LEGAL NOTES VOL 2/2024

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VILLA CROP PROTECTION (PTY) LTD v BAYER INTELLECTUAL PROPERTY GMBH 2024 (1) SA 331 (CC)

Abuse of process — Unclean hands doctrine — Appeal against dismissal of application for amendment of plea to introduce special plea of unclean hands in patent infringement proceedings — Whether applicable in patent infringement proceedings.

Appeal — Leave to appeal — Whether Constitutional Court's jurisdiction engaged — Appeal against dismissal of application for amendment on basis that it was not public interest, ignoring other factors and permissive principle — Amounting to error in law implicating constitutional right of access to courts, engaging Constitutional Court's jurisdiction — Constitution, s 34.

Intellectual property — Patent — Infringement — Defences — Abuse of process — Unclean hands — Whether applicable in patent infringement proceedings.

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Bayer Intellectual Property GmbH (Bayer) was a registered proprietor of a South African patent (the 2005 patent) in respect of the chemical substance spirotetramat, an active ingredient of a plant protection product sold by it in South Africa under the

[1] **A reminder that these Legal are my summaries of all reported cases as are set out in the Index. In other words where I refer to the January 2024 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

commercial name of Movento. Villa Crop was a proprietor of a competing product (Tivoli), which also contained spirotetramat.

In patent infringement proceedings brought in the Court of the Commissioner of Patents in the High Court of South Africa, Gauteng Division, Pretoria (the CoP), Bayer alleged that Villa Crop had infringed the 2005 patent, and sought relief by way of an interdict, delivery-up and an enquiry as to the reasonable royalty payable.

In its plea, Villa Crop claimed that the 2005 patent was invalid, pleading a number of grounds of invalidity. Vila Crop also brought a counterclaim for the revocation of the patent on various grounds, including that a false statement or representation was made in the prescribed declaration required in respect of the application for the 2005 patent — a ground for revocation as contemplated s 61(1)*(g)* of the Patents Act 57 of 1978 (see [57]).

Villa Crop subsequently sought leave to amend its plea, introducing what it styled as 'a special plea *in limine*', based on the principle of unclean hands — a species of abuse of process — and Bayer's breach of its duty as a patentee. In this regard Villa Crop contended that Bayer, at the time of filing the 2005 patent, represented that spirotetramat was a novel invention, which contradicted its earlier representation when applying for a Supplementary Protection Certificate (SPC) in relation to spirotetramat in respect of its European patent, which demonstrated that spirotetramat has been in the public domain since 1997. Villa Crop further contended that the (mis)representation that spirotetramat was a novel invention was also perpetuated by Bayer in the proceedings before the CoP, in breach of the unclean hands doctrine. (See [58] – [59].)

The CoP declined the proposed amendment, concluding that it would not be in the interests of justice to embark upon a protracted enquiry requiring factual comparison of what was disclosed in the SPC application to what Bayer was claiming in the infringement proceedings, particularly since the main issue between the parties, namely the validity of the South African patent, was still a live issue. The Cop thus left the unclean hands issue open. (See [11], [13], [30], [35], [59].)

The present case concerned Villa Crop's application to the Constitutional Court for leave to appeal against the CoP's refusal of leave to so amend its plea, both the latter court and the Supreme Court of Appeal having refused leave.

Villa Crop argued that the matter raised a constitutional issue, as the CoP's refusal denied it the opportunity to raise a separate self-standing common-law defence of

unclean hands, and so unjustifiably limited its right of access to court under s 34 of the Constitution; raised arguable points of law of general public importance, in that the South African patent system placed a duty on patentees to be honest when applying for patents, and that if the doctrine was applicable, it would extend beyond the narrow interests of the parties; and that the CoP incorrectly applied the legal test relating to amendments.

Bayer submitted that the matter did not raise a constitutional issue, nor did it raise an arguable point of law of general public importance, and as a result, leave to appeal should not be granted. It further submitted that there were no reasonable prospects of success that a court would find that the doctrine of unclean hands was applicable in the field of patent law or that it could find application solely based on the allegations made by Villa Crop.

Held

By the minority

Villa Crop had to show that it was a constitutional matter or that it raises an arguable point of law of general public importance, and had to demonstrate that it was in the interests of justice for leave to appeal to be granted. On the facts, there was no basis for suggesting that the refusal of an amendment unjustifiably limited Villa Crop's rights of access to court in terms of s 34.

Accordingly, the refusal of an amendment did not raise a constitutional issue (see [24], [26] – [27]).

The amendment sought also raised an arguable point of law of general public importance. There was, however, no merit to Villa Crop's arguments. In the infringement proceedings it had asserted defences based on misrepresentation, and if successful in those proceedings, the patent would be revoked. The special plea was nothing but a stratagem to insert a novel defence into the South African patent system. The issues were too narrow and did not implicate the interests of the public. (See [28] – [30], [33].)

As to whether the CoP correctly dismissed the application for amendment, while it was so that the CoP did not properly apply the legal test relating to amendments, only focusing on the interests of justice criterion, this misapplication of the test was insufficient to grant Villa Crop jurisdiction before this court. A wrong decision in the application of the law raised neither a constitutional issue nor an arguable point of law of general public importance. (See [36] – [37].)

What Villa Crop in fact asked the court to determine was a factual comparison between what was disclosed in the SPC application, against what Bayer was advancing in support of its action. These were purely factual issues which did not engage the jurisdiction of this court (see [46], [52]).

As to the interests of justice, reasonable prospects of success were an important aspect. Of significance in this regard was that no prejudice would be suffered by Villa Crop if the amendment were refused, because it would not be hampered from proceeding with its counterclaim and resisting the action instituted by Bayer; and also because the patent system was capable of dealing with the misrepresentation of the kind advanced, so that the refusal of the amendment would not put Villa Crop in a worse position than it would have been if the amendment had been granted. There was accordingly no need to import or introduce the doctrine of unclean hand into our patent law. It would therefore not be in the interests of justice to entertain the appeal because there were no reasonable prospects of success; application for leave to appeal would accordingly be refused. (See [49] – [51].)

By the majority

As to the test for granting amendments to pleadings, there was no indication that the CoP adopted the legal principles cited by her. Nothing was to be found of the permissive principle that amendments must be allowed unless they were sought in bad faith or would cause an injustice that could not be remedied by an award of costs. Rather, the CoP applied a distinct and incorrect standard: the interests of justice. She then exercised her discretion to refuse the application to amend, by recourse to that incorrect standard. The adoption of an incorrect legal standard to decide an application to amend amounted to making an error of law. It was not a misapplication of law, because the decision did not proceed from a correct legal premise to an incorrect conclusion because of a failure properly to apply the law to the relevant facts. The constitutional right to have a dispute resolved by the application of law before a court entailed the right of a litigant to frame the dispute that required resolution, and, in the present matter, to formulate a defence — hence, the importance of the permissive principle. (See [64] – [65], [81].)

Courts were not entitled to decide for litigants what disputes the interests of justice permitted them to pursue before the courts. A court may not exclude a cause of action or a defence because the enquiry entailed by it was protracted; that was for the litigant to decide. Nor should a court decide for a litigant, at the stage of pleadings, the real

issue in dispute. That too was a choice which the courts should afford litigants considerable latitude to determine. What was plain from the reasoning of the CoP, was that she considered herself to enjoy a wide discretion to regulate what disputes should go to trial on the basis of the court's judgment as to what disputes might usefully be litigated. CoP elevated the interests of justice as the ultimate criterion by reference to which discretionary judicial power was to be exercised. It was important that this legal error be corrected. The refusal of Villa Crop's proposed special plea by the Commissioner of Patents was predicated upon an error of law that implicated the constitutional right of access to the courts. It was therefore a constitutional matter that engaged the jurisdiction of this court. (See [66] – [67].)

As to whether the matter raised an arguable point of law of general public importance, Villa Crop's claim of abuse against Bayer was not that its 2005 patent was invalid, but that its claims could not be entertained because of its misconduct, whether or not its patent was valid. The power enjoyed by the courts to prevent an abuse of process — of which the doctrine of unclean hands was a species — was not determined by the right that the abusive litigant claimed. The unclean hands doctrine implicated the type of abusive conduct that, in a proper case, might warrant the exercise of the court's power to non-suit a litigant, and the court might do so even if the non-suited litigant claimed a right they could vindicate in court proceedings. The law of patents was not exempted from the application of the doctrine, because abuse of process might occur just as surely among litigants who claimed rights in the law of patents as it did among those who would make claims in the law of contract or delict. It followed that the refusal of the Commissioner of Patents to grant the amendment sought by Villa Crop to introduce the special plea, did indeed raise an arguable point of law of general public importance. (See [77] – [80].)

As to public interest enquiry, the statutory ground of revocation provided for in s 61(1)*(g)* of the Patents Act was not the cause of action that Villa Crop sought to advance in its proposed special plea. The proposed special plea invoked the power of the courts to prevent abuse of process. The basis upon which that power was exercised was entirely distinct; it had nothing to do with revocation. The conduct that might constitute abuse was not confined to the particular misrepresentation or false statement referenced in s 61(1)*(g)*, nor were the averments made in the special plea so confined. Moreover, if the invocation of the unclean hands doctrine in the special plea was simply redundant because it had already been raised in the plea, that would

not be a valid reason to refuse an amendment; and the merits of the application for leave to appeal before this court concerned the proper application of the correct test for the grant or refusal of an amendment sought to the pleadings, which was not a matter that concerned disputes of fact. (See [81] – [86].)

Therefore, leave to appeal would be granted; the appeal would be upheld with costs, including the costs of two counsel; and the order of the CoP would be set aside, and in its place Villa Crop would be granted leave to amend by the introduction of its 'special plea in limine'. (See [93].)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v ABSA BANK LTD AND ANOTHER 2024 (1) SA 361 (SCA)

Revenue — Income tax — Scheme for avoidance of — General Anti-Avoidance Provisions — Notice of under s 80J of ITA — Refusal to withdraw — Legality review not competent — Notice not having adverse effect or impact — Income Tax Act 58 of 1962, s 80J; Tax Administration Act 28 of 2011, s 9(1).

Revenue — Income tax — Scheme for avoidance of — General Anti-Avoidance Provisions — Assessments under s 80B — Review jurisdiction of High Court — Legality review — Whether exceptional circumstances present to seek review in High Court, bypassing internal procedure of objection, appeal and trial in special tax court — While exceptional circumstances included that disputes wholly question of law, in casu review of assessments including disputes of fact — High Court lacking jurisdiction to adjudicate review — Income Tax Act 58 of 1962, s 80B; Tax Administration Act 28 of 2011, s 9(1).

This appeal concerned the exercise of the High Court's review jurisdiction in the context of a tax assessment raised in terms of s 80B of the Income Tax Act 58 of 1962 (the ITA), which allows the Commissioner to determine the tax consequences of impermissible avoidance arrangements. The following provisions were also relevant —

- s 80J, which regulates the procedure to be followed prior to a determination made in terms of s 80B, and requires the Commissioner to notify a taxpayer that the general anti-avoidance provisions in ss 80A – L may be applicable, and gives the taxpayer an opportunity to submit reasons as to why it was not;

- s 80J(3), which provides that such notice may be withdrawn upon consideration of the taxpayer's response to the s 80J notice;
- s 9(1) of the Tax Administration Act 28 of 2011 (the TAA) which provides that '(a) decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act . . . may in the discretion of a SARS official. . . at the request of the relevant person, be withdrawn';
- ss 104 and 105 of the TAA, which deal, respectively, with objections against assessments or decisions and the forum in which assessments or decisions may be disputed. (See [12] – [13], [15] – [17].)

The appeal (to the Supreme Court of Appeal) was against the High Court's setting aside two Sars decisions on review —

- its refusal to withdraw notices issued in terms of s 80J of the ITA issued to the respondents, Absa Bank Ltd (Absa), and its wholly owned subsidiary, United Towers Proprietary Ltd (United Towers), respectively (the s 9 review); and
- the subsequent notices of assessment issued in terms of s 80B of the ITA (the assessment review).

Absa and United Towers had launched the s 9 review simultaneously with the submission of their responses to the s 80J notices, some months prior to the assessment issued in terms of s 80B of the ITA. After the additional assessments were raised, they applied for and were granted leave to amend the notice of motion in the s 9 review to include the assessment review.

The High Court held that while the decisions to issue the s 80J notices did not constitute administrative action, as it was not a 'final' decision which placed an adverse burden on the recipient, the decision *not* to withdraw them was subject to review based on the principle of legality. This was because, notwithstanding that the notices were not final, they had adverse consequences for the recipient. And, it found, that because Sars did not dispute (in the s 80J notices) that Absa and United Towers had no knowledge of the arrangement in which they had participated, they could therefore not have been parties to an arrangement which, unknown to them, had sought to avoid the payment of tax which they would otherwise have been required to pay. The High Court therefore concluded that the application of the GAAR provisions in circumstances where they did not, as a matter of fact, apply, was irrational and offended the principle of legality. (See [6] – [10], [29].)

And in relation to the assessment review, it held that a taxpayer was not obliged only to pursue the remedies for disputing tax liability as provided by s 104 of the Tax Administration Act 28 of 2011 (the TAA), but that the taxpayer may also apply directly to court for relief in exceptional circumstances, which included a dispute that turned wholly upon a point of law. It further held that, since the s 80J notices were premised upon an acceptance that Absa and United Towers were ignorant of the terms of the arrangement or scheme, they could not have been parties to the avoidance arrangement; and that, since the notices of assessment were issued upon the factual premise of the s 80J notices, the assessments were tainted by an error of law. The High Court concluded that the s 80J notices and the assessments were inextricably linked and, accordingly, set aside both sets of decisions. (See [18] – [19].)

At issue in the present case were —

- whether a 'decision' not to withdraw a s 80J notice was reviewable in terms of s 9 of the TAA, either prior to or after the issuing of a notice of assessment in terms of s 80B of the ITA.
- whether the High Court was correct to characterise the challenge to the assessments as wholly a question of law which entitled it to exercise its jurisdiction in terms of s 105 of the TAA. (See [11].)

Held

As to the s 9 review

The decision not to withdraw a s 80J notice could not by itself have an adverse impact or effect. Its effect was to leave the s 80J notice in place until the process contemplated by the section was completed. The statutory power exercised by the Commissioner was to determine a tax liability under the GAAR provisions. Until that determination was made, the issuing of a s 80J notice, or a refusal to withdraw it, could have no adverse effect or impact and was not reviewable. The High Court lost sight of the provisions of s 80J(3), which did not contemplate a separate decision not to withdraw the notice as a precondition for the decision to determine a tax liability under s 80B. It ought to have found that a decision not to withdraw the notice was not subject to review outside of a challenge to the decision to impose a tax liability pursuant to s 80B of the ITA. (See [21] – [24].)

As to the assessment review

While the High Court correctly recognised that a dispute concerning a question of law would constitute an exceptional circumstance entitling it to exercise its jurisdiction (see

[26] – [28]), it incorrectly characterised the disputes regarding the refusal to withdraw the s 80J notices and the legality of the assessments, as involving question of law. The High Court's finding that Sars had accepted the facts as stated by Absa and United Towers, and in particular, their assertion that they had no knowledge of the nature and ambit of the scheme or arrangement, was incorrect. The notices did not state that Sars accepted the claim that Absa and United Towers had no knowledge of the full ambit of the scheme; they only set out reasons for the belief that the GAAR provisions applied, no more; they were not statements of the accepted factual basis for application of the GAAR provisions. There was accordingly no room for the conclusion that Sars accepted that Absa and United Towers were not parties to the avoidance arrangement. It followed that the application of the GAAR provisions was not solely a question of law. Whether they had knowledge of the full nature of the transactions which comprised the arrangement, and whether their sole or main purpose in participating was to secure a tax benefit, was a matter of disputed fact; and whether the 'arrangement' constituted an 'impermissible avoidance arrangement' was a factual enquiry. (See [29] – [31].)

Since the dispute did not involve solely a question of law, no exceptional circumstances existed to justify the High Court assuming jurisdiction in the matter. The High Court ought therefore to have dismissed the application. It followed that in relation to the assessment review, it did not have the required jurisdiction to deal with the matter. In the circumstances, the orders granted by the High Court could stand. The merits of any challenge to the notices of assessment must be adjudicated in accordance with the dispute resolution process provided by s 104 of the TAA. The appeal would accordingly be upheld. (See [33] – [35].)

THE FONARUN NAREE: AFGRI GRAIN MARKETING (PTY) LTD v TRUSTEES, COPENSHIP BULKERS A/S (IN LIQUIDATION) AND OTHERS 2024 (1) SA 373 (SCA)

Shipping — Admiralty law — Maritime claim — Enforcement — Security arrest — Such restricted to property existing when arrest order made — Reconsideration of arrest — Party seeking reconsideration not restricted to original papers — Onus remaining on original applicant to establish genuine and reasonable need for security

— Admiralty Jurisdiction Regulation Act 105 of 1983, s 5(3)*(a)*; Uniform Rules of Court, rule 6(12)*(c)*.

Practice — Applications and motions — Urgent application — Application for reconsideration of order granted in person's absence — Procedure may vary depending on basis on which party applying for reconsideration seeks relief — Said party not restricted to original papers and may file answering affidavit to which original applicant may reply — Reconsideration taking place on all materials then before court — Onus remaining on original applicant — Uniform Rules of Court, rule 6(12)*(c)*.

In February 2018 the first to third respondents (collectively, Copenship), acting in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, obtained, as security for a maritime claim Copenship was pursuing against the appellant (Afgri) in arbitration proceedings in London, UK, the arrest of some R18 million Afgri had in a South African bank account. The order was obtained ex parte and without notice to Afgri. A few days later Afgri applied to the Cape High Court for the reconsideration and setting-aside of the arrest under rule 6(12)*(c)* of the Uniform Rules of Court. Afgri contended that the s 5(3) application was an abuse of process, that there had been material non-disclosures by Copenship and that Copenship had failed to establish that it had a genuine and reasonable need for security.

The High Court dismissed the reconsideration application, thereby confirming the original arrest order. Afgri brought an application for leave to appeal to the Supreme Court of Appeal. A dispute arose over the impact of the application for leave to appeal on the arrest. This led Copenship to bring an urgent application for an order declaring that the arrest order remained in effect notwithstanding the application for leave to appeal, alternatively for an order that it be given effect to pending any appeal. The High Court, having directed that Afgri's funds were to remain in arrest, proceeded to grant leave to appeal to the SCA. Afgri abandoned the abuse-of-process argument, with the result that the substantive issues before the SCA were whether Copenship had established a genuine and reasonable need for security and, if so, whether the terms of the arrest order were appropriate.

Section 5(3) states that a court exercising its admiralty jurisdiction may order the arrest of any property for the purpose of security for a claim which is (or may be) the subject of arbitration or other proceedings, whether domestic or international and whether or not the claim is subject to the law of South Africa. The person seeking the arrest must

satisfy the court that it has a maritime claim enforceable by an action in personam in the chosen forum against the owner of the property concerned; that it has a prima facie case in respect of that claim that is prima facie enforceable in the chosen forum; and that it has a genuine and reasonable need for security in respect of the claim. It was agreed that an applicant was required to show a genuine and reasonable apprehension that the respondent not have sufficient funds to meet a judgment granted against it. The apprehension could arise from actual knowledge of the extent of the respondent's assets or from other factors justifying an inference that the respondent would seek to conceal them or otherwise prevent the award from being satisfied. The enquiry is a factual one and the onus of proof on a balance of probabilities rests upon the applicant. (See [21].)

In support of its alleged genuine and reasonable apprehension in this regard, Copenship referred to Afgri's refusal to provide security and to the financial strain the shipping industry was experiencing. In addition, Copenship referred to a search that had been done some two and a half years earlier during which no movable physical assets that could be attached or arrested in South Africa were discovered. As to the pleadings, Afgri delivered an answering affidavit and Copenship a reply, and when the reconsideration application was argued before the High Court, this was done on the basis of all the affidavits and all the factual material then available to the court.

There was debate as to the proper approach to a reconsideration application in a case of this nature. Afgri contended that the founding affidavit on behalf of Copenship failed to make out a case that Copenship had a genuine and reasonable need for security. It criticised Copenship's argument as amounting to an endeavour to make its case in reply. Copenship in turn submitted that the High Court had been entitled to have regard to all the affidavits filed, and that if there were new material in the replying affidavit that Afgri objected to, or regarded as factually incorrect, its remedy was either to apply to strike it out or to apply for leave to file a further affidavit to deal with that material.

Held, by Wallis JA for the majority

Rule 6(12)*(c)* did not prescribe how an application for reconsideration had to be pursued. This was intentional: the procedure would vary depending on the basis on which the party applying for reconsideration was seeking relief. A party wishing to have the order set aside on the ground that the papers did not make out a case for the relief granted, could deliver a notice to this effect and set the matter down for argument and reconsideration on those papers. It could do the same if it merely wished parts of the

order to be amended or qualified or supplemented, in which case the matter would be then argued on the original papers. It was not open to the original applicant — save in very exceptional circumstances, or where the need to do this had been foreshadowed in the original founding affidavit — to bolster its original application by filing a supplementary founding affidavit. The party seeking reconsideration was not, however, confined to this route, and could file an answering affidavit either traversing the entire case against it or only issues relevant to the reconsideration. The filing of an affidavit did not, however, preclude the party seeking reconsideration from arguing on the basis of the application papers alone that the applicant had failed to make out a case for relief.

If an affidavit *was* filed in support of the application for reconsideration, then the party that obtained the order was entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that was done, and the party seeking reconsideration did not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, the case had to be argued on all the factual material before the judge dealing with the reconsideration proceedings. (See [12] – [14].)

The proper approach for the SCA was to have regard to the factual material placed before the High Court for the purposes of reconsidering the original order. (See [16].)

The evidence produced by Copenship to discharge the onus resting on it under s 5(3) of the Act consisted of few facts and much baseless speculation. Afgri was in fact a substantial company with a significant trading record, and there was no ground or basis for Copenship to entertain a genuine and reasonable apprehension that Afgri might be unable to satisfy an award or try to avoid satisfying it. (See [60].)

The High Court's reasons for refusing to reconsider and set aside the arrest were not clear. There had been no reason for it to conclude on the facts before it that there was any basis upon which Copenship could have entertained a genuine and reasonable apprehension that Afgri might be unable to satisfy an award or might try to avoid satisfying it. The proper conclusion was that Copenship failed to discharge the onus of proving that it had a genuine and reasonable need for security. It was not entitled to the arrest, and it should have been set aside on reconsideration. (See [61].)

Upholding the appeal, the majority of the SCA rescinded the High Court's decision to dismiss the reconsideration application and replaced it with an order setting aside the arrest. (See [62].)

In a dissenting judgment Van der Merwe JA disagreed with the majority's finding that Copenship failed to show a genuine and reasonable need for security for its claim against Afgri. The fact that it appeared from the material before the High Court that Afgri's liabilities exceeded its assets, and that it had attempted to distance itself from the funds in its account, meant that Copenship did demonstrate a real and genuine apprehension that an award in its favour might not be paid. (See [63], [66], [69].)

PFC PROPERTIES (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND OTHERS 2024 (1) SA 400 (SCA)

Abuse of process — Business rescue — Application launched solely to delay or disrupt winding-up proceedings — Applicant non-suited for abuse of process — Application not having effect of suspending winding-up proceedings Companies Act 71 of 2008, ss 131(6), 133(1)*(b)*.

Close corporation — Business rescue — Liquidation proceedings already initiated — Effect of application for business rescue on winding-up proceedings — Application launched solely to delay or disrupt winding-up proceedings amounting to abuse of process — Applicant non-suited for abuse of process — Such application not having effect of suspending winding-up proceedings — Companies Act 71 of 2008, ss 131(6), 133(1)*(b)*.

Section 131(6) of the Companies Act 71 of 2008 (the Act) provides that the launch of a business rescue application automatically suspends winding-up proceedings until the business rescue application is adjudicated upon; and s 133(1)*(b)* that '(d)uring business rescue proceedings, no legal proceeding . . . against the company . . . may be commenced *except . . . with the leave of the court* and in accordance with any terms the court considers suitable'.

A few days before the hearing of a winding-up application, launched by the South African Revenue Service (Sars) against TMR Properties (Pty) Ltd (PFC) under case No GP 543/2021, DRFT trustees, the sole shareholder of PFC, applied in another division (under case No KZP 409/2022 in the Pietermaritzburg court) for PFC to be placed under business rescue.

PFC had changed its registered address to one falling under the latter division, and thereafter failed to file a replying affidavit to Sars' answering affidavit, more specifically replying to Sars' allegations that it was an asset-holding company which had disposed

of all its assets; that it was factually insolvent; and that it had falsely created the impression in its financial statements that the company could be rescued. PFC also did not place the business rescue application on the roll, and when Sars did so, requested a postponement, which was denied, and thereafter did not proceed with application. (See [18], [20] – [24].)

In the winding-up application, PFC likewise failed to deal at all with the allegations in the founding papers, and one court day prior to the hearing thereof filed an affidavit submitting that, in terms of s 131(6) of the Act, Sars was precluded from proceeding with the winding-up application by virtue of the business rescue application. Sars then sought leave, in terms of s 133(1)*(b)* of the Act, to proceed with the winding-up application (in the Gauteng Division, Pretoria), relying on the court's discretion in terms of that subsection to proceed with the winding-up application despite the commencement of business rescue proceedings. Ultimately, a final winding-up order was granted by the Pretoria court against PFC; and the Pietermaritzburg court dismissed its business rescue application. (See [19], [22] – [24].)

The present case concerned PFC's appeals to the Supreme Court of Appeal (the SCA), against both the final winding-up order and the dismissal of its business rescue application. The SCA requested counsel to address it on whether the conduct on the part of PFC and the DRFT trustees, in launching the business rescue application, constituted an abuse of process, and, more specifically, whether the DRFT trustees should be non-suited if it were found that the business rescue application was launched solely to delay or disrupt the winding-up proceedings; and consequently, whether it could have the effect of suspending those proceedings in terms of s 131(6) of the Act.

Held

Comprehensive opposing affidavits in the business rescue application were never answered. The DRFT trustees knew or ought to have known that the business rescue application had no prospect of success. PFC's very existence — if it was ever a genuine asset-holding company — was destroyed by the dissipation of all of its assets. It was factually and commercially insolvent. Yet, in the founding affidavit the DRFT trustees claimed that 'the purchaser of the property has agreed to re-transfer it to PFC'.

This allegation was made solely to bolster PFC's financial status and to create the impression that it could be rescued. (See [31] – [32].)

Business rescue proceedings were aimed at restoring a company to solvency and were not to be abused by a company with no prospects of being rescued, but mainly to avoid a winding-up or to obtain some respite from creditors. The facts showed that, from the outset, the launch of the business rescue application was a stratagem — to thwart the winding-up proceedings and the consequences for the DRFT trustees that may arise therefrom — and that the DRFT trustees had no intention of prosecuting that application to its conclusion. This court must use the power it had to safeguard the integrity of its process. It was clear that the DRFT trustees had sought to use the legal process provided for companies which may legitimately be rescued, for an ulterior purpose. The conduct of the DRFT trustees and PFC was so tainted by impropriety that exercising the court's power to non-suit the DRFT trustees was warranted. (See [27], [36] – [37].)

The Legislature could not have intended that a business rescue application, tainted by abuse, would have the effect of placing a moratorium on winding-up proceedings. As a consequence, their ill-fated application should not have been entertained, by reason of its use in a scheme of abuse. It followed that, although the application was correctly dismissed by the Pietermaritzburg High Court, it would fail on appeal. And because the DRFT trustees were non-suited, the doomed business rescue application was not 'made' as envisaged in s 131(6). Thus, the moratorium did not come into operation and did not suspend the winding-up proceedings. That being so, there was no impediment to the winding-up proceedings. (See [38].)

As for the appeal against the winding-up order, it was clear that PFC was unable to pay its debts and was commercially and factually insolvent. Its assets had been siphoned off and dissipated; and it had lost its substratum. The Pretoria High Court's decision to grant a final order of liquidation was therefore unassailable. The appeals in both cases would therefore be dismissed. (See [39] – [40].)

AM OBO LM v MEC FOR HEALTH, EASTERN CAPE 2024 (1) SA 413 (ECB)

Delict — Medical negligence — Causation — Factual causation — But-for test — Negligence during childbirth at public hospital allegedly resulting in cerebral palsy — Whether failure to monitor foetal heartrate materially contributed to brain injury —

Although medical staff negligent, it could not be found that their negligence caused harm suffered — Evidence not supporting extended inferential reasoning required to find that, 'but for' failure to monitor foetal heartrate, injury would not have occurred.

AM, in her personal capacity and on behalf of her minor son (LM), instituted an action for damages against the MEC, alleging that the MEC's servants, medical personnel employed at Saint Barnabas Hospital, were negligent in the management and treatment of her during labour, in that they failed to monitor LM's foetal heartrate as prescribed, causing LM to suffer a hypoxic ischaemic brain injury (HI injury) at term, manifesting as cerebral palsy.

The present case concerned the determination of liability. There was no dispute that LM suffered such injury; at issue were (as agreed between the parties in their pre-trial minute) — (1) the factual cause of the HI injury, and when the said injuries occurred; and (2) whether negligence (if any) on the part of the MEC's staff caused or materially contributed to the HI injury, in the sense that the defendant by the exercise of reasonable professional care and skill could have prevented it from occurring. (See [4], [21].)

Held

(1) The evidence established that LM suffered a profound global hypoxic ischaemic insult, intrapartum, which shut off oxygenated bloodflow to the foetal brain completely or almost completely, causing the BGT pattern injury. There was no evidence in the medical records or history to point to an antepartum event or occurrence giving rise to hypoxic ischaemic insult which would explain the HIE outcome at birth; no radiological evidence to suggest partial restriction of bloodflow to the foetal brain on multiple occasions during the plaintiff's labour; and no evidence to suggest multiple occlusions of bloodflow to the foetal brain during labour. What remained in evidence was that the brain injury arose because of a global insult which shut off the supply of oxygenated blood to the foetal brain completely or almost completely, for a sufficient duration to give rise to the BGT pattern injury. It was not possible on the evidence to determine when the insult-causing injury occurred; nor, in the absence of a defined or recognised sentinel event, why the insult occurred. (See [19], [38], [40].)

(2) The failure to monitor the foetalheart rate and record the results in accordance with guidelines constituted a breach of the duty of care owed by the medical staff to the plaintiff and her unborn baby. However, to find that such failure caused, in the

sense that it materially contributed to the brain injury, would require additional facts to be inferred, since there was no evidence to establish the existence of those necessary facts. It would need to be inferred that the monitoring would have indicated that the foetal heartrate was abnormal, and that the foetus was in distress; and that the indication of foetal distress would have occurred at a time when successful intervention could have taken place. The only evidence to support the claim that monitoring would have indicated foetal distress, was that which described the mechanism of a partial prolonged hypoxic ischaemic insult. In such instances, abnormal foetal heartrates were likely to occur. But the evidence did not point to such mechanism of injury. Although it was established that the medical staff were negligent, it could not be found that the negligence caused the harm suffered. The application of the traditional 'but-for' test was adequate in this case. The extended inferential reasoning required was not supported by the evidence. Accordingly, it could not be found that, 'but for' the failure to monitor the foetal heartrate, the injury would not have occurred; and plaintiff's claims would be dismissed. (See [40], [43], [54], [56] – [57].)

CITIBANK NA SA AND ANOTHER v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2024 (1) SA 429 (GP)

Revenue — Value-added tax — Imported services — What constitutes — Services rendered locally by foreign-based employees of multinational corporation — Seconded employees still in employ of and paid by seconding (foreign) branch of corporation, subject to reimbursement by local branch — Reimbursement costs not constituting *VAT*-exempted remuneration for employment — Argument that seconded employees 'employed' by local branch rejected — Services rendered by seconded workers constituting vatable 'imported services' — Value-Added Tax Act 89 of 1991, s 7(1)*(c)*, s 14(5)*(d)*.

The applicants (Citibank SA and Citigroup Global Markets (Pty) Ltd) were local branches of the Citigroup multinational investment banking company. They applied in the Pretoria High Court for an order stating that costs linked to the services of 'seconded employees' on 'expatriate assignments' with the applicants were VAT-exempt under s 7(1) read with s 14(5)*(d)* of the Value-Added Tax Act 89 of 1991.
Citigroup runs an expatriate programme in which members second their employees to members in other countries on 'expatriate assignments'. Seconded employees are

paid by the sending member (the foreign branch), subject to reimbursement by the recipient member (the local branch). The foreign branch would conclude an 'assignment agreement' with the seconded employee in terms of which his or her services were 'loaned' to the local branch. The assignment agreement makes it clear that seconded employees would still be employed by the foreign branch.

The applicants nevertheless claimed that the services rendered by foreign Citigroup employees seconded to them were not vatable 'imported services' because the seconded employees were, during their secondment, in the employ of the applicants. This, they said, was apparent from the following: (i) the seconded employees placed their productive capacity entirely at the applicants' disposal; (ii) the applicants supervised and controlled their work; (iii) the applicants reimbursed the foreign branches for their salary costs; and (iv) the applicants, qua employers, withheld employees' tax from their remuneration. This meant that their services were not 'imported' but rendered in the course of their employment with the applicants, and as such exempt from VAT. The applicants argued that the reimbursements in (iii) were equal to the remuneration due to the seconded employees and fell outside the scope of VAT because remuneration for the rendering of services by an employee to an employer was not vatable. The Receiver disputed all of this and insisted that the applicants were on the hook for VAT on the seconded employees' services.

The applicable statutory provisions: s 14(5)*(d)* of the VAT Act exempted imported services from VAT if they were supplied 'by a person as contemplated in terms of proviso (iii)*(aa)* to the definition of enterprise in s 1' (the *proviso*), ie 'an employee to his employer in the course of his employment' to the extent that 'remuneration', in the sense intended in the fourth schedule to the Income Tax Act 58 of 1962, is paid or payable to him. The fourth schedule, in turn, defined 'employee' as someone 'who receives any remuneration'; 'employer' as someone 'who pays or is liable to pay to any person any amount by way of remuneration'; and 'remuneration' as 'any amount of income which is paid or is payable to any person by way of any salary, overtime pay, wage' etc.

The Receiver disputed the applicants' claim that the seconded individuals were employed by the applicants. It argued that, for the purposes of tax law, they were employees of the foreign branches; that labour-law definitions of 'employer', 'employee' and 'remuneration' were irrelevant; and that the 'reimbursement' payments

were payments for a service and did not constitute the cost of salaries paid to the seconded individuals, but was calculated on a 'cost plus' basis.

Held

To succeed, the applicants had to show the following: that they were the 'employers' and the seconded employees the 'employees' as contemplated in the proviso (see above); that the seconded employees rendered services in the course of their employment with the applicants; and that the applicants paid them 'remuneration'. The applicants should have dealt with the nature of the applicants' relationship with the seconded employees in the light of these provisions instead of relying on labour-law definitions. (See [35] – [36], [44].)

The applicants did not substantiate what constituted their alleged 'supervision and control' of the seconded employees or address the provision in the assignment agreement that seconded employees did not become the employees of the recipient entity. Nor was the payment of their salaries by the foreign branches properly addressed. (See [50] – [55].)

The application therefore faltered on two grounds: the applicants' failure to show (i) that they were the 'employers' of the seconded employees or (ii) that the payments they made to the foreign branches constituted 'remuneration' within the meaning contemplated in the proviso to the definition of 'enterprise'. (See [58].)

The court accordingly dismissed the application with costs (see [59]).

INTERWASTE (PTY) LTD AND OTHERS v BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION AND OTHERS 2024 (1) SA 439 (GP)

Black economic empowerment — Broad-Based Black Economic Empowerment Commission — Findings — Review — Finding upholding complaint of fronting ruled to be unlawful, irrational and procedurally unfair — Court criticising Commission's apparent determination to 'convict', irrespective of facts or law — Decision set aside on administrative and legality grounds — Broad-Based Black Economic Empowerment Act 53 of 2003, s 1 sv 'fronting practice'.

In February 2021 the first respondent, the Broad-Based Black Economic Empowerment Commission (the Commission), issued its findings after an investigation into a complaint of fronting, by the second respondent, Mr Mekgwe, lodged against the applicants in August 2017. The Commission found that the

applicants, Interwaste and its CEO, Mr Willcocks, were indeed guilty of the offence of fronting by undermining the objectives of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the Act) and its regulations (the Regulations). Section 1 of the Act defines a 'fronting practice' as conduct that 'undermines or frustrates . . . the objectives of this Act or the implementation of [its] provisions', including practices that 'discourage' black employees appointees 'from substantially participating in core activities' of the enterprises to which they were appointed or that prevent empowerment benefits from 'flow[ing] to black people'.

Rammat, a company owned by Mekgwe and one Mr Tau, became a minority shareholder in the second applicant, PWR, in December 2012. The majority shares in PWR were held by Interwaste, which loaned Rammat the money it required to buy its shareholding. The arrangement was intended to empower Rammat and Tau to become PWR shareholders and to retain them as directors, which they had been since PWR's early days. Rammat, through Mekgwe and Tau, agreed to be bound by the original shareholders' agreement of 2003. It gave Rammat, as minority shareholder, the right to participate in shareholder resolutions, representation on PWR's board and a proportionate share of PWR's dividends. This was not disputed.

In September 2014 PWR retrenched Mekgwe for operational reasons. Mekgwe unsuccessfully challenged the retrenchment in the Labour Court. While wating for the Labour Court judgment, Mekgwe in August 2016 filed the present fronting complaint against Interwaste. He claimed he was not motivated by revenge, but by long-standing concerns about fronting practices by Interwaste and Rammat's lack of actual control over PWR. He said profits were not flowing to him and Tau and that decisions by PWR's board were being taken without their participation. Mekgwe's complaint was not accompanied by supporting documentation.

In April 2017 the Commission informed Interwaste of Mekgwe's complaint. The Commission requested documentation from Interwaste, which it provided.

Mekgwe withdrew his complaint in September 2017. The Commission, however, decided to continue its investigation. In April 2019 it informed Interwaste that it had made preliminary findings against the applicants (Interwaste and its CEO, Willcocks). In February 2021, more than four years after the complaint, the Commission released its findings. They were, inter alia, that Interwaste controlled PWR to the exclusion of Rammat and that PWR's black directors did not participate in the company's decision-making. The Commission found that PWR was used to perform a contract that could

have been performed by Interwaste, which suggested that PWR was being used as a mere front for Interwaste.

The applicants applied to the Pretoria High Court for an administrative and legality review of the Commission's findings. They argued that the Commission had committed multiple reviewable mistakes, including —

- infringing the one-year time bar for the conclusion of investigations in reg 15(4);
- ignoring material evidence;
- acting in a procedurally unfair and irrational manner;
- making material errors of fact;
- making errors of law;
- imposing an impermissible onus; and
- unlawfully continuing with the investigation after it had become obvious that the complaint lacked merit.

The Commission's basic premise was that it was the court's duty to find transgressions in the submitted facts and then rule on them in the Commission's favour. It also argued that the time bar in reg 15(4) was merely procedural and not substantive in nature, and that its failure to adhere to it should not invalidate its findings. The High Court —

Held

This application was not about the constitutional imperative of black economic empowerment but the *rationality and lawfulness of the Commission's findings* in the light of the facts and evidence at its disposal. Arguments aimed at applicants' compliance with the objectives of the Act were irrelevant. (See [7], [110].)

The *time bar* in reg 15(4) was absolute. The Commission's argument to the contrary ignored the devastating consequences a pending investigation by the Commission could have on an accused party. There was, moreover, no good cause for condoning the Commission's reckless delay in finalising its investigation. The Commission had overstepped its powers by issuing its findings late, and for this reason alone they fell to be set aside under s 6(2)*(e)* of PAJA. (See [74] – [76].)

As to the Commission's alleged *failure to consider relevant documents and information* (reviewable under s 6(2) of PAJA, as well as under the principle of legality), that the Commission flagrantly ignored the so-called 'centralised treasury function', an arrangement that gave PWR the advantage of centralised goods and services, and was plainly intended to favour PWR and the minority shareholders. The Commission's disregard of the function was unlawful and reviewable. In addition, the Commission's

disregard of documentation showing that Rammat received its share of dividends in 2016 was similarly unlawful and reviewable. (See [81.3], [81.4], [82].)

As to the alleged *procedural unfairness*, that the Commission's failure, in its apparent determination to 'convict' the applicants, to (i) give them an opportunity to explain themselves or (ii) to apply its mind to the evidence submitted by them, rendered its final findings reviewable under s 6(2)*(c)* of PAJA. The Commission's disturbing view that empowerment principles had to be pursued irrespective of the facts or the law, was representative of its attitude throughout the investigation. (See [86] – [89].)

As to *irrationality and errors of law*, that the facts relied on by the Commission for its finding that the applicants were guilty of fronting practices simply did not point to the offence of fronting as defined in s 1 of the Act. The Commission's view that PWR was being used as a mere intermediary stemmed from an isolated event and was not evidence of fronting. These and other errors of law committed by the Commission meant that its final findings fell to be reviewed under s 6(2)*(d)* of PAJA. (See [93] – [96].)

As to the issue of *onus*, that the Commission's reliance on the (alleged) lack of evidence provided by the applicants as a basis for its finding, imposed an impermissible burden on them to prove their innocence, which rendered the Commission's finding reviewable on this ground as well. (See [97] – [100].)

As to *proceeding with the investigation without a proper basis*, that the Commission ought to have concluded on the evidence provided by Interwaste that there was no reasonable basis for further investigation of the complaint, and that its findings were reviewable also on this ground. (See [102] – [108].)

The decisions and final findings of the Commission, being contrary to both PAJA and the principle of legality, were declared unconstitutional, unlawful and invalid. (See [113] – [115].)

MACNEIL PLASTICS (PTY) LTD v VAN DEN HEEVER NO AND OTHERS 2024 (1) SA 468 (GP)

Company — Business rescue — Liquidation proceedings already initiated — Void disposition made by company after final liquidation but before business rescue — Business rescue suspending, but not terminating, liquidation proceedings already

under way — Previous concursus creditorum reinstated rather than new one formed — Placing company in business rescue not validating or undoing void disposition — Companies Act 61 of 1973, s 341(2); Companies Act 71 of 2008, s 131(6).
Company — Winding-up — Unlawful alienations and preferences — Void disposition — Effect of business rescue — Void disposition made by company after final liquidation but before business rescue — Placing company in business rescue not validating or undoing void disposition — Companies Act 61 of 1973, s 341(2); Companies Act 71 of 2008, s 131(6).

Water Africa Systems (Pty) Ltd (Water Africa) was placed in final liquidation on the ground that it was unable to pay its debts. Despite its final liquidation, Water Africa made two payments to Macneil Plastics (Pty) Ltd in repayment of a credit facility. After this payment, Water Africa was placed under supervision and in business rescue in terms of the Companies Act 71 of 2008 (Companies Act), and the winding-up proceedings suspended as provided for in s 131(6) thereof.
During Water Africa's business rescue, the business rescue practitioner paid its various creditors — excluding Macneil Plastics — before applying for and obtaining an order setting aside the business rescue and reinstating the final winding-up order. The first to third respondents were subsequently appointed as liquidators of Water Africa. They successfully obtained an order that payments made by Water Africa after the date of the final liquidation be declared void, and for Macneil Plastics to return the moneys paid with interest and costs of suit.
The present case concerned Macneil Plastics' appeal against that order. It submitted that the final liquidation order was replaced with the order converting liquidation proceedings under supervision into business rescue, and that this brought the winding-up proceedings to an end, undoing the concursus creditorum that was formed, thus allowing the business rescue practitioners to deal with the assets of the company. It was also submitted that placing a company in business rescue into liquidation started everything afresh — a new concursus creditorum was formed; it did not revive a previous liquidation order or a previously formed concursus creditorum. And so, it argued, the order should be set aside because the payments that the liquidators sought to reclaim from it were made after its final liquidation, which were later replaced or superseded by being converted to business rescue proceedings. (See [14] – [15], [35].)

At issue was the legal effect of a s 131(6) order on existing liquidation proceedings, more specifically whether it terminated and then started afresh upon the failure of business rescue, or whether it was suspended and then resumed from where it left off in the instance that business rescue failed to adequately turn the company around. (See [12] – [13].)

Held

When the impugned payments were made the company was already placed under final winding-up. The legal position regarding a disposition made after granting the winding-up order was that they were void because control rested with the Master and the liquidator. The court did not have the power to validate such dispositions.

The provision in s 131(6) was clear on the effect a court order placing a company in business rescue had upon the pre-existing winding-up order — it remained in place, not terminated, but suspended, until the court, upon the application of the business rescue practitioner, determined that such suspension would be lifted. On the facts and the law, the disposition made to Water Africa was void ab initio; the concursus creditorum was established when Water Africa was placed under final liquidation. Placing the company in business rescue could not validate or undo the void disposition. The disposition should not have occurred because the company's control was already vested with the Master and the liquidators to be appointed. The trial court had not misdirected itself — placing the company in business rescue could not validate a void disposition. The appeal would accordingly be dismissed. (See [40] – [41], [47].)

MALVERN TRADING CC v ABSA BANK LTD 2024 (1) SA 478 (GJ)

Close corporation — Actions by and against — Jurisdiction — Where registered address within court's area of jurisdiction, but not principal place of business, and cause of action also arising elsewhere — Whether location of registered office conferring jurisdiction — Principle of dual jurisdiction generally applicable to close corporations — Close corporation deemed to be resident at its registered office or principal place of business — Recognition of dual jurisdiction in respect of close corporations constitutional imperative to protect right of access to courts — Constitution, s 34; Superior Courts Act 10 of 2013, s 21.

Court — High Court — Jurisdiction — Close corporations — Where registered address within court's area of jurisdiction, but not principal place of business, and cause of action also arising elsewhere — Whether location of registered office conferring jurisdiction — Principle of dual jurisdiction generally applicable to close corporations — Close corporation deemed to be resident at its registered office or principal place of business — Recognition of dual jurisdiction in respect of close corporations constitutional imperative to protect right of access to courts — Constitution, s 34; Superior Courts Act 10 of 2013, s 21.

Malvern Trading CC (Malvern), a duly incorporated close corporation, applied for rescission of an order obtained by default in the Gauteng Local Division, Johannesburg, at the instance of Absa Bank Ltd, for the delivery of a motor vehicle. Malvern's complaint was that the order was erroneously sought and granted in its absence and ought to be rescinded under Uniform Rule 4(1)*(a)*(v). One of the grounds advanced as to why the order was erroneously sought and granted was that, as Malvern's principal place of business was (allegedly) situated in Polokwane, the Johannesburg High Court did not have jurisdiction over its person because Absa's cause of action arose in Polokwane. In this regard it was contended that the location of its registered office in Johannesburg did not confer jurisdiction on the court.
This raised the issue of whether the dual jurisdiction principle — that, for jurisdictional purposes, *a company* was deemed to have dual residency at its registered office and place of business, where these locations differed, with different courts having jurisdiction over a company at the same time — also applied to close corporations.
Held
On the facts it must be accepted that Malvern had no actual place of business in Gauteng at the time legal action commenced in this matter, and also that Absa's cause of action arose outside this court's jurisdiction.
The point of departure was the provisions of s 21 of the Superior Courts Act 10 of 2013, which provided that a division of the High Court had jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction, and all other matters of which it may according to law take cognisance. The central question was whether Malvern was deemed to reside within this court's jurisdiction due to the location of its registered office, for purposes of s 21 of the Superior Courts Act.

An analysis of the provisions of the Close Corporations Act 69 of 1984 (the CCA) supported the legal fiction that a close corporation was deemed to be resident at its registered office. So, for instance, s 25 created a mechanism whereby a corporation was deemed to be present at its place of business; a number of mandatory provisions enjoined a corporation to house those instruments fundamental to its existence and functioning, such as the registered founding statement, at the corporation's registered office; and its provisions regarding the powers of individual members, which considerably eroded the notion of central control in the case of a close corporation. (See [33], [44].)

The legal position regarding close corporations was unaffected by the promulgation of the 2008 Companies Act. The dual jurisdiction principle that applied to companies prior to the 2008 Companies Act, also applied to close corporations. (See [55] – [56].)

There were also relevant constitutional considerations: the question of the court's jurisdiction and the process initiating the *lis* — including the manner of service of process — were fundamental to a litigant's constitutional rights of access to the courts (s 34). The facts of the present matter illustrated that if Absa had to exclusively rely on the location of Malvern's principal place of business to determine which court had jurisdiction, it may well have been denied access to the courts entirely; Malvern was dysfunctional and may well not have had a place of business at the time legal action commenced herein. To guarantee the s 34 right of access to court, it was imperative that a plaintiff or applicant should be able to rely on the dual jurisdiction principle in all matters involving close corporations. Consequently, the court had jurisdiction to grant the order in the present matter, and the application for rescission thereof would be dismissed. (See [59], [62] – [63].)

PITYANA v ABSA GROUP LTD AND OTHERS 2024 (1) SA 491 (GP)

Company — Directors and officers — Director — Removal — Review — Whether board's decision to remove director reviewable under rule 53 — Companies Act 71 of 2008, s 71(5); Uniform Rule 53.

Administrative law — Administrative action — — What constitutes — Decision of company board to remove director — Not amounting to administrative action.

This case concerned an interlocutory application in review proceedings brought under s 71(5) of the Companies Act 71 of 2008, which provides that 'if . . . the board of a

company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director . . . may apply . . . to a court to review the determination of the board'.

The main issue was whether the Uniform Rule 53 — which provides for review of a 'decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions' — applied to review proceedings as contemplated in s 71(5) of the Companies Act. (The Companies Act does not prescribe whether the provisions of rule 53 apply or not.)

Mr Pityana had sought to review and set aside the decision of the boards of the Absa Group Ltd and of Absa Bank Ltd (collectively, 'Absa') to remove him as a non-executive director and called upon Absa to dispatch the record of decision in terms of rule 53(4). Absa responded with the said interlocutory application — for a declaratory order that utilising rule 53 to review the decision was an irregular step, and to have it set aside. Absa submitted that rule 53 did not apply, since the decision did not constitute the performing of a 'judicial, quasi-judicial or administrative function' as contemplated in rule 53(1), and that consequently the rule 53 review application was an irregular step, alternatively was non-compliant with the Uniform Rules.

A second issue was whether the decision was administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), so that the application was subject to the provisions thereof (as Mr Pityana had submitted was the case).

Held

The decision did not constitute administrative action

If conduct was not of an administrative nature, it could not constitute administrative action as envisaged in PAJA. There was nothing bureaucratic about the boards' decision, nor did it involve 'application of policy'. Instead, the decision seemed more commercial or managerial in nature, rather than administrative. The boards' decision was made in the course of running and managing public companies. The nature of the power was thus business-related; no different to a decision of a meeting of shareholders of a company. It was clearly not of an administrative nature. However, given the interrelatedness of the requirements for what constitutes administrative

action, it also needed to be considered whether the decision was made in the exercise of a public power or public function. It was not; no conduct that was 'governmental in nature' was present. The decision was also clearly not administrative action in terms of the definition thereof in s 33 of the Constitution. (See [18], [20] – [23], [29] – [31].)

Rule 53 applied to a review under s 75(1) of the Companies Act

The wording of the rule and the fact that the impugned decision was clearly not that of any inferior court or tribunal, board or officer performing judicial, quasi-judicial or administrative functions, was not determinative of whether the rule applied. To argue that the rule was not applicable was clearly misplaced, as the courts have never interpreted the rule in that way; it did not take into consideration that over a long period of time, and even before the advent of the constitutional era, the rule provided for and was used in proceedings for review, what are currently termed common-law reviews. (See [36], [44], [72].)

The Companies Act and the interpretation thereof were determinative of the issue. It was clear that the procedural requirements set out in ss 71(4) must be followed before the determination to remove the director could be made. In this matter there seemingly was no reason to seek the record, as the reasons and documents were provided to Mr Pityana before the determination was made to remove him as a director. However, even if only the procedure was reviewed, as was the case in reviews under the common law, an applicant was still entitled to make use of the advantages rule 53 created. Despite it being clear from the wording of s 71 that the review was limited and mostly only directed at the procedure followed, there was still some kind of review on the merits. And, despite the fact that the reasons and record may be available to a director, as they should have been provided with the relevant reasons as required, there were other persons who may also make use of the same section to review the determination to remove who had no access to the reasons or record. Rule 53 was therefore available to any applicant applying for a review of the determination. And, while the review contemplated in terms of s 71(5) was sui generis, that did not mean that an applicant was not entitled to make use of the advantages of the rule.

On a simple reading of ss (5), a court reviewing the decision of the board of directors would be empowered to enquire not only into the procedural correctness of the decision, but also at least whether the factual finding was correct, that there was indeed negligence or dereliction to have triggered the process. This enquiry may be limited, but the record should be provided to court to properly determine the matter.

Accordingly, rule 53 was available to an applicant for review under s 71(5) of the Companies Act of 2008, and the application would therefore not succeed. (See [47], [60], [68] – [70], [73], [77], [97].)

RENSBURG AND OTHERS v LEGAL PRACTICE COUNCIL 2024 (1) SA 510 (GP)

Legal practitioner — Attorney — Candidate attorney — Holding of office — Engagement in business — Preconditions for — Legal Practice Council rule 22.1.5.1 — Legal Practice Act 28 of 2014, s 95.

Applicants were candidate attorneys, and respondent the South African Legal Practice Council (LPC). Three of the applicants were directors of companies and the fourth was an administrative assistant. In each case the candidate attorney had signed a Practical Vocational Training Contract with a principal, and submitted the contract to the LPC, which in each instance had refused to register on account of non-compliance with rule 22.1.5.1 of the LPC Rules. The Council is empowered to make rules by s 95 of the Legal Practice Act 28 of 2014.

Applicants then approached the court for an order that they were not required to obtain the LPC's prior written consent before concluding their contracts, and for an order that the contracts be registered; or alternatively, on the basis of rule 22.1.5.2, that the court direct the LPC to register their contracts.

The issue was the proper interpretation of rule 22.1.5.

Held, that the rule should be interpreted as follows (see [14] – [15]).

Rule 22.1.5.1 provides that a candidate attorney may, other than being a candidate attorney, hold an office (remunerative or not) or engage in a business, provided such holding of office or engagement in business was not likely to interfere with his training, and provided he obtained the LPC's prior written consent to do so. (Read with rule 22.1.5.2, the consent is required before conclusion of the Practical Vocational Training Contract.)

Rule 22.1.5.2 provides that if a candidate attorney contravenes rule 22.1.5.1, his contract is void and service rendered in terms of it ineffective. Save that, if the candidate attorney shows good cause, a court may direct otherwise.

Here, on account of the failure to obtain prior written consent, each contract was void, and service rendered thereunder ineffective.

But there was no likelihood that the candidate attorneys' holdings of office or engagement in business were likely to interfere with their training. This equated to good cause shown (see [28] – [29]).
The LPC ordered to register the Practical Vocational Training Contracts (see [30]).

TURNERLAND MANUFACTURING (PTY) LTD v TAXING MASTER, WESTERN CAPE HIGH COURT AND ANOTHER 2024 (1) SA 518 (WCC)

Costs — Taxation — Notice of — Notice to liable party under rule 70(4)*(a)* — Whether formal service by sheriff required — Application 'to review and set aside' taxing master's award obtained on unopposed basis — Whether application was for review or rescission — Whether case made out for rescission under common law — Uniform Rule 70(4)*(a)*.

Turnerland instituted an action in which attorneys Basson & Louw Inc (B&L) were mandated to act on their behalf in the trial. When B&L demanded payment of amounts claimed for services rendered and disbursements made during the course of the trial, Turnerland refused on the basis that the fees charged were excessive. B&L accordingly applied to the taxing master for its attorney – client bill, which it claimed was due and payable to it by Turnerland, to be taxed; and sent its notice of intention to tax the bill of costs to the administrative manager of Turnerland, via email on 29 October 2020. On 24 March 2021 the taxation was held on an unopposed basis and a writ of execution issued on 11 May 2021.
Soon after, Turnerland launched an urgent application in which it sought and was granted an order that B&L, inter alia, be interdicted and prohibited from acting on the warrant and proceeding with the sale in execution, pending the finalisation of an application Turnerland proposed launching to review and set aside the taxation award and the writ. The present case concerned this last-mentioned application.
Turnerland contended that the notice of taxation to tax B&L's bill of costs was not properly served on it in circumstances where B&L had full knowledge that Turnerland disputed its indebtedness to them. They acknowledged that they received B&L's email but denied that service via email constituted proper service, because it was not served on the applicant by the sheriff of the court, who would have explained the nature and exigency of the taxation process. They claimed that they mistook the e-mailed notice for a procedural letter of demand, and did not appreciate its purport, only gaining

knowledge of the taxation award on 11 May 2021 when the sheriff attended at their premises and served the warrant issued pursuant to the taxation award. Turnerland also contended that the taxing master did not comply with rule 70(4)*(a)*, which provides that '(t)he taxing master shall not proceed with the taxation of any bill of costs unless he or she is satisfied that the party liable to pay the costs had received due notice in terms of subrule (3B)'. (See [17], [30].)

B&L submitted that the taxation notice itself explained the process and that the applicant simply ignored the document, despite it being very clear as to what steps had to be followed. They also objected on the technical ground that it was not competent under the rules to apply for both review and setting-aside. In this regard, Turnerland submitted that they were applying for rescission, and that the principles that were applicable to the setting aside of default judgments also applied to the setting-aside of taxation of a bill of costs (see [46]).

At issue was whether the first respondent complied with rule 70(4)*(a)* prior to taxation of the first respondent's bill of costs, ie whether B&L's notice of intention to tax was properly served on the applicant; whether Turnerland's application was a review or a rescission application; and, if the latter, whether a case had been made out for rescission in terms of the common law.

Held

As to whether the first respondent complied with rule 70(4)(a) prior to taxation of the first respondent's bill of costs

Given that the taxing master proceeded with the taxation of the matter, the taxing master must have been satisfied that due notice was given to Turnerland. And the taxing master was seemingly satisfied that there was compliance with the said rule, since there was nothing to suggest that the rule required that service of the notice had to have been effected by the sheriff of the court. There was therefore no non-compliance with rule 70(4)*(a)* as contended. (See [36], [39].)

The status of a taxed bill of costs was akin to a judgment of debt, where failure to satisfy that debt may lead to warrants of execution. To this extent, it had become common practice to require personal service on a debtor where judgment was being sought and where their rights to immovable property may be compromised. The purpose of service of a notice was not only to ensure that personal service thereof came to the attention of the debtor, but also that the particular process being served was explained by the sheriff of the court, to the party so served. There should be a

distinction in the case of a notice of a taxation, which order, such as in the present instance, would have the consequence of the attachment of immovable property in the event that the sale of the movable property did not satisfy the debt. This requirement was even more prescriptive where the debtor involved was unrepresented. (See [40], [43].)

As to whether Turnerland's application was a review or a rescission

The common-law principles relating to rescission applied. An order as to costs could not be enforced without the taxing master's quantification thereof, and a quantification done in the absence of one of the litigants ought to be open to challenge on the same basis as were default judgments. (See [46] – [49].)

As to whether Turnerland made out a case for rescission in terms of the common law

Based on the common-cause facts, it was reasonable for Turnerland's administrative manager to have assumed that the notice which was emailed to her was a procedural 'letter of demand', and that she did not understand the purport of the notice. The application was brought in good faith, and they had a prima facie bona fide defence, having at all times questioned the bill of costs. (See [50].)

The taxation award made by the taxing master in respect of B&L's fees and disbursements, and warrant of execution issued pursuant thereto, would accordingly be set aside. (See [53].)

VAN DER WATT v SCHOEMAN AND OTHERS 2024 (1) SA 531 (ECGq)

Company — Oppressive conduct — Relief — Deadlock — Appropriate order — Purchase of shares — Valuation by independent third party — Companies Act 71 of 2008, s 163.

The applicant (Van der Watt) and the first respondent (Schoeman) were medical doctors and the sole directors and shareholders of the second respondent (the company), a partnership-type private company. They were each allotted 100 shares in the company. Implicit in the arrangement between them was the understanding that they would both participate in the management of the company's affairs. The company's principal asset was a commercial property from which the medical practice operated. The company's liabilities were loans from Van der Watt, Schoeman and the third respondent.

Over time, the relationship between Van der Watt and Schoeman soured, and they decided to part ways. Van der Watt sold her shares in the medical practice to Schoeman and a third party, but remained a shareholder of the company. After Van der Watt's departure from the practice, Schoeman, however, began excluding her from the company's affairs. As a result, the relationship between them broke down completely.

Van der Watt's attorneys informed Schoeman that her behaviour constituted oppressive and prejudicial conduct and demanded that Schoeman purchase Van der Watt's shares and loan account for a market-related price. Van der Watt proposed that an independent valuer be appointed to determine this. Schoeman declined, and the matter proceeded to court by way of an application by Van der Watt for relief from oppressive conduct under s 163 of the Companies Act 71 of 2008. She sought an order directing Schoeman to purchase her shares and loan account in the company at fair value. Schoeman argued that s 163 was not available to Van der Watt because, as equal shareholder, she was not an oppressed minority. She offered Van der Watt R500 000 for her shares, arguing that this was a fair offer that cured any prejudice and ought to be made an order of court. Van der Watt declined the offer on the ground it was unreasonable.

Held

Central to the dispute between the parties was the applicability of s 163 of the Companies Act 71 of 2008 to a company director or shareholder confronted with a management or voting deadlock. While the oppression remedy in s 252 of the (old) 1973 Companies Act was focused on the protection of minority shareholders, the remedy provided by s 163 of the (new) 2008 Act protected not just minorities, but any shareholder, including one with 50% of the vote (majority or controlling shareholders would, however, generally be excluded from protection because of their ability to use their voting power to eliminate the oppression or prejudice complained of). The reference in s 163(1)*(a)* to oppression by the company 'or a related person', read with the relation/control provisions in s 2(1)*(b)* and s 2(2)*(d)* of the Act, served to extend the remedy in s 163 to deadlock situations like the present. * (See [3] – [13].)

As to the appropriate relief, s 163 gave the court a wide discretion in this regard. If it opted for relief by way of an obligatory share purchase, then it had an unfettered discretion as to how a fair price should be fixed, including a valuation by an objective third party. (See [38].)

It was clear from the evidence that Schoeman was guilty of oppressive conduct of the sort envisaged by s 163. It was not only oppressive, but also unfairly prejudicial, to Van der Watt. Since Van der Watt's reasons for rejecting Schoeman's offer were acceptable, the court would decline to make it an order of court. (See [26], [28], [37].) The court, in the exercise of its unfettered discretion under s 163(3) to grant appropriate relief, directed Schoeman to purchase Van der Watt's shares and loan account in the company at a fair value to be determined by a practising chartered accountant agreed on by them. (See [39].)

VAN WYK AND OTHERS v MINISTER OF EMPLOYMENT AND LABOUR 2024 (1) SA 545 (GJ)

Constitutional law — Legislation — Validity — Basic Conditions of Employment Act 75 of 1997, ss 25, 25A, 25B and 25C — For purposes of granting leave entitlements to employee parents, provisions differentiating, on one hand, between mothers and fathers, and, on other hand, between different categories of parents, ie birth mother and father, adoptive parents, and commissioning parents in surrogate motherhood agreement — Provisions unfairly discriminating between mother and father, and between different sets of parents — Provisions invalid by reason of inconsistency with ss 9 and 10 of Constitution — Constitution, ss 9 and 10.

Constitutional law — Legislation — Validity — Unemployment Insurance Act 63 of 2001, ss 24, 26A, 27 and 29A — Provisions corresponding to ss 25, 25A, 25B and 25C of Basic Conditions of Employment Act 75 of 1997, which, for purposes of granting leave entitlements to employee parents, differentiating, on one hand, between mothers and fathers, and, on other hand, between different categories of parents, ie birth mother and father, adoptive parents, and commissioning parents in surrogate motherhood agreement — Provisions of BCEA unfairly discriminating between mother and father, and between different sets of parents — Provisions of *UIF* Act, along with those of *BCEA*, declared invalid by reason of inconsistency with ss 9 and 10 of Constitution — Constitution, ss 9 and 10.

In this matter the applicants * challenged the constitutionality of ss 25, 25A, 25B and 25C of the Basic Conditions of Employment Act 75 of 1997. In terms of such provisions, employees were afforded various leave entitlements when their children were born, or when they adopted children. For these purposes, the provisions,

differentiated between mothers and fathers, and also between three classes of parents: the birth mother and father; adoptive parents; and commissioning parents in a surrogate motherhood agreement. The leave entitlements included the following: A birth mother was entitled to at least four consecutive months' 'maternity leave' (s 25). A father was entitled to at least 10 days' 'parental leave' (s 25A). As to adoptive parents of a child who was below the age of 2, one parent was entitled to 10 weeks' adoption leave; the other to 10 days' parental leave in terms of s 25A (see s 25B). As to commissioning parents in a surrogate motherhood agreement, one parent was entitled to 10 weeks' commissioning parental leave; the other to 10 days' parental leave in terms of s 25A (see s 25C).

Held, that, upon the premise that the leave entitlements, and duration of the leave, were provided for the purpose of the nurture of a baby or toddler, not merely to allow a literal physiological recovery from giving birth, it seemed plain that the distinctions made in the BCEA were at odds with the objectives of ss 9 and 10 of the Constitution, and also at odds with the norms inherent in the Childrens' Act. (See [23].)

Held, that the first irrationality was the provision for a 10-week period of leave for commissioning and adoptive 'mothers' rather than a 16-week period of leave provided for a birth mother. There existed no honourable explanation for such distinction; nor did it serve any legitimate governmental objective. The discrimination was unfair. Mothers in all three categories of parents identified in this judgment ought to be entitled to the same period of leave for the purpose of child nurture if inequality, as proscribed by s 9 of the Constitution, were to be avoided. (See [24].)

Held, further, that distinguishing fathers and mothers in relation to child nurture was unfair discrimination as regards the duration of leave entitlements. To accord a paltry 10 days' leave to a father spoke to a mind-set that regarded the father's involvement in early parenting as marginal. This was per se offensive to the norms of the Constitution, in that it impaired a father's dignity. Long-standing cultural norms which exalted motherhood were not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles. (See [26].)

Held, further, in respect of distinguishing between mothers and fathers, that it was unfair on the mother to be deemed to be the principal caregiver, and that the 'burden' of childcare should be equally shared with the father. Parenting was sui generis and undoubtedly onerous, involving actual work, resilience in the face of exasperation, anxiety, unrelenting close attention to the newborn, extreme exhaustion, sacrifice of

sleep and sacrifice of the pursuit of other interests. A father who chose to share in this experience for his own wellbeing, no less than that of his children and of their mother, could indeed complain that the absence of equal recognition in the BCEA was unfair discrimination. A mother could on the same premise rightly complain that, to assign her role as the primary caregiver who should bear the rigours of parenthood single-handed, was a choice that she and the father should make, not the legislature, and denying the parents the right to choose for themselves impaired her dignity. (See [27].)

Held, in summary, that it ought to be declared that the provisions of ss 25, 25A, 25B and 25C of the BCEA, and the corresponding provisions of the Unemployment Insurance Act 63 of 2001 (UIF Act), ss 24, 26A, 27 and 29A, were invalid by reason of inconsistency with ss 9 and 10 of the Constitution, to the extent that the provisions —

(a) unfairly discriminated between mothers and fathers; and

(b) unfairly discriminated between one set of parents and another on the basis of whether their children —

(i) were born of the mother;

(ii) were conceived by surrogacy;

(iii) were adopted. (See order.)

Held, that the order of invalidity should be suspended for two years to allow Parliament to cure the defects in the legislation. Appropriate relief in the interim would be that the legislation should be read so as to allow all parents of whatever stripe to enjoy four consecutive months' parental leave, collectively. In other words, each pair of parents of a qualifying child shall share the four months' leave as they elect. (See [47] and order.)

NU AFRICA DUTY FREE SHOPS (PTY) LTD v MINISTER OF FINANCE AND OTHERS 2024 (1) SA 567 (CC)

Revenue — Customs and excise — Import duty — Power that s 75 of Customs Act and s 74 of *VAT* Act give Minister of Finance to amend those Acts' schedules — Whether constitutionally permissible for Parliament to delegate power to Minister to amend schedules — Whether sections in substance permitting Minister to introduce money Bills outside of framework in s 77 of Constitution — Constitution, s 77; Customs and Excise Act 91 of 1964, s 75(15)*(a)*(i)(*bb*); Value-Added Tax Act 89 of 1991, s 74(3)(*a*).

Revenue — Customs and excise — Import duty — Duty-free goods — Privilege of diplomats to buy goods duty-free — Abuse of privilege — Consequent amendment by Minister of Finance of schedules to Customs and VAT Acts giving effect to privilege — Amendments imposing quantitative ceilings beyond which affected goods subject to duty — Review of amendments — Grounds — Substantive rationality — Procedural fairness — Vagueness — Unlawful delegation — Inconsistency with Vienna Conventions — Customs and Excise Act 91 of 1964, s 75(15)(*a*)(i)(*bb*); Value-Added Tax Act 89 of 1991, s 74(3)*(a)*.

In the present case the parties on one side were retailers that supplied duty-free alcohol and tobacco to diplomatic and consular missions (Nu Africa, Ambassador, Flemingo and Assortim). Arrayed against them were the Minister of Finance, the Commissioner for the South African Revenue Service and the Minister of International Relations and Cooperation. The Minister of Finance administered the Customs and Excise Act 91 of 1964 (Customs Act) and the Value-Added Tax Act 89 of 1991 (the VAT Act) (see [4] and [6]).

Diplomats were entitled to a rebate on duty in respect of tobacco and alcohol bought by them from the retailers. An unlimited quantity could be bought. The Minister and Commissioner identified abuse: diplomats were buying alcohol and tobacco and on-selling those items in the domestic market. The Commissioner held a meeting and made a presentation to the retailers that warned of a prospective imposition of a quota on tobacco and alcohol. The Commissioner later provided feedback (see [8] – [10]).

Draft amendments to the relevant schedules of the Customs and VAT Acts were published and comments invited. One of the retailers submitted comments. The Minister, using s 75(15)*(a)*(i)*(bb)* of the Customs Act and s 74(3)*(a)* of the VAT Act, amended the schedules of those Acts (see [11]). The Commissioner also amended the rules promulgated under the Customs Act by inserting administrative procedures for implementation of the quota system (see [152]).

Section 75(15) of the Customs Act provides:

> *'(a)* The Minister may . . . by notice in the *Gazette* —
>
> (i) amend Schedule . . . 4 . . . or 6 —
>
> . . . *(b)* whenever he deems it expedient in the public interest to do so; . . . .'

(See [12].)

Section 75(16) states that —

'the provisions of section 48(6) shall . . . apply in respect of any amendment made under . . . subsection (15)'. (See [13].)

Section 48(6) provides:

'Any amendment . . . made under this section in any calendar year shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year . . . .' (See [13].)

Section 74(3) of the VAT Act provides:

'(a) Whenever the Minister amends any Schedule under any provision of the [Customs Act] . . . and it is necessary to amend in consequence . . . Schedule 1 of this Act, the Minister may . . . amend . . . Schedule 1.

(b) The provisions of s 48(6) of the [Customs Act] shall apply mutatis mutandis in respect of any amendment . . . under this subsection.' (See [14].)

Ambassador applied to the High Court to review and set aside the Minister and Commissioner's decisions to, respectively, amend the schedules and rules (see [153]). Flemingo and Assortim later jointly applied for similar review relief while Nu Africa applied to intervene for a declarator that s 75(15)*(a)*(i)*(bb)* of the Customs Act and s 74(3)*(a)* of the VAT Act were unconstitutional.

Ambassador, Flemingo and Assortim in the first instance took PAJA (Promotion of Administrative Justice Act 3 of 2000) and legality points, contending that the process to introduce the quotas had been arbitrary, irrational and procedurally unfair (see [19]). Their second assertion was that the amendments were inconsistent with the Vienna Conventions on the basis that the Conventions did not permit of any limitation of quantities (see [21]).

Nu Africa's constitutional challenge, on the authority of *Smit*, was that it was impermissible for Parliament to delegate plenary lawmaking power to the executive, including power to amend schedules to an Act (see [22] and [29]).

The Minister's contentions, in rebuttal of Flemingo, Assortim and Ambassador's PAJA and legality points, were that (1) the amendments' purpose was to curb abuse and that they were rationally connected to this legitimate purpose; and (2), that there had been no procedural unfairness. The Minister referenced the meeting, feedback and opportunity to comment on the amendments' drafts in this regard (see [20]).

In rebuttal of Nu Africa's constitutional challenge, the Minister argued that s 48(6) of the Customs Act gave Parliament oversight; *Smit* was distinguishable (the question there was whether Parliament could permit ministerial amendment of schedules

without parliamentary involvement, while here there was involvement); Parliament had not delegated plenary legislative power: the amendments were only valid until their lapse, or Parliament's decision otherwise before then) (see [23]).

The High Court held that PAJA was inapplicable. It referenced *Pioneer*'s dicta that the Minister's decision on duties was executive action and his amendment of the schedules was an exercise of legislative function (see [24]).

On the substantive rationality point it found there was no evidence how the quantities of alcohol and tobacco were determined, which equated to their being a random selection and arbitrary (see [26]).

On the Vienna Conventions it interpreted the Conventions to allow countries to have different laws regulating duty-free sale of alcohol and tobacco (see [27]).

Regarding Nu Africa's separation of powers argument, it reasoned that Parliament had made the schedules part of the Act; ss 74(3)*(a)* and 75(15)*(a)*(i)*(bb)* permitted the Minister to amend the schedules; and in doing so the Minister was exercising plenary legislative power (see [28]).

Moreover, with s 48(6), for the period of validity of the amendment (the period before its lapse or parliamentary intervention) the Minister's act of amendment would be an exercise in plenary legislative power (see [28]).

Smit was authority that this was impermissible, and thus ss 74(3)*(a)* and 75(15)*(a)*(i)*(bb)* were unconstitutional (see [28]).

Accordingly, the High Court upheld Nu Africa's constitutional challenge, and Ambassador, Flemingo and Assortim's claim that the Minister had not arrived at the content of the quota system in a substantively rational way (see [154]).

The High Court dismissed the review directed at the Commissioner's amendments to the rules, save that those amendments which were dependent on the validity of the amendments to the schedules, were set aside (see [154]).

Here Nu Africa applied to the Constitutional Court for confirmation of the High Court's declarations of invalidity (see [155]).

The Minister and Commissioner sought leave to appeal the review relief (see [155]).

Issue (1) was whether ss 74(3)*(a)* and 75(15)*(a)*(i)*(bb)*'s giving of legislative power to the Minister was constitutionally permissible (see [75]).

Held, that it was, for the following reasons (see [99]):

• South African constitutionalism did not insist on an absolute separation of powers. Delegation of power to make subordinate legislation was permissible. But assignment of plenary legislative power was generally frowned on (see [75] and [81]).

• *Kennasystems* was authority for the proposition that when the Minister amended schedules of the Act he was not exercising original legislative power (see [92] and *Kennasystmems* in 'Cases cited').

• *Smit* was distinguishable (see [91] and [94] and *Smit* in 'Cases cited').

• The proposition that it was automatically unconstitutional for an Act to empower a member of the executive to amend a schedule to the Act was incorrect. To determine if the delegation was constitutional was a context-specific enquiry, considering the delegation's scope, subject- matter, degree, and constraints on the power conferred (see [95] and [97]).

• The parliamentary process to amend the schedules would be slower than that of the Minister, with the consequence of greater loss to the fiscus (see [97]).

• Amendments were subject to parliamentary oversight in terms of s 48(6) (see [99]).

• The delegation promoted efficient governance (see [100]).

• The Minister was the party with expertise on the Act and its schedules (see [100]).

• The detail of the schedules was likely to require frequent amendment (see [101]).

• It was not practicable to amend duties retroactively by national legislation (see [101]).

Issue (2) was whether ss 74(3)*(a)* and 75(15)*(a)*(i)*(bb)* violated s 77 of the Constitution. Section 77 governs money bills, describing what a money bill is (s 77(1)), what it may deal with (s 77(2)), and the procedure required for such bill's consideration (s 77(3)) (see [33] and [103]).

The contention was that ss 74(3)*(a)* and 75(15)*(a)*(i)*(bb)* violated the section by permitting the Minister to introduce in substance a money bill, outside of s 77's framework (see [34] and [103]).

Held, that the primary purpose of the provisions was regulation, not raising of revenue, which was s 77's trigger, and accordingly the money bill procedure did not need to be followed when amending the schedules (see [105] and [110]).

Issue (3) was whether the amendments were rationally connected to the information they were based on and to their purpose (see [111] and [114] – [115]).

Held, that they were:

- The quotas were based on rational estimates (see [118]); and
- Curbing diplomats exploiting their privilege was a legitimate objective (see [117] and [121]).

Issue (4) was whether the process leading to promulgation of the amendments was fair. *Held*, considering the measures taken, that adequate notice and opportunity to comment had been given (see [122] – [123] and [126]).

Issue (5) was whether the rule amendments made by the Commissioner were so vague or uncertain as to be reviewable. The basis of the issue was the rules leaving it to the relevant authorities at the Department of International Relations and Cooperation (DIRCO) to determine the limits on alcohol and tobacco sales. *Held*, that this was entirely appropriate (see [127] and [129]).

Issue (6) was whether the Minister's delegation to the Dirco of power to permit purchase of higher quantities than in the schedule was lawful. *Held*, that it was: the factors bearing on the discretion's exercise were indisputably clear (see [132] and [134]).

Issue (7), the contention, premised on s 10 of the Diplomatic Immunities Act, that a quota system was permissible only if reciprocity was not shown to South African diplomats, was meritless. There was no evidence that reciprocity had not been shown (see [135]).

Issue (8)'s bases were the licence issued by the Commissioner under s 21 of the Customs Act to sell certain goods to diplomats, and permissions to conduct business in a 'supermarket fashion'. The assertion was that the amendments infringed rights under the licences, and were contra the permissions. *Held*, that there was no infringement. The licences were subject to the Act, Rules and Regulations (see [136] – [138]).

Issue (9) was whether the Vienna Conventions required a blanket exemption from duties (see [139]). *Held*, no (see [144]). The stipulation in art 34 of the Vienna Convention of 1961 that 'A diplomatic agent shall be exempt from all duties' was subject to the qualification in art 36 that 'The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties . . . on *(a)* Articles for the official use of the mission; *(b)* Articles for the personal use of a diplomatic agent or members of his family' (see [15] – [17]); and

in the drafting process of art 36 the state parties' common understanding was that permissible regulations would include those aiming to prevent abuse (see [143]).

Issue (10) was the effect of the Taxation Laws Amendment Act. In 2021 the Minister had promulgated the impugned amendments. In 2022 by means of the Act Parliament enacted the amendments as legislation. The effect was to confirm the validity of the schedules (see [145] – [147]).

Ordered accordingly in the confirmation application (Nu Africa as applicant, the Minister of Finance as first respondent — CCT 29/22) that the High Court order that ss 75(15)*(a)*(i)*(bb)* and 74(3)*(a)* were constitutionally invalid, was not confirmed. The High Court's order setting aside the Minister's amendments to schs 4 and 6 of the Customs Act and sch 1 of the VAT Act was set aside (see 'Order').

In the appeals against the review relief granted by the High Court (the CSARS as applicant, Ambassador as first respondent — CCT 57/22; and Minister of Finance as applicant, Ambassador as first respondent — CCT 58/22), the Commissioner and Minister were granted leave to appeal. The High Court's order reviewing and setting aside the amendments and the rules was set aside, and replaced with an order dismissing Ambassador, Flemingo and Assortim's applications (see 'Order').

Rogers J (Kollapen J concurring) would in CCT 29/2022 (Nu Africa/Minister of Finance) have declined to confirm the High Court's declaration that s 75(15)*(a)*(i)*(bb)* of the Customs Act and s 74(3)*(a)* of the VAT Act were constitutionally invalid (see [285]).

Nu Africa's impermissible-assignment-of-plenary-legislative-power complaint rested on too absolute an approach to the separation of powers to allow for efficient governance. The factors listed in the first judgment at [101] further rendered the Minister's temporally limited power to amend the schedules permissible (see [173]).

The s 77 complaint, if accepted, would disallow in all cases a delegation of power to a Minister to amend national legislation; and ss 73 – 77 of the Constitution, which concerned Bills, only governed how legislation was to be enacted by Parliament. (When Parliament confirmed amendments to the schedules by way of legislation contemplated in s 48(6) of the Customs Act, this confirmatory legislation constituted a money bill.) (See [180] – [181], [183] and [187].)

In the review proceedings in CCT 57/2022 (Commissioner/Ambassador) and 58/2022 (Minister of Finance/Ambassador), Rogers J would have granted leave to appeal, but dismissed the appeals (see [285]).

His conclusions were:

- The Minister had not followed a rational procedure in amending the schedules (see [219], [221], [229] and [234]).
- The information the Minister relied on in making the amendments was not based on information that rationally justified them (see [235] – [236] and [241]).
- The Minister's grant of power to the Dirco to authorise lesser or greater quantities was unlawful (see [244] – [246], [248] – [252] and [255]).
- It was not the case that the amendments to the schedules were so unclear as to be unlawful (see [257] and [265]).
- The amendments to the schedules having been set aside, the rules dependent thereon for their validity, which the High Court had identified, would also fall (see [266]).
- The procedure the Commissioner had followed before amending the customs rules was unfair (see [271]).
- The impermissible delegation of power to the Dirco would also invalidate at least one of the rules that the High Court had delineated (see [272]).

SOUTH AFRICAN CRIMINAL LAW REPORTS FEBRUARY 2023

KNOOP NO AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2024 (1) SACR 121 (SCA)

Prevention of crime — Preservation of property order — Appeal from — Whether permitted — Time-sensitive, closely intertwined, and symbiotic relationship between preservation and forfeiture stages of proceedings under ch 6 of *POCA* demonstrating deliberate legislative choice against appealability of order — Prevention of Organised Crime Act 121 of 1998, ss 38 – 39 and chs 5 and 6.

Appeal — In what cases — Preservation of property order — Time-sensitive, closely intertwined and symbiotic relationship between preservation and forfeiture stages of proceedings under ch 6 of POCA demonstrating deliberate legislative choice against appealability of order — Prevention of Organised Crime Act 121 of 1998, ss 38 – 39 and chs 5 and 6.

The appellants, mostly business rescue practitioners appointed to the affected companies, appealed the grant of a preservation order under s 38 of the Prevention

of Organised Crime Act 121 of 1998 (POCA). The order appointed a curator bonis with designated powers in respect of the affected property. The appellants contended that the order impermissibly interfered with the statutory powers and obligation of the business rescue practitioners as prescribed under the Companies Act 71 of 2008 by making them subject to the oversight of the curator bonis, insofar as the affected property was concerned. They also contended that the preservation order was incompetent as it sought to establish an unlawful state-controlled business rescue process, which did not serve the objects of forfeiture under POCA. The respondent contended that a preservation order granted under ch 6 of POCA was not appealable.

Held, that, broadly speaking, asset forfeiture proceedings under ch 6 of POCA shared a similar objective to that of criminal asset forfeiture under ch 5, and were aimed at depriving persons of their criminal proceeds or of property used as instrumentalities of designated offences. The end goal of ch 6 proceedings was the grant of a forfeiture order over specified property aimed at preserving the property pending the outcome of a forfeiture application under s 48, and to that extent a preservation order could be likened to a restraint order. However, there were significant conceptual and procedural differences between the two forfeiture proceedings. The proceedings were in rem aimed at the property itself and an order was granted if there were reasonable grounds to believe that the property was either the proceeds or instrumentalities of an offence. It was the property, rather than the person, that bore the taint of criminality. That explained why, although, as with restraint applications, POCA provided expressly for the NDPP to apply ex parte for a preservation of property order, no express provision was made for that order to be granted in the form of a rule nisi with a return day. This was to be contrasted with the legislative scheme under ch 5, which envisaged that affected persons should be given an opportunity to oppose the grant of a restraint order on the return day before it was made final, whereas the legislative scheme under ch 6 deliberately postponed the right to oppose until after the preservation order was granted, as expressed in s 39(1). (See [32] – [35].)

Held, further, that, when properly analysed, the time-sensitive, closely intertwined and symbiotic relationship between the preservation and forfeiture stages of proceedings under ch 6 demonstrated a deliberate legislative choice that ran counter to the notion that preservation orders were intended to be appealable. (See [44].) The order was accordingly not properly before the court and had to be struck from the roll. (See [55].)

S v MURPHY AND OTHERS 2024 (1) SACR 138 (WCC)

Search and seizure — Search — Without warrant — Validity of — Reasonable grounds for belief that delay in obtaining warrant would defeat object of search — Reasonable possibility, not probability, of loss or destruction required, because of inherent difficulty of making reliable risk assessment based on incomplete information — Information known to police regarding packing of drugs on premises constituting reasonable grounds — Criminal Procedure Act 51 of 1977, s 22*(b)*(ii).

Search and seizure — Search — Without warrant — Validity of — Police alleging consent — Any consent amounting to waiver of constitutional right had to be fully informed — Consenting person not told that could refuse search and no indication that he was aware that he had choice in matter — Acquiescence not truly volitional and not meeting threshold required for effective consent — Evidence unlawfully seized to be excluded as admission would bring administration of justice into disrepute in circumstances of case — Criminal Procedure Act 51 of 1977, s 22*(a)*; Constitution, s 35.

Search and seizure — Search — With warrant — Validity of — Illegal drugs incidentally discovered during search for firearms — As long as police did not stray beyond ambit of search warrant, search and seizure justified in terms of s 22*(b)* of Criminal Procedure Act 51 of 1977.

Search and seizure — Search — With warrant — Validity of — Seizure by member of police not listed in warrant — Evidence obtained in such manner not excluded by virtue of s 35 of Constitution.

The court was required to decide, in a matter concerning racketeering activities, money-laundering and drug-dealing, whether the evidence obtained during four search-and-seizure operations carried out by members of the South African Police Service (the SAPS) in terms of s 22 of the Criminal Procedure Act 51 of 1977 (the CPA) was admissible.

The *first search* was conducted by one W/O Britz (Britz). After receiving information that drugs were being packed by three women in a certain house, the officer, together with two others, went to the property. The informant (who subsequently testified in the case) was also on the premises, but in another part of the property, and confirmed the presence of the women. He said that they arrived each morning and were collected in

the evening. Britz went to examine that part of the property where the women were alleged to be working and found it padlocked with the curtains drawn. The police cut off the padlock when there was no response from inside. In a room in the back section, they discovered three women and a substantial quantity of drugs. The drugs were seized. Of the three women, one became the second accused, and the remaining two women became state witnesses against the accused.

Held, that, in terms of s 22*(b)* of the CPA, the state was required to prove that Britz believed on reasonable grounds, firstly, that a search warrant would be issued to her in terms of s 21(1) if she applied for one, and, secondly, that the delay in obtaining such warrant would defeat the object of the search. Speaking generally, s 22*(b)*(ii) did not require a probability that the evidence would be lost or destroyed. A real threat or reasonable possibility of loss or destruction, not being fanciful, remote or contrived, was sufficient for purposes of the section. In the present case, the risk of imminent detection of the police presence, coupled with the inherent ease with which drugs might be disposed of, gave rise to a reasonable belief that the evidence was threatened with destruction, and that the object of the search would be defeated if the search were to be delayed in order to secure a search warrant. It therefore followed that the requirements of s 22(2) of the CPA were met and that the search was accordingly lawful. (See [71], [74] and [83].)

The *second search* involved the search of a house by one W/O Beukes in which the police alleged that they had permission to enter the premises looking for drugs, firearms, money and documents. The person who was said to have consented was not told that he had the right to refuse to permit the police to search without a warrant; he was simply told that the police were there to search for alleged drug money. In issue was whether the person had given consent, in terms of s 22, which was 'informed'.

Held, that any consent amounting to the waiver of a constitutional right had to be fully informed. Absent consent in terms of s 22*(a)* of the CPA, the police were required to produce a search warrant to satisfy the requirements of s 22*(b)* of the CPA. Consent to search therefore operated as a waiver of the constitutional right not to be searched, and an abandonment of the important procedural and substantive protections afforded, respectively, by the search warrant requirement and the strictures of s 22*(b).* Consent, to be legally effective, however, had to be voluntary and informed. Applying those principles to the facts of the case it seemed that the purported consent

was neither. There was no indication that he was aware that he had any choice in the matter. His acquiescence in the search in those circumstances was not truly volitional and did not meet the threshold required for effective consent in terms of s 22*(a)* of the CPA. The search was therefore unlawful. Beukes' failure to consider the need to apply for a search warrant was either due to ignorance of the law, or intentional disregard for the law. Neither were reasonable, and neither could be countenanced. The public were entitled to expect that police officers in charge of search-and-seizure operations had a reasonable working knowledge and understanding of the legal provisions governing their actions. The evidence of what was unlawfully seized from the home therefore had to be excluded, as its admission would bring the administration of justice into disrepute, as intended by s 35(5) of the Constitution. (See [130] – [158].)

In the *third search*, drugs were incidentally discovered and seized during a search under a valid search warrant which specified firearms. Defence counsel contended that the seizure of the drugs was unlawful and the evidence inadmissible.

Held, that, if the police, during a lawful search for article X, incidentally discover incriminating article Y, article Y may be seized without a warrant in terms of s 22*(b)* of the CPA. It made no difference whether the initial search was rendered lawful by means of a valid search warrant or by virtue of legitimate reliance on s 22*(b)*: what mattered was that the police were lawfully on the premises and were acting lawfully at the time when they made the incidental discovery which prompted the subsequent seizure. That meant that, at the time when the incidental discovery was made, the police must not have strayed outside the ambit of the relevant search warrant, if they were acting under a search warrant, or without a warrant in terms of s 22*(b).*Once the police officer drew the plastic bag out of a washing machine and discovered that it held drugs and cash, he then had reason to believe that the articles were associated with criminal activity and was accordingly entitled to seize them without a warrant based on exigent circumstances in terms of s 22*(b)* of the CPA. (See [187] – [195].)

The challenge to the *fourth search* was based on the fact that drugs were discovered and seized, during a search under a warrant, by a police officer whose name was not listed on the warrant as one of the officers authorised to search. Counsel for the defence challenged the validity of the search and argued that the evidence seized should be declared inadmissible.

Held, that it was clear that the officer in question, Const Kalase, acted unlawfully when he strayed beyond the role of merely securing the premises, ventured to search for a

black bag (noticed in the possession of an accused) in the back yard of the property, and seized drugs which he discovered. It was a violation of the third accused's right to privacy, since he was not specified in the warrant as an authorised searcher. It was, however, technical and not serious in nature. Had anyone of the team listed in the warrant performed the search, it would have been lawful, and there could have been no complaint. The repute of the administration of justice was better served by admitting the evidence than excluding it in this instance. (See [196] – [223].)

LIFMAN v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE 2024 (1) SACR 188 (WCC)

Bail — Conditions — Amendment of — Accused charged with nine serious offences, including murder and participation in organised crime — Applicant seeking to obtain return of surrendered passport and offering to pay additional amount of security — Applicant wanting to travel to country from which state had experienced difficulty in extraditing persons — Applicant's ipse dixit that he would not abscond insufficient in circumstances — Application dismissed.

The applicant and his co-accused were facing a slew of serious charges, including murder, various counts of conspiracy to murder, as well as contraventions of the Prevention of Organised Crime Act 121 of 1998. He had been granted bail in an amount of R100 000 and ordered to surrender all travel documents to the investigating officer before he could pay his bail. In the present matter he sought the amendment of the bail conditions to the effect that he deposit an additional amount of R150 000 and that his passport be returned to him so that he could travel abroad for business purposes. He indicated that he needed to go to Turkey to purchase textile fabrics. The respondent opposed the application and contended that the state and its witnesses would suffer substantial prejudice, should he abscond. Counsel argued that the poor level of cooperation between Turkey and Dubai, two of the destinations the applicant envisaged travelling to, was such that it could be a lengthy procedure to ensure his extradition, with no guarantee of success, based on previous experience. The applicant assured the court that he would stand trial and would not abscond.
Held, that the applicant's ipse dixit that he would stand trial was not enough and was certainly not a cognisable indication that he would not abscond. The court had been informed that there was another accused that the state was struggling to extradite from

Turkey, and there were reasons to believe that the applicant might want to take advantage of that fact. The matter was going to trial in April 2024 and there was no reason why the applicant could not wait for the matter to be finalised before pursuing his business interests. (See [29], [31] and [36].) The application was refused.

S v LAMB AND ANOTHER 2024 (1) SACR 198 (WCC)

Trial — Presiding officer — Recusal of — Recusal suo motu — On grounds of appearance of bias — Magistrate recusing herself after having been approached by father of one accused after first day of trial — Magistrate unaware of relationship and immediately terminating conversation upon his disclosing such — Facts of matter not discussed — In circumstances, no reasonable apprehension of bias and recusal improper — Magistrate to take guidance from magistrates' oath as set out in s 9(2)*(a)* of Magistrates' Courts Act 32 of 1944.

The two accused were facing trial in a regional court on a count of murder and one of attempted murder. On the second day of the trial, the court told the parties of an incident that transpired the previous afternoon after the court had adjourned. The magistrate revealed that she had been approached by a man who greeted her warmly and chatted about his having worked at the court, and that he had become a senior police officer. He then mentioned that his son was the second accused in the matter. The magistrate immediately terminated the conversation. She stated that she had not been influenced in any manner by the person, but that was not the test. It was whether, to a reasonable observer in the circumstances, there would be a reasonable apprehension of bias on the part of the court. The court believed that there was and that she therefore had to recuse herself. Counsel for both accused express, their appreciation for the magistrate's candour, but suggested that there were no reasons to do so. The prosecutor wanted to take instructions, but the magistrate was determined to recuse herself, and the prosecutor relented. The magistrate then recused herself. The Acting Regional Court President sent the matter on special review.

Held, that it was worth bearing in mind that, though what the gentleman in question had done was clearly highly inappropriate, particularly if one considered that he also identified himself as a father of one of the accused, the conversation had not tainted the impartiality of the magistrate. The information regarding the contents of the

conversation revealed nothing about the facts of the matter. Inasmuch as the appearance of impartiality was important, it ought not be divorced from reality. The overall context of the matter revealed that the way the magistrate managed the situation made it plain that she could not be suspected of being influenced. The reality and the appearance of an impartial magistrate were not affected at all, and the magistrate had not even created an impression that she might reasonably be biased. (See [11] – [13].)

Held, further, that there was as much of an obligation upon a presiding officer not to recuse him- or herself, when there was no reason to do so. In a similar vein, presiding officers should not recuse themselves from hearings for flimsy reasons. The magistrate's oath as set out in s 9(2)*(a)* of the Magistrates' Courts Act 32 of 1944 was instructive. It laid a foundation about the standards which the magistrates needed to always uphold. It was also a moral compass and a safety valve that guided magistrates in situations where they were in a dilemma and did not know what to do. (See [20] – [21].) The court accordingly set aside the magistrate's decision to recuse herself.

S v TSEKO 2024 (1) SACR 208 (NWM)

Sentence — Generally — Formulation of sentence — Splitting of sentence — Fine with alternative of imprisonment, plus further fine with alternative of imprisonment — Such sentence not competent.

Sentence — Suspension of — Period of suspension — Where no minimum punishment prescribed — Period could be suspended for five years in terms of s 297(1)*(b)* of Criminal Procedure Act 51 of 1977, but period of suspension had to be relative to amount of fine and/or period of imprisonment.

The accused was convicted in a magistrates' court of a contravention of s 49(1)*(a)* of the Immigration Act 13 of 2002. He was sentenced to a fine of R600 or 30 days' imprisonment, and a further R1200 or 60 days' imprisonment suspended for a period of five years. On review,

Held, that the sentence imposed by the magistrate did not exceed the applicable sentencing jurisdiction in the Immigration Act. The formulation of the sentence, however, was not competent. In particular, the employment of the words 'and a further', which resulted in a second fine with an alternative of imprisonment. What the magistrate in essence did was split one fine, with an alternative of imprisonment, into

two. Logically, only one fine with the alternative of imprisonment should have been imposed. Having regard to the amounts considered by the magistrate, the sentence could have been formulated as a fine of R1800 or 90 days' imprisonment, of which R1200 or 60 days' imprisonment was suspended for a period of five years, on condition that the accused was not convicted of contravening the provisions of s 49(1)*(a)* of the Immigration Act 13 of 2002, during the period of suspension. (See [22].)

Held, further, that a court convicting a person of any offence (which included a statutory offence) where no minimum punishment was prescribed by law, may pass sentence in terms of 297(1)*(b)* of the Criminal Procedure Act 51 of 1977, in accordance with the limit provided by the statute, and suspend that sentence, or any part thereof, for a period not exceeding five years. Whether or not the maximum period of suspension of five years should be imposed had to be considered relative to the fine and/or imprisonment which was to be suspended. In the present matter, the period of five years was disproportionate to the fine with alternative of imprisonment imposed. (See [24].) The sentence was altered accordingly.

DIRECTOR OF PUBLIC PROSECUTIONS, NORTHERN CAPE v TOSA AND ANOTHER 2024 (1) SACR 217 (NCK)

Corruption — Contravention of s 4(1) of Combating of Corrupt Activities Act 12 of 2004 — Sentence — Imprisonment — Traffic officer accepting gratification of R1000 for ignoring commission of traffic offence — Corruption had to be dealt with harshly and imposition of direct imprisonment ought to be norm — Sentence of fine and suspended imprisonment increased on appeal.

The Director of Public Prosecutions appealed against sentences imposed in a regional court on the two respondents for contravention of s 4(1)*(a)*, read with ss 1(2), 4(2)*(f)*, 21, 24 and 26(1)*(a)*(ii) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The convictions arose from an incident when respondents were both traffic officers in Upington. They solicited and accepted a bribe of R1000 as quid pro quo for not effecting the arrest of a man who was rushing his wife, who was in labour, to hospital and drove his vehicle at a high speed on a public road in excess of the permissible speed limit. They were sentenced to a fine of R10 000 or two years' imprisonment. In addition, each accused was sentenced to undergo three years' imprisonment, which was suspended for five years. The first respondent had passed

away before the hearing of the appeal. The second respondent was 53 years old and had been employed by the Department of Transport as a senior traffic officer for the past 17 years. He was married and his wife has been a schoolteacher for the past 25 years. He had two adult children and was a first offender. He earned R23 000 per month.

Held, that corruption, as expressed by so many courts, was a cancer that had to be dealt with harshly. It eroded the moral fibre of our constitutional democracy. The regional magistrate had indeed overemphasised the respondent's personal circumstances, thereby downplaying the seriousness of the offence and the consequences and impact on society. It was inconsiderate and even callous of the respondents to demand a bribe from a person who was clearly acting out of necessity caused by his child's impending birth. The circumstances of this case call for the imposition of a harsher sentence. (See [24].)

Held, further, that the monetary aspect of the punishment ought to be increased steeply to signify the turpitude of the offence committed and to increase the imprisonment aspect commensurately. The court, however, wanted to issue a serious warning that this sentencing approach should in no way serve as a precedent. Direct imprisonment ought to be the norm. The court increased the fine to R60 000 or three years' imprisonment. In addition, the accused was sentenced to three years' imprisonment, which was wholly suspended for five years. (See [27] – [29].)

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Minister of Justice and Correctional Services and others v Ntuli (Judicial Inspectorate for Correctional Services as *amicus curiae*) [2024] 1 All SA 333 (SCA)

Constitutional and Administrative Law – Rights of prisoners – Right to education – In terms of the Constitution, prisoners enjoy all their constitutional rights subject to limitation by a law of general application in terms of section 36 – Outright prohibition preventing a prisoner from using a personal computer in his cell to study constituting an infringement of right to pursue further education in circumstances of case at hand, and was thus an infringement of section 29(1)(b) of the Constitution.

While serving a 20-year prison sentence at a Medium C Correctional Centre, the respondent (Mr Ntuli) registered with a private institution to pursue a computer studies course. He made a request to the head of the prison to use his personal computer in his cell to advance his studies, but was informed that personal computers were not permitted in cells. Mr Ntuli therefore brought proceedings in the High Court, challenging the policy pursuant to which his request had been declined. The Court held that the policy was an unjustified limitation of Mr Ntuli's constitutional right to further education and constituted unfair discrimination in terms of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (the "Equality Act"). It declared that Mr Ntuli was entitled to use his personal computer in his cell, without a modem, for so long as he remained a registered student with any recognised tertiary institution in South Africa, subject to inspections, at any time, by prison staff. That led to the present appeal.

Mr Ntuli stated that his course focused on data processing, and that a computer was both the object of study and the means by which that study took place. Although he had access to the prison's computer centre, the centre was only open from 9am to 2pm on weekdays. Mr Ntuli was confined in his cell for 17 hours and 45 minutes every day, and contended that the long stretch of time could be used for study with the use of his personal computer. He argued that the prohibition on the use of his personal computer in his cell to further his studies was an unjustified limitation upon his constitutional right to further education. He also contended that the policy amounted to unfair discrimination in terms of the Equality Act as it discriminated against prisoners and as between classes of prisoners. In the latter respect, Mr Ntuli stated that when he was a prisoner in a Medium B Correctional Centre, he had been allowed the use of his personal computer in his cell.

Held – The correctional services policy sought to encourage prisoners to follow a course of formal education, recognising that that would enhance the capabilities of prisoners, and their life chances upon release. The policy permitted a prisoner registered for a course of study to use his personal computer, but only in a designated room, at set times, and under supervision. It prohibited a prisoner from using his personal computer in any cell. That prohibition was applied to Mr Ntuli.

The first issue to be addressed was the High Court's jurisdiction to entertain Mr Ntuli's application. A person wishing to institute proceedings under the Equality Act must notify the clerk of the Equality Court and a presiding officer of that court must decide whether the matter is to be heard in the court. Although every High Court is an Equality Court in its area of jurisdiction, a judge of the High Court can only serve as a presiding officer of the equality court if so designated. Such designation had not occurred in this case and the court below had no power to make the decision it did.

Under our Constitution, prisoners enjoy all their constitutional rights subject to limitation by a law of general application in terms of section 36. The outright prohibition, in the policy, excluding a prisoner from using a personal computer in his cell to study was an infringement of Mr Ntuli's right to pursue his further education, and was thus an infringement of section 29(1)(b) of the Constitution. The justification advanced was insufficient. In the premises, Mr Ntuli was largely successful on appeal.

Ntshongwana v S [2024] 1 All SA 345 (SCA)

Criminal Law and Procedure – Murder, kidnapping and rape – Appeal against conviction and sentence – Criminal capacity – Defence of diminished responsibility – Accused bears onus of proof, in terms of section 78(1B) of the Criminal Procedure Act 51 of 1977, to establish that he did not have the capacity to act in accordance with an appreciation of the wrongfulness of his conduct – Whether capacity to act in accordance with appreciation of wrongfulness of actions, was diminished by reason of mental illness – Presumption in terms of section 78(1A) of the Criminal Procedure Act 51 of 1977, that accused was not suffering from mental illness at time of commission of offence.

The appellant was arrested for the murder of four people who had been hacked to death. The victims were all men, walking alone at night. Both the injuries inflicted and cause of death were similar, namely chop wounds to the head and neck. On further investigation, the perpetrator of the crimes was linked to two more incidents, four months earlier. Those involved an assault with intent to do grievous bodily harm of a man; and the kidnapping and rape of a woman on multiple occasions over a period of three days. The appellant pleaded not guilty. His defence appeared to be that he suffered from a mental illness, and that by reason of such mental illness, he lacked criminal capacity. The type of defence sought to be raised is commonly referred to as

a defence of pathological incapacity. Section 78(1) of the Criminal Procedure Act 51 of 1977 (the “CPA”) regulates such a situation.

The trial court found that on a conspectus of all the evidence, the appellant had failed to discharge the onus resting on him in terms of section 78(1B) of the CPA and that, notwithstanding the fact that he suffered from a mental illness at the time of the commission of the offences, he was criminally responsible for his actions. He was sentenced to, *inter alia*, five life terms – for the four murders and rape. The matter came before the Supreme Court of Appeal where the appellant appealed against the convictions and sentences.

Held – The sole issue for determination regarding conviction was whether the appellant had discharged the onus in terms of section 78(1B) of the CPA, in proving that he did not have the capacity to act in accordance with an appreciation of the wrongfulness of his conduct. In relation to sentence, the issue was whether his capacity to act in accordance with his appreciation of the wrongfulness of his actions, was diminished by reason of his mental illness.

There is a presumption in terms of section 78(1A) that the appellant was not suffering from a mental illness at the time of the commission of the offence so as not to be criminally responsible in terms of section 78(1). The appellant bore the onus to prove the contrary on a balance of probabilities. In this case, the trial court justifiably concluded that the only reasonable inference to be drawn, consistent with the proven facts, was that the murders were premeditated and that the appellant was criminally responsible. In respect of the kidnapping and rape counts, the appellant’s actions were also indicative of conscious and goal-directed behaviour. His claim to suffer from amnesia was of no assistance as that was not a defence to the crimes. On a conspectus of all the evidence, the appellant failed to show any misdirection by the Full Court on the facts or the law. In addition, no circumstances were shown to justify interference on appeal with the finding that the appellant was able to appreciate the wrongfulness of his actions and that he was able to act in accordance with his appreciation of the wrongfulness of his actions during the commission of the offences. The appeal against conviction was dismissed.

Counsel for the appellant accepted that in the absence of a finding of diminished responsibility there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentences imposed by the trial court.

The appeal was dismissed.

Long v Appeal Authority iro Ndlambe Municipality and others
[2024] 1 All SA 364 (ECG)

Civil Procedure – Replying affidavit – Late filing – Condonation – Rule 27(3) of the Uniform Rules of Court gives court wide discretion, on good cause shown, to condone non-compliance.

Constitutional and Administrative Law – Judicial review – Delay in seeking review – In terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000, institution of review proceedings outside 180-day period constitutes unreasonable delay per se – Merits of impugned decision are critical when court embarks upon a consideration of the facts and circumstances of a case to determine whether the interests of justice dictate that a delay should be condoned.

Property – Operation of guesthouse on residential property – Application for review of approval by municipality – Where, in approving operation of guesthouse, the municipal planning tribunal's decision was materially influenced by an error of law, relating to its failure to appreciate the legal effect of the restrictive conditions in relation to the applicable scheme, relevant decisions had to be set aside.

The applicant objected to the operation of a guest house on property abutting her own. She alleged that the steep topography of the area afforded the occupants of the guesthouse a clear and unobstructed view over her property, and that the disturbance caused by the guesthouse prevented her full use and enjoyment of her property. In the present application, the applicant sought the review and setting aside of the municipality's decision to approve the operation of the guesthouse, and the review and setting aside of the first respondent's dismissal of her appeal. A declarator to the effect that the development of the guesthouse in question was unlawful was also sought. The applicant contended that the tribunal's decision to approve the fourth respondent's application for a departure from the zoning scheme was incorrect and amounted to a reviewable decision in terms of the Promotion of Administrative Justice Act 3 of 2000.

Held – The three main issues to be decided were the applicant's application for condonation in relation to the late filing of her replying affidavit; the applicant's application for the extension of the 180-day period within which to have brought her

review application; and if the extension was granted, then whether the municipal planning tribunal's decision to grant conditional approval for the operation of the guest house, and the appeal authority's decision to dismiss the applicant's appeal, were reviewable.

Regarding the late filing of the replying affidavit, rule 27(3) of the Uniform Rules of Court permit a court, on good cause shown, to condone non-compliance. The court enjoys a wide discretion. Two primary requirements have emerged regarding what constitutes good cause. The applicant must file an affidavit that satisfactorily explains the delay, and demonstrate on oath that her action is clearly not ill-founded. A further requirement, possibly secondary in nature, is that the granting of condonation must not prejudice the other party in any way that cannot be compensated by a suitable order. In this case, condonation was granted.

The applicant's institution of review proceedings fell outside the 180-day period stipulated under section 7(1) of the Promotion of Administrative Justice Act. Such delay is unreasonable *per se*. The court was satisfied that the applicant had made application for the extension of the period in question, but whether it would be in the interests of justice to grant such application would depend on the facts and circumstances of the matter. The merits of an impugned decision are critical when a court embarks upon a consideration of the facts and circumstances of a case to determine whether the interests of justice dictate that a delay should be condoned.

In approving the operation of the guesthouse, the planning tribunal's decision was materially influenced by an error of law, relating to its failure to appreciate the legal effect of the restrictive conditions in relation to the applicable scheme. The relevant decisions were set aside and the second respondent was to decide, within 90 calendar days, any application made by the fourth respondent for consent use as envisaged under the current land use scheme.

Ndlozi v Media 24 t/a Daily Sun and others [2024] 1 All SA 392 (GJ)

Civil Procedure – Defamation claim – Motion proceedings – Whether claim of defamation can be decided on motion – Unless court can decide application on undisputed or common cause facts, it must dismiss the application or refer any material dispute of fact to trial.

Personal Injury/Delict – Defamation – Publication is defamatory if it tends to lower the person defamed in the estimation of the ordinary intelligent or right-thinking members of society – Claim upheld where defences of truth and public benefit, and reasonable publication not established on the facts.

In response to a tip-off from a confidential source within the South African Police Service ("SAPS"), the third respondent, a journalist (Mr Manayetso), reported on the naming of the applicant in a rape case. The article was published in the first respondent's newspaper. Before publishing his article, Mr Manayetso sought to confirm what the confidential source had told him with the applicant and with a SAPS spokesperson. The applicant had made it clear that he was not guilty of the charge and had accounted for his whereabouts on the date of the commission of the alleged offence. The article was however still published, despite no response having yet been received from the police. The applicant consequently approached the court for relief, alleging that he had been defamed. In his notice of motion, he sought a declaration that each of the three impugned statements was unlawful and defamatory. He also sought orders directing the respondents to remove the impugned statements from all of its electronic media platforms; that the respondents print a retraction and an apology; and that damages be paid in the sum of R120 000, or that the respondents be declared liable for damages and that quantification of damages be referred for the hearing of oral evidence.

Held – The first question was whether and to what extent the applicant's claim of defamation could be decided on motion. The general rule is that motion proceedings are all about deciding questions of law on undisputed facts. Unless the court can decide the application on the undisputed or common cause facts, it must dismiss the application or refer any material dispute of fact to trial. Where there is a foreseeable dispute of fact, a litigant must ask the court to hold a trial of the facts before any of the ultimate legal questions they wish to raise can be decided. A trial of fact generally involves oral evidence from the parties to the case or other witnesses who will testify in support of their claims. Each party is entitled to cross-examine the other party's witness, and it is through cross-examination that the truth of a witness' account is tested, and any disputes of fact between the parties are resolved. *In casu*, the primary question of whether the applicant was in fact unlawfully defamed could easily be decided on the papers before the court. Regarding the prayer for an apology and

damages, there was no reason to dismiss those claims when they could be postponed and dealt with by way of the hearing of oral evidence.

A publication is defamatory if it tends to lower the person defamed in the estimation of the ordinary intelligent or right-thinking members of society. Two of the statements published by the respondents were defamatory of the applicant. The defences of truth and public benefit, and reasonable publication were not established on the facts.

The impugned statements were declared defamatory and the first respondent was directed to remove them from all its media platforms. The remaining prayers were to be determined by reference to oral evidence.

Ngcobo and another v Minister of Police [2024] 1 All SA 407 (KZP)

Criminal law – Evidence – Confessions – Safeguards for taking confessions – Failure to ensure that safeguards were adhered to, rendering subsequent prosecution unlawful.

Personal Injury/Delict – Claim for damages – Unlawful arrest and detention – Malicious prosecution – A police officer effecting an arrest bears an onus to prove that his action is justified in law, and must entertain a suspicion based on reasonable grounds that arrestee committed a Schedule 1 offence.

The plaintiffs sued the defendant for damages, alleging that they had been wrongfully and maliciously arrested on charges of rape and murder, and detained by members of the South African Police Services without reasonable and probable cause nor belief in their guilt. They claimed that as a result of contrived confession evidence by the police, they were prosecuted convicted and sentenced. It was contended that the police owed the plaintiffs a duty of care in terms of which they should have informed the prosecutor and the judicial officers involved in the case that the plaintiffs' confession was induced by assault. The failure to do so resulted in the plaintiffs remaining in custody from the date of arrest until 10 October 2013 when their conviction and sentence on appeal was set aside and they were released from detention.

Held – A police officer effecting an arrest bears an onus to prove that his action is justified in law. He must entertain a suspicion that the plaintiff committed a Schedule 1 offence. In terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977, such suspicion must be based on reasonable grounds. In order to succeed in a claim of malicious prosecution based on the *actio injuriarum*, a plaintiff must establish that the

defendant set the law in motion (instigated or instituted the proceedings); acted without reasonable and probable cause and with malice (*animo injuriandi*); and the prosecution failed. The only question relating to malicious prosecution in the present case was whether the police had acted without reasonable and probable cause and whether they had also acted with malice.

The confessions taken by the police were shown to have been improperly obtained. The police had taken confessions in the guise of warning statements. They failed to ensure that the safeguards for taking confessions were complied with. Such safeguards ensure that a suspect's constitutional rights are not infringed and that the process accords with the accused's right to a fair trial. The warning statements constituted the only evidence against the plaintiffs. It caused them to be detained from the time they were charged by the police, caused them not to be released on bail and caused them to be tried, convicted and sentenced. The unlawful arrest, unlawful obtaining of confessions in the guise of warning statements and presentation of the confessions as evidence, resulted in the detention and imprisonment until they were released when their appeal against conviction and sentence was upheld. The police breached the duty of care which they owed the plaintiffs, to ensure that the police investigation was conducted in a proper manner with the required care and skill.

Based on the actions of the police, the defendant was liable for the plaintiffs' damages arising from their unlawful arrest and detention up to the date of the first court appearance, and the defendant and the National Director of Public Prosecutions were equally liable for damages arising from the unlawful detention and prosecution of the plaintiffs from the date of the first court appearance to the date of conviction.

Nobilatus Projects 23 (Pty) Limited v K2015351259 (South Africa) (Pty) Limited [2024] 1 All SA 438 (NWM)

Insolvency – Application for winding up of company based on alleged inability to pay debts – Insolvency procedure should not be used as a method of enforcement of disputed debts – Where applicant's claim was disputed by respondent on bona fide and reasonable grounds, winding up not justified.

The applicant sought a final winding up order against the respondent ("K2015"). The basis for the application was that K2015 was unable to pay its debts in accordance

with the provisions of section 344(f) read with section 345 of the Companies Act 61 of 1973.

The respondent had acted as surety for the indebtedness of a company ("Improfin") which had failed to settle the full indebtedness due owing and payable to the applicant in terms of two loans. K2015, in its capacity as surety, had failed to make payment of any portion of the outstanding debt.

In the first of two preliminary defences, K2015 contended that the cause of action had arisen in 2016, and the applicant's claims had become prescribed in 2019, with the result that there was no basis to bring the application for the winding up of the respondent. The second defence was that there was no cause of action established as the applicant had failed to prove that K2015 was commercially insolvent and that it was just and equitable that it be wound up and control of its assets given to a liquidator in order to act in the best interests of its creditors. It was averred that K2015 was not commercially insolvent as it owned assets of sufficient value to cover its liabilities.

Held – Insolvency procedure should not be used as a method of enforcement of disputed debts.

Of significance in the present matter was the fact that there was a civil action pending in the High Court where the present applicant was the first plaintiff and was suing the principal debtor (Improfin) as first defendant and the current respondent as second defendant. The particulars of claim in the civil action were almost the same as the averments in the founding affidavit. The alleged cause of action was the same. That action was instituted before the present application was lodged with the Registrar of the present court. When the applicant bought the present application for liquidation, it was fully aware that the civil action was opposed. As against the application, apart from the respondent's defences, the Court emphasised the fact that it was being requested to liquidate a respondent who was not only opposing the applicant's claim but was doing so on a number of crucial points. At the present stage, it was not necessary for the court to consider whether the applicant had discharged its onus on a balance of probabilities. The crucial question was whether the applicant's claim both in the present court, and in the court in which the civil action was pending, was disputed by K2015 on *bona fide* and reasonable grounds. In answering that question, the court did not need to consider whether the defendant in the pending case would

be successful or not. It was sufficient if the court found that the opposition by K2015 was *bona fide* and based on reasonable grounds. A consideration of the grounds of opposition led to the conclusion that the claims were indeed being opposed on *bona fide* and reasonable grounds.

Finding that the sole purpose of bringing the application was an attempt, on the part of the applicant, to force K2015 to pay a debt which was disputed on *bona fide* and reasonable grounds, the court dismissed the winding-up application.

South African Property Owners Association v City of Johannesburg
[2024] 1 All SA 463 (GJ)

Local Government – Town planning – Land development applications – Development contributions levied on new land developments, based on impact (measured in standard units of impact) of that development on city's infrastructure – Lawfulness of policy – Policy not unlawful, irrational nor unreasonable where a clear rational relationship existed between the objective, namely the funding of the infrastructure growth of the city and the means of obtaining that funding from developers who would ultimately benefit from such development.

The applicant, the South African Property Owners Association ("SAPOA") sought an interdict preventing the respondent (the "City") from applying the Development Contributions Policy, 2021 (the "DC Policy") to any pending or future land development applications brought in terms of Chapter 6 of the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA").

SAPOA contended that it had a reasonable apprehension that the City intended to deal with the land development applications in a way which would be unlawful and thus infringe upon the rights of SAPOA members in respect of permission to develop land in Johannesburg. It was submitted that the City would empower itself to require an applicant to pay a sum of money which was not aimed at compensating the City for the provision of external engineering services in respect of the particular development to which a land development application related. Rather, it could relate to an existing or future infrastructural work by the City entirely unrelated to that proposed development (to which the application related) and the implementation of the DC Policy would accordingly be unlawful as SPLUMA did not authorise that.

Held – The DC Policy raised a development contribution on a new land development based on the impact (measured in standard units of impact) of that development on the capacity of external engineering infrastructure for the provision of water, sanitation, electricity, municipal roads, storm water and transport. The development contribution envisaged by the DC Policy was directly related to the new land development in question in that the impact for which the development contribution was levied was the impact of the new development on the capacity of the engineering infrastructure of the City. The engineering services for which SPLUMA authorised a development contribution charge was not only physical infrastructure but could consist of the provision of access to (in the sense of a connection to or impact on) existing or future infrastructure of the City. Section 40(7)(b) of SPLUMA authorised the City to impose conditions related to the provision of engineering services and the payment of development charges when approving land development applications. A development charge included a development contribution as defined in the DC Policy and was thus authorised by SPLUMA and was lawful.

The purpose of the DC Policy was to introduce a single development contributions policy not to introduce an entirely new approach as suggested by SAPOA. The purpose of the DC Policy was to create uniformity across the City in levying contributions, to provide legal certainty and to regulate the applicability of development contributions. The policy would not introduce an entirely new approach to land development applications. There was no replacing of “development charges” with “development contributions”. There was therefore nothing to interdict. Furthermore, the policy was not found to be unlawful, irrational nor unreasonable. There was a clear rational relationship between the objective, namely the funding of the infrastructure growth of the City and the means of obtaining that funding from the developers who would ultimately benefit from such development being a development contribution based on payment for what was, in effect, a right of access to the capacity of the City’s infrastructure. Every unit of impact potentially diminished the overall capacity of the City’s infrastructure.

The application was dismissed.

Supercart South Africa (Pty) Ltd v Vanesco (Pty) Ltd and another
[2024] 1 All SA 486 (GJ)

Civil Procedure – Discovery and inspection – Anton Piller order – Application for reconsideration – Threshold requirements for Anton Piller order at ex parte stage are that the applicant has a cause of action against the respondent which it intends to pursue; that the respondent has in its possession specific documents or things constituting vital evidence in substantiation of the applicant's cause of action; and a real and well-founded apprehension that such evidence may be hidden or destroyed before trial.

The applicant ("Supercart") and respondent ("Vanesco") were commercial competitors in the design, manufacture, and supply of a variety of different trolleys used by supermarkets and retailers. Supercart alleged that Vanesco's conduct infringed its rights pursuant to a design it had registered under the Designs Act 195 of 1993. Vanesco contended that the design was not novel or original as at the date of its registration, and that it had therefore not been validly registered. In the present application, Vanesco sought the reconsideration and setting aside under rule 6(12)(c) of the Uniform Rules of what both parties referred to as an Anton Piller order that Supercart had sought on an *ex parte* basis and *in camera*. In seeking reconsideration, the respondents mounted a wide-ranging challenge that started by impugning the application as an abuse of process in its very conception, proceeded to question the completeness of the information that was placed before the court on an *ex parte* basis, continued by alleging a lack of justification for a number of the substantive and procedural features of the order as sought and granted, and finally extended to the manner in which it was executed.

Held – The three threshold requirements for an Anton Piller order at the *ex parte* stage are that the applicant has a cause of action against the respondent which it intends to pursue; that the respondent has in its possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which it can claim no real or personal right); and that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or to the stage of discovery.

An Anton Piller order constitutes procedural relief of an extraordinary kind that requires a court to adopt a cautious and circumspect approach. Should the application be justified, stringent safeguards must be built into the order. Our courts have consistently insisted, and must continue to insist, that the requirements for the grant

of Anton Piller-type orders and their established built-in safeguards are strictly observed and meticulously applied. The remedy and its requirements are not lightly trifled with and adjusted in the face of practical problems that may prevent themselves in specific circumstances. Invitations to expand, relax and innovate must be carefully considered and resisted unless properly justified.

The Court considered the proper approach to be taken in weighing the evidence when reconsidering the Anton Piller order, and discussed the onus and standard of proof as applicable to each threshold requirement.

This was considered not an appropriate case to set aside the Anton Piller order upon reconsideration without considering the merits of the matter. Upon such consideration, it was decided that the Anton Piller order should be allowed to stand as granted in all significant respects save in two respects.

Tongaat Hulett Limited (in business rescue) and others v South African Sugar Association and others [2024] 1 All SA 540 (KZD)

Corporate and Commercial – Company law – Business rescue – Suspension by business rescue practitioners of payment obligations arising from industry agreement – Obligations imposed under agreement which constituted subordinate legislation may not be suspended – On a textual interpretation, sections 136 and 133 of the Companies Act 71 of 2008 not entitling business rescue practitioners to suspend a company's payment obligations and not precluding claim to enforce those obligations.

Statutory Law and Interpretation – Rules of statutory interpretation – Interpretation of legislation must follow a purposive approach, while remaining faithful to the literal wording of the statute – If no reasonable interpretation may be given to a statute, courts are required to declare the statute unconstitutional and invalid.

The first applicant ("THL") was a company in business rescue, as was its subsidiary, the second applicant. The third to fifth applicants were the joint business rescue practitioners ("BRPs") of THL. The first respondent, the South African Sugar Association ("SASA"), established in terms of the Sugar Act 9 of 1978, was an industry forum, through which participants negotiated and agreed on issues affecting the sugar industry.

South Africa is vulnerable to dumping by international producers. That refers to the import of cheaper sugar at prices that undercut the price at which the industry could viably produce. One of the steps taken by government to guard against the risk of sugar dumping was the ratification of a revenue-sharing regime agreed on by the

sugar industry, in terms of which local sugar production was protected and sustained. The revenue-sharing regime was particularly important in this matter, because the BRPs sought to suspend THL's obligations under the regime under section 136(2)(a) of the Companies Act 71 of 2008. The arrangement was based on the central principle that sugar growers, millers, and refiners should all benefit from an equitable division of the proceeds of the domestic market, and all be insulated against the risk of the export market. The revenue sharing arrangement was recorded in the Sugar Industry Agreement, 2000 (the "SI Agreement"). As an overproducer of sugar in the domestic market, in that it refined and sold a greater percentage of the total refined sugar on the domestic market than its allocated quota, THL was required to pay SASA redistribution amounts in respect thereof. When it found itself in dire financial straits, the implications were significant as THL was the oldest sugar milling company in South Africa, and was said to be a mainstay of the South African sugar industry, and a major contributor to the economic and socio-economic development of KwaZulu-Natal and South Africa. In October 2022, THL's board of directors resolved to commence voluntary business rescue proceedings. The BRPs decided to suspend THL's obligations under the SI Agreement. In the present application, the applicants sought, *inter alia*, a declaration that the BRPs were empowered to suspend, for the duration of the business rescue proceedings, any obligation of THL which arose under the SI Agreement.

Held – The first question was whether, properly interpreted, section 136(2)(a)(i) of the Companies Act allowed the BRPs to suspend, for the duration of the business rescue proceedings, THL's payment obligations under the SI Agreement. If it did not, the question was whether the section was under-inclusive and irrational, contravening the rule of law in section 1 of the Constitution, and arbitrarily differentiated between creditors in breach of section 9(1) of the Constitution.

The interpretation of legislation must follow a purposive approach, while remaining faithful to the literal wording of the statute. If no reasonable interpretation may be given to a statute, courts are required to declare the statute unconstitutional and invalid. That approach to interpretation is a unitary exercise. On a textual interpretation, sections 136 and 133 of Companies Act did not entitle the BRPs to suspend THL's payment obligations under the SI Agreement and did not preclude SASA from seeking to enforce those obligations.

The applicants' case was that the SI Agreement was contractual in nature and qualified as an agreement, and was therefore capable of suspension under the Companies Act. Alternatively, the applicants submitted that the payment obligations under the SI Agreement were *inter partes* obligations and therefore capable of suspension under the Companies Act. The court rejected the latter contention and found that the SI Agreement constituted subordinate legislation whose requirements could not be suspended. Further, the general moratorium preventing enforcement action whilst a company is under business rescue was of no assistance to the applicants as the obligations under the SI Agreement were simply the cost of doing business and therefore not subject to the moratorium.

The application was dismissed with costs.

Yzerfontein Curesmiths (Pty) Ltd t/a Flying Pig (in liquidation) and others v Laubscher and another [2024] 1 All SA 595 (WCC)

Civil Procedure – Application to found or confirm jurisdiction – Applicant must demonstrate that there is some basis on which the court can have jurisdiction – Consent to jurisdiction after attachment has been made, is not a ground for the attachment to be discharged.

Civil Procedure – Return date of rule nisi – Onus resting on applicant to satisfy the court that it has a prima facie case against the respondent in respect of the relief sought.

The second and third applicants were trustees in the insolvent estate of the first applicant ("Yzerfontein"), a business operated by the first respondent's son (Mr Ferreira). According to the applicants, funds intended to be used to pay Yzerfontein's creditors were instead used by Mr Ferreira to renovate and improve property owned by the first respondent. The property was subsequently sold and the proceeds from the sale had been paid to the second respondent ("ABSA"). The applicants launched an urgent *ex parte* application to attach funds of the first respondent held in a bank account with ABSA, to confirm jurisdiction in respect of an action instituted against the first respondent and Mr Ferreira for payment of damages and/or recovery of assets alleged misappropriated pursuant to various dispositions without value and collusive dealings committed by the first respondent and Mr Ferreira against the applicants. An interim order was obtained, and the Court had to decide whether the order should be confirmed.

Held – Section 21(3) of the Superior Courts Act 10 of 2013 provides for issue of an order for attachment to confirm jurisdiction. Where an attachment is sought to confirm jurisdiction, some ground for that jurisdiction, other than the attachment, must be present.

On the return date of a rule *nisi*, the applicant bears the onus of satisfying the court that it has a *prima facie* case against the respondent in respect of the relief sought; that on a balance of probabilities, it is an *incola* and the respondent is a *peregrinus*; and that the property sought to be attached is that of the respondent. For an application to confirm jurisdiction to be brought, the applicant must demonstrate that there is some basis on which the court can have jurisdiction. Although the first respondent did not dispute that the court had jurisdiction, the applicants contended that a consent to jurisdiction after the attachment has been made, is not a ground for the attachment to be discharged. Consent on its own cannot confer jurisdiction unless the plaintiff is an *incola*. The court concluded that the first respondent's consent to jurisdiction was not dispositive of the matter.

Regarding whether the applicants had succeeded in showing that they had established a *prima facie* case against the first respondent, the question was whether they had shown that there was evidence which, if accepted, would establish a cause of action. Such evidence, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. The applicants' case was based on an alleged disposition without value as referred to in section 26 and collusive dealing before sequestration as referred to in section 31 of the Insolvency Act; the *actio pauliana*, which is an action to recover assets alienated by the insolvent with the intention to defraud creditors; and section 424 of the Companies Act. Section 424 provides that any person may be held liable if knowingly a party to the carrying on of the business recklessly or with intent to defraud creditors of the company.

An application to found or confirm jurisdiction is an exceptional and extraordinary remedy. Although a court to which such an application is made has no discretion to refuse it once the requirements for an order are met, a court will approach such an application with care and caution. It is only where it is evident that the applicant has no action or cannot succeed, that an attachment should be refused. The Court found

that the applicants had made out a *prima facie* case against the first respondent for the relief sought. The rule *nisi* was confirmed.

Zenzile v Minister of Police [2024] 1 All SA 624 (ECM)

Personal Injury/Delict – Arrest and detention – Lawfulness – Claim for damages – Jurisdictional requirements for lawful arrest and detention – Whether arresting officer had reasonable grounds for arrest in terms of section 40(1)(g) of the Criminal Procedure Act 51 of 1977 and whether detention was lawful – Once jurisdictional facts for arrest are established, a discretion as to whether to arrest or not arises – Police officers not acting reasonably and justifiably in the exercise of their discretion when effected arrest, as arresting officer's suspicion did not rest on reasonable grounds.

It was common cause that the plaintiff had been arrested by police at about 5am on 15 May 2017, and was released on bail two days later. She subsequently sued the Minister of Police (the "defendant"), claiming damages of R300 000 for alleged unlawful arrest and detention. She alleged that the arrest and detention were wrongful and unlawful in that the police officers did not have a warrant of arrest; the plaintiff had not committed any offence in the presence of the police; the police had no reasonable suspicion that she had committed an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977; and they failed to apply their minds to the circumstances of the plaintiff and/or properly exercise their discretion and/or acted *mala fide* when they detained the plaintiff.

The defendant denied that the arrest was wrongful and unlawful, alleging that the plaintiff had been causing a disturbance and had launched an unwarranted attack on the members of the defendant.

According to the plaintiff, the defence referred to above was departed from during the trial, where a different case was pleaded, *viz* that the plaintiff was arrested and detained for being in possession of stock suspected to be stolen.

Held – A perusal of the plea clearly showed that the defence raised by the defendant during the trial was not pleaded. Nevertheless, although the relevant averment was lacking in the pleadings, the issue was fully canvassed by both parties during the trial.

The defendant bears an onus to justify an arrest. The issues for determination in this case were whether the arresting officer had reasonable grounds for the arrest in terms of section 40(1)(g) of the Criminal Procedure Act and whether her detention was

lawful. The further issue was whether the plaintiff was entitled to compensation and if so, the quantum thereof. Since the defendant admitted the arrest and detention, the onus rested on him to prove that same were lawful.

The undisputed evidence was that on the day of the plaintiff's arrest, members of the police arrived at her homestead in search of her husband. On being informed that the plaintiff's husband was away, the police proceeded to identify sheep fitting the description of those allegedly stolen from the complainant. The plaintiff disputed that she had been in possession of stock suspected to be stolen, as she had nothing to do with the stock on the homestead. Her allegation was that the police had arrested her until her husband presented himself. There were therefore two conflicting versions before the court.

Based on the facts, a reasonable man in the position of the arresting officer and possessed of the same information, would not have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of possession of stolen property knowing it to be stolen. Once the jurisdictional facts for an arrest are established, a discretion as to whether to arrest or not arises. An exercise of discretion will be unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the Legislature. The discretion must be exercised properly. The party who challenges the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. The plaintiff and her witness created a good impression. Their evidence did not show material inconsistencies and improbabilities. The Court was not satisfied that the police officers had acted reasonably and justifiably in the exercise of their discretion when they arrested the plaintiff. The arresting officer's suspicion did not rest on reasonable grounds. The defendant therefore failed to justify the arrest of the plaintiff. Furthermore, the detention of the plaintiff was not shown to have been justified.

Damages in the amount of R100 000 was considered a fair, reasonable, and appropriate award in the circumstances of the case.

END-FOR NOW