LEGAL NOTES VOL 12/2023

Compiled by: Matthew Klein

INDEX [1]

SOUTH AFRICAN LAW REPORTS DECEMBER 2023

SA CRIMINAL LAW REPORTS DECEMBER 2023

ALL SOUTH AFRICAN LAW REPORTS DECEMBER 2023

South African Law Reports December 2023

FUJITSU SERVICES CORE (PTY) LTD v SCHENKER SOUTH AFRICA (PTY) LTD 2023 (6) SA 327 (CC)

Contract — Legality — Contracts contrary to public policy — Specific instances — Provision exempting contracting party from liability for loss caused by deliberate wrongdoing of employee — Provision fair and reasonable — Equal bargaining power — Contractual provision not contrary to public policy.

The present matter concerned the validity of a contractual provision which sought to exempt a contracting party from liability for loss caused by the deliberate wrongdoing of an employee. The appellant, Fujitsu, was an importer of laptops, computers and accessories. The respondent, Schenker, conducted business as a warehouse operator, freight forwarder, logistics manager, distributor and forwarding agent. The parties from time to time did business together. In April 2012 Fujitsu imported a consignment of laptops from Germany. It engaged the services of Schenker to assist it with logistics, freight forwarding, warehousing and clearing. When the goods arrived at OR Tambo International Airport in June 2022, Schenker sent one of its employees,

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

one Mr Lerama, to collect them. Mr Lerama, however, decided to steal the goods, which prompted Fujitsu to institute a claim for damages against Schenker. The High Court granted Fujitsu's claim. The Supreme Court of Appeal, however, upheld Schenker's appeal. The present matter before the Constitutional Court concerned Fujitsu's application for leave to appeal.

The key issue in dispute was whether Schenker was exempted from liability for Fujitsu's loss arising from the theft, in the light of clause 17 of the South African Association of Freight Forwarders (SAAFF) trading terms and conditions, which had been incorporated in the agreement regulating the parties' dealings at all relevant times. Clause 17, headed 'GOODS REQUIRING SPECIAL ARRANGEMENTS', read:

'Except under special arrangements previously made in writing the Company *will not accept or deal with* bullion, coin, precious stones, jewellery, *valuables*, antiques, pictures, human remains, livestock or plants. Should the customer nevertheless deliver such goods to the Company or cause the Company to handle or deal with any such goods *otherwise than under special arrangements previously made in writing* the Company shall *incur no liability whatsoever in respect of such goods*, and in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods. A claim, if any, against the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 40 and 41.'

Schenker argued that it could incur no liability whatsoever in respect of the consignment delivered to it because the laptops were 'valuables' as intended in clause 17 and no special written arrangement had been made before they were delivered. Fujitsu submitted that clause 17 did not apply to cases of deliberate or intentional conduct such as theft. The exemption, Fujitsu argued, relying on various terms of the contract, would apply only to conduct in the course of the legitimate execution or performance of the contract.

Majority decision

The court held that leave to appeal should be granted because it was in the interests of justice to determine whether a contractual provision which sought to exempt a contracting party from liability for loss caused by the deliberate wrongdoing of an employee was contrary to public policy. (See [91], [95] and [96].) The correct interpretation of clause 17, though not a question of general public importance, had to be addressed in order to deal with the public policy issue (see [87], [88] and [96]).

The first issue the court dealt with was the meaning of clause 17. Properly interpreted, the court held, it meant that Schenker was not liable for Fujitsu's loss occasioned by the theft of its high-value goods: Once goods fell within the list of goods in the first sentence of clause 17, the court explained, they were subject to clause 17. It was common cause, the court noted, that the goods that Mr Lerama stole were of such a type. Under clause 17, the court asserted, if no special arrangements were made concerning such goods, and such goods were sent to Schenker, and Schenker dealt with such goods, Schenker would incur no liability whatsoever. A claim under clause 17 would arise only if Fujitsu had made prior special arrangements in writing with Schenker before sending the goods, which it had not done. That was the deal between the parties, as reflected in clause 17, and such deal had to be upheld unless there were valid reasons why it should not be upheld. (See [97], [99] and [102] – [107].) The court rejected Fujitsu's contention that clause 17 only applied in the execution of the agreement and that such clause could not assist Schenker because Mr Lerama was not executing the agreement when he stole Fujitsu's goods. Were such contention valid, it would mean clause 17 protected Schenker from liability when, for example, its employee acted in accordance with the contract, but not when he or she acted in breach of the contract. But exemption from liability was required for conduct that was in breach of the contract or law, and not for conduct that was in line with the contract and with the law. A clause like clause 17 was required for criminal and wrongful conduct instead of lawful and acceptable conduct. If Fujitsu's argument were valid, the court added, there would be very little value in exemption clauses such as clause 17. (See [111] – [114].)

The next question the court addressed was whether clause 17 was contrary to public policy (see [119]). The court held that it was not. There was nothing unfair or unreasonable about clause 17; on the contrary, it was fair to both parties (see [122]). There was also no suggestion that Fujitsu was in a weaker bargaining position than Schenker when the agreement was concluded (see [123]). The court pointed out that there was nothing contrary to public policy when two contracting parties agreed on the exemption of one party to the agreement from liability, and left it to the other party to take out an insurance policy, should they wish to do so (see [14]). The court added that Fujitsu had not demonstrated why it did not comply with clause 17 by making prior special arrangements with Schenker before it sent the goods of high value to Schenker. To make special arrangements would have been the easiest thing for

Fujitsu to do, but it did not make any, and had offered no reason or explanation as to why it did not do so. (See [123].)

The court concluded that Schenker was not liable for Fujitsu's loss under clause 17, having failed to make any special arrangements in writing with it. Accordingly, the SCA's decision was correct, and the appeal had to fail (see [142]).

Minority decision

The minority also held that it would have granted leave to appeal, but on the basis of both the anterior question of the proper interpretation of clause 17, which it found, contrary to the majority, to be a legal question of general public importance, as well as the question of whether clause 17, on Schenker's interpretation, was contra public policy. (See [28] – [34] and [40] – [41].)

The minority was of the view that clause 17, interpreted, inter alia, in its proper context, giving effect to a sensible, businesslike meaning, as well as having regard to the principle that contractual clauses which limited liability had to be interpreted narrowly, did not apply to conduct falling outside the lawful performance of the contract, such as theft (see [46], [49], [51], [52], [55], [56], [61], [64] and [67]). It held, however, that, should it be found that clause 17 did cover intentional conduct such as theft, it offended public policy: It was unfair and unreasonable to customers such as Fujitsu. It clearly served to prevent Fujitsu from obtaining judicial redress which would otherwise be available to it. Enforcing an agreement in such circumstances would deprive the contracting party (Fujitsu) of its basic contractual rights and offend the principles of good faith and fairness. An act of theft, the minority held, could never be said to be in furtherance of a legally valid and enforceable contract. Any contract which envisioned, tolerated or provided for the furtherance of theft would be contrary to the doctrine of legality and public policy. (See [78] – [79].)

DE GRAAF NO v CS 2023 (6) SA 374 (SCA)

Marriage — Divorce — Proprietary consequences — Pension benefits — Non-member spouse's share — Interpretation and enforceability of clauses of consent paper concluded by ex-spouses governing ex-wife's entitlement to ex-husband's pension fund with his previous employer and his retirement annuity — Whether impugned clauses should be interpreted to mean that ex-husband agreed to pay to ex-wife half of his entire retirement benefits — Half of his net entitlement must be interpreted to mean that ex-husband agreed to pay to ex-wife 50% of one-third of

amount which ex-husband could have commuted, less tax, as at date of withdrawal from pension fund — Divorce Act 70 of 1979, s 7(7) and s 7(8); Pension Funds Act 24 of 1956, s 37D(4)*(d).*

This case concerned an appeal to the Supreme Court of Appeal against a High Court judgment which had granted payment in favour of the respondent, Ms CS, against the appellant, Mr De Graaf, the executor of the estate of her late ex-husband (the deceased) — in her claim in respect of his pension interests and retirement annuity (RA).

In terms of the pension fund rules, the deceased was not entitled to take his entire retirement benefit in cash. On retirement the deceased had the option of commuting a maximum of one-third of the pension benefit in cash. The remaining two-thirds of the pension benefit was used to purchase the RA.

At issue was the interpretation and enforceability of clause 9.4 of the consent paper concluded by Ms CS and the deceased upon their divorce, governing CS's entitlement to his pension fund with his previous employer and his RA. It provided as follows:

'In addition . . . *Plaintiff specifically agrees and undertakes to pay an additional amount to Defendant at the time of his withdrawal from the fund, so as to ensure that she receives one-half of the nett entitlement to him as at date of withdrawal from the fund, (ie, nett of all taxes)*. Such additional amount shall be paid in the same manner as Plaintiff receives his payments from the Pension Fund.'

It was her case, which the High Court accepted as correct, that she was entitled to 50% of the deceased's entire pension and RA benefits, accumulated during their marriage as well as after the divorce, to the date of the deceased's exit from the pension fund and the RA, respectively. The executor argued that the respondent was not entitled to any portion of the deceased's pension interest; this on the basis that the impugned clauses were vague, unenforceable and void.

Held

The wording of the impugned clauses of the consent paper was not vague but clear and unambiguous. It was intended to ensure that she received 'one-half of the nett entitlement to him as at date of withdrawal from the fund'. The additional amount in both instances would become due at date of the deceased's withdrawal from the funds, which could only mean at the time when he exited the funds. In terms of the pension fund rules, the maximum net entitlement to the deceased was one-third of the total net

amount (after taxation). The deceased was not entitled to the full pension benefit as at date of exiting the fund. The two-thirds of the pension benefit which was used to purchase the RA, did not fall into the deceased's estate. The respondent was accordingly entitled to only 50% of one-third of the net pension benefit that the deceased was entitled to. In the result, the appeal would be upheld to the extent set out in the order. (See [17] – [20], [23] and [28].)

ETHEKWINI MUNICIPALITY v CMC DI RAVENNA SC 2023 (6) SA 384 (SCA)

Contract — Enforcement — Public policy — Specific performance — Payment of debt due under arbitration award — Payment dispute between contractants A and B — Arbitrator directing A to pay B — Contractual provision that arbitrator's award stands until revised by court — A instituting pending proceedings for revision — B in financial distress with prospect of bankruptcy — B making arbitrator's award order of court and obtaining High Court order for payment against A — A resisting order on basis that if it paid, there was risk of non-recovery of its money should it obtain revision of arbitrator's award in its favour — Contention that putting it to risk so unfair as to be contrary to public policy.

Specific performance — When granted — Whether order to pay money debt is order for specific performance.

Appellant (the employer) contracted respondent (the contractor, an Italian company) to construct roadworks. The contractor cancelled the contract because the employer was not making payments. The contract allowed for disputes to be submitted to an arbitrator, which the contractor did. The arbitrator ruled that the employer was indebted to the contractor and had to pay, which the employer failed to do. The contractor then applied to the High Court for orders making the arbitrator's findings an order of court and directing the employer to pay the debts set out in the award. During the High Court proceedings, the contractor, finding itself under increasing financial strain, became subject to a legal process in Italy in which an arrangement with its creditors was planned, but bankruptcy was also possible.

The High Court made the arbitrator's award an order of court and gave leave to appeal to the Supreme Court of Appeal. The employer accepted that the arbitrator's findings stood, but might in due course be revised. The contract gave both parties the right to

disagree with the arbitrator's findings and to refer the matter to court, but provided that the arbitrator's decision would be binding until revised by the court.

The employer duly commenced separate proceedings in the High Court to have the arbitrator's decision revised. It argued that the contractor was under severe financial strain and facing bankruptcy, and that if it paid and then succeeded in overturning the arbitrator's awards, it might not get its money back. It further argued that the High Court had had a discretion not to grant the money judgments because doing so would amount to an order for specific performance that was in the circumstances contrary to public policy. The proper exercise of the High Court's discretion would have been to dismiss the contractor's application because the contract had been terminated and monetary awards would not ensure cash flow for the contractor to continue work, and because it was not appropriate to put scarce public funds at risk.

Held

If a court found that enforcement of an obligation would be contrary to public policy, no question of a discretion arose: a court could not enforce an obligation if it would be contrary to public policy to do so (see [15]).

As to the employer's contention that it was inappropriate for scarce public funds to be put at risk, that if public entities were, in a contractual context, privileged at the expense of private parties, then private parties might be expected to charge a premium to public entities to cover this risk, which would not be in the public interest. (See [17] and [19].)

The facts pointed away from the proposition that putting the employer at risk would be so unfair as to conflict with public policy. Considerations were the equal bargaining position of the parties; the constitutional values involved supported enforcement of contracts; the inequity of favouring the employer over the contractor; the employer's bare reliance on unreasonableness, where more was required to engage public policy; and the expectation that the employer would have foreseen the possibility of a counterparty's insolvency, which was an ordinary commercial risk. The argument that the High Court's order offended public policy therefore failed. (See [21] – [22].)

As to whether there had been an order for specific performance, that, while an order to perform a contractual obligation (including to pay money) might in ordinary language indicate an order for specific performance, this was not how the term was used in South African law, which viewed an order of specific performance as an order to perform a contractual obligation to *do* something. There was, indeed, authority that courts had a discretion to grant or refuse orders for specific performance in this sense,

but the discretion only arose when the claim for the performance of an act was made *and* an alternative of damages was available. There was no authority for a discretion to refuse an order to pay a debt. (See [25] – [27] and [35].)

Moreover, the essence of a discretion was a choice between alternatives, and, ergo, there could be no discretion if there were no alternatives. A claim for payment of money had no alternative, whereas a claim for performance of an act did — namely damages. (See [38].) Accordingly, an order to pay a contractual debt was not a discretionary remedy (see [38] and [41]).

Appeal dismissed (see [43]).

LOUIS NO AND OTHERS v FENWICK NO AND OTHERS 2023 (6) SA 400 (SCA)

Company — Business rescue — Business rescue plan — Vote — Rejection — Responses — Binding offer to purchase voting interests of opponents of plan — Where such offer rejected — Whether s 153(4) applicable in such circumstances — Interpretation — Provision only applicable where binding offer accepted — Companies Act 71 of 2008, ss 153(1)*(b)*(ii) and 153(4).

Section 152 of the Companies Act 71 of 2008 deals with the consideration of a business rescue plan by a company. In terms of ss (3)*(a)* thereof, if a proposed business rescue plan is *not preliminarily approved* at the meeting convened by the business rescue practitioner for such purpose, s 153 becomes applicable. Section 153(1)*(a)* provides that, if the plan is rejected at the meeting, the business rescue practitioner may either seek approval from the holders of voting interests to prepare a revised plan, or apply to the court for an order setting aside the result of the vote on the grounds that it was inappropriate. Should the practitioner fail to act in this regard, any affected person present at the meeting is presented with three options: as per s 153(1)*(b)*(i)*(aa)*, they may seek a vote of approval to prepare and publish a revised plan; as per s 153(1)*(b)*(i)*(bb)*, they may apply to set aside the result of the vote as inappropriate; or, as per s 153(1)*(b)*(ii) — and which is relevant here — they may offer to acquire, by means of a 'binding offer', the voting interests of any persons who opposed the adoption of the plan. If an affected person 'makes' a binding offer contemplated above, *in terms of s 153(4)* the business rescue practitioner must, as per para *(a)*, adjourn the meeting for no more than five business days to afford the practitioner an opportunity to make any necessary revisions to the plan to reflect 'the

results of the offer'; and, as per para *(b)*, set a date for the resumption of the meeting at which the provisions of s 152 would apply afresh. The present appeal to the Supreme Court of Appeal concerned the interpretation of s 153(4), that is, whether it applied *where the binding offer was rejected*. The appellants argued that it did. The respondents argued that it *only catered* for the scenario where a binding offer had been *accepted*.

The background to this matter was that the second respondent, Louis Group SA (Pty) Ltd, was placed under supervision. The business rescue practitioner, the first respondent, convened a meeting for the consideration of the proposed business rescue plan. The creditors rejected it. As a result, the Alan Louis Trust, of which the appellants were the trustees, signified their intention, in terms of s 153(1)*(b)*(ii), to make offers to purchase the voting interests of creditors of the company. After the meeting was adjourned the offers were rejected. Consequently, the business rescue practitioner, at a reconvened meeting, declared that, in light of the rejection of the offers, the adjourned meeting was closed, and that he would apply for the conversion of the business rescue proceedings into winding-up proceedings. That prompted the appellants to insist that the practitioner was still obliged to proceed under s 153(4). He declined to do so. So, the appellants launched an urgent application in the Western Cape High Court for, inter alia, an order directing the business rescue practitioner to resume the meeting and apply the provisions of s 153(4) to it. The High Court dismissed the appellants' application. The appellants were granted leave to appeal to the Supreme Court of Appeal. The position of the appellants there was that, once a binding offer made in terms of s 153(1)*(b)*(ii) had been rejected, the business rescue practitioner had to proceed in terms of s 153(4)*(a)* and *(b)*. This brought into effect s 152(3)*(a)*, which operated to provide the relevant affected persons with a further right to call for the approval of a revised plan in terms of s 153(1)*(b)*(i)*(aa)* at a resumed meeting, or to apply for the setting-aside of the original vote under s 153(1)*(b)*(i)*(bb)*. (The appellants acknowledged that it would make no sense that there be a further vote on the rejected plan under s 152.). As noted above, the respondents argued that s 153(4) was of no application.

Held, that in circumstances where a binding offer under s 153(1)*(b)*(ii) *was accepted*, the voting interests of a creditor were altered. Such alteration in the voting interests of a creditor sensibly and logically necessitated the resumption of the meeting, at which the provisions of ss 152 and 153 would apply afresh, to allow for a second vote to take

place. However, it could not have been the legislature's intention that a party whose voting interests *remained unaltered* as a result of *the rejection of a binding offer* would be entitled to a further opportunity to call for the approval of a revised plan, or to apply to the court to set aside the original vote. Such an interpretation simply would not amount to a sensible and businesslike interpretation of s 153(4), and would cause a never-ending loop. Accordingly, it had to be concluded that s 153(4) of the Act only found application when a binding offer in terms of s 153(1)*(b)*(ii) *was accepted*. (See [12] – [15].) Once a business rescue plan had been put to a vote and rejected as contemplated in s 152 of the Act, and the parties had unsuccessfully exhausted their remedies as provided for in s 153(1)*(b)*, business rescue came to an end (see [14]). *Held*, accordingly, that the appeal had to be dismissed (see [16]).

NSS OBO AS v MEC FOR HEALTH, EASTERN CAPE PROVINCE 2023 (6) SA 408 (SCA)

Evidence — Expert evidence — Admissions on record — Statement by party that opponent's expert opinion was admitted and would be handed in as evidence — Not 'fact admitted' on record of proceedings as contemplated in s 15 of Civil Proceedings Evidence Act — Decision on expert evidence one for court to make — Party cannot bind court to opinion of opponent's expert — Court entitled to make findings contrary to opinions of experts — Civil Proceedings Evidence Act 25 of 1965, s 15.

The applicant was the mother and natural guardian of her minor son. She sued the respondent in the High Court for compensation on behalf of the child, who sustained perinatal asphyxia during labour, which rendered him a cerebral-palsy quadriplegic. As plaintiff in the High Court, the applicant gave notice in terms of the Uniform Rules of Court of her intention to present expert evidence by two specialist paediatric radiologists. According to the reports by both experts, the child suffered an acute profound HII, a severe deficient supply of oxygen that *occurred suddenly* and progressed. (See [3] – [6].)

In many cases experts have opined that the onset of an acute profound HII was often undetectable, so that claimants have been non-suited for failing to prove causation. The respondent (defendant in the High Court) sought to turn these opinions to its advantage, informing the plaintiff's attorney by letter that both the expert summaries were 'admitted', and that they could 'be handed in as evidence in the case'. The plaintiff

however next delivered a supplementary report by one of the experts, Dr Alheit, in which he stated that that an acute profound HII could ensue without an obstetric sentinel event. The State Attorney (representing the defendant) responded, again by letter, placing on record that 'the nature of injury being sudden, unexpected and without warning, [was] admitted', and warned that 'any attempt by plaintiff to disprove the above nature and description of the injury, mentioned whether through evidence or otherwise, [would] be objected to by defendant in terms of the provisions of section 15(1) of the Civil Proceedings Evidence Act 25 of 1965'. This section, under the heading 'Admissions on record', provides that '(i)t shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings'.

During the trial, Dr Alheit confirmed his supplementary report in evidence. When, after postponement, the trial resumed, the defendant — as foreshadowed in its earlier warning — applied for an order that the plaintiff was not entitled to present evidence to disprove the 'facts' set out in the reports that had been admitted in terms of s 15. The High Court granted the application, making the order sought. The order rendered Dr Alheit's evidence on the supplementary report inadmissible. It further precluded the plaintiff from adducing any expert medical evidence in support of Dr Alheit's opinion. (See [9] – [12].)

The present case concerned the plaintiff's appeal to the Supreme Court of Appeal with the High Court's leave.

Held

The defendant was seeking to eliminate all evidence which suggested that the HII which the child sustained was not sudden or without warning. Fundamentally, the order irreparably prejudiced the child, who was permanently disabled and whose best interests were paramount. This by preventing the plaintiff from placing evidence which might be held to be decisive before the trial court in support of her claim. Solely for this reason, the order was appealable. A further reason rendering the order appealable was that the administration of justice has been impeded in that the High Court had foreclosed its own assessment of Dr Alheit's evidence. (See [14], [16].)

Section 15 dealt only with a 'fact admitted on the record of . . . proceedings' — a wider concept than pleadings. The purported admission, made in correspondence, was not admitted on the record of proceedings before us and accordingly was not a formal admission as contemplated in s 15 of the Act. It found no application in this case.

There was simply no formal admission by the plaintiff on the record that the child suffered an acute profound HII, which could be regarded as conclusive proof of that fact. The purported admission must be seen for what it was: an opportunistic attempt by the defendant to utilise to its own advantage the opinions by the plaintiff's expert witnesses — untested by cross-examination — under the guise of a 'fact' admitted by the defendant in terms of s 15. (See [18], [21], [23].)

What was more, a party could not bind the court to the opinion of her opponent's expert witness by merely conceding that that opinion was correct. The decision on the opinion was for the court to make, not the witness. For this reason, it was open to the judge to make findings contrary to the opinions of experts, even where their reports were agreed. It was a settled principle that in order to evaluate expert evidence, the court must be apprised of and analyse the process of reasoning which led to the expert's conclusion, including the premises from which that reasoning proceeded. The court must be satisfied that the opinion was based on facts and that the expert had reached a defensible conclusion on the matter. The purported admission by the defendant could not, and did not, absolve the court from this duty. Even if experts agreed on a matter within their joint expertise, that was merely part of the total body of evidence. The court must still assess the joint opinion and decide whether to accept it. (See [24] – [26].)

The defendant's proposition would mean that, when a party admitted the correctness of an expert's opinion and the reasons for it — as the defendant purported to do in this case — both the opposing party and the court would be bound by that admission. Despite being the arbiter of the dispute, the court may then not reject the expert's opinion, even if it were wholly indefensible. Such an approach was untenable, and at odds with the rule that experts had a principal and overriding duty to the court, not to the party by whom they are retained, to contribute to the just determination of disputes. The appeal would accordingly be upheld. (See [26] – [27].)

SHEPSTONE & WYLIE ATTORNEYS v DE WITT AND OTHERS NNO 2023 (6) SA 419 (SCA)

Trust — Trust deed — Interpretation — Unanimity requirement for trustees' decisions — Proper notice of meeting given to all three trustees of trust — Two trustees attending and adopting resolution that trust would bind itself as surety — Whether giving of proper notice satisfying requirement of unanimity.

Mr Volker, Mrs Volker and Mr De Witt were trustees of a trust. Mrs Volker instituted divorce proceedings against Mr Volker and appellant firm were Mrs Volker's representatives. The firm asked Mrs Volker for security for its costs (Mrs Volker was impecunious). To this end, Mrs Volker gave notice of a trustees meeting to consider, inter alia, a resolution that the trust sign a suretyship in favour of appellant for Mrs Volker's legal costs. Mr Volker received notice of the meeting but did not attend. At the meeting Mrs Volker and Mr De Witt passed the resolution and signed the suretyship.

Mrs Volker's fees were unsatisfied, and appellant sued the trust based on the suretyship for the sums owed. The trust's defence was that the suretyship was invalid. This because the resolution to sign the suretyship that it was based on was invalid. The resolution was invalid as (1) the trust deed required unanimity for trustee decisions and there had not been; and (2) the deed required the trustees to conduct the trust 'for the benefit of the trust' and the resolution to sign the suretyship was not for its benefit. The High Court upheld the defence, found that the resolution was invalid, and thus the suretyship too. The Supreme Court of Appeal granted leave to the appellant to appeal to it. (See [1] and [8].)

Appellant's case was that once proper notice was given, the requirement that the trustees act jointly was satisfied. It relied on Western Cape and KwaZulu-Natal authority for this proposition (see [16]).

Held, by the majority (per Mbatha JA; Zondi JA and Mocumie JA concurring), that there was SCA authority that even if a deed provided for majority decision-making, where the resolution would bind the trust externally, the resolution had to be signed by all the trustees, including absent or dissenting trustees. In this case it was signed only by Mrs Volker and Mr De Witt (see [25]).

Moreover, the deed explicitly required the trustees to act unanimously and for the benefit of the trust. Here the trustees had not acted unanimously and undertaking the suretyship was not to its benefit (see [27] and [30] – [31]).

The authority relied on was also distinguishable: it applied only to situations where a deed allowed for majority decision-making, where here the deed required unanimity (see [27] and [30]).

Appeal dismissed (see [33]).

For the minority, Kathree-Setiloane AJA (Weiner JA concurring) would have decided the matter on the more limited basis of the deed's requiring the trustees to exercise

their powers unanimously, where here there was no unanimity. In their view it was unnecessary to enter on the question of whether the suretyship was for the benefit of the trust (see [34], [43] and [45]). They would have distinguished the authority appellant relied on the basis that the deed in each case contained a majority-decision clause, not a unanimity requirement as here (see [36]).

TSHWANE METROPOLITAN MUNICIPALITY v VRESTHENA (PTY) LTD AND OTHERS 2023 (6) SA 434 (SCA)

Appeal — Execution — Order for execution pending appeal — Appeal against — Whether more than one appeal permissible — Meaning of expression 'next highest court' — Only one appeal to next-highest court available to aggrieved party — Decision of such court (next-highest) final, and could not be appealed further — Superior Courts Act 10 of 2013, s 18(4)(ii).

In terms of s 18(1) of the Superior Courts Act 10 of 2013, a decision that is subject to an application for leave to appeal, or to an appeal, is suspended pending the decision of the application or appeal, *unless the court orders otherwise under s 18(3).* Under s 18(4)(ii), if a court does order otherwise, the aggrieved party has an automatic right of appeal to 'the next highest court'.

In the present matter the first respondent had obtained an order against the appellant municipality (the Municipality) before a single judge of the High Court (Pretoria) for the restoration of electricity. The Municipality sought leave to appeal (and was later granted it), after which the first respondent sought, and obtained, an order under s 18(3) of the SCA Act to put into immediate effect the order obtained against the Municipality. That prompted the Municipality to exercise its automatic right of appeal under s 18(4)(ii), by filing an appeal to the full court of the High Court. The full court rejected the appeal. *Subsequently, the Municipality sought to appeal again under s 18(4)*, and accordingly filed a notice of appeal with the Supreme Court of Appeal. Whether the Municipality was afforded multiple opportunities under s 18(4) to exercise an automatic right of appeal formed the focus of the SCA's attention.

The SCA held that, under s 18(4)(ii) of the SC Act, once a court had ordered to be put into immediate operation a decision that was subject of an application for leave to appeal or of an appeal, only 'one appeal', to the 'next highest court', was available to the aggrieved party. The decision of such court (next-highest) was final, and could not

be appealed further. Such an interpretation was in line with the clear wording used in the provision, as well as its context and purposes.

The SCA accordingly held that the notice of appeal delivered by the Municipality was irregular and void, and no proper appeal served before the SCA. It struck the matter from the roll.

BNS NOMINEES (RF) (PTY) LTD AND ANOTHER v ARROWHEAD PROPERTIES LTD AND OTHERS (2) 2023 (6) SA 441 (GJ)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Court application for determination of 'fair value' for shares — Determination of fair value by court — Discretion of court to allow reasonable rate of interest on amount payable to each dissenting shareholder — Nature of court's discretion — Manner of determining what is 'reasonable rate' of interest — Need for applicant to provide factual basis in founding papers for 'reasonable rate of interest' contended for — Companies Act 71 of 2008, s 164(15)*(c)*(iii)*(bb)*.

Section 164(15)*(c)*(iii)*(bb)* of the Companies Act 71 of 2008 provides that a court, on an application to it by dissenting shareholders seeking to exercise their appraisal rights under s 164(14), may, in addition to determining the fair value in respect of the shares of all dissenting shareholders, 'in its discretion' 'allow a *reasonable rate of interest* on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment'. This matter revolves around the question of how a court must determine such a 'reasonable rate of interest'.

The present matter is a sequel to the previously decided case of *BNS Nominees (RF) (Pty) Ltd and Another v Arrowhead Properties Ltd and Another* 2023 (1) SA 478 (GJ) (the main claim). The applicants in that matter (and here) were shareholders of the first respondent, Arrowhead Properties. They had dissented in respect of a resolution passed at a meeting of Arrowhead's shareholders, to approve a scheme of arrangement in terms of which Arrowhead had merged with another company, Gemgrow. In the main claim the applicants had sought to exercise their appraisal rights under s 164 of the Companies Act 71 of 2008, applying to court to appoint one or more appraisers to assist it in determining fair value in respect of their shares in Arrowhead, and arguing that a fair value for the shares equated to their 'net asset value', of R6,90. The court, however, found, agreeing with Arrowhead's view,

that *R3,75 represented fair value*, and accordingly dismissed the applicants' claim, and upheld Arrowhead's conditional counterclaim for declaratory relief. In the present matter, the same court that had dealt with the main claim was approached by the parties, under Uniform Rule 42(1)*(b)*, to now address the question of 'interest': the applicants in their notice of motion did make a claim for an award of interest, yet the question received scant attention during argument in the main matter, with the result that the court omitted to deal with it. The court in this application found that it was indeed appropriate to now consider the question.

The applicants in their notice of motion in respect of their main claim asked the court to 'allow a reasonable rate of interest on the amount payable', effectively repeating the words of the Act, and in their founding affidavit submitted that the 'prescribed rate of interest' would be the most appropriate rate of interest to be applied. However, the applicants departed from this stance in their heads of argument in the present matter, now contending, relying partly on the application of the so-called 'capital asset pricing model' (CAPM), that the court should award interest on the determined fair value of the applicants' shares *at the rate of 15,5%, compounded monthly*. Payment of traditional interest at the prescribed rate, the applicants argued, would under-compensate dissenting shareholders for their loss, and over-compensate the company for holding the money during this period. Arrowhead resisted this approach, arguing that, based on it, interest would have disproportionate value to the capital amount awarded on the shares as fair value.

The court held that a textual analysis of s 164(15) revealed the following: For one thing, it was apparent that the award of interest by a court was discretionary. Furthermore, the qualifier that the rate of interest was to be 'reasonable' suggested that the court was not bound to follow the traditional legal rate. It suggested that evidence may be led on this point, that the standard was objective, but the rest was left unstated. (See [28].)

The court went on to hold that what constituted a reasonable interest rate was a question of fact which had to be pleaded. Use of a particular pricing model, whether it was CAPM or some other, was a matter for expert evidence requiring both motivation and calculation. (See [31].) With this in mind, the court held that applicants needed to make out in their founding papers what reasonable rate of interest they were contending for, and the factual basis for doing so. They did this only in respect of the

prescribed rate, the court held; not for what they now contended for in their heads. This latter claim, therefore, could not be sustained. (See [32].)

The position the court adopted was to grant an award of interest in line with the case made out in the founding affidavit, that is, interest on the determined fair value of their shares, for the period from 23 September 2019 to the date of payment, payable at the prescribed legal rate of interest applicable during such time period, without compounding. (See [34] – [36].)

ELECTROLUX SOUTH AFRICA (PTY) LTD v RENTEK CONSULTING (PTY) LTD 2023 (6) SA 452 (WCC)

Company — Winding-up — Application — On ground that company insolvent and unable to pay its debts as intended in s 344*(f)* of old Companies Act — Discretion of court at final stage — Rule that court will refuse application as constituting abuse of process where company bona fide disputing debt on reasonable grounds (Badenhorst rule) — Applicable, together with Plascon-Evans rule, at final stage in case of factual dispute on respondent's indebtedness — Where acknowledgement of debt signed by company, court will liquidate in absence of evidence to support contention that debt in question genuinely disputed — Companies Act 61 of 1973, s 345(1)*(a)* read with s 344*(f)*.

Lis pendens — Whether requirements met — Action for recovery of liquidated sum of money and subsequent liquidation application in respect of same underlying debt — Same parties and same amount — Nature of proceedings (cause of action), however, fundamentally different — Plea of lis pendens not available.

Under a 2019 agreement between the parties, the applicant sold and delivered goods to the respondent, who failed to pay as agreed and subsequently admitted both its liability and its inability to pay the R3,4 million due. When the respondent again failed to pay in terms of an acknowledgement of debt signed in May 2021, the applicant delivered a letter of demand in terms of s 345(1)*(a)*(i) of the (old) Companies Act 61 of 1973 (the Act). The respondent failed to comply. In June 2021 the applicant issued a combined summons in which it cited the respondent as second defendant and in which it claimed R3,4 million (the action proceedings). The action proceedings were still pending when the applicant, relying on the respondent's inability to pay its debts as they fell due, instituted the present application for its liquidation.

The respondent opposed the liquidation application on two grounds. The first, raised as a point in limine, was that the defence of *lis alibi pendens* was applicable because the pending action proceedings involved the same cause of action between the same parties in respect of the same subject-matter (the sum of R3,4 million). The second was that the respondent was in any event not commercially insolvent because it was disputing the debt on bona fide grounds.

Under s 344 of the Act a company could be wound up if it was unable to pay its debts, which inability would under s 345(1)*(a)*(i) be assumed if the company failed to comply with a letter of demand The applicant argued that the defence of *lis alibi pendens* was not sustainable because the cause of action (the failure to comply with a letter of demand versus failure to settle a monetary debt) and the relief sought (liquidation versus payment) were different.

Held

Since it was not in dispute that the litigation in the action proceedings and the liquidation application related to the same parties and that the amount claimed in the action proceedings was the same amount that remained unpaid under the statutory demand, the issue before court was whether the two legal proceedings instituted were based on the same cause of action. The answer was no, because the set of facts that gave rise to an enforceable claim for the recovery of a liquidated debt from the respondent differed from the set of facts that gave rise to an enforceable claim for the liquidation of the respondent.

In addition, *the nature of the relief sought* was different: the enforcement of a creditor's claim against a debtor versus the takeover of a debtor's insolvent estate for the benefit of all its creditors, not only the one who brought the application. Therefore, the present respondent could not rely on the plea of *lis alibi pendens*. (See [12], [15], [18].)

As to whether the respondent legitimately disputed the debt due to the applicant, that an unpaid creditor had a right, *ex debito justitiae*, to a winding-up order against a company that had not discharged its debts: Commercial insolvency (the inability to pay debts when they fell due) was sufficient for the court to liquidate under s 344*(f)* of the Act. Under the *Badenhorst* rule, [*] a creditor would not have standing to sue if the whole debt was bona fide disputed on reasonable grounds. But then the question was whether *Badenhorst* applied at the final stage of litigation proceedings, or only at the provisional stage, there being authority for the view that it was the *Plascon-Evans* test [†] that applied at the final stage if material facts were in dispute. Since it

was, however, clear that the *Badenhorst* rule and the *Plascon-Evans* test served different purposes (the one being concerned with substantive requirements for establishing a defence and the other with procedure and evidence) and the Supreme Court of Appeal had confirmed that *Badenhorst* did apply at the final stage, it would appear that *both* tests applied where there was a factual dispute about a respondent's indebtedness in an application for a final liquidation order. (See [24] – [27].)
The respondent did not seriously dispute its indebtedness, as evidenced by the acknowledgement of debt it signed. While it did allude to documents in which it allegedly queried the amounts claimed by the applicant, details were not placed before court. Its failure to offer supporting evidence to substantiate its position reflected negatively on the bona fides of its defence. In the absence of a genuinely disputed debt, the conclusion was ineluctable that the respondent was commercially insolvent. Accordingly, it would be placed under final liquidation. (See [30] – [35].)

HLAZI v BUFFALO CITY METRO MUNICIPALITY AND ANOTHER 2023 (6) SA 464 (ECEL)

Administrative law — Administrative action — Review — Duty to exhaust internal remedies before instituting legal proceedings — While courts would not hesitate to uphold constitutional values and fairness, litigants to exhaust internal remedies before litigating — Courts not to be used as credit-control agents by parties who fail to use mechanisms available to dispute charges levied by state arm.
Local authority — Municipality — Debt-collection policy — 80/20 policy — 80% of money used to purchase prepaid electricity offset against arrears allegedly due to municipality and 20% provided as electricity to consumer — Constitutionality — Procedural fairness — Failure to give 14 days' written notice.
Practice — Conduct of litigation — Failure to adhere to rules and practice directions — Court noting that current culture of non-compliance constituting abuse of process that would no longer be tolerated — Adverse costs order called for.

The applicants sought the invalidation of the respondent municipality's so-called '80/20' debt-collection policy and the refund of deductions made under it. Under the 80/20 policy, the municipality would offset 80% of the sum a consumer used to purchase prepaid electricity against any arrears the consumer owed the municipality.

The present applications were but two of a plethora of similar applications on the court rolls.

The court found that the 80/20 policy was duly adopted by the municipal council in compliance with the Constitution and applicable legislation, and hence lawful. The court pointed out, however, the municipality was bound to implement the policy in line with the constitutional guarantee of procedural fairness, which meant it had to give the consumer the 14-day written notice required by its credit policy before it implemented debt-collection procedures. Implementation without notice would infringe the consumer's right to fair administrative action, and be unlawful and subject to reversal. (See [33] – [34], [52], [58] – [60], [63] – [65], [86].)

The court noted that, while it was obliged to ensure the fair implementation of the 80/20 policy, it was not a credit-control agent and that the applicants should before instituting litigation have invoked the various internal mechanisms available for the querying or disputing of municipal charges. Given this, there had been no need for the court's intervention. (See [52] – [53], [56] – [57] and [66] – [69].)

The court lamented the poor quality of, and prolixity in, the papers before it, and noted with approval recent criticism of legal practitioners' culture of non-compliance with court rules and practice directions, which constituted an abuse of process that would no longer be tolerated. The applicants, though successful, would, for their non-compliance with the rules, be denied costs. (See [70] – [73] and [77] – [82].)

The court accordingly made an order (i) directing the municipality to deliver to the applicants a 14-day written notice of its intention to restrict the purchase of electricity by the applicants; (ii) directing the municipality to uplift any restriction on the purchase of electrical supply to the applicants' premises; and (iii) interdicting the municipality from a restriction on the purchase of electrical supply to the applicants' premises pending the provision and expiration of the written 14-day notice. (See [86].)

I-CAT INTERNATIONAL CONSULTING (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2023 (6) SA 477 (GP)

Revenue — Assessment — Limitations on periods for issuance of assessments — Application for reduced assessment made more than three-year limitation after assessment — Whether limitation not applicable to extent that it was necessary to give

effect to resolution of dispute under ch 9 of TAA — Tax Administration Act 28 of 2011, ss 93, 99(2)*(d)*(i), ch 9.

The taxpayer (I-Cat) claimed an amount of R17 170 433 — being the whole amount paid to a third party as compensation for royalties and accounted for by I-Cat as cost of stock — in the 2014 year of assessment, as an allowable deduction against its taxable income under s 11*(a)* of the Income Tax Act 58 of 1962 (the ITA). The South African Revenue Service (Sars) disallowed the deduction on the basis that the amount was capital in nature and not an expense, and issued an additional assessment in respect of the 2014 year of assessment.
I-Cat's objection against this additional assessment disallowed, it next appealed to the Tax Court (in March 2017). There, Sars raised as an alternative defence that only R7 997 633,05 of the claimed deduction was paid during the 2014 year and the balance thereof in the 2015 year of assessment, so that only that amount could be claimed for the 2014 year of assessment (see [80]). On 28 October 2019, the date for the hearing of the 2014 income tax appeal, I-Cat and Sars settled the 2014 income tax appeal in respect of the 2014 year of assessment. The settlement agreement (in para 6) specifically provided that 'issues pertaining to the deductibility of the amount [claimed], as it may relate to the 2015 year of assessment . . . fall outside of the issues in this tax appeal. The appellant may endeavour to address such issues in terms of section 93 of the ITA'. Section 93 provides that Sars 'may make a reduced assessment if . . . necessary to give effect to a settlement under Part F of Chapter 9'.
The Tax Court thereafter (on the same day) made the settlement agreement between the parties an order of court. Pursuant to the settlement and the consent order, I-Cat on 13 December 2019 filed an application for a reduced assessment in respect of the 2015 year of assessment in terms of s 93 of the Tax Administration Act 28 of 2011 (the TAA). Absent any decision in respect of the 2015 reduced assessment request, I-Cat proceeded to institute review proceedings in the High Court on 14 October 2020. Sars reacted by refusing the request (on 26 January 2021). This on the basis that the 2015 assessment of I-Cat has become prescribed in terms of s 99(1) of the TAA. (This section provides that '(a)n assessment may not be made in terms of this Chapter . . . *(a)* three years after the date of assessment of an original assessment by SARS; . . .'.) The said review proceedings were subsequently removed from the roll by agreement.

I-Cat next launched the present review application, to set aside Sars' 26 January 2021 decision refusing the reduced assessment request iro its 2015 assessment. I-Cat had filed its income tax return for the 2015 year of assessment on 26 February 2016 — in the period between the objection and its disallowance — beyond the three-year period of s 99(1). The decisive issue was whether s 99(2)*(d)*(i) of the TAA was applicable and relevant to the evidence presented to court. (This section provides that s 99(1) does 'not apply to the extent that . . . it is necessary to give effect to . . . the resolution of the dispute under chapter 9'.)

Held

At the time the compromise was entered between the parties, Sars knew that the balance of the amount was incurred in 2015 — that was their alternative defence. What was clear from para 6 of the consent order was that both parties agreed that I-Cat would have the right to approach Sars again in respect of the 2015 year of assessment. It was in the parties' contemplation that as part of their compromise, I-Cat could approach Sars in terms of s 93 of the TAA in respect of the 2015 year of assessment with an application for a reduced assessment. It was part and parcel of their resolution of the dispute which they dealt with under ch 9. This would, however, only be possible if the three-year prescription period as provided for in s 99(1) was not applicable. In view thereof that it was necessary to give effect to the resolution of the dispute under ch 9 as contained in the consent order, the 3-year prescription period as provided in s 99(1) could not apply. (See [92], [98] – [99].)

In the premises, Sars' finding that the 2015 assessment had prescribed in terms of s 99 of the TAA and therefor that I-Cat's application for a reduced assessment would not be entertained, would be reviewed and set aside. (See [102].)

JK v SWARTZ AND OTHERS 2023 (6) SA 500 (GJ)

Marriage — Divorce — Proprietary consequences — Pension benefits — Powers of receiver/liquidator in relation to pension funds in divorce — Without specific authorising powers as to pension fund benefits in order, receiver/liquidator having no locus standi to liquidate pension fund assets on behalf of joint estate — Pension Funds Act 24 of 1956, s 37D(4)*(d)*; Divorce Act 70 of 1979, ss 7(7) and (8).

The applicant, Ms JK, and the second respondent, Mr K, were married to each other in community of property and divorced in February 2016. The first respondent, Mr

Swartz, was the court-appointed receiver and liquidator of the joint estate upon their divorce. His agreed powers did not include litigating on behalf of the estate. The final liquidation and distribution account and the accompanying report were drawn on the basis that R988 764 was to be paid to a pension fund nominated by the applicant from Mr K's pension fund. Although she initially accepted this, the applicant subsequently notified Mr Swarts that she wanted the outstanding amount paid into her bank account and not a pension fund.

Following a protracted dispute (see [34] – [50]), the applicant obtained a High Court order against Mr Swartz, inter alia, directing him to 'realise' assets of the joint estate from which to pay her R940 498,31 in cash (see [51] – [52]). At that time some distributions had been made and the only asset left in the joint estate was a pension fund interest held in the name of Mr K, which in terms of s 7(8) of the Divorce Act 70 of 1979, read with s 37D(1)*(d)* of the Pension Funds Act 24 of 1956, was deemed to be part of Mr K's assets and thus the joint estate (see [54]). Mr Swartz, who found it impossible to comply with the order as it related to the realisation of pension fund benefits, unsuccessfully appealed against it (see [56] – [60]).

It was this order that formed the basis of the present application, for an order declaring Mr Swartz to be in contempt of court (and for related relief against him and his attorney, the third respondent). Mr Swartz denied that he was in wilful default, repeating that compliance with the order was impossible.

Under s 7(7) of the Divorce Act 70 of 1979 'the pension interest of a party shall . . . be deemed to be part of his assets', and s 7(8) provides that 'a court granting a decree of divorce in respect of a member of such a fund, may make an order that . . . any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefit accrues in respect of another member'. The applicant claimed Mr Swartz failed in his duty to approach the court for ss 7(7) and 7(8) relief (see [67]). This raised the issue whether, under the legislative scheme created by ss 7(7) and (8), a receiver and liquidator in a divorce would have the locus standi to seek on his own behalf relief under the Divorce Act.

Held

The order sought to be enforced was incompetent on two bases: first, Mr Swartz's powers as receiver under the divorce order did not allow him to bring proceedings on behalf of either of the divorced spouses or the estate, save for the purposes of

vindicating assets; and second, Mr Swartz did not have the locus standi to obtain relief under ss 7(7) and 7(8) of the Divorce Act. A pension benefit was not, in fact, an asset and could not be dealt with under Mr Swartz's general powers of receivership and liquidation as set out in the divorce order. In a divorce, the only manner in which one spouse could become a beneficiary under the pension fund of the other spouse was by means of the machinery in ss 7(7) and 7(8) of the Divorce Act (see [68], [72]).

The receiver/liquidator had no general power to liquidate the pension fund benefit of a member spouse. A third party such as a receiver or liquidator would not have the locus standi to bring an application under s 7, unless this was specifically catered for in the empowering order, on the basis that he was given the power to act on behalf of the spouses or either of them. The legislation did not afford him such standing in his own right. (See [81].)

A party could not be wilfully in contempt of an order that was impossible of compliance. The order sought to be enforced proceeded from the false premise that there were assets that were capable of being liquidated to meet the applicant's demands. The court order against the liquidator/receiver, implicating the liquidation of the pension fund interest, was impossible to comply with. As such, no contempt of court proven. The application would accordingly be dismissed. (See [63], [85], [104] – [105].)

KRUTH v RALL AND OTHERS 2023 (6) SA 514 (WCC)

Trust — Beneficiary — Contingent beneficiary — Rights — Proper administration of trust — Financial records — Though contingent beneficiary having vested interest in proper administration of trust, he or she must, if intending to establish impropriety in motion proceedings, make allegations of maladministration in line with established authorities — No automatic right to trust's financial records on mere whiff of impropriety or on grounds of minor errors or irregularities — To establish right to financial information.

The applicant (KK), a capital and income beneficiary of the EW Family Trust (the Trust), applied in the Western Cape High Court for an order compelling the trustees to supply her with documents and information regarding the Trust's financial position and its decisions on the distribution of benefits. The Trust was discretionary, and the trustees argued that, since they had not exercised their discretion to distribute the

benefits, KK's rights had not yet vested, with the result that, as contingent beneficiary, she had no right to the detailed information sought. Though KK had received some payments from the Trust, the trustees argued that they were informal loans. KK argued that they were distributions and that she had therefore acquired vested rights. She argued in addition that even a contingent beneficiary was entitled to demand information about the state of investment of the trust property, and about his or her share in it. For their part, trustees had a duty to disclose to a beneficiary information needed to enable him or her to form a judgment as to whether the proposed course of action for which their consent was required or sought was in their interest.

KK in her papers alluded to various irregularities, such as that no financial statements had been prepared for the Trust for several years; that one of the trustees had used trust assets for his personal benefit; and that the trustees took decisions about distributions without informing the beneficiaries. The trustees, while disputing most of KK's allegations, had supplied some of the requested information by the time the matter was argued.

Held

Under the common law, contingent trust beneficiaries had a vested interest in the proper administration of a trust, and trustees owed them a corresponding fiduciary duty. Trustees were bound to disclose to them the information they required to decide whether a proposed course of action for which their consent was needed was in their interest. (See [25] – [27].)

Motion proceedings were not designed to resolve disputes of fact, and a motion court faced with them was entitled to dismiss the matter, especially where the applicant ought to have realised that a serious dispute of fact was bound to develop. Here, the dispute about the payments to KK was not appropriate for resolution on the probabilities, and would be decided in favour of the trustees, with the result that KK failed to show that she received the alleged distributions. In addition, the trust deed indicated that beneficiaries were entitled to receive payments before they received their shares of the capital assets, and with there being no evidence that the trustees had determined a vesting date, the beneficiaries' right to receive income or capital from the trust had not yet vested. (See [39] – [41] and [43] – [45].)

While even contingent beneficiaries had a vested interest in the proper administration of a trust, it had been incumbent on KK to be sufficiently specific in her allegations of maladministration to make out a case for it in line with established authorities. Since

she failed to do so, she could not rely on them for the relief claimed. In addition, a trust beneficiary, like a shareholder, did not have an automatic right to receive copies of the trust's financial statements on a mere whiff of impropriety or on the ground of relatively minor errors or irregularities. KK's accusations of unfair treatment amounting to discrimination were, moreover, not established. To reach the conclusion sought by her, the court would have to compare the circumstances of each beneficiary to assess whether his or her treatment was justified. In casu the court did not have sufficient information to reach such a conclusion. (See [49] – [50], [58].)
KK was accordingly not entitled to the documents and information requested in the prayers. The requests for information were extensive and unreasonably wide-ranging and, most importantly, no legal right to it had been established. Application dismissed. (See [66], [72].)

LETSOALE v ROAD ACCIDENT FUND AND OTHER SIMILAR MATTERS 2023 (6) SA 533 (GP)

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — Requirements — Need for some risk to attach to client's case — In circumstances where contingency fee agreement entered into where success virtually guaranteed, such that no, or only negligible, contingency existed, such agreement would be contrary to Act, invalid and amount to abuse.
Motor vehicle accident — Compensation — Claim against Road Accident Fund — Costs — Settled matters — Practice of plaintiff, where entitled to costs on party and party scale on basis of settlement agreement, presenting draft order to court which not simply containing prayer for payment of costs on party and party scale, but also included prayers specifying costs the RAF had to pay, despite there being no agreement between parties in respect of those items — Interference with unfettered discretion of taxing master — Such orders not allowed.

This matter concerned four motor-vehicle accident claims against the Road Accident Fund. One of them was an application for default judgment; the others settled matters. In respect of all of them, contingency fee agreements (CFAs) had been entered into between the plaintiffs and their legal representatives. For the court hearing these matters, the CFAs raised difficulties. For one, the court was concerned that the CFA regime was being abused, in particular that there existed no 'risk for' the practitioner

taking on those matters, rendering inappropriate a CFA. Further, it was concerned that the costs order sought operated to fetter the discretion of the taxing master.

After asking the practitioners representing the plaintiff in each matter to address it on their concerns, the court found as follows:

As to the CFA regime

The court noted that, in terms of s 2(1) of the Contingency Fees Act 66 of 1997, 'a legal practitioner may, if in his or her opinion there were reasonable prospects that his or her client may be successful in proceedings, enter into [a CFA] . . .' with such client (see [6]). What the Act envisioned, the court explained, was that the legal practitioner charge their normal fee, but that, as an added incentive, *to compensate them for the risk of undertaking litigation*, they be rewarded by being permitted to agree with their client to charge an extra fee over and above their normal fee, either equal to, or a percentage increase on, the normal fee (see [15]). The Act did not find application, the court stressed, where a case was hopeless and had no reasonable prospects of success; or, the former's converse, where there was no risk or contingency of failure. Properly interpreted, the Act only permitted a legal practitioner to enter a CFA with their client in instances where, after proper assessment, they had determined that there were some risks attached to the client's case, but that there was a reasonable prospect of success and that the practitioner was prepared to share in that risk for the reward of a 'success fee'. (See [16].)

The court held that, to enter into a CFA in instances where success was so virtually guaranteed that no, or only a negligible, contingency existed, would be contrary to the Act and render the CFA invalid. The same would apply when no proper assessment of any risk had been undertaken. The vast majority of actions instituted against the RAF fell into these two categories. Why, the court asked, do certain practitioners then enter into these agreements and not simply either wait until culmination of the litigation for their fees, or enter into a 'no win, no fee' agreement? The only inference was that it was a simple mechanism where practitioners in effect doubled their fees with little or no risk. This amounted to an 'improper end' and an abuse. (See [23].)

With the above in mind, the court declared invalid the contingency fee agreements entered into in case Nos 52869/2019, 70299/2018 and 54979/2018: in respect of none

of these matters had it been shown that there was any real risk of failure for the legal practitioner taking on these matters. (See [33] – [48].)

As to the costs orders

In respect of each of the matters before it, the court noted, the plaintiff had become entitled to costs on a party and party scale, either by default or by way of acceptance of the RAF's tender. However, here — as had become standard practice in the Gauteng Division — none of the draft orders presented to court simply contained a prayer for payment of costs on a party and party scale; they also included prayers *specifying the costs* the RAF had to pay, despite there being no agreement between the parties in respect of those items. (See [51].) Such types of order, the court held, were impermissible, seeking as they did to bind the hands of the taxing master, who had an unfettered discretion to award costs. (See [52] – [54].)

With this in mind, the court held that, in respect of the costs orders sought in the settled matters which went beyond what was agreed upon, costs would be reduced to orders for payment of agreed or taxed costs on a party and party scale (see [62]).

LIVING AFRICA ONE (PTY) LTD v EKURHULENI METROPOLITAN MUNICIPALITY AND ANOTHER 2023 (6) SA 551 (GJ)

Contempt of court — Disobedience of court order — Failure by municipality to provide evictees with temporary emergency housing in line with eviction order — Municipality made efforts to comply that negated wilfulness and mala fides required for contempt — But failure to comply resulting in infringement of property owner's constitutional rights — Constitutional damages appropriate — Quantification of deferred.

Housing — Right to housing — Violation — Remedy — Continued unlawful occupation by squatters — Failure by municipality to provide temporary emergency housing in line with eviction order — Resulting in infringement of property owner's constitutional rights to use and enjoyment of its property — Constitutional damages appropriate — Quantification of deferred.

In August 2014 the appellant obtained an order from Sutherland J of the Gauteng High Court for the eviction of 'unlawful invaders' from its property (Angelo), which it intended to develop. The present first respondent (the municipality), * also cited as a

respondent in the eviction application, was ordered, under para 6 of Sutherland J's order, to provide the occupiers with temporary emergency accommodation after the date of eviction/execution of the order, 1 February 2015. The municipality failed to comply and the appellant in October 2015 obtained a structured interdict in the same court, this time from Mashile J, directing the municipality to comply with para 6 of Sutherland J's order and stating that non-performance infringed the appellant's constitutional right not to be arbitrarily deprived of its property. The municipality failed to timeously comply with this order, too. Then, in 2017 and 2018, the municipality made efforts to relocate the occupiers, but it was thwarted by circumstances beyond its control (see [16] – [19]). At the time of the present appeal, unlawful occupiers remained in occupation of Angelo.

In July 2019 the appellant obtained another order directing the municipality to comply with Sutherland J's order, and in November 2019 Meyer J, the case- management judge, directed the municipality to provide a report by 5 December 2019 setting out the steps taken since the granting of Sutherland J's 2014 order. The municipality reported that it needed more time to comply with the various orders. Besides logistical challenges and resistance from established communities, it cited financial and budgetary constraints as matters hampering its implementation of the orders. It estimated it needed six more years to fully comply.

In September 2021 came the order appealed here, in terms of which Francis J dismissed an application by the appellant for an order (i) holding the respondents in contempt of the various orders, including the time stipulations (reason: no wilfulness or mala fides because of the municipality's attempts to comply); and (ii) for constitutional damages for the alleged infringement of the appellant's right to housing under s 25 of the Constitution (reason: the issue fell away because of the court's finding in (i)). In an appeal to a full bench of the Gauteng High Court —

Held

Francis J's refusal to find the municipality in contempt could not be faulted and would be upheld. There was no evidence of mala fides; on the contrary, there was ample evidence that the respondents acted with good intentions, but encountered myriad obstacles, including a lack of resources, in their efforts to relocate the unlawful occupiers. While there might have been institutional incompetence and maladministration, there was no evidence that competence and the optimum utilisation of available resources would have resulted in compliance with the time frames

stipulated in the various orders. Non-compliance on its own did not equal contempt. (See [39] – [41].)

But this did not mean that Francis J had not been required to deal with the appellant's constitutional damages claim, which was distinct from, and not dependent on, her contempt finding. She therefore erred in concluding that constitutional damages became a 'non-issue' when she found the respondents not to be in contempt. (See [50] – [51].)

As to the claim for constitutional damages, they could be awarded if the municipality had, by failing to provide accommodation to the unlawful occupiers, infringed the appellant's constitutional rights and if constitutional damages were, moreover, the most appropriate remedy. (See [81] – [83].)

By failing to relocate the unlawful occupiers, the municipality had not only shirked its constitutional responsibilities, passing them on to the appellant, but also its duty to the court to provide the occupiers with alternative emergency housing under Sutherland J's 2014 order. (See [95] – [96].)

Until the municipality complied with its constitutional duty to provide the unlawful occupiers with alternative accommodation, the appellant was arbitrarily deprived of its right to use and enjoy its property. The interference with and limitation of the appellant's rights were substantial and amounted to actionable deprivation, and the denial of an effective remedy for the position it found itself in was equally unacceptable. An order for constitutional damages was, besides a declaratory order, the only just and equitable relief for the violation of the appellant's rights, which came close to expropriation. Constitutional damages would assist the appellant in vindicating its rights, compensate it for the unlawful occupation of its property, and ensure that the unlawful occupiers were accommodated until suitable alternative lodgings were found. A further enquiry into quantification was, however, required. (See [98] – [103].)

The court accordingly set aside Francis J's order, replacing it with one, inter alia, declaring (i) that the first respondent's failure to provide the illegal occupiers with alternative temporary accommodation and its resultant inability to give effect to the eviction order unlawfully infringed the applicant's rights under s 25(1) and s 34 read with s 1*(c)* of the Constitution; (ii) that the applicant should be compensated by the first respondent for the unlawful infringement from 1 February 2015; and (iii) that compensation should be calculated in terms of s 12(1) of the Expropriation Act 63 of 1975. (See [105].)

MAZETTI MANAGEMENT SERVICES (PTY) LTD AND ANOTHER v AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND OTHERS 2023 (6) SA 578 (GJ)

Constitutional law — Human rights — Right to freedom of expression — Freedom of press and other media — Journalists' sources — As general principle, journalist who received information in confidence is justified in refusing to perform act which would unmask source, unless refusal would be inconsistent with public interest.

Constitutional law — Human rights — Right to freedom of expression — Prior restraints on publication — South African court should not restrict media from publishing something, before publication having seen light of day, unless fact-specific circumstances convincingly demonstrated that public interest not served by such publication.

Practice — Applications and motions — Ex parte application — Where appropriate — Interdict to restrain or forbid intended publication by journalist — As general principle, ought to be brought on notice to journalist.

This was an application for the reconsideration of an order — obtained by the applicant companies *in in camera proceedings, on an urgent ex parte basis* — inter alia, directing the respondents — an investigative journalistic enterprise, and its individual journalists — to return digital documentation allegedly stolen from the applicants by an ex-employee, and now allegedly in the respondents' possession; and interdicting the respondents from publishing anything that was based on the documentation or in any other way using the documentation.

What gave rise to the above order was the publication of a series of articles by the respondents, concerning the activities of the applicants and their principal director, one Mr Moti, and relating the ostensibly curious correlation between the flourishing of the businesses of the applicants and the intimate proximity of Mr Moti to political elites in Zimbabwe. The articles' content was such as to convince the applicants that the respondents had read, possessed or had access to confidential internal documents. What had followed was a series of communications between the applicants and the respondents, either directly or via their attorneys, in which, inter alia, the applicants accused the respondents of being in unlawful possession of documents stolen, they alleged, by an ex-legal advisor, Mr Van Niekerk, and repeatedly demanded that they

should return them; the respondents denied possession, but admitted having access to such documents via two secure servers; the respondents refused, based on the journalistic duty not to reveal the identity of confidential sources, to hand over such documents; the respondents assured the applicants that the documents in question would not be deleted or destroyed for at least one year; and the respondents warned the applicants that any court application against them brought on an ex parte basis would be unlawful. Despite the aforementioned assurances and caution, the applicants did indeed bring proceedings against the respondents on an ex parte basis, the justification offered for doing so being the belief that the respondents would destroy the documents in question.

Whether applicants entitled to bring application on ex parte basis

Held, that, as general principle, an interdict to restrain or forbid an intended publication by a journalist had to be brought on appropriate notice to the journalist. (See [45].)

Held, on the facts, that the ex parte application was an abuse of the process of court (see [11], [13] and [45]): There was no justification for seeking the order on an ex parte basis (see [15]). This, in the light of, inter alia, the following: the prolonged interaction (three months) between the legal representatives of the parties preceding the bringing of the ex parte order in which the points of contestation between the parties were repeatedly articulated (see [11] and [13]); the undertaking given by the respondents to preserve the documents in question (see [11]); and the express caution issued by the respondents to the applicants to not take an order behind their back (see [13]).

Held, that the absence of any justification for bringing the application on an ex parte basis constituted a sufficient reason in itself to set aside the order in its entirety (see [15]).

The substantive merits of the application

As to the relief seeking the return of the documents, held, that, as a general principle, a journalist who had received information in confidence was justified in refusing to perform an act which would unmask the source, unless the refusal would be inconsistent with the public interest (see [45]).

Held, that, on the facts, no cogent case had been made out to compel the respondents to disgorge the data files which were the subject-matter of the application (see [45]).

As to the relief seeking to interdict the publication of articles referencing the documents provided to them, *held*, that a South African court should not restrict media from publishing something, even before the publication had seen the light of day, *unless* the

fact-specific circumstances convincingly demonstrated that the public interest was not served by such publication. This was most likely to be rare. (See [34].)
Held, that, on the facts, no cogent case had been made out to interdict the respondents from publishing articles which referenced the documents in question (see [45]), this having regard to the following: to the extent that the information contained in the documents in question could be fairly categorised as confidential, such confidentiality had been lost when the documents were leaked (see [37] – [39]); the public interest in corruption being weeded out (see [43]); and, to the extent that the publications were defamatory, the availability to the applicants of other means to protect their legitimate interests, namely through the exercise of a right of rebuttal and, if needs be, suing for defamation (see [44]).
Held, accordingly, that the ex parte order obtained by the applicants should be set aside in its entirety (see [48]).

MEC FOR HEALTH, GAUTENG v SOLOMONS 2023 (6) SA 601 (GJ)
Evidence — Subpoena duces tecum — Ambit — Confidential medical information — Inappropriate for litigant to seek production of such information through issuance of subpoena duces tecum — Appropriate course, absent patient consent, is to make application in terms of s 14(2) of National Health Act for order of court to permit such disclosure — National Health Act 61 of 2003, s 14(1) and (2); Uniform Rules of Court, rule 38.
Evidence — Production and admission — Confidential medical information — Appropriate procedure for obtaining such information from medical professional — Statutory and ethical duties of medical professional — Absent patient consent, litigant obliged to make application in terms of s 14(2) of National Health Act for order of court to permit such disclosure — Inappropriate for litigant to seek production of such information through issuance of subpoena duces tecum — National Health Act 61 of 2003, s 14(1) and (2); Uniform Rules of Court, rule 38.
Medicine — Confidential medical information — Prohibition on disclosure of information — Discretion of court to order medical professional to disclose such information — Relevant guiding principles — National Health Act 61 of 2003, s 14(1) and (2).

The appellant, the MEC for Health, Gauteng, was the defendant in an action for damages brought by the plaintiff on behalf of her minor child. (The claim was based on the alleged negligence of the medical staff at a clinic in failing to properly monitor the plaintiff's labour, which had the result that probable foetal distress went undetected, resulting in the plaintiff's baby being born with hypoxic ischaemic brain injury, conventionally referred to as 'acute profound' hypoxic ischaemic injury.) The respondent was Dr Regan Solomons. He was a co-author of a research paper, whose principal author was a witness for the plaintiff in her damages claim, and who would testify in support of the paper's conclusions (Dr Solomons was neither witness nor party in that matter), to the effect that basal ganglia-thalamic brain injury in the term or near-term infant may result in absence of an 'acute profound' ischaemic event. What gave rise to the present proceedings was the appellant's causing, under Uniform Rule 38, to be issued, and served on the respondent, a *subpoena duces tecum*, calling on him to hand over to the Registrar of the High Court, or inform him of the whereabouts of, the following documents: *(a)* documents setting out the names of the parties, the division of the High Court that heard the matter, the case numbers and the judgments in each of *the 195 medicolegal actions that were referred to on p 2 of the article*; and *(b)* all supporting documentation, including, but not limited to, raw data, expert reports, medical records and MRI scans relating to the 63 cases referred to on p 3 of the article. The respondent resisted the subpoena. Consequently, the appellant launched an application in the High Court, where an order was ultimately sought compelling the respondent to inform the registrar and court of the whereabouts of the documents. That application was dismissed. The present matter was the appeal against that dismissal.

The position of the respondent was that he was within his rights to resist the subpoena. He argued that, in terms of the legislative framework regulating the healthcare profession, absent patient consent, he was not permitted to disclose confidential patient information unless ordered by court. Reference was here made to, inter alia, the National Health Act 61 of 2003 (the NHA), s 14(1), which provided that '(a)ll information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential', and s 14(2), which provided that 'no person may disclose [such information]', except in certain limited instances, one of which was where 'a court order or any law requires that disclosure' (para *(b)*). However, the appellant argued that the information sought *was not confidential*,

because it formed part of court records which comprised *public documents*; alternatively, if the information was confidential, then confidentiality was waived by the patients by virtue of the fact that the relevant medical information was contained in court files which remained open to public scrutiny.

Held, that, whilst a party was as of right entitled to issue a subpoena under Uniform Rule 38, in terms of s 36(1)*(c)* of the Superior Courts Act 10 of 2013, a recipient of a subpoena may refuse to produce the documentation sought (ie resist compliance with the subpoena), provided he/she had a 'just excuse' for such refusal (see [35]).

Held, further, that the court below was correct in its finding that the ambit of a 'just excuse' was wide enough to cover the confidentiality obligations imposed upon the respondent by virtue of the relevant legislative framework [and that it could therefore not be concluded that the respondent was in wilful disobeyance of the subpoena or that the appellant was without more entitled to the documentation sought]. (See [37].) Contrary to the assertions of the appellant, the appellant did not have an unassailable right of access to documents containing otherwise confidential patient information once such documents were disclosed in (unrelated) court proceedings (medicolegal actions) and thus comprising public records. (See [38].) It was apparent from case law that a court would only allow disclosure of private and confidential medical records after careful enquiry, having regard to a number of guiding principles (see [38] – [42]):

- Medical records inherently affected the rights to dignity and privacy of individuals. Those rights must, by default, be respected and protected.
- There was a strong privacy interest in maintaining confidentiality over medical records.
- The need for access to medical records had be weighed against the patient's privacy interest in every instance.
- A court therefore had to carefully consider whether there was a genuine need for access to medical records sought. This would perforce entail a consideration of the relevance of the documentation sought in each case, the potential harmful effects that may result from disclosure, and whether the benefits of the principle of openness outweighed the dangers inherent in the disclosure of private information, amongst others, the conceivable violation of the dignity and psychological integrity of the patient/s. If the records were not genuinely necessary, then, by default, the court ought to protect the individual's rights to dignity and privacy.

A factual basis for a finding that access to medical records was warranted in a particular case had to be laid by an applicant for purposes of enabling a court to conduct the above enquiries (see [43]). In the present case, no such factual foundation had been laid (see [44]).

Held, further, that, in terms of s 14(1) read with s 14(2), of the NHA, private and confidential patient information *may only be disclosed if a court ordered that disclosure*, absent patient consent (relevant here) or absent non-disclosure of such information representing a serious threat to public health (not relevant here). When disclosure of private and confidential medical information absent patient consent was sought, *judicial oversight was required*, in terms of which a court would grant disclosure only in circumstances where a factual foundation had been laid for such disclosure, having regard to the guiding principles referred to above. (See [17], [47] – [48].)

Held, accordingly, that, having regard to the above, the *appellant's choice to issue a subpoena against a medical professional to produce private medical information* (i) in the absence of patient consent; (ii) absent proper inquiry undertaken by the court consequent to an application in terms of s 14(2) of the NHA; and (iii) in circumstances where the medical professional was statutorily and ethically duty-bound to resist compliance, more particularly, under threat of a costs order, was inappropriate. (See [50].)

Held, further, that the appellant's argument that confidentiality was lost in respect of patient information once it was contained in public records, stood to be rejected (see [57]). The fact that a patient's private and confidential medical information was disclosed in a court file for purposes of that specific litigation (in which the patient was involved as a party) did not mean that the patient had provided blanket consent for the publication of their health information in any future unrelated litigation instituted between third parties going forward. (See [60].)

Held, accordingly, that in all the circumstances the conclusion reached by the court below, that *the appellant had utilised the wrong procedure*, was unassailable (See [61].)

Held, in conclusion, that the appeal had to be dismissed.

TALACAR HOLDINGS (PTY) LTD v COLE 2023 (6) SA 626 (GJ)

Document — Authentication — Foreign public document — Apostille certificate — Effect — Interplay with rule 63 of Uniform Rules of Court — Under Apostille Convention, law of origin determining whether document requires certificate, law of destination its legal effect — Court accepting foreign document as authentic despite lack of Apostille certification where it satisfied requirements of rule 63.
Land — Sale — Contract — Terms — Clause conferring unilateral right on purchaser to cancel for defects — Objective criteria to be applied — Cannot permit purchaser to perform only if he wishes to — Even on objective criteria, cancellation invalid where purchaser relying on purely cosmetic defects with intention to drive down price.

The applicant contended that the answering affidavit filed by the respondent, who was domiciled in the United States of America, did not meet the formal requirements for an affidavit in terms of rule 63 of the Uniform Rules of Court ('authentication of documents executed outside the Republic for use within the Republic') because it was not properly endorsed or Apostilled * by the relevant US authority. The court had to decide, firstly, whether the respondent's affidavit could, in the light of the requirements of rule 63, be accepted in evidence without an Apostille certificate. It appeared that the respondent's affidavit had been authenticated in the US by a notary acting as commissioner of oaths.
The following issue was whether the respondent was entitled to resile from the voetstoots property sale he had concluded, as purchaser, with the applicant. The relevant clause was clause 20.2, which provided that the purchaser 'will conduct an inspection of the home within 14 . . . days of acceptance of the offer should there be structural defects or defects that are unacceptable to the purchaser then the purchaser can at his discretion elect to cancel this agreement [sic]'.
The respondent, after listing a number of 'defects', cancelled the agreement, contending that it was void for want of consensus on the material terms of the contract. In response to the applicant's contention that the respondent was using clause 20.2 to strong-arm him into accepting a lower price, the respondent stressed that he merely wanted to 'cover the additional expenses to address what I concluded was unacceptable to me'. In the respondent's view, clause 20 overrode the voetstoots clause, thus entitling him to cancel the sale despite the lack of structural defects.

The applicant, having elected to take the respondent's cancellation as a repudiation, sued for specific performance rather than damages. He did not consider or agree to a reduced purchase price.

Held

As to the missing Apostille certificate, that the law of origin determined whether the affidavit was a public document and required a certificate, while the law of destination determined what legal effect to give it. Since there was no evidence on the former and no evidence that the respondent or the US notary had any intention to mislead the court, or that the affidavit was not authentic or did not contain the version relied on by the respondent, it met the requirements of rule 63 for its acceptance as affidavit. The notary's stamp and details were, in addition, sufficiently explained and reflected a properly signed and authenticated affidavit in terms of rule 63. The applicant therefore failed on the first preliminary issue. (See [13] – [15].)

As to the applicant's claim for specific performance, that the respondent's alleged cancellation in terms of clause 20.2 was invalid. Applying the precedent in *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 (2) SA 170 (W), where reasonable grounds where required, the stipulation in clause 20.2, relied on by the respondent to permit him to perform only if he wished to, could not be valid (see [24]). Even on the objective criteria required by *Kommandonek*, the alleged defects he relied on were no more than personal, cosmetic preferences. There were no true material defects: aware that withdrawal of the offer would amount to repudiation, the respondent sought to foist a reduction on the purchase price on the applicant. Accordingly, his alleged cancellation of the agreement in terms of clause 20.2 could not stand. (See [23] – [27].) In the event, the applicant was entitled to specific performance. The respondent would be directed to perform by way of a bank guarantee issued in favour of the applicant. (See [28] – [34].)

AGRIBEE BEEF FUND LTD AND ANOTHER v EASTERN CAPE RURAL DEVELOPMENT AGENCY AND ANOTHER 2023 (6) SA 639 (CC)

Government procurement — Procurement process — Whether for goods and services as intended in Constitution, s 217 — Tripartite agreement between two organs of state and private party for latter to provide farmers with livestock and training in animal husbandry — Supreme Court of Appeal finding contract was for 'goods or

services' and, owing to lack of procurement process prior to its conclusion, invalid — Constitutional Court considering whether there were grounds on which to grant leave to appeal — Leave declined — Constitution, s 217(1).

First applicant in this matter ('the Fund') was a private party, and respondents ('the Agency' and 'the Department' respectively) were organs of state.

The Department conceived of a strategy for agricultural upliftment in the province, and devised a scheme under which it would provide funds to the Agency, which would transfer them on to the Fund, for it to provide cattle- and animal-husbandry training to farmers. An agreement between the parties was concluded to this effect, and the Fund proceeded to fulfil its obligations.

Later, however, the Department and the Agency took the view that the agreement was unlawful and applied for its review and setting-aside. They reasoned that public funds were being used to acquire the goods (cattle) and to provide the services (training), and that accordingly a procurement process as mandated by s 217(1) of the Constitution ought to have preceded the contract's conclusion. The omission, they argued, was fatal to the contract's validity.

The High Court, however, dismissed the application, reasoning, inter alia, that, were the agreement to have been one for the provision by the Fund of services to the Agency, it could have been expected that it would provide for remuneration to the Fund. But it did not.

Thereupon, with the High Court's leave, the organs of state appealed to the Supreme Court of Appeal (SCA).

The SCA *held* that the agreement was indeed one for the provision of goods and services, albeit to the farmers rather than the organs of state themselves. It noted, however, that s 217(1) was not confined to an organ of state's procurement for its own benefit, but could extend to its procurement for third parties such as the farmers here, and that in any event the Department and the Agency had benefited by the Fund's fulfilling their mandate in their stead (see [17] and [19]).

Here, the Fund applied to the Constitutional Court for leave to appeal to it. The CC *held* that the matter was moot — the contract having expired — and that none of the factors justifying hearing a moot matter were present (see [23] and [29]).

The CC accordingly declined leave to appeal (see [33]).

SOUTH AFRICAN CRIMINAL LAW REPORTS DECEMBER 2023

S v EVANS 2023 (2) SACR 541 (SCA)

Fraud — Sentence — Prescribed minimum sentence in terms of s 51(2)*(a)* of Criminal Law Amendment Act 105 of 1997 — Applicability of — Cumulative convictions of fraud — Appellant convicted of 60 counts of fraud, no count involving amount exceeding R500 000 — Prescribed sentence not applicable.

The appellant appealed against a sentence of 15 years' imprisonment imposed on her after her conviction in a regional court of 60 counts of fraud, involving a total amount of R1 489 694. None of the counts involved an amount exceeding R500 000. The magistrate invoked the provisions of s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 to impose the prescribed minimum sentence. The appellant was a first offender, was 43 years old and had three minor children. Some of the money had been repaid to the complainant.

Held, that the trial court misdirected itself in imposing the prescribed sentence in terms of s 51(2)*(a).* Such sentence was not determined by the cumulative total amount of the various counts and only applied where one of the counts involved an amount of R500 000. (See [8] and [11].) In the circumstances, a sentence of eight years' imprisonment, of which five years were suspended, was considered appropriate. (See [15].)

S v SMITH 2023 (2) SACR 547 (GJ)

Theft — Sentence — Appellant, recruited as agent for trap to catch illegal rhino-horn traders, stole proceeds of sale received from illegal traders — Misdirection by court a quo in linking matter to offence of rhino-poaching, or illicit dealing in rhino horn, since irrelevant in circumstances of case — Sentence of 15 years' imprisonment reduced to four years.

The appellant appealed against a sentence of 15 years' imprisonment imposed in a regional magistrates' court for theft. His conviction arose from an undercover operation to detect, investigate or uncover the commission of illicit dealing in rhino horn. The

appellant, together with another, was used by an agent to contact potential buyers for rhino horn and to effect the sale of the rhino horn to them. They succeeded in selling rhino horn supplied by the authorities (valued at R900 000) for an amount of R290 000 and received the money from the buyer. The appellant was to hand the money over to the agent, but failed to disclose the transaction and kept the money for himself, paying the other person an amount of R10 000. The other person was later used to trap the appellant and he was arrested. On appeal,

Held, that the court a quo had clearly taken into consideration previous cases which dealt with rhino-poaching, as opposed to theft. It emphasised that the matter was inextricably linked to illicit dealing in rhino horn and had taken into account that the complainant had suffered actual loss of rhino horn to the value of R900 000. The evidence of rhino-poaching was, however, irrelevant in casu, as the appellant was not charged with it or with illicit trading in rhino horn. This impermissible approach entitled the court to interfere with the sentence. A further reason was that the kingpin was later arrested and sentenced to 10 years' imprisonment, yet a low-ranking person, like the appellant, was sentenced to 15 years' imprisonment. (See [23] – [24].)

Held, further, that a non-custodial sentence of correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 was inappropriate in the circumstances of the matter. The broader community, and SANParks itself, had certain expectations. When a person was utilised as an informer in a trap, agreeing to the conditions set out in the trap, then he or she could not steal the money that was entrusted to them in ensuring the success of the trap. A sentence in terms of s 276(1)*(i)*, which entailed imprisonment, but with the prospect of early release, was equally inappropriate, as the gravity of the offence, coupled with the aggravating factors, called for a longer term of imprisonment. In the circumstances, a sentence of four years' imprisonment was appropriate. (See [36] and [42].)

S v BURGESS 2023 (2) SACR 558 (ECMk)

Sentence — Evidence on sentence — Hearsay evidence — State relying on hearsay evidence in aggravation of sentence — Although no objection made in respect of evidence, s 3(1) of LEAA providing against its admission, save under certain circumstances — Basis on which hearsay evidence admitted not explained —

Sentence ameliorated on appeal — Law of Evidence Amendment Act 45 of 1988, s 3(1).

The appellant appealed against her sentence of 15 years' imprisonment imposed in a regional court after conviction on 972 counts of fraud, all relating to her activities as an employee (creditors clerk) of the Eastern Cape Training Centre (ECT). As none of the individual counts she was convicted of involved amounts of R500 000 or more, the minimum-sentencing regime was not applicable. The court nonetheless accepted that 15 years' imprisonment should be used as a yardstick for the imposition of sentence in the present case, as suggested by the prosecutor, and imposed that sentence. The only evidence on sentence was that of the CEO of ECT, and two presentence reports. As to where the CEO obtained the information relating to the fraud, he referred to unspecified company records and that he had spoken to some of his colleagues, whose names he did not reveal. It was unclear who provided which information, what position that person held, and which information was gleaned from records, as against what colleagues had told him. It appeared from the appeal record, however, especially from the presentence reports, that some of the information had found its way into the reports. The persons who compiled the reports did not testify.

Held

It seemed that very little, if anything at all, had been gleaned from the company records by the CEO, but that it was the finance officer who had regard to the company records, and that the CEO had been no more than her mouthpiece.

Even worse, the information that found its way into the presentence reports may all have been elicited from the human-resource officer and the finance officer. That begged the question as to the probative value of the information contained in the reports. The answer was that the evidence of the CEO was merely hearsay evidence. The fact that there had been no objection from the defence to the evidence was irrelevant. Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 dealt with hearsay evidence and provided against its admission, save under certain circumstances. The basis on which the hearsay was admitted was not explained, even as the court dealt with it and took it into account when determining the sentence imposed on the appellant. That was a misdirection which materially influenced the court in the exercise of its sentencing discretion. (See [36] – [42].)

The sentence accordingly had to be set aside and replaced with a sentence of 10 years' imprisonment, backdated to the date of the original sentence. (See [48].)

S v DLAMINI 2023 (2) SACR 575 (MM)

Bail — Generally — Duty of court — Role of judicial officer in bail application more than umpire and went deeper than in criminal trials — In casu, where matter assumed to be sch 5 offence turned out to be sch 6 offence, court entitled to have alerted appellant to such, and should not have let matter proceed on former basis — Criminal Procedure Act 51 of 1977, schs 5 and 6.
Trial — Watching-brief counsel — Role of — In bail application — Right of victim to be heard not entitling watching-brief counsel to cross-examine witnesses — Criminal Procedure Act 51 of 1977, s 60(2A).

The appellant was charged with murder, and brought an appeal against his refusal of bail in a magistrates' court. It appeared that the appellant, who was living in a house which had been bought by the deceased, had threatened that he would resist the deceased moving in, claiming that the house belonged to his grandmother. The deceased took the threats seriously and engaged a locksmith to change the locks, but he fled after being threatened by the appellant. The deceased and her partner thereafter sought a protection order against the appellant. On the day the order was granted, the appellant approached the deceased's vehicle, which was parked at a shopping centre, and shot and killed the deceased. The appellant was arrested and applied for bail. The prosecutor and the appellant's attorney agreed that the offence fell under sch 5 to the Criminal Procedure Act 51 of 1977 (the CPA), and the bail application proceeded on that basis. During the application, it became apparent to the magistrate that the offence was premeditated, and therefore fell under sch 6. Nonetheless, the application proceeded under sch 5, the magistrate holding that, since the parties had submitted at the beginning of the hearing that the offence fell under sch 5, it had to continue as such. The appellant raised this issue on appeal as an irregularity; and also questioned the propriety of allowing a watching brief counsel for the deceased's family to take part actively in the bail proceedings, to the extent that he was allowed an opportunity to cross-examine the state witness.

Held, that the reasoning of the magistrate for continuing with the bail application as if it were a sch 5 offence was flawed. The role of a judicial officer in a bail application was more than just sitting as an umpire who watched a game between two sides and declared a winner. It went deeper than in criminal trials. The magistrate was entitled to alert the appellant the moment it appeared that the schedule of the offence could change to sch 6. This would have afforded him an opportunity to reconsider his position regarding exceptional circumstances, that would then have been expected of him. The magistrate's failure to deal with the application as a sch 6 offence was irregular, but the appellant's attorney and the prosecutor could also not escape criticism, since they had a duty to submit to the court that the schedule had changed, in the light of the information. The magistrate was nevertheless able to deal with the application on the basis that the appellant had to satisfy the court that the interests of justice permit his release on bail, without expecting him to show exceptional circumstances. The irregularity therefore did not render the bail hearing unfair. (See [26], [28], [30], [31] and [33].)

Held, that there was no doubt that the watching-brief counsel was there to watch the proceedings. Allowing him to do more than that was an irregularity. Whether the proceedings had been rendered unfair, however, had to be approached with the understanding that at the time of the hearing the law pertaining to bail had just been amended: s 60(2A) of the CPA now provided that 'the view of any person against whom the offence in question was allegedly committed, regarding his or her safety', had to be considered. This, however, did not entitle the watching-brief counsel to cross-examine witnesses. Fortunately, the address by the watching-brief counsel came after the appellant had finished his submissions and appellant's counsel had the opportunity to reply, but he chose not to do so. There had accordingly been no irregularity committed that affected the validity of the hearing. (See [40] – [43].) In the result, the appeal against the refusal of bail had to be dismissed. (See [44].)

KHAMA v DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG AND OTHERS 2023 (2) SACR 588 (GJ)

Extradition — Representations — Whether magistrate permitted to consider representations by affected person before issuing of warrant of arrest — Proper

construction of provisions of s 5(1)*(b)* not allowing for such — Extradition Act 67 of 1962, s 5(1)*(b)*.

Extradition — Application to court concerning constitutionality of extradition proceedings before warrant of arrest issued — Whether such premature — Extradition Act 67 of 1962, s 5(1)*(b)*.

Extradition — Representations — Depriving affected person of right to make representations before issuing of warrant of arrest — Constitutionality of — Extradition Act 67 of 1962, s 5(1)*(b)*.

The applicant was the former president of Botswana who was exiled in South Africa. He sought, inter alia, a declaratory order to the effect that s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act), properly interpreted, permitted a magistrate, seized with an application for an arrest warrant under that section, in appropriate circumstances, to consider representations by a person whose arrest was sought, before the issuing of the warrant. In the alternative, an order declaring s 5(1)*(b)* unconstitutional to the extent that such authorisation was not implicit in the provision.

The applicant alleged that a summons had been issued against him in Botswana to answer charges relating to the unlawful possession of firearms, and that he had seen a copy of a Botswana newspaper alleging that the government of Botswana was considering his extradition. His attorneys wrote to the respondents, stating that it had come to their attention that South Africa may receive a request for such. The attorneys requested that he be afforded an opportunity to submit representations to the appointed magistrate before any warrant for his arrest under s 5(1)*(b)* of the Act was issued. A Deputy Director of Public Prosecutions responded by refusing the request, stating that there was no provision for this in the Act, but that any facts that the applicant wished to place before the magistrate, to substantiate his claim that the charges had been trumped up, had to be placed before the magistrate after his arrest. As a courtesy to the applicant, his office would 'be amenable that he be informed before his arrest so that he could report to the SAPS and the necessary formalities be taken care of before the matter was placed on the court roll'. The applicant interpreted this letter as implying that the National Prosecuting Authority would apply for his arrest imminently because of the use of the word 'when', as opposed to 'if'. The respondents

contended that the matter was premature because there was no pending extradition request.

Held, that the applicant's case had an established factual basis and was not premised on mere speculation, as suggested by the respondents. What was more, absent a decision being made as to the proper interpretation of s 5(1)*(b)*, any application for a warrant for the applicant's arrest would be made without notice. Consequently, the only opportunity the applicant might have to challenge s 5(1)*(b)* of the Act, and to obtain clarity on whether he could make representations to avoid an arrest, was now. It followed that the dispute was ripe for determination and was not premature. (See [55] – [56].)

Held, further, as to the question whether s 5(1)*(b)* could be interpreted to permit representations to a magistrate before a warrant of arrest was issued: not only did the applicant's interpretation unduly strain the language of the provision, it also upended the entire scheme of the Act. It would provide a magistrate with the authority to decide whether the extradition process should proceed, impermissibly widen the limited discretion of the magistrate as envisaged in s 5(1)*(b)* and appropriate to the magistrate powers that lay within the prerogative of the Minister. There was no room for such a finding. (See [76] – [77].)

As to the alternative constitutional relief, the first difficulty with the applicant's submissions was that it was settled law that fairness was not an absolute concept, but depended on the context of the decision. The context of the decision to issue a warrant in terms of the Act was to bring the person before a magistrate only as the first step in the Minister's consideration of whether to extradite a person or not. The extradition process was usually resorted to because the person whose surrender was sought was a fugitive from justice. In such circumstances, depriving an affected person of the right to make representations before a warrant was issued did not amount to a constitutionally unfair process. Even if s 5(1)*(b)* were held to be unconstitutional, the limitations imposed thereby on the affected constitutional rights were justified under s 36(1) of the Constitution. (See [81] and [98].)

S v ROBERTSON 2023 (2) SACR 615 (NCK)

Appeal — Record — Lost, destroyed or incomplete — Reconstruction of — Whether adequate for purposes of determining appeal — Record containing evidence only of

state witnesses, evidence of appellant and co-accused missing — Record inadequate for proper adjudication of appeal — Conviction and sentence set aside.

Appeal — Record — Lost, destroyed or incomplete — Reconstruction of — Delay in — Reconstruction process only beginning three and half years after SCA granting leave to appeal, despite incarcerated appellant having applied for such within eight days of sentence — No explanation provided for delay, and appellant blameless — Appellant's right to have trial conclude without unreasonable delay infringed — Constitution, s 35(3)*(d)*.

The appellant was convicted in April 2006 of having murdered his father and was sentenced to life imprisonment. He applied for leave to appeal, but the application was only heard in September 2017 when leave to appeal was refused. The appellant then appealed to the Supreme Court of Appeal (the SCA) which granted him leave to appeal to the full court. The majority of the court were not satisfied with the reconstruction of the record. They noted that, amongst the 13 witnesses whose evidence could not be retrieved or reconstructed, was that of the appellant and his co-accused, who had all testified in their own defence. That created a major stumbling block in accepting the available record as adequate to adjudicate the appeal properly. It meant that the appeal would be considered solely on the evidence presented by the state, with total disregard for the opposing evidence. (See [60].) The court also noted the long delay in the hearing of the appeal after the appellant had applied for leave to appeal eight days after his sentence. The reconstruction process was embarked upon some three and a half years after the SCA granted leave. In those circumstances, the blame for the delay in the hearing of the appeal could not be laid at the door of the appellant. No explanation was given for the delay, despite the appellant's endeavours over the years to have his appeal heard. The delay was not only regrettable, but for the appellant, who had been incarcerated since his arrest in 2004, the inordinate delay in finalising the matter had also infringed his right under s 35(3)*(d)* of the Constitution, to have his trial begin and conclude without unreasonable delay. In the circumstances, the appeal had to be upheld and the conviction and sentence set aside. (See [77] – [78] and [88].) In a dissenting judgment, Phatshoane DJP held that, having regard to the general issues raised by the appellant in his application for leave to appeal in the trial court, the court was in a position to fairly assess the appeal on the record in its imperfect

form. It bore emphasis that the trial court's judgment had not been subjected to any critical analysis in the appeal on the basis of its findings of fact, or as to its exposition and application of the law. There was more than enough evidence to prove beyond a reasonable doubt that the appellant had murdered the deceased and robbed him of his vehicle. The judge would therefore have dismissed the appeal against the conviction and sentence. (See [21], [53] and [58].)

S v POKOLA 2023 (2) SACR 643 (NCK)

Sentence — Plea-and-sentence agreement — Presiding officer of view that proposed sentence inadequate and altering it without giving accused opportunity to withdraw from agreement — Such constituting irregularity nullifying proceedings — Conviction and sentence set aside — Criminal Procedure Act 51 of 1977, s 105A.

The accused appeared in a magistrates' court on a charge of fraud, as well as a charge under the immigration legislation. A plea-and-sentence agreement was entered into as contemplated by s 105A of the Criminal Procedure Act 51 of 1977 (the CPA). In terms of said agreement the accused would plead guilty to both offences and be sentenced in respect of the first count to a fine of R3000 or nine months' imprisonment, wholly suspended for five years; and in respect of the second count a fine of R2000 or six months' imprisonment wholly suspended for three years. After convicting the accused, the magistrate enquired of his legal representative whether the court retained a discretion on the sentences to be imposed. Said representative replied in the affirmative, stating that, if the sentence imposed was more than the agreed sentence, the accused had to be informed and granted the opportunity to withdraw from the agreement. The legal representative and the prosecutor then discussed the matter in chambers. The magistrate, on returning to court, took both counts together for purposes of sentence and sentenced the accused to one year's imprisonment wholly suspended for five years. On review,
Held, that the court had failed to follow the process stipulated by s 105A(9) of the CPA, in that he had failed to advise the prosecutor, or the accused, that the court considered the agreed sentence unjust; advise what the court considered to be a just sentence; and had failed to afford the prosecutor, or the accused, the opportunity to withdraw from the agreement so that the trial could be commenced de novo before a different

presiding officer. Because of this irregularity it could not be said that the proceedings were in accordance with justice, and the conviction and sentence had to be set aside. (See [11] and [15].)

All South African Law Reports December 2023

Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and another [2023] 4 All SA 589 (SCA)

Constitutional and Administrative Law – Legality review by municipality seeking to challenge Minister's decision on reasonableness of its water tariffs – Delay in seeking review – High Court wrongly overlooking unreasonable delay and wrongly proceeding to entertain review application which should have been dismissed due to such delay.

In terms of the Water Services Act 108 of 1997 (the "Act"), passed in December 1997, municipalities became water services authorities. In 2004, the first respondent municipality set higher water tariffs for the appellant's predecessor-in-title ("AngloGold") than those it had previously been paying. AngloGold filed an appeal with the second respondent (the "Minister") who upheld the appeal and ruled that the premium established in respect of the water price for industrial usage was unreasonable, because the municipality provided no value for the services given to AngloGold. However, the municipality insisted on payment of its charges from AngloGold, who consequently approached the High Court to enforce the Minister's decision. Its stance was that the Minister's decision existed in fact, had legal consequences, and the municipality could not treat it as though it did not exist. The municipality filed a conditional counter-application for declaratory relief, asserting that it had exclusive executive authority to set, adopt and implement tariffs for the provision of water services within its area of jurisdiction; and that the Act did not give the Minister authority to interfere with a tariff set and implemented by it for the provision of water services. The High Court, and then the Supreme Court of Appeal, held that the municipality was required to review the Minister's decision, and could not fail to comply with the Minister's decision because it considered it to be void. In the Constitutional Court, the majority held that the municipality was entitled to raise a reactive challenge as a defence to AngloGold's enforcement application, and that both the review that the municipality might then bring and its reactive challenge would require a

determination by the High Court as to the impact of the municipality's delay in bringing the challenges. The matter was then remitted to the High Court (the "High Court redux"), which found the delay to have been unreasonable, but overlooked the delay and granted the application for review. That led to the present appeal.

Held – The critical question was whether the delay of the municipality should have been overlooked by the High Court redux so as to entertain the review of the Minister's decision taken in 2005. The order sought by the municipality's review had the effect of setting aside the Minister's decision of 18 July 2005. That decision had no on-going effect. There was no warrant to decide important legal questions to resolve a long expired ministerial decision. The High Court redux was incorrect to overlook the delay of the municipality in bringing its review. That delay was both unreasonable and should not have been overlooked. The correct order that the High Court redux should have made was to refuse to entertain the Municipality's review, and dismiss it.

The Court went on to consider whether AngloGold was entitled to relief to enforce the Minister's decision, and if so, what relief should that have been. A case for such relief had been established. The decision of the Minister affected tariffs for a limited period of time, dating back to 2005, and AngloGold was entitled to limited relief in respect of those tariffs.

The appeal was accordingly upheld.

KGA Life Limited v Multisure Corporation (Pty) Ltd and others [2023] 4 All SA 613 (SCA)

Insurance – Contract between intermediary and insurer – Termination of contract by intermediary – Whether there was in fact a valid contract to be terminated due to impact of Insurance Act 18 of 2017 – Intermediary's group funeral insurance scheme constituting contract for the unlawful conduct of unlicensed insurance business in contravention of section 5(1) of the Insurance Act 18 of 2017, meaning there was no contract to be cancelled and intermediary had no right to replace insurer as underwriter of its defunct group scheme.

The appellant ("KGA") was a licensed insurer as defined in section 1 of the Long-Term Insurance Act 52 of 1998. The first respondent ("Multisure") was an independent

intermediary as defined in the Act. Its business was to market and sell funeral cover plans (funeral policies) for various companies to individuals and families.

Multisure had a large body of clients with whom it had concluded funeral policy agreements by admitting each client to membership of Multisure's group funeral insurance scheme. On 14 January 2015, KGA and Multisure entered into an Intermediary Agreement ("IA") which incorporated a Master Policy ("MP") underwritten by KGA. The majority of Multisure's clients or members were social grant beneficiaries, whose payments for funeral cover were made by the South African Social Security Agency ("SASSA"). KGA had agreed to underwrite and provide the necessary cover to Multisure's clients under a group scheme. The dispute arose after Multisure cancelled the IA and entered into a new agreement with another entity.

The IA provided that, if the agreement was cancelled, for any reason, by either Multisure or KGA, Multisure was obliged to notify in writing, all policyholders on the book of the intermediary that the underwriting agreement with KGA had been cancelled. The termination provisions required one month's notice from either party. There was no dispute that Multisure had complied with that, but the issue was whether there was a contract to cancel, having regard to the provisions of the Insurance Act 18 of 2017.

Held – As a result of the changes brought about by the 2017 Insurance Act to the regulation of the funeral insurance industry, the issue of legality was at the centre of the appeal. The Act replaced the system of registration of insurers with a licensing system, and recognised the need for transitional provisions which allowed time for the conversion of registration to licencing. However, with effect from not later than 1 July 2020, Multisure's group scheme constituted a contract for the unlawful conduct of unlicensed insurance business – a contravention of section 5(1) of the 2017 Act which, in terms of section 69, constituted an offence which, on conviction, attracted a fine not exceeding R10 million.

The general rule applied, that things done contrary to statutory prohibition are invalid, which has as a consequence that contracts for the performance of those things are invalid. In the result, there was no contract to be cancelled at the time Multisure purported to do so, and Multisure had no power or right to appoint a third party as a substitute for KGA as the underwriter of what had become its defunct group funeral

insurance scheme. KGA's appeal accordingly succeeded. The Court emphasised that it was not sanctioning KGA's non-compliance with the 2017 Act, nor its subsequent conduct. However, the relief sought by Multisure could not succeed for the reasons set out above.

Silverback Technologies CC and others v Commissioner for the South African Revenue Service [2023] 4 All SA 629 (SCA)

Trade (Customs and Excise) – Importation of bicycle parts – Determination of correct tariff for import duty – Classification of parts – Application of three-stage process in classification of goods for purposes of import duties as between different tariff headings – Absence of wheels in imported parts not having consequence that remaining parts would necessarily lack the essential character of a bicycle.

Three cases which essentially raised the same question of law and fact were dealt with in a composite judgment by the High Court. They primarily concerned the classification, for purposes of customs duty, of certain bicycle parts imported into the country for use in assembling bicycles in order to determine the appellants' liability for import duties, if any. The appeal raised the question of whether the goods in question, ie bicycle parts, as presented upon importation bore the essential character of a bicycle or were merely parts or accessories of a bicycle. The significance of the distinction lay in the fact that bicycle parts that bear the essential character of a bicycle are liable, under tariff heading 8712.00 of Part I of Schedule I to the Act, for import duties of 15% of their value. By contrast, parts and accessories that lack the essential character of a bicycle are exempt from customs duty.

The appellants were importers of bicycles and their parts for local distribution. The respondent in each case was the Commissioner for the South African Revenue Services ("SARS"). The High Court decided that SARS was correct in determining that the goods were liable for import duty, leading to the present appeal.

Held – To determine whether the bicycle parts imported into the country by the appellants, properly classified, rightly attracted import duties, it was necessary first to determine which one between two tariff headings, namely tariff heading 8712.00 and 8714.9 was applicable. If the imported goods were classified under tariff heading 8712.00.10, import duty would be payable. By contrast, if tariff heading 8714.9 was applicable, the relevant goods would be free of duty on importation. In order to classify

the bicycle parts, it had to be determined whether the parts, viewed collectively when assembled, had the essential character of a bicycle.

Classification of goods for purposes of import duties as between different tariff headings is a three-stage process. The first stage involves interpretation, namely, the ascertainment of the meaning of the words used in the headings (and relative Section and Chapter Notes) which may be relevant to the classification of the goods concerned. Second, is a consideration of the nature and characteristics of the goods, and, finally, the selection of the heading which is most appropriate to such goods must be decided upon. The process of interpretation is a unitary and objective exercise that pays due regard not only to the text but also to the context and purpose of the document being interpreted. Reliance on headings and explanatory notes when classifying goods must be understood as intended to provide explanations and guidance, and is not intended to override or contradict legislation. Courts are enjoined to interpret the Act and any tariff headings in a manner that is consistent with international law. The expression "the essential character of a bicycle" must be interpreted purposively and contextually.

Addressing the appellants' focus on the absence of wheels in the imported parts, the Court held that whilst bicycle wheels, in combination with other parts, collectively make up a bicycle as a finished or complete article, their absence did not have the consequence that the remaining parts would necessarily lack the essential character of a bicycle.

The appeal was accordingly dismissed.

Zuma v Downer and another [2023] 4 All SA 644 (SCA)

Civil Procedure – Private prosecution against lead prosecutor for the National Prosecuting Authority and journalist reporting on litigation – Execution of order pending appeal – Appeal against execution order – Existence of ulterior purpose for private prosecution rendering the institution of such prosecution unlawful and an abuse of the court's process.

The appellant ("Mr Zuma") faced multiple charges of corruption, fraud, racketeering and money laundering. Although he had first appeared in court in relation to those charges on 29 June 2005, his trial had still not commenced. Throughout that period,

the first respondent, Mr William Downer, had served as the lead prosecutor for the National Prosecuting Authority ("NPA"). In 2021, instead of pleading to the charges, Mr Zuma raised a special plea in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977, contending that Mr Downer was not a fit person to prosecute him. He was unsuccessful in that regard and attempts to appeal failed. In September 2022, Mr Zuma instituted a private prosecution in the High Court against Mr Downer and the second respondent, Ms Karyn Maughan, a senior legal journalist, who had been reporting on the criminal matter for well on 20 years. Mr Downer and Ms Maughan (collectively referred to as the "respondents") applied separately to the High Court to have the private prosecution set aside as an abuse of process of the court. The Court set aside the criminal summons against the respondents, interdicted the private prosecution and ordered Mr Zuma to pay costs on a punitive scale. The respondents obtained an execution order pending an appeal by Mr Zuma, who then filed an appeal against the execution order.

Held – The issue before the Court was whether Mr Zuma should be permitted to continue the private prosecution while an application for leave to appeal or, if granted, an appeal by him was pending. The Court described Mr Zuma's strategy as a clear case of "Stalingrad", demonstrated by the patent lack of substance to the charges; by the fact that Mr Zuma had clearly not pursued the prosecution as would someone intent on obtaining a conviction; and, by the vexatious nature of his litigation. The central purpose of the private prosecution was to enable Mr Zuma to have Mr Downer removed as the prosecutor on the basis that he (Mr Downer) stood accused in the private prosecution. The facts demonstrated that the private prosecution of Mr Downer was an abuse of the process of the court. The existence of an ulterior purpose rendered the institution of the private prosecution unlawful. Even on his own version of the facts, Mr Zuma had not made out any possible basis on which Mr Downer might be convicted. With regard to Ms Maughan, the Court found that she was not guilty of an actionable violation of Mr Zuma's rights as alleged by him.

The Court pointed to the patent lack of substance to the charges against the respondents and the fact that Mr Zuma had clearly not pursued the prosecution as would someone intent on obtaining a conviction. The harm asserted by the respondents was very real. In the result, the appeal was dismissed with costs, including those of two Counsel, to be paid on the attorney and client scale.

Eskom Holdings SOC Ltd v Silicon Smelters (Pty) Ltd [2023] 4 All SA 661 (GP)

Constitutional and Administrative Law – Organ of State – Self-review – Delay in seeking review – Where delay was unreasonable, the court still had to consider whether it should be overlooked – Test for determining whether delay may be overlooked is a flexible one, based on the proven facts of each case and other objectively available considerations.

Constitutional and Administrative Law – Organ of State – Self-review – Whether agreements with third party amounted to fruitless and wasteful expenditure as defined in the Public Finance Management Act 1 of 1999 – Where there was a financial benefit to both parties and therefore a quid pro quo, the agreements did not violate section 51(1)(b)(ii) of the Public Finance Management Act.

The applicant ("Eskom") was a major public entity and an Organ of State conducting its business under authority of licences granted to it by the National Electricity Regulator of South Africa ("NERSA") in terms of the Electricity Regulation Act 4 of 2006. Its main business was the generation, transmission and distribution of electricity in bulk within South Africa and neighbouring countries. Electricity Supply Agreements concluded with its customers, set out the terms and conditions of supply of bulk electricity. In terms of such an agreement, Eskom supplied the respondent with electricity for its ferro-alloy smelter. In 2018, Eskom introduced a programme called the Offer Sales Incentive Programme ("OSIP") in terms of which customers who became part of the programme were incentivised to consume more electricity. At Eskom's invitation, the respondent was one of the key customers who agreed to participate in the OSIP. Subsequent thereto, Eskom allowed the respondent to participate in its Demand Response Programme ("DRP"). In terms of the parties' agreement in that regard, the respondent on any day during the subsistence thereof, within 30 minutes of receiving an instruction from Eskom, would reduce its electricity consumption by the amounts agreed. In exchange, Eskom would credit respondent's electricity account at a rate of R1485 per megawatt hour. Thus, the OSIP was a mechanism to incentivise the respondent to increase electricity consumption at its smelting facility, while the DRP operated contrarily to reduce electricity consumption at Eskom's behest to protect the technical integrity of the electricity network.

A dispute arose between the parties after Eskom took the view that its decision to allow the respondent to also participate in the DRP resulted in the making of a double payment to the respondent and/or allowing the respondent to double dip. That led to the respondent cancelling the agreement under OSIP and initiating arbitration proceedings against Eskom. The arbitrator directed Eskom to approach the court based on lack of jurisdiction. That led to the present application.

Held – The nature of the application before court and the relief sought was a self-review by an Organ of State. The Court had to accordingly also determine whether the applicant's delay in seeking review was unreasonable and, if so, whether it should nevertheless be condoned. Reviews must, as a general rule, be instituted without undue delay. The Court exercises a narrow discretion in deciding whether to grant or refuse a delay in instituting a legality review such as the present one. Although the delay was unreasonable, the Court still had to consider whether it should be overlooked. The test for determining that aspect is a flexible one, based on the proven facts of each case and other objectively available considerations. In the interest of justice, the delay was condoned.

A defence of *lis alibi pendens* raised by the respondent was considered next. The court set out the requirements for a dilatory special plea of *lis alibi pendens* and stayed part of the relief sought until determination of the applicant's counterclaim for rectification in the arbitration proceedings.

On the merits of the review application, the Court found that the OSIP did not amount to fruitless and wasteful expenditure as defined in the Public Finance Management Act 1 of 1999, and therefor there was no violation of section 51(1)(b)(ii) of that Act as averred by Eskom. There was a financial benefit to both parties and therefore a *quid pro quo*. Accordingly, viewing each agreement separately, they did not result in fruitless and wasteful expenditure.

The application was dismissed.

Fuel Retailers' Association v Minister of Energy and others [2023] 4 All SA 739 (GJ)

Mining, Minerals & Energy – Petroleum industry regulation – Judicial review of decision by Minister of Energy to adopted Regulatory Accounting System for the Petroleum Sector – Failure to consider impact on certain fuel retailers, to address

specific concerns and to provide appropriate trading margin, rendering model fundamentally flawed – A decision taken in ignorance of, or without sufficient regard to, materially relevant considerations is procedurally unfair and procedurally irrational.

While the procurement and refining of crude oil in South Africa is not regulated, government regulates the price of petrol at service stations and determines the allowable returns on investments in all petrol activities once it leaves the refinery. Retailing of petroleum products is a licensed activity in South Africa. Retail stations may be both owned and operated by a retailer (a retailer-owned retailer-operator or "RORO" site) but are more commonly owned by one of the oil companies and operated by a retailer (a company-owned retailer-operated or "CORO" site). The distinction is important because the retailer of a CORO site has additional costs that a RORO retailer does not have.

In December 2011, the Regulatory Accounting System for the Petroleum Sector ("RAS") was adopted by the Minister of Energy, and was implemented in November 2013. The Fuel Retailers Association ("FRA") represented small business-owners and entrepreneurs within the retail sector who operated fuel service stations across the country. It applied for the review and setting aside of the Minister's decision to the extent that it established a retail margin for the activity of selling petrol to end-users without providing a trading margin, also referred to as an Entrepreneurial Compensation ("EC"), for retailers to compensate them for the dispensing services they provided.

Held – The RAS stipulated the margin (in cents per litre) that accrued to each identified activity along the retail petroleum value chain. The present application concerned only the margin allocated to the retailing sector within the petroleum industry. The retail margin included a return on capital for the owner of the assets portion ("CAPEX") through which they could achieve a return on their investment or capital expenditure in the assets required along the petroleum value chain, and an operating costs portion ("OPEX") representing a straight cost-recovery facet to compensate parties for the costs involved in providing the services required along the petroleum value chain.

The Court found the Minister's decision to constitute administrative action, and found that there were multiple grounds on which the decision was reviewable. There

was a failure to properly consider the impact of the RAS on CORO retailers and to deal with the specific concerns raised by the FRA. The Minister was bound to act procedurally fairly. A decision taken in ignorance of, or without sufficient regard to, materially relevant considerations is procedurally unfair and procedurally irrational. In this case, the Minister took the decision to approve the full implementation of the RAS in ignorance of materially relevant considerations regarding the trading margin. To suggest that the EC should be covered by the oil companies forfeiting a portion of the capex was untenable. Retailers are as of right entitled to EC and should not have to negotiate with the oil companies to forfeit a part of the CAPEX. The Minister's decision was irrational insofar as it required such negotiation in unconducive conditions. The model was fundamentally flawed for CORO sites. In the premises, the application for review succeeded.

LW v KCA [2023] 4 All SA 769 (GJ)

Family Law and Persons – Harassment – Appeal against granting of final protection order granted ex parte – Party seeking relief ex parte has a duty of the utmost good faith to the court, and all material facts impacting upon the court's decision must be disclosed – Breach of duty of utmost good faith to court, and failure to make full disclosure, leading to discharge of interim protection order, and denial of a final protection order.

The respondent obtained an interim protection order against the appellant in terms of section 3(2) of the Protection from Harassment Act 17 of 2011 (PHA). He alleged that the appellant, with whom he had previously been in an intimate relationship, had made allegations of gender-based violence and rape against him and had threatened to make those allegations public. The appellant opposed the confirmation of the interim protection order on the grounds that the allegations against the respondent were not false and that the lodging of complaints against him did not constitute harassment as defined in section 1 of the PHA. The magistrate held that she had no jurisdiction to adjudicate whether the allegations of rape were true or false, and confined her enquiry to whether the appellant's conduct constituted harassment as defined in the PHA, finding that it did. A final protection order was consequently issued. The appellant noted an appeal, and the respondent brought a cross-appeal.

Held – The magistrate's decision could not stand, as she had misdirected herself in finding that she had no jurisdiction to enquire into the veracity of the rape allegations. That finding impacted her enquiry into whether there was harassment, as she implicitly conducted it on the assumption that the rape allegations were false. What then remained to be decided was whether the appeal should simply be upheld, as the appellant requested, or whether the further forms of relief sought by the respondent should be granted. Ultimately the respondent wished to have the veracity of the rape allegations determined by way of oral evidence in proceedings on remittal in the Magistrates' Court, on the basis of the full replying affidavits that he wished to introduce.

In order to arrive at a final decision on the referral for hearing of oral evidence, it was necessary to resolve the dispute of fact about the veracity of the rape allegations. The resolution of that dispute of fact would not be necessary if there was no harassment found, or if the respondent had a duty of utmost good faith under the PHA, requiring full disclosure at the interim protection order stage, and it appeared that he had breached it in circumstances warranting refusal of final relief on the return date. A party seeking relief *ex parte* has a duty of the utmost good faith to the court. All material facts impacting upon the court's decision must be disclosed. The respondent failed to make full disclosure in seeking the protection order. His non-disclosures, dishonesty and the likelihood that the magistrate would have refused relief in the event of full disclosure had to result in the discharge of the interim protection order, and the denial of a final protection order. On that basis alone, the appeal was allowed, the cross-appeal dismissed and the magistrate's order overturned and replaced with one discharging the interim protection order and dismissing the application for a final protection order.

The Court went on to consider the question of whether, on the common cause facts, the appellant had harassed the respondent. Examining the appellant's conduct against the definition of harassment in the PHA, the Court found that it did not constitute harassment.

Rautenbach and others v Governing Body of die Hoërskool DF Malan and another [2023] 4 All SA 801 (WCC)

Constitutional and Administrative Law – Judicial review – Decision by school governing body to embark on process intended to change name of school – Procedure adopted by the governing body fair and rational and constituted just and reasonable administrative action.

Constitutional and Administrative Law – Judicial review – Time limits – Condonation of delay in review application brought later than 180 days after the impugned decision was taken – Time limit extended in terms of section 9(2) of Promotion of Administrative Justice Act 3 of 2000 in interest of justice.

Since 1957, the school in which the first respondent was the governing body, was named "DF Malan High School", after the fourth Prime Minister of South Africa. His role as one of the architects of *apartheid* led to the governing body ("SGB") deciding to reconsider the name of the school. That led to the present application for the review of the SGB's decision.

Setting out the procedure adopted by the SGB in anticipation of the name change, the applicants contended that such procedure was unfair and irrational and that the decision should be set aside on that ground. It was also contended that the SGB had relied upon irrelevant considerations, failed to consider relevant considerations and that the decision was not rationally connected to the information before it. A further objection was that that some of the members of the SBG were especially biased towards a certain outcome from the inception.

In response, the SGB contended that the review application should fail on the basis of delay, that the applicants lacked *locus standi* to bring the application and that the application was not susceptible to review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

Held – It had to be ascertained whether a final decision had been made. The applicants were correct in submitting that the decision to change the name of the school had been made on 6 May 2021, and it was that decision which was subject to the present review proceedings. The review application was brought later than 180 days after the impugned decision was taken, and was therefore, in terms of PAJA, out

of time. The question then was whether the Court, in terms of section 9(2) of PAJA, should grant an extension of time as requested by the applicants. The Court found that it was in the interest of justice to condone the delay.

Based on the undisputed facts in terms of a circular issued by the second respondent, the SGB had the sole power to change the school's name. While the South African Schools Act 84 of 1996 did not explicitly grant a governing body the power to change a school's name, there was nothing in the Schools Act that prohibited a governing body from exercising such a power. The court also confirmed that the decision to change the name of the school amounted to administrative action in terms of PAJA. It rejected the SGB's contention that a narrow meaning be given to the administrative action undertaken by it, to conclude that it did not affect the rights of the applicants. The enquiry into whether an administrative decision adversely affected a party's rights should not be interpreted in the strict literal sense because it would lead to absurd results which would disqualify deserving litigants from the reach of the court.

The next question was whether the procedure that was adopted by the SGB was fair and rational. The applicants' complaints about the adequacy of the consultation process embarked on by the SGB and related matters were not borne out by the evidence. The overall process which resulted in the decision was a proper one, which could not be faulted and was not offensive to the provisions of PAJA. The process constituted fair administrative procedure, which included adequate consultation and a proper chance by all concerned to give their input.

The application was dismissed with costs.

S v PM [2023] 4 All SA 845 (NWM)

Criminal Law and Procedure – Criminal proceedings involving child offender – Automatic review of conviction and sentence – Misdirections in conduct of matter, which either individually or cumulatively, constituted gross irregularities, leading to conviction and sentence being set aside.

Criminal Law and Procedure – Record of proceedings – Incomplete record – Rule 66 of Magistrates' Court Rules setting out duties of person employed to record criminal proceedings.

The accused was convicted of murder and assault with intent to do grievous bodily harm, committed when he was 16 years old. He was sentenced to an effective term of eight years' imprisonment. The regional magistrate subsequently submitted the case for review as he had exceeded his sentencing jurisdiction in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. The review court, faced with an incomplete record, raised a query. However, the query was not brought to the attention of the regional magistrate. In explanation thereof, the clerk of the court filed an affidavit.

Held – The tenor of the affidavit filed by the clerk of the court demonstrated a nonchalant attitude to her duties. The unacceptable handling of review queries and reviews in general required serious and urgent attention by the Court Manager. Moreover, both the regional magistrate and the clerk of 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.

Regarding the incomplete record of proceedings, section 4(1) of the Magistrates Court Act 32 of 1944 provides that a court is a court of record and therefore a presiding officer is required to keep notes of proceedings in his/her court. The primary responsibility of ensuring that there is a court record therefore rests on the magistrate. In respect of the Magistrates' Courts in particular, rule 66 of the Magistrates' Court Rules is very clear in respect of the duties of the person employed to record criminal proceedings by mechanical means or who may be required to note same in shorthand. The rule places the responsibility for keeping of the official court record on the person employed for such purpose (the custodian of the record). Rule 66(1) makes it clear that criminal proceedings may be noted in shorthand either verbatim or in narrative form or recorded by mechanical means. Rule 66(2) refers to every person employed for the taking of shorthand notes in terms sub-rule (1) or for the transcription of notes so taken by another person. That implies that stenographers (the correct designation being clerk of the court) are employed not only for recording proceedings by mechanical (digital) means but also to keep shorthand notes.

The regional magistrate's conduct of the matter was criticised. Although the accused had now been released, he had served four years of an incompetent sentence. The entire proceedings demonstrated a myriad of misdirections in the conduct of the matter, which either individually or cumulatively, constituted gross irregularities. The

conviction and sentence were set aside. The seriousness of the failures required the judgment to be brought to the attention of the relevant authorities.

Van Heerden and another v Master of the Eastern Cape High Court, Port Elizabeth and others [2023] 4 All SA 875 (ECP)

Constitutional and Administrative Law – Decision by Master of High Court to appoint evidence leader in enquiry in terms of section 381(1) of the Companies Act 63 of 1971 – Decision having all attributes of administrative action as envisaged in section 1 of the Promotion of Administrative Justice Act 3 of 2000.

Constitutional and Administrative Law – Judicial review – Delay – Whether applicants should be faulted for having sought to resolve the matter amicably before approaching court – As parties should be encouraged to resolve their disputes before resorting to litigation, there was no delay in bringing review application.

Corporate and Commercial – Liquidation of company – Enquiry in terms of section 381(1) of the Companies Act 63 of 1971.

The first applicant and fourth respondent were appointed by the first respondent (the "Master") as liquidators of a company ("Retro"). Pursuant to complaints and an application by the third respondent ("Hantle"), the Master approved an enquiry in terms of section 381 of the Companies Act 61 of 1973, to investigate the conduct of the liquidators of Retro in the performance of their duties. Hantle was a creditor of Retro. The Master indicated his intention to use the services of an evidence leader ("Counsel") to cross examine the evidence placed before the enquiry by the liquidators and other witnesses. Notices were sent to the liquidators, requiring their appearance before the enquiry. Hantle addressed a letter to the Master, requesting that the second respondent ("Adv Van Zyl") be appointed as the evidence leader for the section 381 enquiry. The applicants instituted proceedings seeking review of the decision to allow the enquiry to be conducted by anyone other than the Master, and in the alternative, for review of the Master's decision to appoint the Adv Van Zyl as evidence leader in the enquiry.

Adv Van Zyl and Hantle opposed the application on several grounds.

Held – The first ground was that the applicants lacked *locus standi* to bring the application as they did not have a direct and substantial interest in the decision that

was the subject of review, because the decision did not affect any of their rights and did not constitute administrative action reviewable at their instance. As the enquiry that was authorised by the Master's decision was directed at investigating the conduct of, *inter alia*, the first applicant in his capacity as liquidator, the applicants had a right to challenge the decision, and had a direct and substantial interest in the proceedings. Further, contrary to Hantle's submission, the impugned decision was taken by a bureaucratic functionary, carrying out the functions of a State, and exercising a power in terms of legislation. The decision had all the attributes of administrative action as envisaged in section 1 of the Promotion of Administrative Justice Act 3 of 2000. The respondents' contention that the applicants had unduly delayed in bringing the application for review led to the applicants seeking condonation. A party seeking condonation must furnish an explanation which accounts for the entire period of the delay and that above all the explanation must be reasonable. A court granting condonation, or overlooking a delay, exercises a discretion and the discretion must be exercised judiciously in the interests of justice. The question which arose was whether the applicants should be faulted for having sought to resolve the matter amicably with the Master before they approached the court. As parties should be encouraged to resolve their disputes before resorting to litigation, there was no delay in the bringing of the application.

On the merits, the first question was whether section 381(1) of the Companies Act permitted the appointment of any person other than the Master to conduct an enquiry into a liquidator's conduct. The answer to the question lay in the proper interpretation of section 381(1) of the Companies Act. In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question. Statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and the statutory provision must be construed consistently with the Constitution. Section 381 did not prescribe how the Master should enquire into the conduct of the liquidator. Neither did it preclude the Master from utilising the services of an evidence leader in the enquiry. The Master was therefore permitted to appoint an evidence leader to assist him in the enquiry. However, as the Master had failed to furnish reasons for the decision to appoint Adv Van Zyl, that appointment was not sown to be defensible. No facts were furnished to

explain how the Master had arrived at the decision to appoint Adv Van Zyl. His decision was irrational, and on that basis fell to be reviewed and set aside.

Vorster NO v Buthelezi and others [2023] 4 All SA 889 (KZP)

Wills, Trusts and Estates – Application for removal of trustees in terms of section 20(1) of the Trust Property Control Act 57 of 1988 – Duties of trustees – Section 9(1) of Trust Property Control Act providing that a trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another – Duties include avoidance of conflict of interest – Payments made contrary to objects of trust and which were prejudicial to trust property and beneficiaries, warranting removal of trustees.

As an independent trustee of a trust, the applicant sought the suspension of the first to fourth respondents' powers to act as trustees of the trust, and their removal as trustees. The main issue for determination was whether the trustees of the trust were entitled to pay or distribute certain amounts to, amongst others, the first to fourth respondents. Related to that question was whether the various payments authorised by the trustees fell within the wide discretion afforded to them in terms of the provisions of the trust deed. The applicant highlighted conduct on the part of the first to fourth respondents which he found highly concerning. The trust had received an amount of R10m from a donor and the first to fourth respondents had made various payments to themselves from the donated amount. The applicant pointed out that only the second and third respondents were beneficiaries of the trust. He contended that any payments made by the trustees had to be made bearing in mind the objectives of the trust and its status as a community trust. The respondents were shown to have paid amounts to themselves as a return on the investment of their time and effort (without proof provided) spent in the execution of their duties as trustees. According to the applicant, those payments were to the detriment of all the other beneficiaries and the respondents had conflated their rights of income to that of a capital trust, which the trust was not. It was a charitable trust and not a trading trust.

Held – The application for the relevant trustees' removal was brought in terms of section 20(1) of the Trust Property Control Act 57 of 1988. Section 20(1) did not specify any grounds for removal, other than that the court should be satisfied that the

removal would be in the interests of the trust and its beneficiaries. Regarding the duties of trustees, section 9(1) of the Act states that a trustee shall in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. Amongst the relevant duties was the avoidance of a conflict of interest. Ultimately, the court had to decide whether the trustees had administered the trust properly and not in a manner that was detrimental to all the beneficiaries. The payments made by the trustees and the motivation therefor did not do anything to promote the objects of the trust, which included the alleviation of poverty and the creation of sustainable businesses. The trustees were not entitled to pay or distribute the funds in the way they had, and the impugned payments had been made contrary to the objects of the trust and were prejudicial to the trust property and the beneficiaries. It was consequently concluded that the first to fourth respondents should be removed as trustees of the trust.

END-FOR NOW