counter-applications, the Madibeng respondents applied to rescind and set aside both the interdict and contempt orders, and the Bojanala Platinum District Municipality applied for the interdict and contempt orders to be set aside as nullity.

Held – Rule 42 of the Uniform Rules of Court makes provision for the rescission of an order in several circumstances. The Madibeng respondents relied on rule 42(1)(a) which provides for rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby, either by the court *mero motu* or upon the application of any party affected by such an order or judgment. However, where the Madibeng respondents deliberately elected to be absent, their absence did not fall within the scope of rule 42(1)(a). Rescission of a default judgment may also be granted under the common law, with an applicant being required to show good or sufficient cause. That generally entails giving a reasonable and acceptable explanation for the default; showing that the application was made *bona fide*; and showing that on the merits the applicant had a *bona fide* defence which *prima facie* carried some prospect of success.

For relief based on contempt of court, Mr Madiro bore the onus to prove that a court order was granted; that the court order was served on the municipal managers or that the municipal managers had knowledge thereof; and that the court order was not complied with by them. If those requirements were established, a presumption would arise that the non-compliance was wilful and *mala fide*. Once Mr Madiro had satisfied the requirements to prove contempt, an evidentiary burden shifted to the respondent to show reasonable doubt. Should the respondent fail to discharge that burden, contempt would have been established.

Both sets of respondents were found not to have complied with the court order. That non-compliance was proven to be *mala fide*.

Turning to the issue of remedy, the court decided that incarceration was not appropriate where the current municipal managers were not the same as those against whom the order had been issued. The critical nature of Mr Madiro's situation required

the court's intervention to ensure that its orders were complied with. The order issued set out the steps to be taken by the respondents, and in the event of non-compliance, the recourse available to Mr Madiro.

South African Board for Sheriffs v Seboka and others [2024] 1 All SA 273 (WCC)

Civil Procedure – Appeal – Mootness – Contention that despite appeal having no practical effect, it should be entertained in interest of justice – Where allegations based on interest of justice were not supportable, no exception to doctrine of mootness could be found to exist leading to dismissal of appeals.

As the first and second respondents had since been removed from their respective posts as sheriffs, the order sought in this matter would have no practical effect. However, the appellant, the South African Board of Sheriffs, contended that the appeal was not moot as the following issues still required determination: (a) the appellant's powers to issue a fidelity fund certificate by way of legislative intervention; (b) the validity of the appointments of acting sheriff's by the third respondent without the confirmation of the appellant; (c) the appellant's apparent lack of power to discipline an acting sheriff after he vacates office; (d) the obligation to consult with the appellant and the heads of court before the appointment of acting sheriffs.

An acting sheriff shall not perform any functions assigned to a sheriff by law unless the acting sheriff is the holder of a relevant certificate, or the acting sheriff has paid the prescribed monetary contribution to the appellant. The appellant is required to issue a certificate to any such person, provided that it had been established that such person is suitable so to act.

The first respondent and second respondents had previously been appointed as sheriffs of the High Court. After they reached retirement age, they were no longer entitled to hold office as sheriff. However, their appointments as acting sheriffs were extended from time to time, and they were again issued certificates at the instance of the appellant. In terms of a new policy shift at the instance of the appellant, certificates would no longer be issued to retired sheriffs. The first and second respondents successfully challenged that decision in the court below, leading to the present appeal.

The first and second respondents argued that the appeal was moot.

Held – The fact that the first and second respondents had been removed from their respective posts as acting sheriffs meant that the appeals were moot. Our courts have over time developed some exceptions to the mootness doctrine. One of those exceptions concerns equitable mootness. Thus, although moot, some disputes may have the potential of recurrence. That exception must be applied sparingly and only in exceptional circumstances. The appellant's contention that the appeal was not moot and should be considered by the court was based on the interest of justice. However, the court found that the circumstances which led to the dispute involving the first and second respondents were unlikely to recur in the future. The appellant's assertion that it was hamstrung in performing its function was rejected. The Court questioned how setting aside the orders by the court below would assist the appellant in the future exercise of its statutory powers to regulate the sheriff's profession. The factual position and circumstances that prevailed almost a year prior and whatever influences those held for the lawfulness or otherwise of the previous court orders, should have no bearing on any future acting appointments that might be contemplated in consultation with the appellant. The appeals were dismissed on the ground of mootness.

Wamjay Holding Investments (Pty) Ltd v Auckland Park Theological Seminary [2024] 1 All SA 298 (GJ)

Property – Lease agreement – Cancellation of lease agreement – Claim for repayment of money paid under agreement – Prescription defence – Identification of when cause of action was perfected – When debt should be considered to have been immediately claimable as envisaged in section 12(1) of Prescription Act 68 of 1969 – Identification of stage at which lessee may sue lessor if lessee is dispossessed of the subject of the underlying agreement.

The applicant ("Wamjay") sued the respondent ("ATS") for repayment of the amount which it had paid to take over its rights under a long lease. The lessor had cancelled the lease on the ground that the contract had involved a *delectus personae*. Wamjay relied on the law of unjustified enrichment to recover the money which it had paid to ATS. Its case was that it had paid R6,5 million to ATS but did not have possession of the land which was the legal cause of the payment. It therefore contended that ATS had been unjustifiably enriched and should repay the R6,5 million to it. ATS, for its part, contended that any claim which Wamjay might have had, had prescribed. It also

denied that Wamjay had satisfied the requirements to succeed in a claim based on unjustified enrichment.

Held – In deciding on the prescription defence, that the question concerned the moment at which ATS's alleged debt to Wamjay was "immediately claimable" (ie when Wamjay's cause of action was perfected). As the estoppel argument and the contention that prescription was interrupted had to fail, the issue of prescription turned solely on that issue.

Section 12(3) of the Prescription Act 68 of 1969 provides that "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." Section 12(1) provides that prescription begins to run "as soon as the debt is due". The resolution of the dispute in this matter turned on when ATS's debt to Wamjay should be considered to have been immediately claimable (as envisaged by section 12(1)) and not on whether Wamjay knew, or ought to have known, all of the facts underlying its claim by a particular date (as envisaged by section 12(3)).

The precise question was, if either a buyer or a lessee is dispossessed of the subject of the underlying agreement, at what stage he may sue the seller or lessor. In the law of lease, there is a duty on a party such as ATS to defend its right to possess the property. That flowed from the warranty against eviction. The ultimate issue, when it comes to claims of innocent tenants under the law of lease, was whether the landlord had a plausible basis to defend the right of occupation. The law of lease obliged ATS to put up a vigorous defence to the lessor's claim to avoid breaching the warranty against eviction. The law obliged Wamjay to give ATS a chance to put up a defence before suing it. ATS did in fact defend the lessor's claim. Its debt to Wamjay could then not be due at any time before the *virilis defensio* failed and Wamjay was actually evicted. In the circumstances, ATS did not succeed in the prescription defence and adduced no facts to support a defence of non-enrichment. Wamjay was therefore entitled to the relief sought.

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